Collective Liability in Islam

Offering the first close study of the *ʿāqila*, a group collectively liable for blood-money payments on behalf of a member who has committed an accidental homicide, Nurit Tsafrir analyzes the transformation of this group from a pre-Islamic customary entity to an institution of the Shariʿa, and its further evolution through medieval and postmedieval Islamic law and society. Having been an essential factor in the maintenance of social order within Muslim societies, the *ʿāqila* is at the intersection between legal theory and practice, between Islamic law and religion, and between Islamic law and the state. In describing the history of the *ʿāqila*, this study reveals how religious values, state considerations, and social organization have participated in shaping and reshaping this central institution, which still concerns contemporary Muslim scholars.

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The ʿĀqila *and Blood-Money Payments*

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To Amnon

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Preface

This book is concerned with a legal institution of the Sharīʿa known in Arabic as the *ʿāqila*. The *ʿāqila* is a group with joint liability for the payment of compensation for homicide or bodily injury (*ʿaql* or *diya*) caused by any of the group's members. This institution, of which there is no mention in the Qurʾān, goes back to pre-Islamic Arab society, as its name reflects. The words *ʿaql* and *ʿāqila* both come from the root *ʿ-q-l*. Words derived from this root often have meanings related to "binding." According to one explanation, the term *ʿaql* in the meaning of blood money reflects the ancient Arab practice of paying blood money in camels that were bound (*tuʿqalu*) in the courtyard of the victim.[1] The *ʿāqila* are those who pay the *ʿaql*, that is, bring and bind the camels. According to another explanation, the word *ʿaql* in this context means "a restraint," referring to the role of blood money in restraining the parties from further bloodshed.[2] Hence, the *ʿāqila* are "those who restrain," or "hold back," because by paying the blood money they bring about the end of the conflict, thus restraining the parties from further bloodshed.

As the latter explanation suggests, the *ʿāqila* is essential for the maintenance of social order, and the question of whom it includes, that is, who is liable for the payment of blood money in a given case, is of major importance. This is illustrated by an early account preserved by Ibn

[1] ʿAynī, *Binaya*, 13:362, and for a similar but not identical explanations see Māwardī, *al-Ḥāwī al-kabīr*, 12:340 and Mawṣilī, *Ikhtiyār*, 5:64.
[2] Marghīnānī, *Hidāya*, 4:1711; Mawṣilī, *Ikhtiyār*, 5:64; Zaylaʿī, *Tabyīn*, 7:364.

Hishām (d. 218/833) in his biography of the Prophet Muḥammad, in which he describes one of the ways by which liability for blood money was determined among the Arabs before Islam. According to this account (of which there are several versions), seven arrows were kept next to the image of Hubal, the greatest god of Quraysh, which was situated by a well (*bi'r*) inside the Ka'ba. The Arabs would interpret the god's answers to important questions by means of these arrows.[3] One of the arrows, on which the word '*aql* was written, served to identify the person liable for blood money in a case of a homicide. When a dispute arose on such a question, the Arabs would cast the seven arrows, and the obligation to pay would be imposed on the person indicated by this arrow (how exactly this was indicated Ibn Hishām does not say).[4]

Three other arrows out of the seven in the Ka'ba were used to decide whether a person belonged to a particular tribe by descent, or was merely an ally of that tribe, or was neither a tribesman by descent nor an ally. It is not surprising that almost half the arrows served to clarify questions concerning tribal affiliation. In pre-Islamic Arabia, where almost everyone was a member of a tribe, and where the tribe was the individual's source of security and identity, there was no more important question. Liability for blood money was closely tied to tribal affiliation.[5] Salient expressions of the tribal framework were, on the one hand, the tribesmen's obligation to avenge the blood of a fellow tribesman (or, alternatively, their right to financial compensation for his spilled blood)[6] and, on the other hand, their joint responsibility to undertake the payment of blood money for a homicide perpetrated by a tribal member; that is, "the limits of the obligation to pay blood money are also the limits of the tribal group."[7] It follows that the network of obligations to pay blood money in pre-Islamic Arab tribal society reflected its internal lines of demarcation. Not only did liability for blood money reflect these lines but also it contributed to their maintenance and even to their creation.

