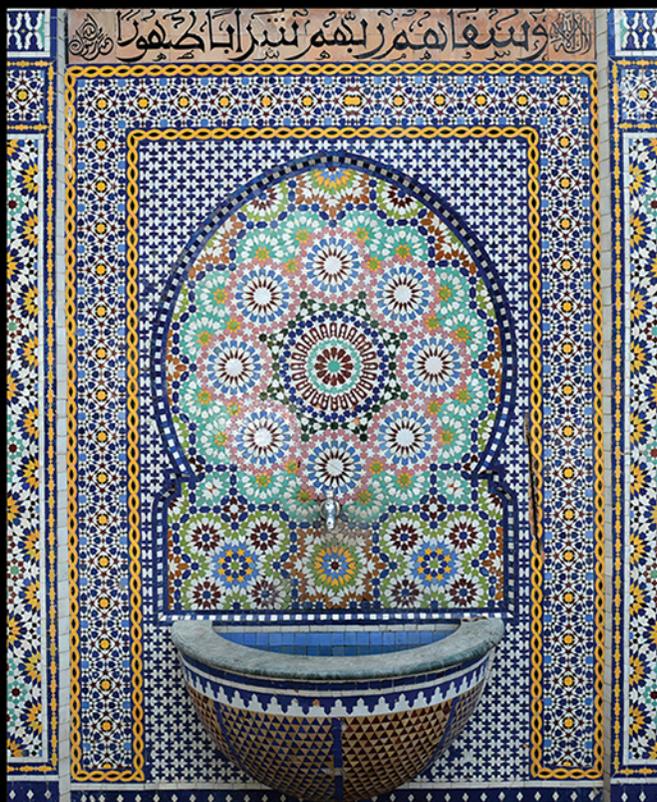


# Collective Liability in Islam

The *Āqila* and Blood Money  
Payments

Nurit Tsafirir



## **Collective Liability in Islam**

Offering the first close study of the *‘āqila*, 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 Shari‘a, 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 *‘āqila* 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 *‘āqila*, 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.

**Nurit Tsafrir** is Lecturer in the Department of Middle Eastern and African History at Tel Aviv University.

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# **Collective Liability in Islam**

## *The ‘Āqila and Blood-Money Payments*

NURIT TSAFRIR

*Tel Aviv University*



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*To Amnon*



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## Preface

This book is concerned with a legal institution of the Sharī‘a known in Arabic as the *‘āqila*. The *‘āqila* is a group with joint liability for the payment of compensation for homicide or bodily injury (*‘aql* or *diyya*) caused by any of the group’s members. This institution, of which there is no mention in the Qur’ān, goes back to pre-Islamic Arab society, as its name reflects. The words *‘aql* and *‘āqila* both come from the root *‘-q-l*. Words derived from this root often have meanings related to “binding.” According to one explanation, the term *‘aql* in the meaning of blood money reflects the ancient Arab practice of paying blood money in camels that were bound (*tu‘qalu*) in the courtyard of the victim.<sup>1</sup> The *‘āqila* are those who pay the *‘aql*, that is, bring and bind the camels. According to another explanation, the word *‘aql* in this context means “a restraint,” referring to the role of blood money in restraining the parties from further bloodshed.<sup>2</sup> Hence, the *‘āqila* 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 *‘āqila* 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

<sup>1</sup> ‘Aynī, *Bināya*, 13:362, and for a similar but not identical explanations see Māwardī, *al-Hāwī al-kabīr*, 12:340 and Mawṣilī, *Ikhtiyār*, 5:64.

<sup>2</sup> Marghīnānī, *Hidāya*, 4:1711; Mawṣilī, *Ikhtiyār*, 5:64; Zayla‘ī, *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 (*bir*) inside the Ka‘ba. The Arabs would interpret the god’s answers to important questions by means of these arrows.<sup>3</sup> 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).<sup>4</sup>

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.<sup>5</sup> 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)<sup>6</sup> 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.”<sup>7</sup> 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.

<sup>3</sup> For the practice of belomancy (*istiḡsām*) among the ancient Arabs, including particular examples of it, see *EI*(2), s.v. “Istiḡsām” (Fahd); Procksch, *Über die Blutrache*, 50.

<sup>4</sup> Ibn Hishām, *al-Sīra al-nabawiyya*, 1:125; Ṭabarī, *Ta’rīkh*, I:1075.

<sup>5</sup> Robertson Smith, *Kinship and Marriage*, 25–26; Procksch, *Über die Blutrache*, 56–58.

<sup>6</sup> Hoyland, *Arabia and the Arabs*, 113.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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, *walāʾ*. 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, *walāʾ* 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

<sup>8</sup> Ibn Hishām, *al-Sīra al-nabawiyya*, 2:110, for a translation see Lecker, *The “Constitution of Medina,”* 88–89.

<sup>9</sup> Lecker, *The “Constitution of Medina,”* 93.

blood money incurred by the latter.<sup>10</sup> 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.<sup>11</sup>

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 *dūwān* (military register) and Bedouin shall not pay blood money on behalf of each other, even if a blood relationship exists between them.<sup>12</sup> 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,<sup>13</sup> 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

<sup>10</sup> Crone, *Roman, Provincial and Islamic Law*, 39.

<sup>11</sup> 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).

<sup>12</sup> Shaybānī, *Aṣl*, 4:598; Marghīnānī, *Hidāya*, 4:1715–1716.

<sup>13</sup> Shaybānī, *Aṣl*, 4:599; Mawṣilī, *Mukhtār*, 5:66.

contemporaneous conditions of life. This observation also applies to the *‘āqila* 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 *‘āqila*, 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 *‘āqila* 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 *‘āqila* from an ancient Arab customary institution to an institution of the Shari‘a. 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 *‘āqila*, 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 *‘āqilas*, was the first step toward the adoption of the *‘āqila* institution by Islam, and its first encounter with Islamic political authority. Eventually, the *‘āqila*, 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 *‘āqila* 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 *‘āqila*, the connection of these opinions to the reality of life in Persian lands, and their contribution to the legal variety within the Shari‘a.

Over the last few centuries, rules and discussions related to the *‘āqila* 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 *‘āqila* institution, remains to be witnessed and told.

Alongside the historical aspects, the *‘āqila* 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 Sharī‘a 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 Sharī‘a 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.”<sup>14</sup> 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.”<sup>15</sup> Since the publication of Schacht’s works, a number of scholars, including Ya‘akov Meron, Baber Johansen, and Wael Hallaq, have studied different aspects of the changes that occurred in the Sharī‘a, and have refined Schacht’s statement in various ways.<sup>16</sup> Observing the institution of the *‘āqila* 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 *‘āqila* 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**

<sup>14</sup> Schacht, *Introduction*, 71.

<sup>15</sup> *Ibid.*, 112–113.

<sup>16</sup> Meron, “The Development of Legal Thought in Hanafi Texts”; Johansen, “Legal Literature”; Hallaq, “From *Fatwās* to *Furū*”; 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 *fatwās* 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.

## Acknowledgments

The idea for writing this book first came up over dinner with Patricia Crone at the Institute for Advanced Study in Princeton in January 2008. Faced with my hesitation, Patricia showed a characteristic, infectious determination and it was she who launched me on this journey, whose complexity I had not envisaged. Patricia followed the early stages of the work with interest, remained at my disposal whenever I needed advice, and provided me with invaluable references. The deep gratitude that I owe her is tinged with a sense of sorrow and regret that she did not live to see the completed work.

My stay as a member at the Institute for Advanced Study later that year enabled me to elaborate on my initial idea. Some preliminary thoughts appeared in an article whose parts are incorporated in the book.<sup>1</sup> I would like to acknowledge the Martin and Sara Leibowitz Fund, which supported me during that year.

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<sup>1</sup> Tsafir, N. "The *Āqila* 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).

knew what I required even before I knew it myself. He deserves special thanks for his efficient and devoted help.

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## 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.<sup>1</sup> 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,

<sup>1</sup> 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.

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'khdhu aḥad bi-jarīrat aḥad*),” or a variation of this.<sup>2</sup> 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.<sup>3</sup>

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 Sharī'a. 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,<sup>4</sup> 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*)

<sup>2</sup> 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'ī, *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-Tasserón, “Alliances in Islam,” 22.

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

<sup>4</sup> 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).<sup>5</sup>

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,<sup>6</sup> 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,<sup>7</sup> 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."<sup>8</sup> 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 khūlifā ḥādḥā al-aṣl fī qatl al-ḥurr al-ma'dhūr fīhi*) (for in this case the 'āqila assumes payment)."<sup>9</sup> 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.<sup>10</sup>

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

<sup>5</sup> Nafrāwī, *al-Fawākih al-dawānī*, 2:203, and Ibn Rusḥd, *Muqaddimāt*, 2:377.

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

<sup>7</sup> E.g., Jaṣṣās, *Aḥkām al-Qur'ān*, 3:194.

<sup>8</sup> Juwaynī, *Nihāyat al-maṭlab*, 16:503.

<sup>9</sup> Ibn Qudāma, *Mughnī*, 12:13.

<sup>10</sup> Qurṭubī, *Jāmi'*, 5:315.

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,<sup>1</sup> 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’*),”<sup>2</sup> 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*

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

<sup>2</sup> Kāsānī, *Badā’i’*, 10:241, 245.

*laysā min ahl al-‘uqūba*).<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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*.<sup>7</sup>

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

<sup>3</sup> *Ibid.*, 10:236–237. See also Idrīs, *al-Diyya 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).

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

<sup>5</sup> Cf. Schacht, *Origins*, 286.

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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,<sup>10</sup> 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*).”<sup>11</sup> The distinction in this regard is not clear cut, however, for punishment may also be the result of violating *ḥaqq al-‘ibād*.<sup>12</sup>

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 *qadhif* (false accusation of adultery). Muslim jurists recognize that both a right of God and a private right are infringed by *qadhif*, which is an offense against honor.<sup>13</sup> 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.<sup>14</sup> They also debate whether this punishment requires the victim’s petition. The debate arises from their view that *qadhif* contains aspects of both *ḥuqūq al-‘ibād* and *ḥuqūq Allāh*, the former requiring petition, the latter not.<sup>15</sup>

<sup>8</sup> 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).

<sup>9</sup> Anderson, “Homicide,” 811.

<sup>10</sup> 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).

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

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

<sup>13</sup> Emon, “*Ḥuqūq Allāh*,” 338–340.

<sup>14</sup> *Ibid.*, 338.

<sup>15</sup> *Ibid.*, 342–346.

In the eyes of Muslim jurists, theft (*sariqa*) and banditry (*ḥirāba*) similarly offend against both the right of God and the right of men.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> The Ḥanafīs Muḥammad b. Aḥmad al-Sarakhsī (d. 483/1090) and, about a century later, al-Kāsānī, present blood revenge as *ḥaqq al-‘ibād*,<sup>19</sup> 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 (*fi nafs al-maqtūl ḥurmatān wa-l-māl fi al-khata’ wajaba bi-i‘tibār sāhib al-nafs fa-qaṭ fa-tajibu al-kaffāra bi-i‘tibār ḥurmat ḥaqq Allāh ta‘ālā*).”<sup>20</sup> 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-innahu wa-in kāna ‘uqūba muqaddara, lākinnahu yajibu ḥaqqan li-l-‘abd ḥattā yajriya fihi al-‘afw wa-l-ṣulḥ*).”<sup>21</sup> 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-Sarakhsī 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 fihi al-ḥ*

<sup>16</sup> *Ibid.*, 358ff and 367ff (theft); 373ff (banditry).

<sup>17</sup> Hoexter, “*Huqūq Allāh*,” 138ff.

<sup>18</sup> Māwardī, *al-Ḥāwī al-kabīr*, 12:343; Sānū, *Mu‘jam muṣṭalahāt uṣūl al-fiqh*, 181.

<sup>19</sup> Sarakhsī, *Mabsūṭ*, 9:36; Kāsānī, *Badā’i*, 9:177.

<sup>20</sup> Sarakhsī, *Mabsūṭ*, 27:87.

<sup>21</sup> Kāsānī, *Badā’i*, 9:177.

*aqqān wa-ḥaqq al-‘abd aghlab*).<sup>22</sup> 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.”<sup>23</sup> 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.

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

<sup>23</sup> 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.<sup>1</sup> 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;<sup>2</sup> and when blood money is due it is paid to the injured party as compensation, rather than to the state as a fine.<sup>3</sup>

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

<sup>1</sup> Schacht, *Introduction*, 7.

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

<sup>3</sup> Cunnison, “Blood Money,” 109.

that reflect the tendencies just described are presented in what follows. The *'āqila* institution assumed its Islamic shape as part of these tendencies.

## 2.1 RESTRICTING THE LIABILITY FOR BLOOD REVENGE TO THE PERPETRATOR

Islamic law curtailed the liability for blood revenge: only the perpetrator of a homicide rather than any of his relatives is considered the legitimate object of blood revenge.<sup>4</sup> This major modification is well represented in Islamic tradition. 'Alī b. Abī Ṭālib (r. 35–40/656–661), fatally injured by Ibn Muljam, is said to have instructed his sons on his deathbed not to kill anyone but the killer in retaliation. Even his exalted status as caliph, 'Alī said, did not justify disobeying this rule by taking revenge on any Muslim other than the offender.<sup>5</sup> The prohibition on exacting revenge from a man other than the killer is also ascribed to the Prophet: “Those who will be counted on the day of resurrection as the most disobedient to God’s commands are three: a man who killed [in revenge] someone other than the killer (literally: his killer, *rajul qatala ghayr qātīlihi*), a man who killed within the sacred territory around Mecca (*al-ḥaram*), and a man who followed the blood revenge [practice] (*dhuhūl*) of the Jāhiliyya.”<sup>6</sup> This prohibition is inferred from several Qur’ānic verses, most notably 17(*al-Isrā*):33: “Do not slay a soul which God has forbidden, except by right. Whoever is slain unjustly, We have appointed to his next-to-kin authority; but let him not exceed in slaying; he shall be helped.” The verse does not literally specify the prohibition that the jurists anchor in it, but the interpretation bridges between the two.<sup>7</sup> The words “Let him not exceed in slaying” are explained by Muḥammad b. Jarīr al-Ṭabarī (d. 310/923) in his commentary on the Qur’ān as follows:

Do not kill in retaliation for someone who was slain unjustly anyone other than his slayer. This [was said because] the people of the Jāhiliyya followed this custom.

<sup>4</sup> EI(2), s.v. “Kişāş” (Schacht); Anderson, “Homicide,” 812; Coulson, *A History of Islamic Law*, 18.

<sup>5</sup> Majlisī, *Biḥār al-anwār*, 42:239.

<sup>6</sup> Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 1:165; and for variants see ‘Abd al-Razzāq, *Muṣannaf*, 9:47 (no. 16304); Ṭabarī, *Jāmi’ al-bayān*, 9:5497; Bayhaqī, *Sunan*, 8:164–165; Qurṭubī, *Jāmi’*, 2:245. In some versions, the absurd *rajul qatala ghayr qātīlihi* was changed into *rajul qatala ghayr qātīl abīhi* (Sarakhṣī, *Mabsūt*, 26:59).

<sup>7</sup> That is, the interpretation bridges between the prohibition and the verse not by really deriving the former from the latter, but rather by justifying the already existing view by reading it into the verse (cf. Sadeghi, *The Logic of Law Making*, xii).

When a man killed another, the victim's next of kin would take revenge on a notable of the offender's tribe rather than on the offender himself. God forbade his servants to follow this practice and said to his Messenger: Taking revenge on anyone but the slayer is tantamount to disobedience and excess; do not kill in retaliation anyone but his slayer.<sup>8</sup>

According to al-Ṭabarī's comment, which he repeats elsewhere,<sup>9</sup> restricting liability to the killer thus modifies a pre-Islamic custom by which blood revenge could be taken on a tribesman other than the killer. Commentaries on the Qur'ān are not always a faithful historical source, but in this case there is evidence of pre-Islamic practice that reinforces al-Ṭabarī's interpretation.<sup>10</sup>

The custom of taking revenge on men other than the perpetrator, which is still followed by modern Arabs,<sup>11</sup> emerges from a report of negotiations to settle a dispute between tribal groups in Baṣra in the year 64/684, namely, in the early Umayyad period. While revealing some clear signs of Islam, the negotiations and the preceding events are still dominated by pre-Islamic tribal tradition. The gist of the report is as follows.<sup>12</sup> Mas'ūd b. 'Amr, the leader of the tribe of Azd and its allies from Bakr b. Wā'il (a section of Rabī'a), was appointed by the Umayyad governor of Baṣra, 'Ubaydallāh b. Ziyād, to substitute for him ('Ubaydallāh had been forced out of town by the *ashbrāf*, following the death of the caliph Yazīd b. Mu'āwiya [r. 60–64/680–683]).<sup>13</sup> The tribe of Tamīm, which, like Azd and Bakr b. Wā'il, was an important element of the military aristocracy of Baṣra,<sup>14</sup> opposed Mas'ūd's appointment. When Mas'ūd was assassinated

<sup>8</sup> Ṭabarī, *Jāmi' al-bayān*, 9:5495, and see also 9:5496–5497. For many variations of this explanation in exegetical *ḥadīths* see, e.g., the chapter “Imposing Blood Revenge on the Killer Exclusively” in Bayhaqī, *Sunan*, 8:162–167.

<sup>9</sup> Ṭabarī, *Jāmi' al-bayān*, 2:863.

<sup>10</sup> For a general description of this pre-Islamic practice see Robertson Smith, *Kinship and Marriage*, 25–27.

<sup>11</sup> There is plenty of evidence for this. For the Ḥumr tribes in Sudan see Cunnison, “Blood Money,” 115 and Cunnison, *Baggara Arabs*, 159 (implied); for the Bedouin of the Middle East and North Africa see Stewart, “Customary Law,” 252, 256, and *EI(2)*, s.v. “Ṭḥa'r” (Stewart); for the south of Israel see 'Arif al-'Arif, *al-Qaḍā' bayna al-Badu*, 78, and Hardy, *Blood Feuds*, 90; for Arabia see Robertson Smith, *Kinship and Marriage*, 26.

