

PART I

The Contribution of Islamic Values

INTRODUCTION

The nature of the ancient Arab custom from which the Islamic ‘*āqila*’ institution was derived differed considerably from that of the Sharī‘a, to which this institution was transferred.¹ Arab custom reflected the tribal society from which it originated, which lacked a central political authority and was based on the joint responsibility and solidarity of groups. In such a society, the safety of an individual’s life, property, and rights depends largely upon the assistance and defense that his solidarity group provides. In contrast, Islam, whose values the Sharī‘a seeks to reflect, pays tribute to the idea of a community (*umma*) that unifies all Muslims, and within which the individual bears sole responsibility, both religious and legal,

¹ Against the accepted view that the Islamic ‘*āqila*’ has developed from an ancient Arab, tribal institution, Norman Calder proposed that the Muslims rather “adopted its various features from their sedentary non-Muslim neighbors, who quite clearly also possessed some such system” (Calder, *Studies*, 206). The Bedouin, in turn, might have “recognized community groupings, which acknowledged communal responsibility for non-deliberate injury, with fixed rates of payment, over fixed periods of time . . . due to the influence of the relatively civilized and/or organized cities” (ibid.). Calder seems to suggest, not entirely clearly, that first came the city-based ‘*āqila*’, inspired by the neighboring communities, and that this ‘*āqila*’ then served as a model for the Bedouin ‘*āqila*’. He finds support for this sequence of events in the fact that the bureaucratic ‘*āqila*’ appears in the Ḥanafī and to some extent in the Mālikī texts, which are relatively early, while the Shāfi‘ī material, which is later, “displays some characteristic features of Bedouinization” (ibid., 207). It makes sense that the various Islamic urbanized, administrative ‘*āqilas*’ borrowed certain elements from non-Islamic sedentary models, but because Calder’s speculation in this regard is merely “an experiment in historical reasoning” (ibid., 206), as he says, rather than a study based on evidence, it is difficult to consider his suggestion in a useful fashion.

2 The Contribution of Islamic Values

for his actions. A number of Qur'ānic verses provide the basis for the notion of individual responsibility, and the major *Ḥadīth* collections often contain a section devoted to traditions that convey this concept, under the title: “Should a man be punished for the crime of another (*hal yu'khabhu aḥad bi-jarīrat aḥad*),” or a variation of this.² The state, with its army and institutions, rather than the tribal group, was supposed to care for the individual's protection. Tribal solidarity and loyalty along lines of descent (whether genuine or fictitious) or alliance, even if they continued to play a part in Islamic society and politics, were perceived as a threat to the coherence of the community.³

In no other Islamic legal institution is the tribal spirit more deeply inherent than in the *'āqila*, and no other institution contradicts more bluntly the Islamic principle of individual responsibility. The principle of joint liability for blood money, which underlies the *'āqila* institution, is the most salient expression of solidarity based on kinship and/or alliance, and the most effective way of delineating tribal lines. As was noted in the Preface, the collective obligation to pay blood money not only reflected the contours of tribal groups and of alliances but also contributed to defining and maintaining them.

Despite the conflict with the Islamic notion of personal responsibility and with the attempt to replace the tribal frameworks by united community and state administration, the tribal *'āqila* institution was adopted by the Shar'ā. The evident contradiction that this adoption produced, which greatly concerned Muslim jurists, is aptly articulated by the Egyptian Mālikī scholar Aḥmad b. Ghunaym al-Nafrāwī (d. 1125/1713) (whose words echo those of his celebrated predecessor, Ibn Rushd the Elder, of Cordova, who died in 520/1126):

That liability for unintentional homicide rests on the killer's *'āqila* is based upon the *sunna* of the Messenger of God, God's blessing and peace be upon him,⁴ and there is no dispute among the *'ulamā* about this. It is a practice (*amr*) that prevailed in the Jāhiliyya, and the Prophet confirmed (*aqarra*) it under Islam, although it contradicts the general rule (*wa-in kāna al-qiyās khilāf dhālika*)

² Qur'ān: 6(*al-An'ām*):164; 35(*Fāṭir*):18; 53(*al-Najm*):38. For *Ḥadīth* see, e.g., Ibn Mājah, *Sunan*, 3:70–71 (*Kitāb al-Diyāt*); Nasā'i, *Sunan*, 694–695 (*Kitāb al-Qasāma*). For a short discussion of the personal responsibility principle in Islamic dogma, with reference to more sources, see Landau-Tasseron, “Alliances in Islam,” 22.