[3] For the practice of belomancy (*istiqsām*) among the ancient Arabs, including particular examples of it, see *EI*(2), s.v. "Istiḳsām" (Fahd); Procksch, *Über die Blutrache*, 50.
[4] Ibn Hishām, *al-Sīra al-nabawiyya*, 1:125; Ṭabarī, *Ta'rīkh*, I:1075.
[5] Robertson Smith, *Kinship and Marriage*, 25–26; Procksch, *Über die Blutrache*, 56–58.
[6] Hoyland, *Arabia and the Arabs*, 113.
[7] Lecker, *The "Constitution of Medina"*; Stetkevych, "Archetype," 368 ("The law of blood vengeance, which virtually amounts to the definition of the distinction of kin from non-kin, is that a man kills only non-kin and avenges only kin"); Stetkevych, "The Rithā'," 34–35.

With the transition from Jāhiliyya to Islam, the obligation to pay blood money remained an important means of drawing social borderlines. A revealing example is in the Constitution of Medina, which is considered the oldest document from the time of Muḥammad, and in which pre-Islamic tradition is still very recognizable. The composition of the Constitution of Medina, which is discussed in Part II, is ascribed to the Prophet Muḥammad. In this document, the Prophet drew up the lines of solidarity within the new political entity that he had founded in Medina (and whose later growth he could not have imagined). Whether he left existing solidarity groups as they were or created new ones, the criterion by which the Prophet defined these groups was ancient, and familiar to all concerned. The *Muhājirūn*, men from various tribal groups of Quraysh in Mecca who had attached themselves to the Prophet in migrating to Medina, would pay blood money for each other, thereby breaking their ties with their original, pre-Islamic tribal units and becoming a new unit. Other groups from Medina are also defined in the Constitution by means of a mutual obligation to pay blood money.[8] From other sources we learn that the Prophet also laid down joint liability for blood money, albeit for a limited sum, between the *Muhājirūn* and the *Anṣār*, his supporters from Medina.[9] This was doubtless a step toward unifying the two groups under the flag of Islam. The shared liability for the payment of blood money, the most obvious characteristic of pre-Islamic tribal affiliation, and the quintessential symbol of group solidarity known to the Prophet and to his contemporaries, assumes here an Islamic dress, but continues to fill a traditional role, that is, sanctioning or redefining social groups.

The obligation to pay blood money played a similar role in the norms related to an old Islamic institution, *walā'*. Although Islam sought to wipe away tribal loyalties in favor of a commitment to the entire community (the *umma*), the early converts who joined the Islamic community, as well as other individuals who had no blood relations within it, still needed a substitute for a family or a tribe. According to Ḥanafī law, *walā'* provided an alternative, namely a Muslim patron (*mawlā*) who gave his protection to such an individual, who was his client (also called a *mawlā*). A basic obligation of the patron to his client was to pay

[8] Ibn Hishām, *al-Sīra al-nabawiyya*, 2:110, for a translation see Lecker, *The "Constitution of Medina,"* 88–89.
[9] Lecker, *The "Constitution of Medina,"* 93.

blood money incurred by the latter.[10] This obligation was so fundamental, that not only did it lie at the heart of the *walā'* contract, it even served to corroborate its validity. Ḥanafī doctrine rules that as long as the patron had not paid on behalf of the client the latter could end the agreement, but from the moment the patron fulfilled his obligation, the contract between them could no longer be terminated by the client.[11]

In later Islamic law responsibility for blood money similarly serves as a means to create or to solidify lines of demarcation between groups. Ḥanafī law, for example, states that city-dwellers who are enrolled in the *dīwān* (military register) and Bedouin shall not pay blood money on behalf of each other, even if a blood relationship exists between them.[12] This rule was part of the Umayyad policy of distinguishing these two populations from each other, and giving priority to the former. The line dividing Muslims from unbelievers was emphasized in a similar manner. The Sharī'a forbade Muslims to pay blood money on behalf of unbelievers, and vice versa,[13] which, together with a string of other restricting laws, established a division between them.