<sup>12</sup> Multiple versions exist of the negotiations and of the events that led to it. Here I rely mainly on Balādhurī, *Ansāb*, 4/2:98–99 (a reference for which I am indebted to Michael Ebstein), while a few details are from al-Ṭabarī's *Ta'rikh* or from the quite different version of the negotiations in Jarīr and al-Farazdaq, *Naqā'id*, 2:738–741 (I thank Patricia Crone for the latter reference, and also for her assistance in making sense of the text).

<sup>13</sup> *EI(2)*, s.v. “'Ubayd Allāh b. Ziyād” (Robinson).

<sup>14</sup> *EI(2)*, s.v. “al-Baṣra” (Pellat).

by the Khawārij while preaching in the mosque of Baṣra, the Azdīs reasonably suspected that al-Aḥnaf, Tamīm's leader, was responsible.<sup>15</sup> This suspicion led to a violent confrontation between Tamīm and their allies on one side, and groups of Azd and Rabī'a on the other, and many were killed on both sides. At some point, the tribesmen of Tamīm, trying to reach a settlement, offered three options.

The first of these is relevant to our point: "if you have a proof that we killed Mas'ūd," Tamīm said to Azd and Rabī'a, "then select our best man and kill him in return."<sup>16</sup> The pre-Islamic perception that this offer reflects is that it does not matter who the offender is. Because blood revenge was not meant to punish the killer,<sup>17</sup> it made no difference whether the life taken in requital was that of the killer or of a fellow tribesman. The governing rule was that retaliation should be exacted against a man of equal status to that of the victim, and tribesmen tended to demand or boast of the killing of many people or of a particularly reputed man in revenge for a victim of theirs, as a way of claiming high status.<sup>18</sup> Because Mas'ūd was of preeminent importance for his tribe, custom determined that Tamīm must suffer the loss of a similarly weighty figure. What mattered, in other words, was the tribe, not the tribesman. The individual was not necessarily punished by revenge when he committed a homicide, nor was his personal interest in revenge always satisfied when he was on the injured side.

According to a quite different version of the events, preserved in the *Naqā'id* of Jarīr and al-Farazdaq (both died around 110/728), the negotiations took another path. This version also testifies, in a different way, to a concern for collective, tribal redress, rather than for individual reparation. According to this other version, each side wrote down the names of the victims, and on the basis of these lists it was agreed that Azd and Rabī'a, which had suffered more casualties than Tamīm, had the right to receive blood money from the latter.<sup>19</sup> No account is taken in this

<sup>15</sup> For al-Aḥnaf see *EI*(2) s.v. "al-Aḥnaf b. Ḳays" (Pellat).

<sup>16</sup> Balādhurī, *Ansāb*, 4/2:99; Ṭabarī, *Ta'rikh*, II:462. Azd and Rabī'a opted for blood money, the third offer presented to them by Tamīm, as discussed in Part II.

<sup>17</sup> Classical Arab poetry contains the notion that blood revenge is merely a means of redressing the strength of the victim's tribe in relation to the killer's tribe (Hoyland, *Arabia and the Arabs*, 122; see also Anderson, "Homicide," 815; Hardy, *Blood Feuds*, 17).

<sup>18</sup> Lecker, *The "Constitution of Medina,"* 123–124 (including examples). Against this, however, an example is found of a demand to take revenge from the killer exclusively (al-Isfahānī, *Aghānī*, 3:21, mentioned in Procksch, *Über die Blutrache*, 51).

<sup>19</sup> Jarīr and al-Farazdaq, *Naqā'id*, 2:738, 740.

composition agreement of the injured individuals from Tamīm, nor even, it seems, of all the victims from Azd and Rabī‘a. The number of the Tamīmī slain must have been subtracted from the dead of the other group so that the calculated compensation covered just the remainder. This pre-Islamic custom of set-off is known from other examples. An arbitration between the two major tribes in Medina, Aws and Khazraj, designed to end a twenty-year conflict between them, determined that the losses of one tribe would be subtracted from those of the other, and the tribe that suffered less casualties would pay the other the blood money due for the remainder.<sup>20</sup> The settlement that put an end to the famous *al-Fijār* war in the Ḥijāz toward the end of the sixth century AD, between Quraysh and Kināna on one side and groups of Qays ‘Aylān, including Hawāzin, on the other, was based on the same principle.<sup>21</sup> Early commentators of the Qur’ān also record this practice. According to some of them, the word *qīṣāṣ* in 2(*al-Baqara*):178 refers to the custom, said to have been followed by the Prophet, of reconciling two hostile tribes by setting-off the blood money due for the dead of one side against that due for the dead of the other (*muqāṣṣat diyāt ba‘d al-qatlā bi-diyāt ba‘d*).<sup>22</sup>

The pre-Islamic method of calculating blood money to restore the balance between the tribes takes no account of the individual or of punishment; it concerns solely tribal compensation. By limiting blood revenge to the killer, Islamic law introduced individual responsibility and punishment. The modification to which al-Ṭabarī refers is, therefore, a step toward transforming blood revenge from a mechanism of tribal compensation, reminiscent of civil wrongs, into an individual punishment, as in criminal law.<sup>23</sup>

## 2.2 DISTINGUISHING BETWEEN ACCIDENTAL AND INTENTIONAL HOMICIDE

Islamic law reinforces the importance of intention, as derived from Qur’ān 4 (*al-Nisā*):92–93:

A believer shall not kill a believer unless by mistake. He who has killed a believer by mistake must emancipate a believing slave and pay blood money to his (i.e., the

<sup>20</sup> Iṣfahānī, *Aghānī*, 3:27 (I owe this reference to Avraham Hakim).

<sup>21</sup> Landau-Tasseron, “The Sinful Wars,” 40–41.

<sup>22</sup> Ṭabarī, *Jāmi‘ al-bayān*, 2:862; for another explanation of the word *qīṣāṣ* see Qurṭubī, *Jāmi‘*, 2:245. In modern Bedouin custom too, when two groups injure each other, the method of set-off is followed (Stewart, “Customary Law,” 252).

<sup>23</sup> cf. *EI*(2), s.v. “*Qīṣāṣ*” (Schacht).

victim's) relatives, unless they waive it as an act of charity. If he (the victim) is of a people hostile to you, and he is a believer, let him release a believing slave. If he belongs to a people with whom you have a pact, then blood money must be paid to his relatives and a believing slave should be released. If he (the slayer) has no means [for emancipating a slave] then he must fast for two consecutive months so that God shall turn to him again. God is all-knowing and wise (92), but whoever slays a believer intentionally, his reward is hell forever, and the wrath and the curse of God are upon him and He will prepare for him an awful doom (93).

Verse 92 establishes the perpetrator's obligation to expiate an accidental homicide, as a sign of repentance. The message inherent in the obligation to expiate is that under the law of Islam, bloodshed can no longer be considered as an offense only against a private right, and therefore cannot be made good by compensation alone. Homicide also infringes a right of God, and the offender must remedy this by expiation, which "belongs to those rights of God . . . in which there is no room for a waiver nor for assistance (to the offender in fulfilling his obligation) (*wa-lā yaṣih̄hu fih̄ā 'afw fa-lam yadkhuḥā muwāsāt*)."<sup>24</sup> In contrast to the believer who kills accidentally, no way of repentance is offered to one who kills intentionally; as emerges from verse 93, he is doomed to suffer eternal punishment. The verses thus introduce a religious distinction between intentional and accidental homicide.

The Ḥanafīs adopt this distinction with regard to expiation. According to their doctrine, expiation applies only to accidental (and semi-intentional) homicide.<sup>25</sup> It is not required for intentional homicide because there the inherent sin is too grave for expiation to eliminate the punishment that awaits the killer in the world to come (*al-wa'id al-manṣūṣ 'alayhi lā yartafi'u bi-l-kaffāra wa-l-dhanb fih̄i a'ẓam min an tarfa'ahu al-kaffāra*).<sup>26</sup> In the Mālikī view too, expiation is due only for accidental homicide; the Shāfi'īs require it in both categories of homicide (if blood revenge is not exacted); and both views are ascribed to Aḥmad b. Ḥanbal (d. 241/855).<sup>27</sup>

The weight assigned to intention and the ensuing distinction between accidental and intentional homicide gave rise to a significant difference in

<sup>24</sup> Māwardī, *al-Ḥāwī al-kabīr*, 12:343.

<sup>25</sup> Qudūrī, *Mukhtaṣar*, 98. The opinion that semi-intentional homicide does not require expiation is also represented among the Ḥanafīs (Kāsānī, *Badā'i'*, 10:300); for the categories of homicide, including semi-intentional homicide, see p. 18.

<sup>26</sup> Sarakhsī, *Mabsūt*, 27:84, 86 (the quotation is from the former page). For other reasons why expiation is required in accidental but not in intentional homicide see *ibid.*, 86–87; Kāsānī, *Badā'i'*, 10:299.

<sup>27</sup> *EI*(2), s.v. "Ḳatl" (Schacht).

the legal consequences: accidental homicide was to be settled by blood money as a way of compensation, while intentional homicide required retaliation, which is considered a punishment.<sup>28</sup> This difference was accepted by the four Sunnī schools of law.<sup>29</sup> Retaliation may be substituted by blood money, but only with the consent of the injured party or, according to some jurists, of both parties.<sup>30</sup>

Viewing blood revenge as a punishment rather than compensation is reflected in various rules. One of them is the exclusion of minors and the insane from liability to blood revenge, as mentioned previously. Because blood revenge is considered a punishment, liability depends on intent and on awareness that the act was an offense, and because in Islamic law neither of these can be ascribed to minors or the insane, they are not liable to blood revenge.<sup>31</sup> Another example is the rule that if multiple perpetrators have intentionally killed one person, they are all liable to blood revenge. This rule – which prevailed over the views that retaliation cannot legally be inflicted in such a case, or that it applies to only one of the offenders – was endorsed by the four Sunnī schools of law.<sup>32</sup> It is supported by a famous *ḥadīth* according to which ‘Umar said about a boy who was assassinated by four men, that had all the people of Ṣan‘ā’ taken part in killing him, he would have killed them all.<sup>33</sup> It is clear that blood revenge for an intentional joint murder was not meant to compensate the injured side for their loss but rather to punish each of the participants for the crime he committed. In terms of its legal

<sup>28</sup> Shīrāzī, *Muhadhḥab*, 3:170.

<sup>29</sup> Ḥanafīs: Qudūrī, *Mukhtaṣar*, 97–98; Mālikīs: Ibn Rushd, *Bidāyat al-mujtahid*, 2:473; Shāfi‘īs: Shīrāzī, *Muhadhḥab*, 3:170; Ḥanbalīs: Ibn Qudāma, *Mughnī*, 11:457, 464. While 4(*al-Nisā*):92–93 establish the religious consequence of both accidental and intentional homicide, these verses only speak of the legal consequence of the former. The Qur’ānic basis for retaliation in the case of a murder are the following verses: 2(*al-Baqara*):178; 5(*al-Mā’ida*):45; and 17(*al-Isrā*):33.

<sup>30</sup> ‘Abd al-Wahhāb, *Ishrāf*, 2:817–818 (implied); Ibn Rushd, *Bidāyat al-mujtahid*, 2:478.

<sup>31</sup> Peters, *Crime and Punishment*, 20.

<sup>32</sup> Ibn Rushd, *Bidāyat al-mujtahid*, 2:476 although among the Ḥanbalīs there was no consensus about it (Anderson, “Homicide,” 816; Ibn Qudāma, *Mughnī*, 11:490). Ibn Qudāma’s explanation of this rule, that just as the “punishment (of blood revenge) is the right of one individual against another, so it is also the right of one individual against the many (*‘uqūba tajību li-l-wāḥid ‘alā al-wāḥid fa-wajabat li-l-wāḥid ‘alā al-jamā’a*)” (ibid., 491) reflects the view that punishment may also satisfy a private right. For more details on retaliation in the case of complicity see Peters, *Crime and Punishment*, 28–29.

<sup>33</sup> Bukhārī, *Ṣaḥīḥ*, 4:303 (*Kitāb al-Diyāt*, no. 6896), and a different version in Mālik, *Muwatta’*, 512 (*Kitāb al-‘Uqūl*, no. 1580/36).

consequences, intentional killing thus required an individual punishment, that is, it acquired an essential punitive element.

Alongside this punitive element, intentional homicide retained major elements of a tort. This is revealed, for example, when blood revenge is replaced by blood money. Muslim jurists view the obligation to pay blood money in such a case as punishment of the killer (and their view in this regard greatly affects the rules of the *'āqila*, as discussed in due course),<sup>34</sup> yet the money is paid to the victim's heirs rather than to the public treasury, as would have been the case for a punishment imposed for a crime. That is, when blood revenge is transmuted into blood money the consequence of the homicide reveals evident characteristics of reparation.

Accidental homicide required compensation. It remained, in terms of its legal consequences, within the realm of private law. From the Islamic religious perspective, however, it also was extended beyond private law. The obligation of expiation reflects the transformation of accidental homicide from a purely private offense into one involving the transgression of God's rights as well.

We thus see that although elements of private law persisted in intentional and even more so in accidental homicide, the contribution of Islamic values extended the law of homicide beyond private law. By accentuating the importance of intention, the Qur'ān and Muslim scholars created a religious and legal distinction between accidental and intentional homicide. The weight assigned to individual responsibility, which led to restricting the scope of blood revenge to the killer, affected the consequences of intentional homicide. It changed the emphasis from compensation to punishment, thereby bringing intentional homicide closer to a crime. Under Islam homicide also became a religious transgression, and this is expressed in the obligation to expiate it. This obligation reflects an aspect of the law of homicide that falls beyond private law, within the realm of *ḥuqūq Allāh*.

The modifications introduced in the rules related to the *'āqila* are connected to this development. They are designed to accentuate the distinction between accidental and intentional homicide by stressing individual responsibility, the perpetrator's intention, and the punitive nature of the consequences of intentional homicide.

<sup>34</sup> See p. 23.

## The ‘*Āqila*’s Liability for Homicide Restricted and Justified

### 3.1 ACCIDENTAL HOMICIDE

The ‘*āqila*’ is an institution based on joint liability. From this fact homicide emerges as a tort which incurs compensation – a punishment would have necessitated individual responsibility. The Islamization of this institution involved adjusting it to Islamic values, which, as discussed previously, required attaching more weight to individual responsibility and intention, and to fault and punishment. For this purpose, the liability of the ‘*āqila*’ was restricted according to the level of intention involved in the homicide, and the perpetrator’s liability was broadened correspondingly. Where to draw the line between the ‘*āqila*’s liability and that of the perpetrator was, in the formative period of Islamic law, a matter of some dispute. The different views on this issue relate to the following three major categories of homicide recognized by Islamic law. Intentional homicide (*qatl ‘amd*), committed with the intention to kill and by means likely to achieve this end; accidental homicide (*qatl khata’*), in which the killer’s intention was either to shoot at a target, or to kill an animal or a person whose killing is not illegal; and an intermediate category: semi-intentional (*shibh ‘amd*) homicide in which the killer intentionally assaults the victim, but does so in a fashion that indicates an intention to injure, not to kill.<sup>1</sup>

<sup>1</sup> In the fourth/tenth century the Ḥanafīs refined this division into five categories (Tsafirī, “Abū Ja’far al-Ṭaḥāwī,” 143–144), but in the discussion of the ‘*āqila*’s liability the two additional categories are not mentioned. In practice they were probably treated under *qatl khata’*. The Mālikīs, or at least some of them, recognize, in practice, only two categories, assimilating the intermediate one under intentional homicide (Anderson, “Homicide,” 819; *EI*[2], s.v. “Diya” [Ṭyan]; Sarakhsī, *Mabsūt*, 26:65; Ibn Qudāma, *Mughnī*, 11:445).

The most extreme opinion on this issue was represented only by non-Sunnīs, who opposed the ‘*āqila*’ institution entirely. The two Mu‘tazilīs from Baṣra, Abū Bakr al-Aṣamm (d. 200/815 or later) and his disciple Ibrāhīm b. Ismā‘īl, known as Ibn ‘Ulayya (d. 218/833) (who later settled in Egypt), rejected any dilution of the principle of individual responsibility, adducing Qur’ānic verses, *ḥadīths*, and arguments based on analogy (*qiyās*) in support of their view.<sup>2</sup> They also refused to recognize the commonly accepted distinction between the legal consequence of an accidental homicide and that of an intentional homicide – namely, compensation in the first case and punishment in the second – claiming that the consequence is in both cases a punishment: “Blood money [for accidental homicide] is a punishment, therefore the ‘*āqila*’ should not bear it, [just] as [it is not liable for] blood revenge.”<sup>3</sup> The argument of al-Aṣamm and Ibn ‘Ulayya reflects the guidelines of the discussion: the limits of the ‘*āqila*’s liability became connected to the distinction between compensation and punishment; the ‘*āqila*’ was liable only for what was considered compensation. According to these Mu‘tazilīs, blood money always constitutes a punishment, whether it is required for accidental or inadvertent homicide. Liability for it therefore rests in both cases with the perpetrator.<sup>4</sup> It has to be said, however, that both al-Aṣamm and Ibn ‘Ulayya were considered somewhat eccentric. They were known to have rejected the majority view, and to have disagreed with the *ijmā‘* (the consensus of scholars) on issues of theology, politics, and law so often that their views were not considered an infringement of *ijmā‘*.<sup>5</sup>

<sup>2</sup> The verses are 35(*Fāṭir*):18 “no burdened soul shall bear the burden of another”; 20 (*Ṭāh*):15 “Every soul shall be rewarded for its works”; and 74(*al-Mudaththir*):38 “Every soul is a pledge for what it has earned” (Māwardī, *al-Hāwī al-kabīr*, 12:341; the *ḥadīths* and the arguments based on *qiyās* are also listed by al-Māwardī on that page).

<sup>3</sup> Māwardī, *al-Hāwī al-kabīr*, 12:341.