³ For the Islamic rejection of (or reservation about) alliances see (*EI*[2], s.v. “Ḥilf” [Tyan]; Landau-Tasseron, “Alliances in Islam,” 2ff).

⁴ Honorific expressions related to God, to the Prophet, or to other worthy personalities are omitted in translations from Arabic henceforth.

according to which a man should not be burdened with another's offence (*lā yuḥammalu aḥad jināyat aḥad*), because of God's saying: '[On no soul does Allāh place a burden greater than it can bear], for it is (only) that which it has earned, and against it (only) that which it has deserved' (2[*al-Baqara*]:286), and 'Every soul earns only to its own account and no burdened soul shall bear the burden of another' (6[*al-An'ām*]:164).⁵

One aspect of the clash between the concepts of individual responsibility and joint liability is religious. The Qur'ānic verses that al-Nafrāwī adduces, and the latter verse in particular, are taken by Muslim commentators to refer to the burden of sin,⁶ and homicide, whose consequences the 'āqila shares, contains an aspect of sin: it is considered a transgression not only against a human being but also against God. Another aspect of the clash is legal. While some jurists discuss the religious aspect,⁷ others, such as the Shāfi'ī Abū al-Ma'ālī al-Juwaynī (d. 478/1085), known as Imām al-Ḥaramayn, from Nīshāpūr, accentuate the legal contradiction, saying that the jurists "are in complete agreement that imposing blood money on the 'āqila is a deviation from general rule (*qiyās*), for it amounts to holding against a man an offence perpetrated by another, whereas the general rule requires that blood money be imposed [only] upon the offender, even if he acted accidentally."⁸ The Ḥanbalī Muwaffaq al-Dīn Ibn Qudāma (d. 620/1223) similarly says that the basic principle in pronouncing financial liability in cases of homicide is that "[liability for] indemnifying lies with the one who caused the damage (*badal al-mutlaf yajibu 'alā al-mutlif*) . . . this principle is contravened, however, in the case of a non-culpable homicide perpetrated by a free man (*wa-innamā khūlifa hādihā al-aṣl fī qatl al-ḥurr al-ma'dhūr fīhi*) (for in this case the 'āqila assumes payment)."⁹ A shorter formulation of the same idea is included by the Mālikī Abū 'Abdallāh al-Qurṭubī (d. 671/1272) in his commentary of Qur'ān 4(*al-Nisā*):92.¹⁰

For Islamic law to adopt the pre-Islamic 'āqila involved a process of adjustment. By this process the apparent contradiction between individual responsibility and joint liability was examined with due attention, and the relevant rules were modified with a view to resolving, or at least to

⁵ Nafrāwī, *al-Fawākih al-dawānī*, 2:203, and Ibn Rushd, *Muqaddimāt*, 2:377.

⁶ Ṭabarī, *Jāmi' al-bayān*, 5:3659–3660; Ibn al-Jawzī, *Zād al-masīr*, 3:162; Ibn Kathīr, *Tafsīr*, 3:141.

⁷ E.g., Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:194.

⁸ Juwaynī, *Nihāyat al-maṭlab*, 16:503.

⁹ Ibn Qudāma, *Mughnī*, 12:13.

¹⁰ Qurṭubī, *Jāmi'*, 5:315.

4 The Contribution of Islamic Values

tempering the contradiction. In the Islamic shape that the *‘āqila* institution eventually assumed, the contradiction was not entirely eliminated, but was considerably reduced. This was achieved by modifying the law in a way that restricted the liability of the *‘āqila* while extending that of the perpetrator. This modification, which is the subject of Part I, is closely connected to other changes introduced in the Islamic law of homicide during its transition from Arab custom. A proper examination of the modification requires viewing it in the context of these other changes. Some of them, therefore, are discussed in the text that follows.

These changes, and the Islamic law of homicide in general, can be considered from two somewhat different points of view: the modern one and the Islamic one. To fully comprehend the changes in the Islamic law of homicide we need to view them sometimes from the modern and sometimes from the Islamic point of view. In Chapter 1 these two points of view are presented, and then used to examine some modifications of the Islamic law of homicide.