The question of how to determine who is liable for the payment of blood money, that is to say, how to define the composition of the *'āqila*, thus involved a variety of considerations, which had, however, one thing in common: throughout Islamic history the *'āqila* was defined with reference to boundary lines of some sort, whether social, administrative, military, municipal, or professional, and reflected those lines. It follows that the composition of the *'āqila* attests, even if in a limited fashion, to the reality wherein it came into being. In other words, the *'āqila* is a legal institution that contains historical information relating to the organization of the society. The legal discussions about the *'āqila*, and the changes that this institution underwent through the ages, may therefore serve as evidence for social history.

It is true that Islamic legal institutions did not always reflect reality, and did not immediately accommodate themselves to change. Islamic law is conservative, and many legal discussions are detached from the

[10] Crone, *Roman, Provincial and Islamic Law*, 39.
[11] Shaybānī, *Aṣl*, 4:604; Qudūrī, *Mukhtaṣar*, 97; Sarakhsī, *Mabsūṭ*, 8:97. According to a *ḥadīth* in 'Abd al-Razzāq, *Muṣannaf*, 9:419 (no. 17852), the payment of blood money may even generate *walā'* between the two sides (see p. 38).
[12] Shaybānī, *Aṣl*, 4:598; Marghīnānī, *Hidāya*, 4:1715–1716.
[13] Shaybānī, *Aṣl*, 4:599; Mawṣilī, *Mukhtār*, 5:66.

contemporaneous conditions of life. This observation also applies to the *ʿāqila* institution. Some of the rules relating to it remained the subject of lively discussions hundreds of years after they had become irrelevant to actual practice. Other rules of the law of the *ʿāqila*, however, were tied, in one way or another, to reality. Therefore, even though this law was not always an indication of subtle social developments, it does testify to significant turning points, or processes of change.

A study of the development of the *ʿāqila* across the generations shows, in fact, that the story of its formation as an Islamic legal institution is bound up with the story of the development of Islam, and three chapters of this intertwined story are discussed in the three Parts of this book.

Part I deals with the changes in ethics and religious values that accompanied the transformation of pagan Arab society into an Islamic community. The ambivalent attitude of the Muslims to their pre-Islamic past, which resulted in continuity mingled with change, was also reflected in the evolution of the *ʿāqila* from an ancient Arab customary institution to an institution of the Sharīʿa. While the institution remained as central in Islam as it had been in the Jāhiliyya, changes were introduced that sought to accommodate it to the new religion. This Part looks at the contribution of Islamic values to the formation of rules related to the *ʿāqila*, and at the legal consequences of this contribution.

Part II relates to the transformation undergone by Arab tribal society in a state with a centralized political authority, and with an administrative apparatus capable of enforcing state policy. The liberty that the Prophet claimed in the Constitution of Medina to establish the arrangements for the payment of blood money, that is, to define the *ʿāqila*s, was the first step toward the adoption of the *ʿāqila* institution by Islam, and its first encounter with Islamic political authority. Eventually, the *ʿāqila*, a product of tribal society, was essentially formed anew to become a part of the state administrative structure.

The background of Part III is the integration of the Persians into the originally Arab Islam, and their eventually successful struggle for an equal share in forming an Islamic culture and civilization. The rules related to the *ʿāqila* reflect the Persian-Arab cultural interaction. Part III describes how the Persian jurists joined the legal discussion that originated in Iraq, and how they questioned the hegemony of the Iraqīs. It examines the Persians' opinions related to the *ʿāqila*, the connection of these opinions to the reality of life in Persian lands, and their contribution to the legal variety within the Sharīʿa.

Over the last few centuries, rules and discussions related to the *ʿāqila* have reflected a weakening of social solidarity and of clan loyalties in Islamic societies. Part III touches upon the roots and the beginnings of such rules and discussions. The nature of the future development of social groupings in Islamic societies, and how this will affect the *ʿāqila* institution, remains to be witnessed and told.