<sup>4</sup> Ibn al-Bannā, *Muḡnī*, 3:1069; Sarakhsī, *Mabsūt*, 26:65; ‘Imrānī, *Bayān*, 11:512; Kāsānī, *Badā‘i*, 10:313; ‘Aynī, *Bināya*, 13:362 (in some of these only al-Aṣamm is mentioned). The claim that the Baṣrī ‘Uthmān al-Battī also followed this opinion (Ibn Ḥazm, *Iḥkām*, 5:146; Ibn Qayyim al-Jawziyya, *I‘lām al-muwaqqā‘in*, 2:324) is incorrect. This claim is merely meant to serve a very specific discussion of *uṣūl al-fiqh* that should not concern us here. ‘Uthmān al-Battī is known for another opinion, as is mentioned later.

<sup>5</sup> For al-Aṣamm see Nawawī, *Tahdhīb al-asmā’ wa-l-lughāt*, 2:301; *EI*(2), s.v. “al-Aṣamm” (van Ess); For Ibn ‘Ulayya see Ibn Ḥajar, *Lisān al-mīzān*, 1:22. For an example of a legal opinion of theirs – regarding the amount of blood money due for killing a woman – that contradicts *ijmā‘* see Ibn Qudāma, *Muḡnī*, 12:56; Māwardī, *al-Hāwī al-kabīr*, 12:289.

The Khawārij, or some of them, are also said to have completely rejected the ‘*āqila* institute as being incompatible with individual responsibility.<sup>6</sup> Those Khawārij who rejected the ‘*āqila* must have belonged to sects other than the Ibādīs. The Ibādīs are the only Khawārij whose legal works are available to us, and their writings show that the ‘*āqila* was recognized by their law.<sup>7</sup>

All other Muslims accepted the ‘*āqila* in principle. They agreed that it was liable for blood money due for accidental homicide, and accepted that in the case of intentional homicide, any agreed blood money (as a substitute for blood revenge) was to be imposed on the perpetrator alone. The allocation of liability for semi-intentional homicide remained, however, a moot point. It was discussed notably in Iraq. Leading Kūfī scholars including Ibn Shubruma (d. 144/761) and Ibn Abī Laylā (d. 148/765), the Baṣrīs Muḥammad b. Sīrīn (d. 110/728) and ‘Uthmān al-Battī (d. 143/760), as well as al-Zuhrī (d. 124/742), from Medina, are said to have placed liability for semi-intentional homicide with the perpetrator,<sup>8</sup> and this survived as a minority opinion in the Ḥanbalī school up to at least the fourth/tenth century.<sup>9</sup> The other jurists took the view that the ‘*āqila*’s liability covers both accidental and semi-intentional homicide.<sup>10</sup> According to the Ḥanafīs, the perpetrator pays his share of blood money together with the other ‘*āqila* members. The Ḥanbalīs and the Shāfi‘īs exempt him even of his share, and the Mālikīs are divided about this.<sup>11</sup> They all agree that the killer alone is liable for intentional homicide.

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<sup>6</sup> Shāshī, *Hilyat al-‘ulamā’*, 7:590; Māwardī, *al-Ḥāwī al-kabīr*, 12:340; Ibn al-Bannā, *Muqni’*, 3:1069; ‘Aynī, *Bināya*, 13:362; Shawkānī, *Nayl al-awṭār*, 7:92.

<sup>7</sup> Ibn Baraka, *Kitāb al-Jāmi’*, 303; Basyawī, *Mukhtaṣar*, 275, 320; Thamīnī, *Kitāb al-Nil wa-shifā’ al-‘alīl*, 15:191, 195.

<sup>8</sup> ‘Abd al-Razzāq, *Muṣannaf*, 9:409 (no. 17814); Shāshī, *Hilyat al-‘ulamā’*, 7:590; ‘Imrānī, *Bayān*, 11:512; Ibn Qudāma, *Mughnī*, 12:16.

<sup>9</sup> It was held by Abū Bakr ‘Abd al-‘Azīz b. Ja‘far (d. 363/973) (Ibn Qudāma, *Mughnī*, 12:16; Ibn Qudāma, *Kāfi*, 4:46), a student of Abū Bakr al-Khallāl and a leader of the Ḥanbalīs in Baghdad.

<sup>10</sup> Ḥanafīs: Qudūrī, *Mukhtaṣar*, 103; Shāfi‘īs: Shāshī, *Hilyat al-‘ulamā’*, 7:590; Ḥanbalīs: Ibn Qudāma, *Kāfi*, 4:46. The Mālikīs do not recognize the intermediate category of semi-intentional homicide, as mentioned.

<sup>11</sup> *EI*(1), s.v. “‘Āqila” (Juynboll); Qārī, *Fatḥ bāb al-‘Ināya*, 3:398; Ḥanafīs: Qudūrī, *Mukhtaṣar*, 104; Mālikīs: Qayrawānī, *Nawādir*, 13:485; ‘Abd al-Wahhāb, *Ishrāf*, 2:833; Qarāfī, *Dhakhīra*, 12:391; Shāfi‘īs: Māwardī, *al-Ḥāwī al-kabīr*, 12:345; Ḥanbalīs: Ibn Qudāma, *Mughnī*, 12:22.

In the customary law of the modern Bedouin in the Middle East and North Africa, the members of a blood-money group participate in any blood-money payment due for a homicide committed by any group member,<sup>12</sup> whether intentional or not. This may well reflect pre-Islamic Arab legal tradition,<sup>13</sup> from which modern Bedouin custom ultimately originates.<sup>14</sup> If so, Islamic law continues the pre-Islamic Arab custom only by retaining the ‘*āqila*’ in regard to accidental homicide; in cases of intentional homicide it deviates from custom by exempting the ‘*āqila*’ and attaching liability to the killer alone. That is, in terms of legal history, the basic principle is the ‘*āqila*’s liability, and exempting the ‘*āqila*’ represents a deviation. Muslim jurists, however, guided by the value of individual responsibility, present this in the opposite way. In their eyes, the perpetrator’s sole liability for homicide was the original (and correct) state of things, or the basic principle, *aṣl*. Imposing liability on the ‘*āqila*’ is a deviation from this basic principle, and must therefore be justified. The Mālikī jurist al-Zurqānī (d. 1122/1710), for example, expresses this point of view. He says that the ‘*āqila*’ is liable for accidental homicide because its liability in such a case

is established by the *sunna*, in the public interest (*maṣlahah*); but no analogous rule should derive from this regarding intentional homicide (*fa-lā yuqāsu ‘alayhi al-‘amd*), for the principle (*al-aṣl*) is that ‘no burdened soul shall bear the burden of another’ (6[*al-An‘ām*]:164). The ‘*āqila*’s liability for accidental homicide was made an exception to it but cases of intentional homicide remain in accordance with the principle (*khuṣṣa minhu ḥaml al-‘āqila al-khaṭa’ fa-baqiya al-‘amd ‘alā al-aṣl*).<sup>15</sup>

Ibn Qudāma expresses the legal aspect of the same point of view in the following paragraph (partly cited previously):

All scholars agree that blood money for intentional homicide is to be imposed on the killer, the ‘*āqila*’ does not pay it. This is the basic legal principle (*qaḍiyyat al-aṣl*), that is, [liability for] indemnifying lies with the one who caused the damage. . . . This principle is contravened, however, in the case of a non-culpable homicide perpetrated by a free man.<sup>16</sup>

<sup>12</sup> Stewart, “Customary Law,” 253.

<sup>13</sup> According to Juynboll, in *El*(1), s.v. “Āqila,” the custom among the ancient Arabs dictated that the tribe was obliged to pay the blood money on behalf of any of its members, irrespective of whether the act was premeditated.

<sup>14</sup> Schacht, *Introduction*, 77.

<sup>15</sup> Zurqānī, *Sharḥ*, 4:227, repeated on the following page.

<sup>16</sup> Ibn Qudāma, *Mughnī*, 12:13.

The justifications for neglecting the principle of individual responsibility are varied, and fall into two overlapping types, one more religious, the other more legal in nature. According to the religious justification, while a number of Qur'ānic verses and a series of Prophetic *ḥadīth* dictate the principle of personal responsibility for misdeeds,<sup>17</sup> another well-known Prophetic *sunna*, and *ijmā'*, legitimize the 'āqila as an exception to this principle.<sup>18</sup> This *sunna* is testified by a multipurpose *ḥadīth* whose numerous versions are used to support differing arguments, and whose components change according to the discussion it serves. The part of the *ḥadīth* that is relevant to us concerns two women (in many versions they are the wives of Ḥamal b. Mālik b. al-Nābigha, a tribesman of Hudhayl), one of whom killed the other by striking her with a tent pole. The case was brought before the Prophet, and he imposed the blood money for the slain woman on the members of the attacker's 'āqila, despite their protest.<sup>19</sup> The Prophet's judgment in this case was later ratified by the practice of his Companions and their Successors.<sup>20</sup> The Prophet's decision and the Companions' approval of it are taken to sanction the 'āqila's liability in cases of accidental homicide.

The more juristic argument for the 'āqila institution focuses on the connection between individual responsibility, intention, and punishment.

<sup>17</sup> The verses referred to are, again, 6(*al-An'ām*):164; and 35(*Fāṭir*):18; as well as 17(*al-Isrā'*):15, all of which contain the phrase "no burdened soul shall bear the burden of another." The *ḥadīth* usually adduced by the jurists in support of this principle is about a Companion of the Prophet, called Abū Ramtha or Abū Rimtha (or another Companion), and his son, to whom the Prophet said: "He will not commit an offence against you nor will you commit an offence against him (*lā yajni 'alayka wa-lā tajni 'alayhi*)" (Jaṣṣās, *Aḥkām al-Qur'an*, 3:194; Ibn Rushd, *Bidāyat al-muḥtabid*, 2:489; Ibn Qudāma, *Mughnī*, 12:13), which is taken to mean: neither of you will be at fault for an offence committed by the other (al-Sarakhsī, *Mabsūt*, 26:65; Nawawī, *Rawḍat al-ṭālibīn*, 9:349). For extended versions of this *ḥadīth* see, e.g., Ibn Ḥanbal, *Musnad*, 13:389–392 (nos. 17421ff); Bayhaqī, *Sunan*, 8:165–166 (nos. 15897 and 15898). For the same *ḥadīth* with another Companion see Ibn Ḥanbal, *Musnad*, 14:360 (no. 18932), and 15:316 (no. 20648).

<sup>18</sup> Ibn Rushd, *Bidāyat al-muḥtabid*, 2:489; Ibn Rushd, *Muqaddimat*, 2:377 (for *khuṣimat* read *khuṣṣiṣat*?); Zurqānī, *Sharḥ*, 4:228; 'Aynī, *Bināya*, 13:362; Ibn 'Abidīn, *Radd al-muḥtār*, 10:325. The fact that in the eyes of the last two authors the 'āqila is legitimized not by an exception from the Qur'ānic precept but rather by an addition to it belongs to the intricacies of a dispute over legal methodology that is beyond our discussion.

<sup>19</sup> Sarakhsī, *Mabsūt*, 27:124–125; Marghīnānī, *Hidāya*, 4:1711. For fuller versions of the *ḥadīth* see, e.g.: Muslim, *Ṣaḥīḥ*, 3:165–167 (*Kitāb al-Qasāma*); Jaṣṣās, *Mukhtaṣar Ikhṭilāf al-'ulamā'*, 5:88ff; Jaṣṣās, *Aḥkām al-Qur'an*, 3:201–202; Bayhaqī, *Sunan*, 8:300 (nos. 16367 and 16368).

<sup>20</sup> 'Aynī, *Bināya*, 13:362; Ibn 'Abidīn, *Radd al-muḥtār*, 10:325.

According to the rationale at the basis of this justification, an unintentional homicide does not demand punishment. Imposing a large amount of blood money on the killer alone, in addition to the expiation required, could lead to his financial ruin, and would hence constitute an unjustified punishment. The ‘*āqila* is, therefore, invoked to provide relief by sharing the burden of the blood money.<sup>21</sup> According to this line of reasoning, the ‘*āqila* would not assume responsibility for blood money for intentional homicide. Since the perpetrator of such a homicide deserves punishment, there is no reason to deviate from the principle of individual responsibility and relieve his burden. As the Ḥanafī jurist ‘Uthmān b. ‘Alī al-Zayla‘ī (d. 743/1342) says, the ‘*āqila* is not liable for blood money resulting from intentional homicide, “because intentional action requires punishment, and deserves no mitigation (*li-anna al-fi‘l al-‘amd yūjibu al-‘uqūba fa-lā yastahiqqu al-takhfīf*).”<sup>22</sup>

Limiting the ‘*āqila*’s liability to accidental homicide was thus intended to distinguish between intentional and accidental homicide, by imposing punishment on an intentional murderer and relieving an accidental killer. Defining the extent of the ‘*āqila*’s liability in this way brings intentional homicide closer to a crime, which requires a punishment, while leaving accidental homicide in the realm of torts that are redressed by compensation.

In the perception of Muslim jurists, however, accidental homicide was also associated with aspects of a crime. This is revealed in their discussions of another contradiction, within the realm of accidental homicide. On the one hand, there is the reasoning that the killer should not be punished because he had no intention of killing, and the heavy burden of blood money, if laid upon him, would be tantamount to a punishment. On the other hand, there is no way to abolish the duty of payment, “for human life is sacrosanct, and blood must not be spilled with impunity (*li-anna al-nafs muḥtarama lā wajh ilā al-ihdār*).”<sup>23</sup> The ‘*āqila* institution serves to resolve the conundrum. By assuming the perpetrator’s financial burden it both prevents the unfairness of punishing the individual who killed with no intention, and maintains the payment of blood money, thereby

<sup>21</sup> ‘Abd al-Wahhāb, *Ma‘ūna*, 3:1324; Sarakhsī, *Mabsūt*, 27:125; Marghīnānī, *Hidāya*, 4:1711; Ibn Qudāma, *Mughnī*, 12:13; Zayla‘ī, *Tabyīn*, 7:364–365; ‘Aynī, *Bināya*, 13:363–364; Khusraw, *Durar al-ḥukkām*, 2:125.

<sup>22</sup> Zayla‘ī, *Tabyīn*, 7:365, and similarly in Ibn al-Bannā, *Muqni*, 3:1068; Sarakhsī, *Mabsūt*, 27:131–132; Kāsānī, *Badā‘ī*, 10:312; Ibn Qudāma, *Mughnī*, 12:28.

<sup>23</sup> Marghīnānī, *Hidāya*, 4:1711.

compensating for the spilled blood and conveying the message that human life must not be taken.

Al-Sarakhsī, like many other jurists, expresses the twofold purpose governing the *‘āqila*’s role in this regard, and the justifying arguments:

One who kills by mistake is not culpable, and his lack of culpability, though it does not do away with the sanctity of the victim’s life, does protect him from punishment (*al-khāṭi’ ma’dhūr wa-‘udhruhu lā yu’dimu ḥurmat nafs al-maqtūl wa-lākin yanna’u wujūb al-‘uqūba ‘alayhi*). Therefore, the law imposes the payment of blood money as a way of preventing the victim’s blood from being spilled with impunity (*ṣiyānatan li-nafs al-maqtūl ‘an al-badr*). Since imposing the entire [blood money] upon the killer would reduce him to poverty and brings entire ruin (*isti’ṣāl*) upon him, which is tantamount to a punishment, while his punishment was dropped because of lack of culpability (*wa-qad saqāṭat al-‘uqūba ‘anhu li-l-‘udhr*), the law added to him the *‘āqila*, to protect him from the punitive aspect [of blood money] (*li-daf’ ma’nā al-‘uqūba ‘anhu*).<sup>24</sup>

The Shāfi‘ī Abū al-Ḥasan al-Māwardī (d. 450/1058) offers an even sharper formulation:

Imposing the blood money on the killer’s property [involves] one of two things: either it would lead to destruction of his property if it is only he [who pays] – for only rarely is the property of one individual sufficient to bear the payment of [full] blood money – or, if the killer has no financial means, it would lead to spilling blood with impunity. The *‘āqila*’s payment on his behalf amounts to assistance which results in [both] the saving of blood (*ḥifẓ al-dimā*) and the preservation of property (*istibqā’ al-aḥwāl* [read *al-amwāl*]).<sup>25</sup>

In these and in similar arguments that justify the participation of the *‘āqila* in the case of accidental homicide, consideration is accorded to the respect for human life as a general value whose protection is in the interest of the law – blood should not be spilled with impunity. There is also a concern for the perpetrator’s financial burden and an attempt to avoid punishing him unjustly. No attention is paid, however, to the right of the injured party to compensation. If the killer lacks the financial means to pay blood money, his inability to pay results not only in the spilling of blood with impunity; it also leaves the injured party’s right to compensation unsatisfied. This aspect, which reflects the tortious element of accidental homicide, is not mentioned by the jurists; they pay no heed to the private

<sup>24</sup> Sarakhsī, *Mabsūt*, 27:125, and similarly in Marghīnānī, *Hidāya*, 4:1711; Zayla‘ī, *Tabyīn*, 7:364–365; ‘Aynī, *Bināya*, 13:363–364.

<sup>25</sup> Māwardī, *al-Ḥāwī al-kabīr*, 12:342.

interest of the injured party. In other words, in this discussion blood money for accidental homicide is viewed as a means of proclaiming the sanctity of human life, that is, a public value whose protection is the interest of the entire society; blood money is not presented as a means of restitution for private damage.

To summarize this point, the liability of the ‘*āqila*’ was restricted to accidental homicide as part of the tendency of Muslim jurists to stress the distinction between accidental and intentional homicide. This restriction reinforced the punitive nature of the consequence of intentional homicide as opposed to the compensational nature of the consequence of accidental homicide. In this way, the distinction between intentional and accidental homicide was bolstered, and the former was brought closer to a crime. Accidental homicide was also not considered merely as a tort. In the arguments justifying the ‘*āqila*’s liability for accidental homicide, blood money due for accidental homicide is presented less as compensation for violating a private right than as the means of conveying a message against the violation of common welfare. The ‘*āqila*’ is seen as a tool for expressing this message. This conceptual expansion of accidental homicide beyond private law agrees with its development on the religious level, discussed earlier: the demand for expiation for accidental homicide also transforms homicide from a purely private offence into one in which an element from the realm of *ḥuqūq Allāh* is inherent.