I

The Modern Perspective and the Islamic Perspective, and Their Application to the Law of Homicide

In modern legal systems wrongs are, roughly speaking, divided into civil wrongs and crimes. The two types of wrongs are distinguished from each other by three features in particular, which are relevant to the following discussion. First, it is the state that brings an action for a crime (and it can do so even if the victim does not bring a complaint) and a private person that brings an action for a civil wrong. Second, a private plaintiff may drop the case subsequent to making the complaint; if the victim of a crime brings a complaint and subsequently withdraws it, the state is not debarred from prosecuting (for the prosecution is meant to protect the well-being of the entire society). Third, the plaintiff of a civil wrong usually claims damages and may be entitled to financial compensation; when the state prosecutes a crime, it is to impose punishment.

The distinction between civil wrongs and crimes can be applied to modern legal systems, but this is not to say that in any of these systems all wrongs fall neatly into one or other of the two categories. This is certainly true for Islamic law of wrongs,¹ and the Ḥanafī law of blood revenge provides a good example. The Ḥanafī jurist Abū Bakr b. Mas‘ūd al-Kāsānī (d. 587/1191) views blood revenge as a punishment (*‘uqūba*) whose purpose is to protect life “by deterrence and prevention (*bi-l-zajr wa-l-rad’*),”² and a number of legal rules are based on the view that blood revenge constitutes a punishment. For instance, minors and the insane are not liable to blood revenge “because blood revenge is a punishment, and punishment does not apply to them (*li-anna al-qīṣāṣ ‘uqūba wa-humā*

¹ Schacht, *Introduction*, 113; Heyd, *Studies in Old Ottoman Criminal Law*, 180.

² Kāsānī, *Badā’i’*, 10:241, 245.

6 The Contribution of Islamic Values

laysā min ahl al-‘uqūba).³ However, while al-Kāsānī considers blood revenge a punishment, which in a modern legal system would generally be the consequence of a crime, he allows – in line with the Islamic consensus based on the Qur’ān – the aggrieved party to remit blood revenge in return for a blood price, or to drop the case altogether.⁴ That is, he gives the wronged party a power analogous to that of the plaintiff in an action for civil wrong.

Modern legal terms are inadequate for describing the religious components of Islamic law; to properly comprehend religious conceptions such as repentance or expiation (*kaffāra*) in their legal context one must look at them from the Islamic perspective.

Muslim jurists distinguished between *ḥuqūq al-‘ibād* (or *ḥuqūq al-ādamiyyīn*), which is the equivalent of private law, and *ḥuqūq Allāh*, which is the equivalent of public law, a distinction that in a certain way goes back to the very early stage of Islamic law.⁵ The former category contains rules that define the right and duties of private individuals in their dealing with each other. Torts fall under this category. The category of *ḥuqūq Allāh* covers the rules protecting the rights of the Islamic society and religion, and defining the claims of these rights upon the individual.⁶ The fulfillment of central religious precepts such as pilgrimage and fast are included among the claims of the Islamic religion; crimes also fall under *ḥuqūq Allāh*.⁷

There are significant parallels between the modern categories of crimes and civil wrongs and the Islamic *ḥuqūq Allāh* and *ḥuqūq al-‘ibād*, respectively. Generally speaking, in *ḥuqūq al-‘ibād*, as in civil wrongs, a petition (*muṭālaba*) of the aggrieved party is required for the case to be dealt with by the authorities or state institutions; this is not necessary to deal with the

³ Ibid., 10:236–237. See also Idrīs, *al-Dīya bayna al-‘uqūba wa-l-ta’wīd*, 528. Punishment does not apply to minors and the insane because it requires criminal intent and awareness that the act was an offense, and neither of these can be ascribed to them, according to Islamic law (Peters, *Crime and Punishment*, 20).

⁴ Kāsānī, *Badā’i*, 9:177. The consensus on this question is based on Qur’ān 2(*al-Baqara*):178.

⁵ Cf. Schacht, *Origins*, 286.

⁶ My definition is inspired by that of Miriam Hoexter (in her “*Ḥuqūq Allāh*,” 134). For a survey of the main studies about *ḥuqūq Allāh* and *ḥuqūq al-‘ibād* see Emon, “*Ḥuqūq Allāh*,” 329–333.