Alongside the historical aspects, the *ʿāqila* also tells a story of legal change. Over many generations this institution has been shaped and reshaped by developments occurring in religion, state, and society. Despite the obvious tendency of the Sharīʿa to conservatism, the fact that Islamic legal institutions have changed over time is by now well known and widely accepted. Joseph Schacht implied two generations ago that the Sharīʿa undergoes constant changes, saying that "the official doctrine of each school is to be found not in the works of the old masters, even though these had been qualified in the highest degree to exercise *ijtihād*," but, generally, in "handbooks dating from the late medieval period," which "contain the latest stage of authoritative doctrine that has been reached in each school," and "which the common opinion of the school recognizes as the authoritative exponents of its current teaching."[14] Schacht also says that "[t]he development of the style, method, and contents of the works of Islamic law reflects the development of legal doctrine. . . . The greater number of cases and decisions in a later work as compared with a similar older one represents, generally speaking, the outcome of the discussion in the meantime. . . the cases themselves reflect, in principle, the influx of new subject-matter."[15] Since the publication of Schacht's works, a number of scholars, including Yaʿakov Meron, Baber Johansen, and Wael Hallaq, have studied different aspects of the changes that occurred in the Sharīʿa, and have refined Schacht's statement in various ways.[16] Observing the institution of the *ʿāqila* through the ages instructs us, however, not only about the changes it underwent but also about the legal mechanisms that made them possible. The old Arab law of the *ʿāqila* was changed both for religious and for practical reasons. Part I concerns legal changes introduced to accommodate the institution to Islamic principles. Parts II and III

[14] Schacht, *Introduction*, 71.
[15] Ibid., 112–113.
[16] Meron, "The Development of Legal Thought in Hanafi Texts"; Johansen, "Legal Literature"; Hallaq, "From *Fatwā*s to *Furūʿ*"; Hallaq, *Authority, Continuity and Change* (ch. 6 in particular).

deal with changes made apparently for practical reason, and explore the methods by which these changes were endowed with the authority required to incorporate them in the Sharī'a.

*

The attempt to include all these aspects of the *'āqila* in a single work dictates different descriptive styles. For example, describing the historical context in which one legal element or another developed demands a broad sketch along general lines. In contrast, to consider the religious justification of the rules, or the development of their legal authority, it was necessary to delve into the intricacies of the legal discussion, sometimes to the level of a single link of an *isnād*. The different subjects discussed may also appear disconnected from each other. The transitions from matters of religion in Part I to administrative subjects in Part II and from these to differences in social structure in Part III are somewhat abrupt, as is the transition from the discussion about law to that about history, and vice versa. If the book seems to be lacking in unity, that is perhaps because of the many different aspects and contexts of the institution whose development it seeks to document. The deeper I went and the wider I cast my net, the more I realized the wealth of subjects to which the *'āqila* pertains, and it consequently became clear to me that the book could cover only a modest portion of these riches. I do not pretend to exhaust the subject, and the scope of the book is limited in several ways. It does not relate to non-Sunnī doctrines beyond isolated remarks based on polemical references in Sunnī legal literature. Part I is based on the doctrines of the four Sunnī legal schools, with particular attention given to the Ḥanafī doctrine. Parts II and III focus almost exclusively on Ḥanafī doctrine because that doctrine turned out to be the least conservative, the most willing to change the law in accordance with practical reality. The quantity of material is so large, however, that not all the aspects of the *'āqila* in Ḥanafī doctrine could be covered. A discussion of the remaining material would call for a second book.

The legal literature upon which the study here is based is not limited to a particular period. It includes the important compositions of standard Ḥanafī law, beginning with the *Kitāb al-Aṣl* of Muḥammad b. al-Ḥasan al-Shaybānī (d. 187/803) of Iraq, and concluding with the works of the last great Ḥanafī legist, the Damascene Muḥammad Amīn Ibn 'Ābidīn (d. 1252/1836). The Ḥanafī *fatwā* literature, most of which remains in manuscript, was an important source for Part III, but I have not surveyed

the collections of *fatwā*s systematically, and those I used are usually from the pre-Ottoman period. As for the other three schools of law, I generally consulted the major legal compilations of each.

Death dates or dates of the reigns of rulers are given according to both the Hijrī calendar and the Common Era; unless I knew the exact date, I have noted the year in the Common Era in which the Hijrī year began. I have repeated a person's death date when relevant to a particular discussion.

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[1] Tsafrir, N. "The *ʿĀqila* in Ḥanafī Law: Preliminary Notes", in *The Islamic Scholarly Tradition: Studies in History, Law, and Thought in Honor of Professor Michael Allan Cook*, eds. A. Q. Ahmed, B. Sadeghi, and M. Bonner, Leiden: Brill, 2011 (pp. 221–238).

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