### 3.2 MINOR BLOOD-MONEY PAYMENTS

The liability of the ‘*āqila*’ was also restricted by the amount of blood money required: it lapses when this amount is low, as, for example, in cases of bodily harm requiring less than the full blood money (i.e., the blood money for the homicide of a free Muslim man). The Ḥanafīs established this minimum at 500 dirhams or a twentieth of full blood money (which in Ḥanafī law is 10,000 dirhams),<sup>26</sup> the Mālikīs and the Ḥanbalīs at a third of the full amount. The liability for a payment up to this minimum rests on the perpetrator.<sup>27</sup> The Shāfi‘īs set no such limit; according to their doctrine, the ‘*āqila*’ is liable for any amount of blood money,<sup>28</sup> but an earlier opinion (*al-qadīm*) of al-Shāfi‘ī (d. 204/820) agrees

<sup>26</sup> Qudūrī, *Mukhtaṣar*, 104.

<sup>27</sup> Mālikīs: Ibn Rushd, *al-Bayān wa-l-taḥṣīl*, 16:54; Ḥanbalīs: Ibn al-Bannā, *Muqni‘*, 3:1070; Ibn Qudāma, *Kāfī*, 4:46.

<sup>28</sup> Māwardī, *al-Ḥāwī al-kabīr*, 12:355–356.

with the Ḥanbalīs and the Mālikīs.<sup>29</sup> This restriction, especially in the Mālikī and the Ḥanbalī version, seems to echo customary law. A division of blood-money payment so that the perpetrator and his close relatives pay a third, and the remainder is paid by the other members of the blood-money group is known from the customary law of Modern Bedouin in Sinai, Iraq, and Sudan,<sup>30</sup> and perhaps reflects pre-Islamic tradition.

Muslim jurists explain it, however, in Islamic terms, and in a way very similar to what we have already seen. Setting a minimum limit for the ‘*āqila*’s liability, which is a rule claimed to reflect a *sunna* of the Prophet,<sup>31</sup> is linked to the principle of individual responsibility. The jurists argue that this principle must be honored unless there is good reason to do otherwise. It is acceptable to rely on the ‘*āqila* to avoid imposing a heavy financial burden on an unintentional killer, but when the amount of blood money due is low and does not threaten to ruin the payer, there is no reason to neglect the principle of individual responsibility.<sup>32</sup> As the Mālikī al-Qarāfī (d. 684/1285) says in his *Dhakhīra*,

Because the principle requires that only the offender pays . . . the ‘*āqila* was made liable only in order to ensure that the offender is not rendered destitute; if he were, he would be incapable of making the payment and the offence would go for nothing. The ‘*āqila* is therefore made liable if the sum due is such [as might be expected to ruin the offender]. If it is less, then liability is assigned according

<sup>29</sup> Imrānī, *Bayān*, 11:513. Yet an early, third opinion is ascribed to al-Shāfi‘ī, according to which the ‘*āqila* is not liable to any amount below the full amount of blood money (ibid., and Qudūrī, *Tajrīd*, 11:5758 [no. 27603]).

<sup>30</sup> Stewart, “Customary Law,” 254.

<sup>31</sup> The Ḥanafīs adduce in support of this rule mainly the following very widespread *ḥadīth* whose *isnād* goes back to the Prophet’s Companion Ibn ‘Abbās, or, in other versions to the Prophet himself (*ḥadīth* Ibn ‘Abbās *raḍīya Allāh ‘anhu mauqūfan ‘alayhi wa-marfū’an ilā rasūl Allāh ṣallā Allāh ‘alayhi wa-sallama*). The *ḥadīth* lists five restrictions on the ‘*āqila*’s liability: “the ‘*āqila* pays neither blood money for intentional homicide (i.e., in the exceptional cases which do not incur liability to blood revenge) nor for [a homicide committed by, or, according to some: against] a slave nor blood money agreed upon in a composition (i.e., blood money which substitutes revenge) nor for confession (i.e., blood money due on the basis of the perpetrator’s confession) nor any amount below that which is required for *mūḍiḥa* (i.e., a wound in which the head is broken so that the bone is exposed; the payment for causing it is 500 dirhams) (*lā ta‘qilu al-‘āqila ‘amdan wa-lā ‘abdan wa-lā ṣulḥan wa-lā i’tirāfan wa-lā mā dūna arsh al-mūḍiḥa*)” (al-Sarakhsī, *Mabsūt*, 27:127; Marghinānī, *Hidāya*, 4:1717–1718). This is an extended version of a *ḥadīth* that originally lists only the first four restrictions (see Aynī, *Bināya*, 13:380). The fifth one is perhaps an addition intended to support the Ḥanafī minimum amount.

<sup>32</sup> Marghinānī, *Hidāya*, 4:1718; Ḥaddād, *Jawhara*, 2:371; Khusraw, *Durar al-ḥukkām*, 2:125.

to the principle (*wa-li-anna al-aṣl ikhtiṣāṣ al-jānī bi-l-ghurm . . . innamā ju‘ilat ‘alā al-‘āqila li-allā yastaw‘iba al-jānī wa-qad ya‘jizu ‘anhu fa-taḍṭu al-jināya, fa-ju‘ila ‘alā al-‘āqila alladhī yatawaqqa‘u fihī dhālika fa-baqiya mā ‘adāhu ‘alā al-aṣl*).<sup>33</sup>

### 3.3 DENYING THE INCOMPATIBILITY WITH THE INDIVIDUAL RESPONSIBILITY PRINCIPLE

We have seen so far that the ‘*āqila*’ institution was justified by its importance. By removing from (or sharing with) the killer the burden of blood money it prevents the injustice of punishing the one who deserves no punishment. It also ensures that blood does not go for nothing. Its contribution to maintaining these values outweighs the apparent contradiction that the ‘*āqila*’ posed to the principle of individual responsibility. Another way by which Muslim jurists justified the ‘*āqila*’ was to contend that its liability does not, in fact, contravene the principle of individual responsibility. To support their contention they resorted to two opposing arguments. According to the first argument, the ‘*āqila*’ is not in fact at fault for the homicide for which it is required to pay; only the perpetrator is accountable for it. The ‘*āqila*’, his solidarity group, merely relieves him of the heavy burden laid upon him, as a consequence of its duty to assist its members in hardship. In other words, the obligation of the ‘*āqila*’ is toward the perpetrator, not toward the injured party. According to the second, opposing argument, the ‘*āqila*’ is liable for a homicide perpetrated by any of its members because it contributed to its perpetration, even if indirectly.

The first argument appeared very early. It is already in *Kitāb al-Aṣl* of al-Shaybānī: “Blood money was imposed . . . on a man’s tribal group (*‘ashīrat al-rajul*) although they did not commit a crime or a homicide (*wa-lam yajnu wa-lam yuḥdithū ḥadathan*), by way of helping their fellow-member, for they are united against outsiders and provide support (*nuṣra*) to each other against outsiders.”<sup>34</sup> The Ḥanafī Abū Bakr al-Jaṣṣāṣ (d. 370/981), who discusses the ‘*āqila*’s responsibility in painstaking detail, brings Qur’ānic verses into the discussion. The verse “Every soul earns only to its own account; no burdened soul shall bear the burden of another” (6[*al-An‘ām*]:164) contains no rejection of the ‘*āqila*’s obligation

<sup>33</sup> Qarāfī, *Dhakhīra*, 12:384. See also: ‘Abd al-Wahhāb, *Ma‘ūna*, 3:1325; Ibn al-Bannā, *Muqni‘*, 3:1070; Ibn Qudāma, *Mughnī*, 12:30–31; Ibn Qudāma, *Kāfī*, 4:46–47.

<sup>34</sup> Shaybānī, *Aṣl*, 4:593 and in a different wording in *ibid.*, 609. For the meaning of *ḥadath* as homicide see p. 34 n. 4.

to pay the blood money, he says in a polemic vein, explaining that “[t]he verse rejects merely the punishing of a man for another’s offence. Imposing the blood money upon the ‘*āqila* does not involve, however, punishing its members for the offender’s sin (*dhanb al-jānī*). The blood money is imposed on the offender, according to our view; these men (*hā’ulā’i al-qawm*, i.e., the ‘*āqila*) were commanded to share the burden by way of assisting him, without the sin of his offence being attributed to them.”<sup>35</sup> Al-Sarakhsī, following al-Shaybānī, expounds the same idea from a legal rather than religious point of view: “The primary duty (to pay blood money) is incumbent upon the killer; once [this duty] is incumbent upon him, the ‘*āqila* fulfills it on his behalf (*aṣl al-wujūb ‘alā al-qātil, wa-ba’da mā wajaba ‘alayhi tataḥammalu ‘anhu ‘āqilatuhū*),”<sup>36</sup> and similar statements can also be found in Shāfi’ī literature.<sup>37</sup>

By the fifth/eleventh century, the second, opposing argument had developed. It justifies imposing the blood money on the ‘*āqila* by ascribing a certain complicity to it. According to this argument, inadvertent homicide is the result of the perpetrator’s carelessness, which arises, in turn, from his sense of strength. This sense of strength stems from the confidence that he derives from his solidarity group, the ‘*āqila*. The ‘*āqila*, by giving the perpetrator confidence, is thus responsible for the negligence that led to the homicide, and hence can be considered culpable, albeit indirectly. Furthermore, its role as a support group demands that the ‘*āqila* should always monitor the conduct of its members, so that if one of them commits a homicide this testifies to the ‘*āqila*’s negligence in supervision.<sup>38</sup> It follows that by failing to fulfill this duty, each ‘*āqila* member is at fault for a homicide committed by any other member, and must share the consequences on the basis not of joint but of individual responsibility. Imposing the blood-money payment on the ‘*āqila* deters it from offering support to those acting in a foolish way (*sufahā*), and prompts it to stop them.<sup>39</sup>

<sup>35</sup> Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 3:194, and for an abridged articulation of the same argument see Qurṭubī, *Jāmi’*, 5:315; part of it appears also in Kāsānī, *Badā’i’*, 10:311 and 312.

<sup>36</sup> Sarakhsī, *Mabsūt*, 27:134; repeated in different words in Qāḍikhān, *Fatāwā*, 3:360.

<sup>37</sup> Al-Juwaynī, al-Sarakhsī’s contemporary, presents both the view that the original obligation is the ‘*āqila*’s, and that it is the perpetrator’s (Juwaynī, *Nihāyat al-maṭlab*, 16:504), of which the Shāfi’īs, in the tenth/sixteenth century at least, preferred the latter (al-Haythamī, *Tuhfat al-muḥtāj*, 4:90; Nūrī, *al-Rawḍ al-naḍīr*, 571).

<sup>38</sup> Sarakhsī, *Mabsūt*, 27:125; Kāsānī, *Badā’i’*, 10:314; Marghīnānī, *Hidāya*, 4:1711; Ibn ‘Ābidīn, *Radd al-muḥtār*, 10:325.

<sup>39</sup> Walwālījī, *Fatāwā*, 5:279.

Of the two arguments, the one that ascribes complicity to the ‘*āqila*’ remained of marginal importance. The other argument – which, in accordance with Islamic values, underscores the individual and holds him alone responsible and hence ultimately liable for the homicide – prevailed. The principle underlying this argument influenced the shaping of further rules as the following examples from Ḥanafī law demonstrate.

- A. According to the Ḥanafī majority view, if a man commits an accidental homicide and moves to another ‘*āqila*’ before the case comes to court, the *qāḍī* must impose the payment upon the killer’s new ‘*āqila*’.<sup>40</sup> This view implies that the ‘*āqila*’s liability arises from its duty to help the killer out of solidarity, rather than from any responsibility for the homicide. Had the ‘*āqila*’s liability derived from complicity in committing the homicide, the liability for blood money would have been laid on the ‘*āqila*’ to which the killer belonged at the time of the homicide.

The Ottoman scholar Sa’dī Efendī (d. 945/1538) represents the opposite view, but his reasoning reveals the same logic. He argues that since the ‘*āqila*’s liability arises from its failure to supervise the perpetrator’s conduct effectively (*taḥammul al-‘āqila li-taqṣīrihim fī tarkihim murāqabatahu*), the obligation to pay must fall on the ‘*āqila*’ to which he belonged when he committed the homicide, for this is the ‘*āqila*’ whose negligence allowed it to occur.<sup>41</sup> This opinion continued to exist, but did not gain much support.

- B. This example is from the realm of legal procedure. The defendant in a trial for homicide is the alleged perpetrator (or his father, if he is a minor) rather than his ‘*āqila*’. Therefore, he must attend the court when the evidence regarding the homicide is presented, while the presence of the ‘*āqila*’ is not required. In the words of the leading Ḥanafī of Bukhārā, Abū Bakr Muḥammad b. al-Ḥusayn, known as Bakr Khwāharzādah (d. 483/1090):<sup>42</sup>

The (alleged) perpetrator’s presence (*ḥaḍrat al-jānī*) is necessary when the evidence regarding the homicide is heard, because he is the (alleged) killer;

<sup>40</sup> Shaybānī, *Aṣl*, 4:599 (for a quotation see pp. 41–42); Sarakhsī, *Mabsūt*, 27:133–134; Zayla‘ī, *Tabyīn*, 7:372. For the opposite, minority view, that the payment rests on his original ‘*āqila*’, see Sarakhsī, *Mabsūt*, 27:133; Marghīnānī, *Hidāya*, 4:1716.

<sup>41</sup> Sa’dī Efendī, *Hāshīya ‘alā Sharḥ al-‘Ināya*, 10:433.

<sup>42</sup> For his biography see Sam‘ānī, *Ansāb*, 2:412; Qurashī, *Jawābir*, 3:141; Laknawī, *Fawā'id*, 270.

the *'āqila* [merely] pays on his behalf. The presence of the one who bears the secondary liability (i.e., the *'āqila*) is not required because if the proof is provided, the obligation to pay rests on the principal (*wa-ḥaḍrat al-kafil lā tushtaratu li-wujūb al-māl 'alā al-aṣīl idhā qāmat al-bayyina*)... As for those who demand the *'āqila*'s presence: this opinion contradicts the school's doctrine, and must be rejected.<sup>43</sup>

In other examples, the principle that the *'āqila* is not at fault for the homicide, and that its liability is secondary to that of the perpetrator and results merely from its solidarity with him, serves as a (retrospective?) rationale of various rules.

- C. According to Ḥanafī law, the perpetrator must pay his share of blood money together with the other members of the *'āqila*.<sup>44</sup> The reasoning for this duty is articulated by the Ḥanafī-Mu'tazilī grammarian, al-Zamakhsharī (d. 538/1144) as follows:

Blood money is required as compensation for the deceased's life [that was taken] as a result of a wrongdoing (*jināya*). It is the killer who is the wrongdoer, not the *'āqila* (*wa-l-qātil huwa al-jānī, wa-l-'āqila laysat bi-jāniya*). Since the *'āqila* pays the blood money despite not having committed any wrongdoing, it is most appropriate that the wrongdoer should pay [his share of it] (*fa-l-jānī awlā an yataḥammala*).<sup>45</sup>

- D. Ibn Qudāma explains in a similar way that the amount of blood money imposed on the *'āqila* should not be so heavy as to ruin it. This is

because it is imposed upon it (i.e., the *'āqila*) although it committed no wrong, as a way of assisting the killer and relieving him of his burden (*li-annahū lāzim lahā min ghayr jināyatihā 'alā sabīl al-muwāsāt li-l-qātil wa-l-takhfīf 'anhu*). The wrongdoer is not entitled, however, to be relieved of his burden at the cost of burdening and ruining another (*fa-lā yukhaffafu 'an al-jānī bi-mā yathqulu 'alā ghayrihi wa-yujīfū bihi*).<sup>46</sup>

<sup>43</sup> Qāḍīkhān, *Fatāwā*, 3:360.

<sup>44</sup> See p. 20.

<sup>45</sup> Zamakhsharī, *Ru'ūs al-masā'il*, 474; for the same argument in an abridged articulation see Jaṣṣās, *Aḥkām al-Qur'ān*, 3:197; Jaṣṣās, *Sharḥ Mukhtaṣar al-Ṭahāwī*, 5:415; Sarakhṣī, *Mabsūṭ*, 27, 126; Marghīnānī, *Hidāya*, 4:1714. In Mālikī literature: Qarāfī, *Dhakhīra*, 12:391.

<sup>46</sup> Ibn Qudāma, *Mughnī*, 12:44; see also Jaṣṣās, *Sharḥ Mukhtaṣar al-Ṭahāwī*, 5:416.

There are other rules reflecting the view that only the killer is at fault for the homicide,<sup>47</sup> while rules based on the other view, that the ‘*āqila*’ bears some of the responsibility for the killer’s action and is therefore culpable, are in the minority.<sup>48</sup>

In sum, Muslim jurists expended great efforts in applying the concept of individual responsibility to Islamic law. A limited form of the ‘*āqila*’ institution survived this attempt, and the apparent conflict with the principle of individual responsibility posed by even this restricted form was dealt with in two ways. The first way was to admit the discrepancy and provide justifications for it. The justifications emphasize the punitive aspects of the penalties for homicide, and reveal an emergent notion of criminal law. The other way was to deny any incompatibility between the ‘*āqila*’s liability and the principle of individual responsibility. In the arguments for this approach, the Islamic notion of individual responsibility prevails over the concept of collective responsibility – the argument that relieves the ‘*āqila*’ of any blame for the homicide, which reflects the former, prevails over the argument that the liability of the ‘*āqila*’ arises from complicity.