⁷ For a list of laws and rules that fall under *ḥuqūq Allāh* see Johansen, “The Claims of Men,” 73–74; Johansen, “Secular and Religious Elements,” 213–214; Sānū, *Mu’jam muṣṭalahāt uṣūl al-fiqh*, 180.

violation of *ḥuqūq Allāh*, which in this respect resemble crimes.⁸ A case that falls under *ḥuqūq al-‘ibād* can be dropped by the injured party, as in civil wrongs; but as in crimes, this is impossible when *ḥuqūq Allāh* are violated.⁹ The safeguarding of *ḥuqūq Allāh* is the duty of the political authorities, while the upholding of *ḥuqūq al-‘ibād* is a private matter, as in civil wrongs. Violation of *ḥuqūq al-‘ibād* is usually made good by compensation, while the consequence of offending *ḥuqūq Allāh* is usually punishment, as in crimes,¹⁰ for “God is above being affected by deficiency such that His right would be in need of compensation (*li-anna Allāh ta‘ālā ‘an yalḥaqahu nuqṣān li-yaḥtāja fī ḥaqqihi ilā al-jubrān*).”¹¹ The distinction in this regard is not clear cut, however, for punishment may also be the result of violating *ḥaqq al-‘ibād*.¹²

The line of demarcation between *ḥuqūq al-‘ibād* and *ḥuqūq Allāh* is even more blurred when applied to substantive law. Many Islamic laws, and even single rules, do not fall strictly within one or the other of the two categories, but rather combine elements of both. An example of such a combination is the law of *qadhḥ* (false accusation of adultery). Muslim jurists recognize that both a right of God and a private right are infringed by *qadhḥ*, which is an offense against honor.¹³ They debate whether the punishment of eighty lashes prescribed by the Qur’ān (in 24[*al-Nūr*]:4) for this offence vindicates the right of God by deterring people from slander, thereby maintaining the public interest in honor as a social value, or whether it rather satisfies a private right to the redress for the infringement of personal honor.¹⁴ They also debate whether this punishment requires the victim’s petition. The debate arises from their view that *qadhḥ* contains aspects of both *ḥuqūq al-‘ibād* and *ḥuqūq Allāh*, the former requiring petition, the latter not.¹⁵

⁸ Sānū, *Mu‘jam muṣṭalahāt uṣūl al-fiqh*, 180. There are exceptions to this dichotomy; it can happen that a petition is required in a case of violation of *ḥaqq Allāh* (Emon, “*Ḥuqūq Allāh*,” 345).

⁹ Anderson, “Homicide,” 811.

¹⁰ A division similar to the modern one, in which punishment satisfies *ḥuqūq Allāh* and compensation *ḥaqq al-‘ibād*, is demonstrated, e.g., by the juristic discussion of the two liabilities of theft – amputation and compensation – which redress *ḥaqq Allāh* and *ḥaqq al-‘ibād*, respectively (Emon, “*Ḥuqūq Allāh*,” 367–372; cf. Johansen, “Secular and Religious Elements,” 212).

¹¹ Sarakhsī, *Mabsūt*, 9:36 (referred to, in addition to more references, by Johansen in “Secular and Religious Elements,” 214 n. 90).

¹² Idrīs, *al-Dīya bayna al-‘uqūba wa-l-ta’wīd*, 447. For an example see p. 16 n. 32.

¹³ Emon, “*Ḥuqūq Allāh*,” 338–340.

¹⁴ *Ibid.*, 338.

¹⁵ *Ibid.*, 342–346.

8 The Contribution of Islamic Values

In the eyes of Muslim jurists, theft (*sariqa*) and banditry (*ḥirāba*) similarly offend against both the right of God and the right of men.¹⁶ Moreover, the interests served by a single legal institution may in the course of time change from *ḥaqq al-‘ibād* into *ḥaqq Allāh*. This has been shown by Miriam Hoexter with regard to family endowments (*awqāf*), whose original beneficiaries were private individuals, but ultimately came to benefit the general interest of the Islamic community.¹⁷