<sup>47</sup> An exceptional opinion (*riwāya shādhda*) ascribed to Abū Ḥanīfa, according to which blood money on behalf of a Muslim who has no ‘*āqila*’ is paid by himself rather than by the treasury, is explained by this principle: “the basic principle (*al-aṣl*) is that liability lies with the killer. . . the ‘*āqila*’ takes it upon itself as a way of lightening (his burden). . . if he has no ‘*āqila*’ the rule returns to the basic principle (*‘āda al-ḥukm ilā al-aṣl*)” (Marghīnānī, *Hidāya*, 4:1719; repeated in Kāsānī, *Badā’i*, 10:315). The same rule and the same rationale apply to a *dhimmī* who has no ‘*āqila*’ (Sarakhṣī, *Mabsūt*, 27:133).

<sup>48</sup> An example is the following rationale of the rule that women and children are exempt from paying blood money on behalf of others. Collective liability for blood money arises from the group members’ duty to watch each other’s conduct. This duty derives, in turn, from their obligation for mutual support. A homicide perpetrated by a member indicates that the other members have neglected their duty of supervision. By their negligence they have contributed to the homicide, and therefore must share the payment due for it. Women and children have no duty to provide support to their group members and hence no obligation to supervise them. Therefore, they are exempt from payment on their behalf (Marghīnānī, *Hidāya*, 4:1715; Zayla’ī, *Tabyīn*, 7:370; Ḥaddād, *Jawhara*, 2:371).



## PART II

# The Contribution of the State Administration

### INTRODUCTION

Part I discussed how Muslim jurists modified the Arab customary law of homicide to suit Islamic values. It showed the role that religious and legal principles played in shaping this law, particularly in regard to the payment of blood money. Religious considerations were not necessarily at play, however, in the creation of law in the early Islamic period. During the Umayyad period, Islamic law had not yet completed the process of becoming a branch of religion, and religious scholars did not have the monopoly of lawmaking. The legal system fell to a large extent under state administration, which supplied much of the legislation required to meet the state's needs. Many administrative regulations found their way into the Shari'a, including those related to penal law in general and to homicide in particular.<sup>1</sup>

Under the Umayyads there was no change in the attitude toward tribal custom, which treated homicide as belonging to the realm of civil wrongs. The custom of private blood revenge, which is sanctioned by the Qur'an, remained untouched;<sup>2</sup> prosecution continued to be private; and the state did not serve as a party in cases of homicide or bodily injury. The transition from a tribal society to a state did, however, find expression in the Umayyad period and even earlier, in that legal proceedings and the implementation of penal law came under state control.

<sup>1</sup> Schacht, *Origins*, 198ff, particularly 205–210; Schacht, *Introduction*, 23–24.

<sup>2</sup> Schacht, *Origins*, 208; Schacht, *Introduction*, 24.

Already in the first days of Islam, the ruler had power in these matters, in terms of both legal procedure and implementation. This is reflected in the document that symbolizes the very inception of Islam as a political entity: the Constitution of Medina. This document is said to have been laid down by Muḥammad shortly after his arrival in Medina, with the purpose of uniting the *Muhājirūn* and various groups in Medina.<sup>3</sup> Although the Constitution shows an awareness of the existing tribal divisions, as well as some readiness to accept them, it clearly tries to lessen these divisions by laying down a preliminary foundation for a unified community under a single authority. This attempt is evident in matters relating to liability for blood money, which figure prominently in the Constitution. It prescribes that any such matter that is likely to cause dissension is to be tried before Muḥammad, that is, the supreme political authority: “cases of murder [or other major crimes] or disputes among the people of this treaty, which are likely to cause dissension, should be brought before God, great and glorious, and Muḥammad the Apostle of God (*wa-innahu mā kāna bayna ahl hādhihi al-ṣaḥīfa min ḥadath aw ishtijār yukhāfu fasāduhu fa-inna maraddahu ilā Allāh ‘azza wa-jalla wa-ilā Muḥammad rasūl Allāh*).”<sup>4</sup> The Constitution also establishes a governing rule to direct the political authority in deciding cases concerning blood money: the believers must undertake the payment of blood money on behalf of any of them who is unable to pay it: “The believers shall not neglect to give [aid] to a debtor amongst them according to what is customary in matters of ransom or blood money (*wa-inna al-mu’minīn lā yatrūkūna mufrāḥan baynahum an yu’ṭūhu bi-l-ma’rūf fi fidā’ aw ‘aql*).”<sup>5</sup>

<sup>3</sup> The Constitution has been studied extensively, and while its meaning and precise date of conclusion are in dispute, its general authenticity is widely accepted (Wellhausen, “Muḥammad’s Constitution of Medina,” 135; Wensinck, *Muḥammad and the Jews*, 51; Watt, *Muḥammad at Medina*, 225; Serjeant, “The ‘Constitution of Medina’,” 3; Gil, “The Constitution of Medina,” 49; Rubin, “The ‘Constitution of Medina,’” 18 [the authenticity is implied]; Lecker, *The “Constitution of Medina,”* 1 and 182 [implied]; Arjomand, “The Constitution of Medina,” 555; Crone, *Slaves on Horses*, 7).

<sup>4</sup> Ibn Hishām, *al-Sīra al-nabawiyya*, 2:112; a slightly different version: Abū ‘Ubayd, *Amwāl*, 217 (no. 518); Ibn Kathīr, *al-Bidāya wa-l-nihāya*, 3:225. My translation combines those of Lecker (in his *The “Constitution of Medina,”* 173 [no. 52]) and Arjomand (in Arjomand, “The ‘Constitution of Medina,’” 564 [no. 23]); for another translation of this clause see Wensinck, *Muḥammad and the Jews*, 59 (no. 42). For the meaning of *muḥdīth* as murderer and hence of *ḥadath* as murder see Lecker, *The “Constitution of Medina,”* 129–133.

<sup>5</sup> Ibn Hishām, *al-Sīra al-nabawiyya*, 2:110; I adopt Lecker’s translation (Lecker, *The “Constitution of Medina,”* 106 [no. 12]), which he explains in detail.

The mutual obligation of blood-money payment and its importance to Muslims are reinforced in other early texts. In the *Ṭabaqāt* of Ibn Sa‘d (d. 230/845), in the chapter on the Prophet’s swords, a *ḥadīth* is cited that includes an extended paraphrase of the Constitution’s clause just quoted: “‘Amir said: I read in [a text attached to] the scabbard (*jafn*) of the Messenger of God’s sword, [named] *Dhū al-Faqār*: the believers have an obligation to pay blood money, and one who is burdened by debt (i.e., of blood money) shall not be left unbefriended among the Muslims (*al-‘aql ‘alā al-mu‘minīn wa-lā yutraku mufrāḥ fī al-Islam*).”<sup>6</sup> According to a report in the *Ta‘rīkh* of al-Ṭabarī, the Prophet wrote the rules related to blood money (*al-ma‘āqil*) in the year 2/624, and the document containing them was suspended from his sword (*fa-kāna mu‘allaqan bi-sayfihī*).<sup>7</sup> When ‘Alī b. Abī Ṭālib, who is said to have owned *Dhū al-Faqār* after Muḥammad’s death,<sup>8</sup> was asked whether they (meaning, probably, the *ahl al-bayt*, the Prophet’s family) possessed any divine literature except for the Qur’ān, he referred to the document attached to the sword, which he designated *al-ṣaḥīfa*. ‘Alī said that it contained statements of the believers’ obligation to pay blood money and ransom for each other (as well as of the rule against killing a Muslim in revenge for a nonbeliever) (*al-‘aql wa-fikāk al-asīr wa-an lā yuqtala Muslim bi-kāfir*).<sup>9</sup>

The obligation of Muslims to pay blood money on behalf of each other is thus set out as early as the Constitution of Medina, and is so fundamental that Islamic tradition gives it a status tantamount to that of a divine commandment. The ultimate responsibility for fulfilling this obligation rested with the leader of the community.<sup>10</sup> A saying of the Prophet

<sup>6</sup> Ibn Sa‘d, *Ṭabaqāt*, 1:377 (cited by Gil, “The Constitution of Medina,” 46; the *ḥadīth* is cited with a full *isnād*, which I have omitted). The last part of my translation follows that of Lane, *Arabic-English Lexicon*, s.v. *mufrāḥ*.

<sup>7</sup> Ṭabarī, *Ta‘rīkh*, 1:1367 (cited by Gil, “The Constitution of Medina,” 46); Ibn Kathīr, *al-Bidāya wa-l-nihāya*, 3:347.

<sup>8</sup> *EI*(2), s.v. “Dhū ‘l-Faqār” (Mittwoch).

<sup>9</sup> Bukhārī, *Ṣaḥīḥ*, 4:306 (*Kitāb al-Diyāt*, no. 6903), 309 (*Kitāb al-Diyāt*, no. 6915), and a variant in Bayhaqī, *Sunan*, 8:169 (no. 15909). That the *ṣaḥīfa* referred to by ‘Alī is the text attached to the Prophet’s sword is only implied in this *ḥadīth*, but is confirmed by the following one in Bayhaqī’s *Sunan* (8:169 [no. 15910]). In it ‘Alī, in reply to the same question, takes the document (which in this *ḥadīth* is called *kitāb*) out of the sheath, and reads from it. Other rules are also said to have been written in the document attached to the Prophet’s sword (‘Abd al-Razzāq, *Muṣannaf*, 9:47 [no. 16304] [I owe this reference to Elimelech Grossmann]; Bayhaqī, *Sunan*, 8:171 [no. 15915]; Goldziher, *Muslim Studies*, 2:27).

<sup>10</sup> This is similar to the custom prevailing in pre-Islamic Arab society, where tribal leaders often undertook to pay the blood money owed by the tribe (Procksch, *Über die Blutrache*, 59–60; Lecker, *The “Constitution of Medina,”* 101–102).

transmitted by his Companion al-Miqdām b. Ma‘dī Karib confirms this responsibility: “God’s Apostle said: . . . I am the heir of the one who has no heir, I inherit from him and pay blood money on his behalf (*arithuhu wa-a‘qilu ‘anhu*).”<sup>11</sup> The mutual obligation of the believers and the responsibility of the ruler in matters of blood money are reflected in Ḥanafī law. Here the doctrine has developed that blood money owed by a Muslim without an *‘āqila* is to be paid from the treasury. This is on the grounds that the entire Islamic community is considered to be his solidarity group (*ahl nuṣratihī*). This opinion prevailed over the opposing doctrine, which remained that of a minority (*riwāya shādhaha*), that the killer alone must pay,<sup>12</sup> and was sanctioned by the authority of ‘Umar b. al-Khaṭṭāb.<sup>13</sup> According to most Ḥanafīs, the ruler also assumes responsibility if a Muslim who has no relatives is killed. In such a case, the victim’s blood is to be avenged by the ruler, though he may instead merely demand blood money.<sup>14</sup>

The notion that the ultimate responsibility for blood-money payments fell on the leader of the community became a practical policy. From a very early date, disputes over blood money and failure to pay it were regularly referred to the ruler. One early example is a dispute said to have been addressed to the third caliph ‘Uthmān b. ‘Affān (r. 24–36/644–656) after a tribal group called Banū al-Ghazāla (or Banū al-‘Arāba), of Banū Bahz (a section of Sulaym), killed a member of their own tribal group.<sup>15</sup> After the killing, the Banū al-Ghazāla fled and contracted an alliance with Abū al-Julayd al-Khuzā‘ī. Men of Bahz pursued and caught up with the Banū al-Ghazāla, but Abū al-Julayd’s son protected them and assumed their blood-money debt as a consequence of their alliance with his father. The Bahzīs were not satisfied, however, with the amount of blood money that he offered,<sup>16</sup> and when ‘Uthmān came to power they brought the matter before him. They claimed that the alliance between

<sup>11</sup> Abū ‘Ubayd, *Amwāl*, 233 (no. 542), and a variant in Ibn Mājah, *Sunan*, 3:54 (*Kitāb al-Diyāt*, no. 2687).

<sup>12</sup> Kāsānī, *Badā‘i*, 10:315; Marghīnānī, *Hidāya*, 4:1719. The same applies to a case in which the *‘āqila* can only pay a portion of the blood money due. The rest of it is to be paid by the treasury, according to the most authoritative Ḥanafī view, the *ṣābir al-riwāya* (Walwālīj, *Fatāwā*, 5:319).

<sup>13</sup> Ibn Ḥazm, *Muḥallā*, 11:58.

<sup>14</sup> Sarakhsī, *Mabsūṭ*, 21:15–16.

<sup>15</sup> Landau-Tasserou, “Alliances in Islam,” 11–12; Lecker, *Banū Sulaym*, 21. For a case of homicide (whose perpetrator was unknown) said to have been referred to ‘Umar b. al-Khaṭṭāb see Wakī‘, *Akbbār al-quḍāt*, 2:193–194.

<sup>16</sup> Their dissatisfaction appears from the verses in Ibn Ḥabīb’s *Munammaq*, 262.

Banū al-Ghazāla and Abū al-Julayd was invalid, since it was concluded under Islam,<sup>17</sup> implying that Ibn Abī Julayd's undertaking to pay blood money was null. They probably wanted revenge, but were scared to take it as long as Abū Julayd was involved. 'Uthmān rejected the claim, on the ground that the alliance was concluded before the Prophet's migration to Medina.<sup>18</sup> The historicity of this report must be doubted, for its purpose is clearly to support one view among others in the discussion of the question as to where the line lay between Jāhiliyya and Islam and consequently, between valid and invalid alliances.<sup>19</sup> But in the context in which this report came into being the procedure of addressing disputes about blood-money payment to the caliph must have been a familiar one.

We also possess firmer evidence for this procedure, and for the ruler's role in guaranteeing blood-money payments. When complaints about failure or inability to pay blood money were addressed to the community leaders, they would employ various means to ensure payment, either compelling or assisting the debtor to pay. A poet from the tribe of Tayyi', for example, who incurred such a debt on behalf of his tribe (*ḥamāla taḥammaltu 'an qawmī*), is said to have sought the assistance of the caliph Yazīd b. Mu'āwiya in paying it. The caliph complied and gave him 10,000 dirhams for this purpose.<sup>20</sup> The word *ḥamāla* may refer to blood money or to any debt, but considering that the amount of 10,000 dirham given by the caliph is equal to full blood money, the report probably concerns blood money. A further example is perhaps a case that occurred at the end of the Umayyad period, when Ibrāhīm (b. Muḥammad) al-Imām, who led the 'Abbāsīd revolution from 125/742 until his death in 132/749, arrived in Medina. A group of Arabs (*qawm min al-'Arab*) applied to him for assistance in the payment of *ḥamāla* (blood money?) that they had incurred, and Ibrāhīm gave them enough to pay the balance of the debt.<sup>21</sup> In Egypt in the year 99/717, an 'āqila refused to pay blood money and the matter came before the Umayyad caliph 'Umar b. 'Abd al-'Azīz

<sup>17</sup> According to a well-known Prophetic *ḥadīth*, only pre-Islamic alliances were valid. This *ḥadīth* reflects an Islamic attempt to eradicate alliances, which in pre-Islamic times were a way of producing tribal groups and therefore an obstacle to a unified community under Islam. For a discussion of this *ḥadīth* and of the Islamic attitude to alliances see Landau-Tasserion, "Alliances in Islam," 2ff.

<sup>18</sup> Ibn Ḥabīb, *Munammaq*, 261–262, referred to by Ella Landau-Tasserion ("Alliances in Islam," 12 n. 33), whose interpretation of the incident is somewhat different from mine.

<sup>19</sup> For other views on this question, ascribed to authorities other than 'Uthmān, see Landau-Tasserion, "Alliances in Islam," 12.

<sup>20</sup> Ibn 'Asākir, *Ta'rikh madīnat Dimashq*, 68:147–148.

<sup>21</sup> *Ibid.*, 7:206 and 208.

(r. 99–101/717–720). In this case, an Egyptian *mawlā* was riding to a hippodrome (*miḍmār*) when his horse knocked a woman down and killed her. The *mawlā*'s *'āqila* (i.e., his patron, and the patron's *'āqila*, who were liable for the blood money<sup>22</sup>) refused to pay, and the case was brought before the *qāḍī* of Egypt, 'Iyād b. 'Ubaydallāh al-Azdī. The *qāḍī* wrote a letter to the caliph, requesting a solution to the problem. He reminded the caliph of the principle that ought to guide his decision: "You should not allow a blood money for a Muslim to go unpaid (*fa-lā yasquṭanna 'indaka 'aql Muslim*)." In line with the *qāḍī*'s advice, which must have reflected the policy of the Umayyads, the caliph instructed the *qāḍī* to pay the blood money himself (probably out of the treasury) and then to collect it from the patron's *'āqila*.<sup>23</sup> The report does not indicate how the *qāḍī* was to collect the money from the recalcitrant *'āqila*, but a *ḥadīth* transmitted by the Kūfī Sufyān al-Thawrī (d. 161/778), which may have originated in the Umayyad period as a means of supporting the state policy in this regard, hints at rather forceful steps: "if the *'āqila* [members] refuse to pay the blood money for their *mawlā* they are to be compelled to do so (*idhā abat al-'āqila an ya'qilū 'an mawlāhum jubirū 'alā dhālika*)." <sup>24</sup> According to another *ḥadīth*, the way in which the Umayyads guaranteed that the injured party would receive the blood money due to him was not by forcing the *'āqila* to pay, but rather by undertaking the payment themselves. Mu'āwiya is said to have declared that if the *'āqila* refuses to pay blood money on behalf of its *mawlā*, the Umayyads would pay it instead (and the *mawlā* on whose behalf they paid would consequently come under their patronage).<sup>25</sup>

The government's responsibility to ensure that blood money was paid is also attested after the Umayyads. The 'Abbāsīd scribe and man of letters Abū 'Ubayd b. al Sallām (d. 224/838) in his *Kitāb al-Amwāl*, which is a kind of a manual for bureaucrats, considers assistance in the payment of blood money to be one of the few obligations of the government toward its Bedouin subjects. Abū 'Ubayd explains that in general the status of the Bedouin (*ahl al-bādiya* or *al-a'rāb*) was much inferior to that of the urban population (*ahl al-ḥāḍira*), for only the town dwellers contributed

<sup>22</sup> For the obligation of a patron to pay for his *mawlā* in Islamic law see Schacht, *Introduction*, 186; Crone, *Roman, Provincial and Islamic Law*, 39; Kāsānī, *Badā'ī*, 10:315.

<sup>23</sup> Kindī, *Qudāt*, 333–334 (cited in EI[2], s.v. "Mawlā" [Crone], and referred to in Crone, *Roman, Provincial and Islamic Law*, 126 n. 18); a shorter version of the report appears in Ibn Ḥajar, *Raf' al-iṣr*, 2:254.

<sup>24</sup> 'Abd al-Razzāq, *Muṣannaf*, 9:419–420 (no. 17855); Ibn Ḥazm, *Muḥallā*, 11:58.

<sup>25</sup> 'Abd al-Razzāq, *Muṣannaf*, 9:419 (no. 17852, for *fī* read *abā*); Ibn Ḥazm, *Muḥallā*, 11:58.

to Islam. Only they defended the believers against their enemies, and only they acquired knowledge of the Qur'ān and the *sunna* and fulfilled the religious obligations. Therefore, the residents of towns enjoyed benefits from the treasury – namely, the receiving of regular stipends, of which the Bedouin were deprived.<sup>26</sup> The Bedouin were entitled, nevertheless, to aid from public money in three kinds of misfortunes (*nawā'ib* or *ḥawādith*).<sup>27</sup> They had a right to assistance if attacked by a polytheist enemy – the ruler and the Muslims must then defend them “with [their] bodies and [their] money (*bi-l-abdān wa-l-amwāl*)”; in case of a calamity brought about by drought;<sup>28</sup> and when “they are divided among themselves as a result of bloodshed and the situation becomes very serious, but it remains possible to heal the division and to reconcile them by means of a blood-money payment (*an yaqa'a baynahum al-fatq fī safk al-dimā' ḥattā yatafaqqama fihā al-amr, thumma yuqdaru 'alā ratq dhālika al-fatq wa-iṣlāḥ dhāt al-bayn wa-ḥaml tilka al-dimā' bi-l-māl*).”<sup>29</sup> To prove this obligation of the authorities toward the Bedouin, Abū 'Ubayd invokes the Prophet's authority. He cites a *ḥadīth* according to which the Prophet promised a Bedouin called Qabīsa b. al-Mukhāriq al-Hilālī assistance in the payment of blood money that he had incurred, using the funds of the *ṣadaqa* for this purpose.<sup>30</sup>

About a century later, another 'Abbāsīd state secretary, Qudāma b. Ja'far (d. 328/939 or 337/948), who also wrote a manual for bureaucrats, *al-Kharāj wa-ṣinā'at al-kitāba*, likewise considered it within the ruler's authority “to demand the payment of blood money for homicide or bodily injury (*al-muṭālaba bi-l-diya wa-l-arsh*) from those who owe it (*mimman yuqbalu dhālika minhu*), unless the victim or his kinsmen waive it or reach an amicable agreement (*ṣulh*).”<sup>31</sup> Qudāma b. Ja'far devotes a chapter of his

<sup>26</sup> Abū 'Ubayd, *Amwāl*, 240 (no. 561). Abū 'Ubayd does not refer here to the contrast between settled and nomadic Muslims, but rather to the contrast, regular in Umayyad material, between emigrants (*Muhājirūn*) and nonemigrants. The latter are called Bedouin, whether nomads or not. They are the ones who remained in their homes rather than emigrating to the garrison towns and participating in *jihād*, and were therefore less privileged than the *Muhājirūn* (Crone, “The First-Century Concept of *Hiḡra*,” and for the term *a'rābiyya* indicating the status of Muslims who did not emigrate see also Athamina, “*A'rāb* and *Muhājirūn*,” 12–13).

<sup>27</sup> Abū 'Ubayd, *Amwāl*, 244 (no. 565), 245 (no. 566), respectively.

<sup>28</sup> For the assistance that the nomads received from the sedentary population at times of drought during 'Umar b. al-Khaṭṭāb's reign see Lecker, *The “Constitution of Medina,”* 154.

<sup>29</sup> Abū 'Ubayd, *Amwāl*, 240–241 (no. 561).

<sup>30</sup> *Ibid.*, 242–243 (no. 564), and for shorter versions see 575 (no. 1853), and 592 (no. 1922); Ibn Sa'd, *Ṭabaqāt*, 1:235; Mizzi, *Tabdhīb al-Kamāl*, 24:228.

<sup>31</sup> Qudāma b. Ja'far, *Kharāj*, 65.

manual to the Sharī'a rules that should direct the ruler in fulfilling this duty.<sup>32</sup> Other authors of works of the same genre – Abū Yūsuf al-Anṣārī (d. 182/798) in his *Kitāb al-Kharāj*, al-Māwardī in *al-Aḥkām al-sultāniyya*, and Abū Ya'lā (d. 458/1066) in his *al-Aḥkām al-sultāniyya* – similarly list the legal intricacies related to the consequences of various offences, including the rules related to blood revenge and payment of blood money. Their purpose is to guide the ruler and his representatives in such matters because they fall within their responsibility.<sup>33</sup>

The information in these 'Abbāsīd state manuals reflects political theory, but there is also evidence of the actual involvement of the 'Abbāsīd rulers in blood-money payments. The Mālikī jurist Ibn Abī Zayd al-Qayrawānī (d. 386/996) implies that Mālik b. Anas (d. 179/796) was familiar with the ruler's policy of sending his officials to collect blood money from the 'āqila; Mālik looked on it with aversion, fearing it would lead to great evil (*wa-kariha Mālik an yab'atha al-sultān fī al-diya man ya'khudhubā min al-'āqila fa-yadkhulu fihā fasād kabīr*).<sup>34</sup> In a section on the imprisonment of debtors, al-Sarakhsī indicated that failure to pay blood money could result in imprisonment,<sup>35</sup> thereby implying that blood money was viewed as a debt,<sup>36</sup> with the state involved in enforcing its payment.

In addition, there is an example showing that blood money for homicide committed by a state official while fulfilling his responsibilities was the liability of the 'Abbāsīd ruler rather than of the official in question. In the late third/ninth century, Abū Khāzim, the Ḥanafī *qāḍī* of the Sharqīyya quarter of Baghdād between 283/896 and 292/904, unintentionally killed an audacious litigant whom he merely meant to discipline. The *qāḍī* wrote to the caliph al-Mu'taḍid (r. 279–289/892–902) that since the ultimate purpose of his action was to defend the interest (*maṣlaḥa*) of the Islamic community, the obligation to pay must fall upon the treasury. The caliph drew the required blood money, which amounted to

<sup>32</sup> *Ibid.*, 65–76.

<sup>33</sup> Abū Yūsuf, *Kharāj*, 154ff; Māwardī, *al-Aḥkām al-sultāniyya*, 287–293; Abū Ya'lā, *al-Aḥkām al-sultāniyya*, 272–279.

<sup>34</sup> Qayrawānī, *Nawādir*, 13:482; Qarāfī, *Dhakhīra*, 12:389 (the quotation is from the latter source).

<sup>35</sup> Sarakhsī, *Mabsūt*, 20:91 (I owe this reference to the Jerusalem Prosopography Project).

<sup>36</sup> A common function of imprisonment was forcing debtors to pay their debt (Peters, *Crime and Punishment*, 34); *dhimmīs* who did not pay their *jizya* were put in prison (Abū Yūsuf, *Kharāj*, 123).

10,000 dirhams, from the treasury and sent it to the *qāḍī*, who transferred it to the deceased's heirs.<sup>37</sup>

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In the Umayyad period, the policy of ensuring that blood money was paid gave rise to a number of regulations intended to assist the ruler in supervising the payments. The method of payment was adjusted to a society increasingly governed by state administration rather than by tribal tradition, by way of major changes being introduced in the old *‘āqila* institution and in the general mechanism of blood-money payment. The modifications were later incorporated into the Sharī‘a. However, unlike the changes required by the principle of individual liability discussed in Part I, on which the four legal schools generally agreed and which they all introduced into their respective legal doctrines, the administrative modifications of the *‘āqila* institution entered the Sharī‘a mainly through the legal doctrine of the Ḥanafī school. While the Ḥanafī jurists integrated the Umayyad regulations into the Sharī‘a, thus changing the traditional laws of the *‘āqila* and blood money, the jurists of the other schools took a more conservative approach, usually preferring to adhere to custom and to reject the Umayyad modifications. Part II, which discusses the Umayyad modifications, therefore concentrates on Ḥanafī law.

In works of Ḥanafī law, the chapters devoted to the *‘āqila* contain whole sections concerning purely administrative matters. The rules in these sections are so administrative in both style and content that they often read like manuals for bureaucrats rather than the product of juristic discussions.<sup>38</sup> One example is the following quotation from *Kitāb al-Aṣl* of al-Shaybānī:

If a man who receives no stipend (*‘aṭā*), and who resides in Kūfa, accidentally kills another man, and if – before the *qāḍī* imposes the blood money upon his *‘āqila* [in Kūfa] – he moves from Kūfa to Baṣra, takes it as a residence and settles there (*ittakhabbahā dāran wa-awṭanahā*), and the matter is then brought before a *qāḍī*,

<sup>37</sup> Ibn al-Jawzī, *Muntaẓam*, 6:54–55; Dhahabī, *Siyar*, 13:540–541. This case is to be distinguished from homicide committed by a state official where there is no liability at all, such as a lawful execution (for this category of homicide see Peters, *Crime and Punishment*, 38).

<sup>38</sup> Norman Calder similarly observes that the Ḥanafī (and Mālikī) materials on the *‘āqila* articulate “a distinctly bureaucratic and city-based approach” (Calder, *Studies*, 207).

the *qāḍī* should impose the blood money upon his [new] ‘*āqila* in Baṣra, to be paid over three years, rather than upon his [previous] ‘*āqila* in Kūfa.<sup>39</sup>

Sections of this kind, which are lacking in the other schools’ discussions of the ‘*āqila*,<sup>40</sup> suggest a strong connection between the Ḥanafī rules and the state administration.

Like the Umayyad regulations from which they arose, the changes in the regulations of blood-money payment introduced by the Ḥanafīs were intended to transform the tribal method of payment based upon group solidarity into a compulsory payment that could be effectively maintained, supervised, and, if necessary, enforced by state officials. To this end, the Ḥanafīs modified both the composition of the ‘*āqila* and the method of blood-money payment. Whereas in pre-Islamic Arab society the group responsible for the payment of blood money was considered to be based mainly on kinship,<sup>41</sup> the Ḥanafīs divorced liability for blood money from an individual’s tribe and family. In their doctrine, a man’s ‘*āqila* was comprised of the warriors (*muqātila*) of his military division, that is, those who were registered on the same payroll of the *dūwān*; and instead of the ‘*āqila* members paying the blood money from money they possessed (*mimmā fī aydhim min al-amwāl*),<sup>42</sup> it was to be deducted and paid to the victim or to his family from the annual stipends (*aṭīya*, *aṭīyāt* or *aṭāyā*, sing. [and collective noun] *aṭā*) to which they were entitled.<sup>43</sup> I will refer to this change in the organization of the ‘*āqila* and the payment of blood money as “the *dūwān* innovation.” Only the ‘*āqila* of those who were not registered in the *dūwān* continued to rest on common descent.<sup>44</sup> The Shāfiʿīs and the Ḥanbalīs rejected the *dūwān* innovation, and retained the originally pre-Islamic custom in which the agnatic group was the most important unit, and was consequently the natural choice to serve as the ‘*āqila* of its members. In their law, the payment of blood money remained the exclusive obligation of the perpetrator’s agnates, or

<sup>39</sup> Shaybānī, *Aṣl*, 4:599.

<sup>40</sup> Not even all Ḥanafī legal works include these sections. While some authors such as al-Sarakhsī in his *Mabsūt*, and al-Marghīnānī in his *Hidāya* follow al-Shaybānī’s *Aṣl* and even develop these administrative instructions further, other authors such as al-Samarqandī in *Tuhfat al-fuqahā* and al-Kāsānī in his *Badāʾiʾ al-ṣanāʾiʾ* do not discuss them at all.

<sup>41</sup> ‘Alī, *al-Mufaṣṣal fī taʾrīkh al-ʿArab*, 5:488, 595; Landau-Tasseron, “Alliances among the Arabs,” 144.

<sup>42</sup> The quotation is from Sarakhsī, *Mabsūt*, 20:91.

<sup>43</sup> Schacht, *Origins*, 207; *EI*(2), s.v. “‘Āqila” (Brunschvig).

<sup>44</sup> Shaybānī, *Aṣl*, 4:598; Kāsānī, *Badāʾiʾ*, 10:316.

‘*aṣaba*.<sup>45</sup> Among the Mālikīs both opinions are represented, that the ‘*āqila* is based on common lineage<sup>46</sup> and that it comprises a man’s *dīwān*.<sup>47</sup> Unlike the Ḥanafīs, however, the Mālikīs did not develop the latter view.

In what follows I shall discuss the Umayyad practice that was the origin of the Ḥanafī *dīwān* innovation, the Ḥanafī law that arose from it, the mechanism by which the Umayyad practice in this regard was transformed into religious law, and the relations between the two. Ḥanafī legal literature offers a full and systematic account of the ‘*āqila* institution, and this stands in sharp contrast to the scarcity of historical information about the ‘*āqila* in the Umayyad practice. It may be possible, however, to use the Ḥanafī sources to fill in at least some of the blank spaces in our picture of Umayyad practice, even though the Ḥanafī rules diverged from their origins in the practice by being subjected to further legal development.

<sup>45</sup> Ḥanbalīs: Ibn Qudāma, *Mughnī*, 12:39–40. According to the Shāfi‘īs, a man’s ‘*āqila* is composed of his agnates, but his ascendants and descendants are excluded (Peters, *Crime and Punishment*, 50, and in Shāfi‘ī sources: Māwardī, *al-Hāwī al-kabīr*, 12:344), and this is also one of the opinions ascribed to Ibn Ḥanbal (Ibn Qudāma, *Mughnī*, 12:40).

<sup>46</sup> Abd al-Wahhāb, *Talqīn*, 1:480; Ibn Rushd, *Bidāyat al-mujtahid*, 2:490.

<sup>47</sup> Qayrawānī, *Nawādir*, 13:488; Rajrājī, *Manāhij al-taḥṣīl*, 10:200. For both opinions within the Mālikī school see Ibn Rushd, *al-Bayān wa-l-taḥṣīl*, 15:473–474.

## The *Dīwān* Innovation in Umayyad Practice

In support of his observation that the *dīwān* innovation in Islamic law originated from Umayyad administrative practice, Schacht refers to a unique report preserved by the Egyptian historian Abū ‘Umar al-Kindī (d. 350/961). This report suggests that it was the first Umayyad caliph, Mu‘āwiya b. Abī Sufyān (r. 41–60/661–680), who introduced the new system.<sup>1</sup> Mu‘āwiya is said to have instructed Sulaym b. ‘Itr, the *qāḍī* of Egypt between the years 40/660 and 60/679, to examine cases involving bodily injuries (*ya’ muruhu bi-l-naẓar fī al-jirāḥ*), determine the amount of blood money owed, and submit his decision to the man in charge of the *dīwān*, the *ṣāhib al-dīwān*.<sup>2</sup> Sulaym was the first *qāḍī* who “examined cases involving bodily injuries and passed judgment regarding them (*naẓara fī al-jirāḥ wa-ḥakama fīhā*),” the report says. ‘Abd al-Raḥmān b. Maysara, on whose authority the report was transmitted, described how the caliph’s instruction was put into practice. When a man was injured, he would come to the *qāḍī* and present the evidence against his attacker. The *qāḍī* would then hand down his decision as to the amount of blood money the perpetrator’s ‘*āqila* was to pay (*fa-yaktubu al-qāḍī bi-dhālika al-jurḥ qiṣṣatahu ‘alā ‘āqilat al-jāriḥ*) and submit it to the man in charge of the *dīwān*. When the time came for the payment of the stipends, the man in charge of the *dīwān* would deduct the money due to the victim

<sup>1</sup> Schacht, *Origins*, 207, referring to Kindī, *Quḍāt*, 309.

<sup>2</sup> A report by the Maghribī scholar Zayd b. Bishr (d. 242/856), indicates that by his time, the system had developed to include a wound expert who received a regular salary, and on whose classification of wounds the *qāḍī* relied in deciding the amount of blood money due in a given case (Kindī, *Quḍāt*, 309).

from the stipends of the perpetrator's clan (*'ashīrat al-jāriḥ*) in installment over the course of three years.

In his *Ta'riḫ*, the third/ninth-century historian al-Ya'qūbī (d. 284/897?) corroborates the implication of this report, namely, that the system of deducting blood money from the stipends was introduced by Mu'āwiya. In a list of Mu'āwiya's innovations, al-Ya'qūbī also credits him with being the first to deduct *zakāt* (alms) from the stipends (*wa-kāna Mu'āwiya . . . awwal man akhadha al-zakāt min al-a'tīya*).<sup>3</sup> The deduction of a variety of debts from the stipends was an Umayyad policy, as discussed in due course,<sup>4</sup> and Mu'āwiya appears to have been its initiator.

Mu'āwiya's new method of paying blood money, as described by al-Kindī, may have had far-reaching implications because of the nature of the *dīwān* in this caliph's time. According to the Islamic sources, the *dīwān* was founded by the second caliph 'Umar b. al-Khaṭṭāb (r. 12–23/634–644) in the year 15/636 or 20/640.<sup>5</sup> In his time, it was a register of names arranged according to religious merit. It contained the names of members of the Prophet's family, of those who had joined him in the early years, and of those who had contributed to Islam as warriors and/or as emigrants who had settled in the Islamic garrison towns. Once registered in the *dīwān*, Muslims were entitled to a regular stipend, of varying amounts, paid out of the revenues from the conquered lands.<sup>6</sup> In the Umayyad period, the nature of the *dīwān* changed considerably. Each garrison town or province had a *dīwān*,<sup>7</sup> and in it the male Muslim residents were registered together with their dependents, according to their tribes. They were all entitled to stipends both in return for past service to Islam (by having fought in the wars of conquests and/or by having emigrated to the occupied lands), and in return for being available for future military service when summoned. The amount of the stipends was also indicated in the *dīwān*. While in practice not all those registered in the *dīwān* served in the army – the number of men who could be recruited for military campaigns was much smaller than the total number

<sup>3</sup> Ya'qūbī, *Ta'riḫ*, 2:220 (I owe this reference to Patricia Crone). See also Ibn 'Asākir, *Ta'riḫ madīnat Dimashq*, 59:203; Schacht, *Origins*, 199.