The law of homicide, and blood revenge in particular, belong in this intermediate group that captures elements of both categories; the sanctity of human life is considered both the right of God and a private right. The perpetrator of an accidental homicide must therefore both pay blood money to the injured party as compensation for the private right that he offended, and expiate the transgression as a way of upholding the right of God. The victim’s kinsmen may renounce the former but not the latter.¹⁸ The Ḥanafīs Muḥammad b. Aḥmad al-Sarakhsī (d. 483/1090) and, about a century later, al-Kāsānī, present blood revenge as *ḥaqq al-‘ibād*,¹⁹ but both are aware of the mixed nature of homicide. Al-Sarakhsī says, “[T]he victim’s life is sacrosanct in two respects. The liability for [blood] money in the case of accidental homicide relates only to the victim, whereas the liability for expiation relates to the sacrosanctity of God’s right (*fī nafs al-maqtūl ḥurmatān wa-l-māl fī al-khaṭa’ wajaba bi-i’tibār sāhib al-nafs fa-qaṭ fa-tajibu al-kaffāra bi-i’tibār ḥurmat ḥaqq Allāh ta’ālā*).”²⁰ Al-Kāsānī implies a similar awareness in a different formulation: “Although it (i.e. blood revenge) is a [legally] established punishment, it is imposed with a view to satisfying a private claim, so that pardon and amicable settlement are applicable to it (*fa-innahū wa-in kāna ‘uqūba muqaddara, lākinnahū yajibu ḥaqqan li-l-‘abd ḥattā yajriya fihī al-‘afw wa-l-ṣulḥ*).”²¹ That is, blood revenge is a punishment whose purpose is to satisfy a private claim, whereas punishment usually serves to satisfy God’s claim. Works of legal theory also point to the dichotomy inherent in the law of blood revenge. Both al-Sharakhsī and the Ḥanafī ‘Alī b. Muḥammad Fakhr al-Islām al-Pazdawī (d. 482/1089), in their respective *Uṣūl* works, classify blood revenge in the intermediate group that involves both *ḥuqūq Allāh* and *ḥuqūq al-‘ibād*, with the latter prevailing (*mā yajtami‘u fihī al-ḥ*

¹⁶ Ibid., 358ff and 367ff (theft); 373ff (banditry).

¹⁷ Hoexter, “*Huqūq Allāh*,” 138ff.

¹⁸ Māwardī, *al-Ḥawī al-kabīr*, 12:343; Sānū, *Mu‘jam muṣṭalahāt uṣūl al-fiqh*, 181.

¹⁹ Sarakhsī, *Mabsūt*, 9:36; Kāsānī, *Badā’i’*, 9:177.

²⁰ Sarakhsī, *Mabsūt*, 27:87.

²¹ Kāsānī, *Badā’i’*, 9:177.

aqqān wa-ḥaqq al-‘abd aghlab).²² When the Islamic law of homicide is described in modern terms, a similar picture emerges: homicide looks more like a civil wrong, namely, a tort, than a crime. As is pointed out by Anderson, “Perhaps the first point which attracts the attention of the European lawyer who begins to study the treatment of *qatl* (homicide) in the textbooks of Islamic law is that it is there treated, in modern parlance, more as a tort than a crime.”²³ Anderson proceeds to show how the concept of punishment and crime is intertwined in the Islamic law of homicide with the concept of torts, and how the latter predominates. In the balance between criminal and tortious elements in the law of homicide, the modifications related to the liability of the *‘āqila* enforced the former, as discussed in the text that follows.

²² Sarakhsī, *Uṣūl*, 2:297; Pazdawī, *Uṣūl*, 307 (the quotation is from the former); see also Ibn ‘Ābidīn, *Radd al-muḥtār*, 8:22.

²³ Anderson, “Homicide,” 811.

Major Modifications of the Islamic Law of Homicide

The concept of a tort prevails in the Islamic law of homicide because this law was derived from Arab custom, and Arab custom is a product of a society that, in the absence of a central political authority, had no developed concept of criminal law.¹ Influenced by Arab custom, the Islamic law of homicide does not invoke any relationship between the state and the killer. The state does not function as an agent of criminal justice; it merely interposes itself between the parties, controls the legal proceedings, and supervises the retaliation;² and when blood money is due it is paid to the injured party as compensation, rather than to the state as a fine.³

While Islamic law was influenced by Arab custom in treating homicide in the realm of civil wrongs, it did not incorporate the customary law of homicide indiscriminately, but only after Muslim jurists had adapted it to Islamic values and principles. The jurists emphasized individual responsibility, intention, fault rather than mere causation, and punishment rather than compensation. By their emphasis, they expressed the notion of homicide as an offense against the interests of the entire community, not just against private rights. Other developments of Islamic law, such as the evolution of the notion of *ḥuqūq Allāh*, and the inclusion of religious rules such as the obligation of expiation, brought the law closer to or into the religious sphere. A number of modifications of the Islamic law of homicide

¹ Schacht, *Introduction*, 7.

² Blood revenge cannot be legally dispensed unless proof of guilt is brought before a *qādī*, and accepted by him (*EI*[2], s.v. “*Ḳiṣās*” [Schacht]).

³ Cunnison, “Blood Money,” 109.