<sup>4</sup> See pp. 63–65.

<sup>5</sup> Duri, *Early Islamic Institutions*, 167.

<sup>6</sup> EI(2), s.vv. "Dīwān (i.-The Caliphate)" (Duri), and "Aṭā'" (Cahen); Kennedy, *Armies*, 61–62. For the traditional report of the *dīwān*'s foundation see Ya'qūbī, *Ta'riḫ*, 2:143–144; Māwardī, *al-Aḥkām al-sultāniyya*, 249–252.

<sup>7</sup> The word *dīwān*, literally "a register," indicates both the *dīwān* as a whole and a unit of it.

registered<sup>8</sup> – they were all considered part of the army and received stipends.<sup>9</sup> This was not an army in the usual sense, but rather an integral part of a society that lacked a clear distinction between soldiers and civilians.<sup>10</sup> Given the *dūwān*'s extensive role at the time, Mu'āwiya's new practice of paying blood money out of the stipends had a potentially very broad implication; when first introduced, it applied essentially to all the Muslims in the conquered lands. The fact that the annual stipends were usually paid in cash<sup>11</sup> must have facilitated the deduction of blood money from them.

Following its introduction by Mu'āwiya, the method of deducting blood money from the stipends was implemented, in various ways, throughout the Umayyad empire. Mu'āwiya's instruction, which in al-Kindī's report relates to injury, was also applied to cases of homicide. An early piece of evidence for blood money being taken from the stipends is found in an account of the intricate negotiations toward an amicable agreement (*ṣulḥ*) following a series of clashes between two major tribal factions in Baṣra.<sup>12</sup> The report reflects the atmosphere during the months immediately following the death of Yazīd b. Mu'āwiya in 64/683, an event that marked the beginning of the second civil war. The civil war severely undermined the Umayyad regime, whose control of Baṣra weakened so much that the Umayyad governor was compelled to escape the town, and political tensions between the tribal groups surfaced. The negotiations, between tribesmen of Tamīm on one side and of Bakr b. Wā'il and Azd on the other, finally led to an agreement in Baṣra in the year 64/684. It was attained thanks to the efforts and generosity of two arbitrators from Quraysh, 'Umar b. 'Ubaydallāh b. Ma'mar al-Taymī and 'Umar b. 'Abd al-Raḥmān b. al-Ḥārith al-Makhzūmī. In line with the social convention, the two Qurashīs, who were not involved in the events, took it upon themselves to defray most of the blood money.<sup>13</sup> Once the amount of blood money that Tamīm would pay Azd and Bakr (who suffered greater

<sup>8</sup> Kennedy, *Armies*, 20, 39.

<sup>9</sup> Crone, "The Early Islamic World," 312–313.

<sup>10</sup> Kennedy, *Armies*, 18.

<sup>11</sup> *Ibid.*, 59.

<sup>12</sup> The warfare that led to the negotiation and the settlement that was achieved are mentioned briefly in *EI(2)*, s.v. "Azd" (Strenziok). For more details about the warfare see pp. 12–13.

<sup>13</sup> Jarīr and al-Farazdaq, *Naqā'id*, 2:738–739. For the importance and the nature of arbitration in pre-Islamic tribal custom see Procksch, *Über die Blutrache*, 54–56. For the custom of leading figures taking upon themselves blood-money payments incurred by others, see p. 35 n. 10.

losses then Tamīm) was agreed upon, Azd and Bakr gave their consent that the blood money be paid from Tamīm's stipends: "[T]hen he (al-Aḥnaf, Tamīm's leader) said . . . but you have agreed that we shall pay [for] this blood out of our stipends in the treasury. They said: we have agreed, Abū Baḥr; he said: have you agreed? They said: yes (*thumma qāla* [al-Aḥnaf] . . . *wa-lākin qad raḍītum an nahmīla hādhibi al-dimā' fī bayt al-māl min a'ṭiyātinā. Qālū: qad raḍīnā yā Abā Baḥr; qāla: qad raḍītum? qālū: na'am*)."<sup>14</sup> Azd and Bakr demanded, however, that a guarantor of the payment be designated (*lā narḍā illā an yaqūma bihā rajul*). Eventually a suitable man was found, and he arranged the payment from the stipends.<sup>15</sup> This event reflects an early stage of transition from a tribal society to a state. The absence of a *qāḍī*, the need for tribal arbitrators, and the demand for a guarantor for the payment all demonstrate how powerful the grip of custom remained in enforcing the law – particularly in light of the fact that the event took place not in some remote province, but at the very heart of the empire. The political turbulence and the weakening of the Umayyads that characterized the period certainly contributed to the prevalence of custom over state practices. At the same time, however, the existence of stipends and their availability as a source of blood money reflect the presence of the Umayyad central government, despite its weakness.

A few years later, still during the second civil war, blood money was taken from the stipends once again, this time in the vicinity of Damascus. This occurred in the course of the notorious series of battles between Kalb, who allied themselves with the Umayyads, and Qays, who supported their opposition led by the contender for the caliphate 'Abdallāh b. Zubayr.<sup>16</sup> After Muṣ'ab b. al-Zubayr, 'Abdallāh's brother and the governor of Iraq on his behalf, was killed in Iraq in 72/691 by the forces of the caliph 'Abd al-Mālīk (r. 65–86/685–705), tribesmen of the Fazāra (a subtribe of Qays) complained before 'Abd al-Mālīk about the leader of Kalb, Ḥumayd b. al-Ḥurayth, who had deceitfully killed many of their fellow tribesmen.

<sup>14</sup> Jarīr and al-Farazdaq, *Naqā'id*, 2:740. Their consent was needed probably because paying from the stipends usually meant postponing the payment until their annual distribution (cf. Sarakhsī, *Mabsūt*, 27:129); although in this particular case it was ultimately paid without delay.

<sup>15</sup> Jarīr and al-Farazdaq, *Naqā'id*, 2:740–742. For reasons that are beyond the scope of our discussion, he eventually paid the blood money for every victim in the clashes, not only those included in the agreement.

<sup>16</sup> For the battles between Kalb and Qays see *EI*(2), s.v. "Kalb b. Wabara (II-Islamic Period)" (Dixon).

The killing took place when Ḥumayd approached the tribesmen of Fazāra claiming that the caliph had appointed him as their alms collector, and presenting a fabricated letter testifying to his alleged appointment. When the Fazārīs obediently gathered to deliver their alms to him, Ḥumayd killed more than a hundred of them. The Fazārīs argued before ‘Abd al-Mālik that because their fellow tribesmen were killed while responding to what they believed was the caliph’s instruction, it was the caliph’s duty to avenge their blood. ‘Abd al-Mālik rejected the Fazārīs’ demand for blood revenge, but he did pay them the blood money due for the slain tribesmen. The total came to 1,200,000 dirhams, which the caliph deducted from the stipends of tribesmen of Quḍā’a who were registered in the *dīwān* of al-Sha’m.<sup>17</sup> Kalb is one of the groups of Quḍā’a. The large amount of the blood money required must have compelled ‘Abd al-Mālik to draw the money from a tribal group broader than Kalb alone. Clearly, in no other way could the caliph have so easily levied such a huge amount from the Quḍā’a without their consent.

The deduction of blood money from the stipends was still practiced in the year 99/717, in Egypt. This is implied by the previously mentioned report from al-Kindī, which documents the letter sent by the Egyptian *qāḍī* to the caliph ‘Umar b. ‘Abd al-‘Azīz. The letter is about the ‘*āqila* that had neglected its duty to pay blood money on behalf of a client whose horse had killed a woman.<sup>18</sup> “[H]is *mawālī* refuse to pay the blood money on his behalf (*fa-abā mawālīhi an ya‘qilū ‘anhu*)” the *qāḍī* wrote to the caliph, “and he is not the recipient of a stipend (*wa-laysa ya’khubhu al-‘atā*).” By noting that the offender was not in receipt of a stipend, the *qāḍī* implied that if he had been, the problem would not have arisen, for it would then have been possible to enforce the payment by deducting it from the stipends of those registered with him in the *dīwān*.

At the very end of the Umayyad period, in the year 126/743, Ṭufayl b. Ḥāritha al-Kalbī, from Damascus, incurred a debt, possibly of blood money (*ḥamala ḥamālatan*).<sup>19</sup> A short and not entirely clear account in

<sup>17</sup> Balādhurī, *Ansāb*, 5:309–310; Iṣfahānī, *Aghānī*, 19:216–217. The reports in these two sources complete each other, and my account combines the two. According to the report in al-Balādhurī the money was taken from the stipends of Quḍā’a and Ḥimyar. The payment from the stipends of Quḍā’a is briefly mentioned also in Ibn ‘Asākir, *Ta’rīkh madīnat Dimashq*, 15:139. I owe all the references in this note to the Jerusalem Prosopography Project.

<sup>18</sup> See pp. 37–38.

<sup>19</sup> For Ṭufayl b. Ḥāritha see Ibn ‘Asākir, *Ta’rīkh madīnat Dimashq*, 25:6–7 (I owe this reference to Elimelech Grossmann).

al-Ṭabarī's *Ta'riḫ* has it that the Umayyad Yazīd b. al-Walīd (soon to be Yazīd III) asked his brother, al-'Abbās b. al-Walīd, to intercede with Marwān b. Muḥammad, the Umayyad governor (and later the last Umayyad caliph), and persuade him to allow Ṭufayl to request his clan to pay on his behalf (*an ya'dhana lahu an yas'ala 'ashīratahu fihā*), probably from their stipends. Special permission was needed because Marwān did not normally allow people to ask for the deduction of their debts from the stipends when they were issued (*wa-kāna Marwān yamna'u al-nās an yas'alū shay'an min dhālika 'inda al-'aṭā*).<sup>20</sup> The practice of taking debts, possibly blood-money debts, from the stipends is implied by Marwān's policy of forbidding it.

These pieces of evidence from various provinces of the empire, originating at various times from the beginning of the Umayyad regime to its end, demonstrate the diversity of ways by which the new Umayyad method of blood-money payment was implemented. The evidence provided by al-Kindī's report from Egypt offers a picture very different from the one emerging from Baṣra, for example. In Baṣra the government, with its representatives and administration, is absent; instead, tribal leaders, arbitrators, and coalitions held sway, and the course of events (only the gist of which has been presented here) generally reflects a customary tribal system. Accordingly, in the case of Baṣra the payment of blood money from the stipends was optional and based on agreement between the two sides, rather than a policy maintained and enforced by the state bureaucracy, as in Egypt. In Egypt money was to be deducted from the stipends only after the injured party had brought a petition and a decision had been issued by the *qādī*, following a trial. None of the other pieces of evidence suggests the need for formal legal proceedings before blood money was deducted from the stipends. (It may be noted that papyrological evidence from Egypt concerning the collection of money and produce from the villagers, and their distribution to the recipients of stipends, also shows that the Egyptian system was highly centralized).<sup>21</sup> There were also differences in the degree of accessibility of the stipends. The tribal leaders in the Baṣra region seem to have been able to draw money freely from the accounts of those registered. When al-Aḥnaf offered his solution to Azd and Bakr, he must have been aware of this ease of access, which the Umayyads may have permitted as a means of

<sup>20</sup> Ṭabarī, *Ta'riḫ*, II:1851 (I thank Patricia Crone for this reference).

<sup>21</sup> Kennedy, *Armies*, 67.

rallying local support following the death of Yazīd I.<sup>22</sup> Indeed, once the consent of Azd and Bakr was given, the man whose task it was to make the payment had immediate access to the stipends, from which he paid the money with no delay.<sup>23</sup> In contrast, about six decades later, Ṭufayl b. Ḥāritha al-Kalbī needed the governor's approval before the stipends could be used for a similar purpose. The story of Ṭufayl implies, also in contrast to the event in Baṣra but in accordance with the information about Egypt, that to transfer payments by way of the *dūwān*, one had to wait for the yearly distribution of the stipends. While there may be further variation in the ways by which blood money was deducted from stipends in different provinces, all the reports have one thing in common: they indicate that this method was known, available, and implemented throughout the Umayyad empire. It is also apparent from all the accounts (with the exception of the one from Baṣra) that the method of deduction from the stipends allowed the caliph considerable control over blood-money payments.

<sup>22</sup> For the purpose of recovering support in Baṣra after the death of Yazīd I, its governor, 'Ubaydallāh b. Ziyād, authorized all the money in the treasury to be distributed to those registered in the *dūwān* as stipends (*a'tiyāt*) and *arzāq*. Eventually the governor changed his mind, but his initial dictate reflects the Umayyad policy of using the stipends for gathering support (Kennedy, *Armies*, 73, citing Ṭabarī, *Ta'rikh*, II:439). For other examples of this policy see pp. 74–75.

<sup>23</sup> Jarīr and al-Farazdaq, *Naqā'id*, 2:742.

## From Umayyad Practice to Ḥanafī Law

Against the historical background of this Umayyad administrative practice, by the first half of the second/eighth century the rule that blood money was to be paid out of the stipends of members of the perpetrator's *dīwān* had become the subject of scholarly discussion. In Baṣra, 'Uthmān al-Battī was familiar with, and opposed to, the opinion that blood money was to be paid from the stipends. In Kūfa the view that stipends were to be drawn on was adopted in the circle of Ḥammād b. Abī Sulaymān (d. 120/737) – which was later headed by Abū Ḥanīfa (d. 150/767) – and probably earlier, as we will soon see. A generation or so later, the Kūfīs Sufyān al-Thawrī and al-Ḥasan b. Ṣāliḥ b. Ḥayy (d. 167/783) endorsed it, as did the leading Egyptian scholar, al-Layth b. Sa'd (d. 175/791). Al-Layth stated that “the blood money falls on the killer and on those with whom he receives stipends (i.e., those registered on the same pay-roll); none of it falls on his fellow-tribesmen (i.e., those of them who are not registered in his *dīwān*) (*al-‘aql ‘alā al-qātil wa-‘alā al-qawm alladhīna ya'kbudhu ma'ahum al-‘aṭā' wa-lā yakūnu ‘alā qawmihi minhu shay*).”<sup>1</sup> This is also one of the two views ascribed to Mālik b. Anas (according to the other one the *‘āqila* continues to be the killer's tribal group).<sup>2</sup> It thus becomes evident that the *dīwān* innovation, which started as an Umayyad administrative regulation around the middle of the first/seventh century and became an Umayyad practice during the second half of that century, found support

<sup>1</sup> Jaṣṣāṣ, *Mukhtaṣar Ikbtilāf al-‘ulamā'*, 5:100–101; Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:196; Ibn Ḥazm, *Muḥallā*, 11:46.

<sup>2</sup> Jaṣṣāṣ, *Mukhtaṣar Ikbtilāf al-‘ulamā'*, 5:100; Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:196; Ibn Ḥazm, *Muḥallā*, 11:46.

(and also faced opposition) among the scholars of Iraq and Egypt by the first half of the second/eighth century. By the second half of that century, the innovation had become part of the nascent Ḥanafī law: it is included in the earliest Ḥanafī work available to us, al-Shaybānī's *Kitāb al-Aṣl*, and appears subsequently in all the Ḥanafī works that discuss the 'āqila, up to Ibn 'Ābidīn in the thirteenth/nineteenth century.<sup>3</sup> A typical, pithy articulation of the *dūwān* innovation in Ḥanafī law is offered by al-Qudūrī (d. 428/1037) in his *Mukhtaṣar*: "[T]he 'āqila are the men of the *dūwān*, if the killer is registered in the *dūwān*. [The blood money] is to be taken from their stipends over a period of three years (*wa-l-'āqila ahl al-dūwān in kāna al-qātil min ahl al-dūwān yu'khdhu min 'atāyāhum fī thalāth sinīn*)."<sup>4</sup>

To be incorporated into the Ḥanafī legal doctrine, however, the *dūwān* innovation had first to meet a basic requirement of the Sharī'a: it had to be sanctioned by a religious authority. In other words, for an Umayyad administrative regulation to become part of Islamic religious law it had to be Islamized – that is, to have originated not from some Umayyad governor or even a caliph, but rather from an authoritative source of religious law. The *dūwān* innovation, whose *historical* source was in state regulation, required an approved *legal* source. This is Islamization of a different kind from that presented in Part I, in the discussion of how Arab custom of homicide was brought more or less into conformity with the Islamic principle of individual responsibility. As we have seen, this involved changes in the content of the law. In contrast, Islamizing the *dūwān* innovation merely required an upgrade of the sanctioning authority. The modification of content had already been accomplished by the Umayyad officials. The motive of the jurists who adapted the law to the principle of individual responsibility was religious, whereas the Umayyads were prompted by social and administrative considerations.

### 5.1 THE *DŪWĀN* INNOVATION IN ḤADĪTH

The challenge of attributing the *dūwān* innovation to an accepted, weighty religious authority in order to validate its pedigree was taken up by the Ḥanafīs (or the proto-Ḥanafīs). They ascribed it to the respected Companion and second caliph 'Umar b. al-Khaṭṭāb, and they also claimed for it the authority of the *ijmā'* of the Prophet's Companions. The ascription to 'Umar represents the tendency, demonstrated by Schacht, to ascribe

<sup>3</sup> Shaybānī, *Aṣl*, 4:590; Ibn 'Ābidīn, *Radd al-muḥtār*, 10:325ff.

<sup>4</sup> Qudūrī, *Mukhtaṣar*, 103.

Umayyad regulations to worthy figures from the past.<sup>5</sup> The ascription was substantiated by reference to *ḥadīths*, and the examination of these *ḥadīths*, to which the following section is devoted, reveals traces of the process of Islamization that the *dīwān* innovation underwent.

### 5.1.1 *Ḥadīth* ‘Umar

All the *ḥadīths* that ascribe the *dīwān* innovation to ‘Umar (to which I refer as *Ḥadīth* ‘Umar) are transmitted through Iraqī *isnāds*. The main *ḥadīth* of this type appears in the *Muṣannaf* of Ibn Abī Shayba (d. 235/849). It is transmitted through two typical Kūfī *isnāds*, each going back to a Successor:

Abū Bakr (b. Abī Shayba) – ‘Abd al-Raḥīm b. Sulaymān (d. 187/802)<sup>6</sup> – Ash‘ath (b. Sawwār, d. 136/753) – al-Sha‘bī (‘Āmir b. Sharāḥīl, d. 104/722):

and:

Abū Bakr – ‘Abd al-Raḥīm b. Sulaymān - al-Ḥakam (b. ‘Utayba, d. 115/733) – Ibrāhīm (b. Yazīd al-Nakha‘ī, d. 97/715):

The first who prescribed the stipends (*awwal man faraḍa al-‘aṭā*) was ‘Umar b. al-Khaṭṭāb, who prescribed that blood money is to be paid from them: if the full blood money is due, it is to be paid within three years, if two thirds is due, within two years, if a half, within two years, if a third, within a year, and any smaller fraction within the year of the accident (*wa-mā dūna dhālika fī ‘āmihī*).<sup>7</sup>

Ibn Ḥazm (d. 456/1064) rejects the Ḥanafī claim that ‘Umar changed the traditional *‘āqila* approved by both the Prophet and Abū Bakr, and describes this claim as “invalid, baseless, and a fabricated lie (*bāṭil lā aṣlahu wa-kadhib muftarā*).”<sup>8</sup> In his *al-Muḥallā*, Ibn Ḥazm records an abridged version of *Ḥadīth* ‘Umar, also going back to al-Sha‘bī, and dismisses its authenticity: Mūsā b. Mu‘āwiya (d. 225/839) – Wakī‘ (b. al-Jarrāḥ, d. 197/812) – Sufyān al-Thawrī – someone who heard al-Sha‘bī (*man sami‘a al-Sha‘bī*) – al-Sha‘bī: “‘Umar imposed the payment of blood money on the *‘āqila* from the stipends (*ja‘ala ‘Umar al-diya ‘alā al-‘āqila fī al-a‘ṭiya*).” The chain of transmission is faulty in two respects, Ibn Ḥazm

<sup>5</sup> Schacht, *Origins*, 199ff.

<sup>6</sup> ‘Abd al-Raḥīm b. Sulaymān, a resident of Kūfa, is a well-known traditionist who compiled books of *ḥadīth* (Ibn Abī Ḥātim, *al-Jarḥ wa-l-ta‘dīl*, 5:339; Dhahabī, *Siyar*, 8:357–358; Ibn Ḥajar, *Tahdhīb*, 6:270–271); he is a major source for the material in Ibn Abī Shayba’s *Muṣannaf* (Lucas, “Where Are the Legal Ḥadīth?,” 292 [table]).

<sup>7</sup> Ibn Abī Shayba, *Muṣannaf*, 5:406 (no. 27438); for variants see ‘Abd al-Razzāq, *Muṣannaf*, 9:420 (no. 17858); Jaṣṣāṣ, *Aḥkām al-Qur‘ān*, 3:195.

<sup>8</sup> Ibn Ḥazm, *Muḥallā*, 11:47.

argues. First, the unnamed link between Sufyān al-Thawrī and al-Sha'bī is a transmitter of bad reputation whose identity Sufyān therefore concealed. Second, al-Sha'bī was born after 'Umar's death, therefore he could not possibly have transmitted genuine information directly from 'Umar.<sup>9</sup>

There is some support for Ibn Ḥazm's rejection of the *ḥadīth*. In a variant of the *ḥadīth* from Ibn Abī Shayba's *Muṣannaf*, transmitted on the authority of Ibrāhīm al-Nakha'ī with an even more typical Kūfī *isnād*, 'Umar's name is missing:

Abū Ḥanīfa – Ḥammād (b. Abī Sulaymān) – Ibrāhīm: The blood money for accidental and quasi-intentional homicide is to be paid by the 'āqila [i.e.,] the *ahl al-dīwān*, within three years, one third each year. And [blood money due for] accidental injuries is [also] the obligation of the 'āqila (i.e.,) the *ahl al-dīwān*. It is due within two years if [the payment due for] the injury amounts to two thirds of [the full] blood money, [also] in two years if it amounts to half of the [full] blood money, and if it amounts to one third, it is due within one year. All this is to be paid by the *ahl al-dīwān*.

This variant, without 'Umar's name, is documented in al-Shaybānī's *Kitāb al-Aṣl* as well as his *Kitāb al-Āthār*.<sup>10</sup> We thus see that in the first variant, from Ibn Abī Shayba's *Muṣannaf*, Ibrāhīm ascribes the *dīwān* innovation (and the rules about paying in installments) to 'Umar, whereas in the variant that is preserved in al-Shaybānī's works, the earliest authority for this rule is Ibrāhīm himself. Muḥammad b. Maḥmūd al-Khwārizmī (d. 655/1257), in his *Jāmi' al-masānīd*, lists under the same *isnād* a shorter *ḥadīth* in support of the *dīwān* innovation, also without a mention of 'Umar: Abū Ḥanīfa – Ḥammād – Ibrāhīm, who said: "Blood money is to be paid by the recipients of stipends, four [dirham] from the stipend of each."<sup>11</sup> 'Umar's name is also absent from the following short *ḥadīth*, which al-Mughīra b. Miqsam (d. 133/750) transmits from Ibrāhīm al-Nakha'ī, who declares briefly that "blood money is to be paid by the *ahl al-dīwān*."<sup>12</sup>

<sup>9</sup> Ibn Ḥazm, *Muḥallā*, 11:47 (Ibn Ḥazm also names the later transmitters of the *isnād*, whom I have omitted). 'Umar died in 23/644, al-Sha'bī was born in 17/638, 21/641, 28/648 or around 30/650 (Dhahabī, *Sīyar*, 4:295–296).

<sup>10</sup> Shaybānī, *Aṣl*, 4:591–592; Shaybānī, *Āthār*, 214 (where a few words of the text are distorted).

<sup>11</sup> Khwārizmī, *Jāmi' al-masānīd*, 2:182. Al-Khwārizmī refers to his source for the *ḥadīth*: a collection by Abū Bakr Muḥammad b. 'Abd al-Bāqī al-Anṣārī, from Baghdād, who died in 535/1140.

<sup>12</sup> Ibn Abī Shayba, *Muṣannaf*, 5:396 (no. 27323). This *ḥadīth* is also ascribed to al-Ḥasan al-Baṣrī (ibid., no. 27324).

The Successor Ibrāhīm al-Nakha'ī was considered the main authority of the Kūfīs until, as Schacht asserts, his authority was felt to be insufficient. Views previously ascribed to Ibrāhīm were then accredited to a Companion. In this way, an opinion for which Ibrāhīm had previously been the oldest authority was now presented as a rule that he transmitted from a Companion.<sup>13</sup> This is an example of Schacht's back projection theory. From this theory it follows, according to him, that whenever traditions from Companions or the Prophet are to be found together with opinions of Successors about a given doctrine, the latter are, generally speaking, the starting point, and the former are the product of a secondary development intended to corroborate the doctrine in question by ascribing it to a higher religious authority.<sup>14</sup> This theory implies that the first of the *ḥadīths* just presented, in which the *dīwān* innovation is ascribed to 'Umar, represents a later development whose purpose is to provide higher authority for this rule, which originally came under the name of Ibrāhīm.

It seems impossible to date the interpolation of 'Umar's name into the *ḥadīth*, and it is similarly impossible to determine whether Ibrāhīm al-Nakha'ī expressed the opinion that appears in the *ḥadīth* or whether it was merely ascribed to him. Schacht argued that most of the opinions under Ibrāhīm's name could not have originated in his time because they reflect a level of legal thought that did not yet exist in Islamic law. In his view, unless the authenticity of the traditions from Ibrāhīm is proven, we must conclude that they originated in the generation after him and were merely ascribed to him.<sup>15</sup> Schacht's assertion has been questioned by Behnam Sadeghi, who suggested that the views ascribed to Ibrāhīm really are his.<sup>16</sup> The material presented here corroborates Sadeghi's suggestion. The historical evidence leaves no doubt that in Ibrāhīm's lifetime, that is, the second half of the first/seventh century, the Umayyad practice that gave rise to this opinion was well known and widely followed. It therefore appears probable that sayings in favor of this practice originated with Ibrāhīm or at least in his generation. Whether the *ḥadīth* originated in Ibrāhīm's generation or in the following one (that of Ḥammād b. Abī Sulaymān), the process by which the administrative decree of the Umayyads turned into a legal opinion required no more than a few decades.

<sup>13</sup> Schacht, *Origins*, 31ff, 234.

<sup>14</sup> Schacht, *Origins*, 156–157, and 33.

<sup>15</sup> *Ibid.*, 235–236; Schacht, *Introduction*, 31.

<sup>16</sup> Sadeghi, "The Authenticity of Two 2nd/8th Century Ḥanafī Legal Texts," 307–311.

We may summarize this process as follows. Mu‘āwiya’s regulation, according to which blood money was to be paid by deduction from the stipends, was implemented around the middle of the first/seventh century and remained in effect through the second half of that century and thereafter. By the turn of the first/seventh century or slightly afterward, this regulation was provided with the authority of a renowned Kūfī, Ibrāhīm al-Nakha‘ī, and in the following decades the regulation was the subject of scholarly discussion and dispute. With the growth of demand for higher authority, the name of a local worthy of the stature of Ibrāhīm al-Nakha‘ī was no longer sufficient. For this reason, in the second/eighth century ‘Umar’s name was invoked and the regulation was ascribed to him by interpolating his name into the *ḥadīth* that had previously served to provide this regulation with the authority of Ibrāhīm. Equipped with the authority of ‘Umar duly corroborated by *ḥadīth*, the Umayyad regulation was now fully qualified to become part of Ḥanafī law.

Nevertheless, in due course the Ḥanafīs elevated the legal status of this regulation even further and bestowed upon it the authority of *ijmā‘*. As a part of their polemics against the Shāfi‘īs, who opposed the *dūwān* innovation and considered it to be a *naskh* (abrogation) of the Prophet’s *sunna*,<sup>17</sup> the Ḥanafīs bolstered ‘Umar’s authority by the arguably collective approval of the Prophet’s Companions. The innovation was introduced by ‘Umar in the presence of the Companions, the Ḥanafīs claimed, and since none of those who attended rejected it, it gained the authority of *ijmā‘* (*qad qadā bihi ‘Umar raḍiya Allāh ‘anhu ‘alā ahl al-dūwān bi-maḥḍar min al-ṣaḥāba wa-lam yunkir ‘alayhi munkir fa-kāna dhālika ijmā‘an minhum*).<sup>18</sup>

### 5.1.2 The Three Installments Ḥadīth

In the *ḥadīths* just discussed two related but different rules are interwoven. One rule is the *dūwān* innovation – blood money was to be paid from the stipends of those enrolled in the perpetrator’s *dūwān*; the other is the payment timetable: full blood money was to be paid in three equal annual installments (with smaller amounts in fewer installments over a shorter

<sup>17</sup> Marghīnānī, *Hidāya*, 4:1711.

<sup>18</sup> Sarakhsī, *Mabsūt*, 27:125–126, and variations in Samarqandī, *Tuḥfat al-fuqahā’*, 3:121; Kāsānī, *Badā’i’*, 10:314–315; Burhān al-Dīn, *Muḥīṭ*, 20:98. The method of providing a rule with the authority of *ijmā‘* by arguing that it was introduced in the presence of the Companions with none of them rejecting it was also applied in other cases. Another example also relates to the payment of blood money appears in sec. 5.1.2. For an example from a different area, see Kāsānī, *Badā’i’*, 1:409–410, 418.

period). Like the *dīwān* innovation, the three installments rule was also part of Umayyad administrative practice.<sup>19</sup> I am not aware of specific instances in the historical record, but the practice is mentioned in al-Kindī's report: "When the time came for the payment of the stipends [the man in charge of the *dīwān*] would deduct from the stipends of the perpetrator's clan their debt to the victim in installments over the course of three years (*fa-idhā ḥaḍara al-‘aṭā’ iqtaṣṣa min a-ṭiyāt ‘ashīrat al-jāriḥ mā wajaba li-l-majrūḥ wa-yunajjamu dhālika fī thalāth sinīn*)."<sup>20</sup> While the *ḥadīths* dealt with in the previous section include both the *dīwān* innovation and the three installments rule, the latter usually appears separately, in *ḥadīths* devoted to it exclusively. These *ḥadīths* merit attention: they offer a clue to the process by which the three installments rule was Islamized, and complete our picture of the Islamization that the *dīwān* innovation underwent.

The general outlines of the arguments that justify both the *dīwān* innovation and the three installments rule are identical. The latter was also introduced by ‘Umar, and was similarly sanctioned by the consensus of the Prophet's Companions. In al-Jaṣṣāṣ' words, the basis for the three installments rule is "that ‘Umar b. al-Khaṭṭāb prescribed that blood money is to be paid by the *‘āqila* over three years; [he did this] in the presence of the Companions with none of them disapproving it, and nobody opposing it. Consequently, this became a principle to be followed (*fa-ṣāra dhālika aṣlan yajibu al-rujū’ ilayhi*), just like the rest of the obligations that he imposed on the totality of the Muslims in the presence of the Companions and that none of them disputed, and which consequently became indisputable principles (*fa-ṣārat uṣūlan lā yasa’u kbilāfuhā*)."<sup>21</sup> The three installments *Ḥadīth* provides a fairly detailed picture of the way by which this argument was constructed and evolved.

Unlike the *ḥadīths* concerning the *dīwān* innovation, which were transmitted solely by Iraqīs, the *isnāds* of the three installments *ḥadīths* also contain transmitters from the Ḥijāz and Egypt. This difference is connected to the fact that while the *dīwān* innovation was adopted only by the Ḥanafī school, whose origins were in Iraq, the three installments rule is also followed by the Mālikīs and the Shāfi‘īs, whose doctrines are related to the legal traditions of the Ḥijāz and Egypt.<sup>22</sup> In their early form,

<sup>19</sup> Schacht, *Origins*, 207.

<sup>20</sup> See pp. 44–45.

<sup>21</sup> Jaṣṣāṣ, *Sharḥ Mukhtaṣar al-Ṭahāwī*, 5:343.

<sup>22</sup> For the Mālikīs see ‘Abd al-Wahhāb, *Ma’āna*, 3:1326; for the Shāfi‘īs: Māwardī, *al-Ḥāwī al-kabīr*, 12:348. The Ḥanbalīs also follow this rule (Ibn Qudāma, *Mughnī*, 12:21).

*ḥadīths* of the three installments appear under the authority of highly reputed figures of the second half of the first/seventh century, among them Saʿīd b. al-Musayyab (d. 94/712) of Medina. Saʿīd is the oldest authority for the following *ḥadīth*:

Ibn Lahīʿa (d. 174/790, Egypt) – Yaḥyā b. Saʿīd (al-Anṣārī, d. 143/760, Medina) – Saʿīd b. al-Musayyab: “Paying blood-money in installments over three years is *sunna* (*min al-sunna an tunajjama al-diya fī thalāth sinīn*).”<sup>23</sup> The term *sunna* suggests an early date for this *ḥadīth*. It seems to have been used here not in its later sense of the Prophet’s exemplary conduct – a meaning that this term acquired only under al-Shāfiʿī – but rather in its earlier sense, typical of the ancient schools’ usage, of the established, generally accepted practice or “living tradition” (to borrow Schacht’s term, alongside his reconstruction of the evolution of the term *sunna*).<sup>24</sup> Ibn al-Muqaffaʿ (d. 139/756), a state secretary under the late Umayyads and the early ‘Abbāsids, illustrates in his *al-Risāla fī al-ṣaḥāba* the contemporaneous concept of *sunna*. When a man is required to provide a *sunna* that justifies his action, and is unable to base it upon a *sunna* of the Prophet or the righteous *imāms*, he refers to the precedent of an Umayyad caliph or one of his governors, saying: “This was done by ‘Abd al-Mālik b. Marwān, or by one of those governors . . . (*faʿala dhālika ‘Abd al-Mālik b. Marwān aw amīr min ba’d ulā’ika al-umarā*) . . .” At that time, then, the regulations of the Umayyad government were considered *sunna*.<sup>25</sup> The term *sunna* in the *ḥadīth* ascribed to Saʿīd b. al-Musayyab seems indeed to refer to living tradition or Umayyad practice. If this is the case, then the *ḥadīth* dates from no later than the Umayyad period or the decades immediately following it.

The three installments *Ḥadīth* is also ascribed to Ibrāhīm al-Nakhaʿī<sup>26</sup> and to al-Shaʿbī. As with *Ḥadīth* ‘Umar, when the authority of the local worthies became insufficient, an appeal was made to respected Companions. Al-Shaʿbī, who in early *ḥadīths* was an independent authority for the three installments rule (see *ḥadīth* A), later became merely a transmitter of

<sup>23</sup> Shawkānī, *Nayl al-awṭār*, 7:96 citing al-Bayhaqī; the *ḥadīth* appears in Bayhaqī, *Sunan*, 8:307 (no. 16391), and 237 (no. 16131), but with an incomplete *isnād*, from which Saʿīd b. al-Musayyab’s name is missing.

<sup>24</sup> Schacht, *Origins*, 58.

<sup>25</sup> *Ibid.*, 58–59; the quotation is from Ibn al-Muqaffaʿ, *al-Risāla fī al-ṣaḥāba*, 353 (referred to by Schacht).

<sup>26</sup> Abū Yūsuf, *Āthār*, 222 (no. 983); ‘Abd al-Razzāq, *Muṣannaf*, 9:421 (no. 17860); Ibn Abī Shayba, *Muṣannaf*, 5:406 (no. 27439) (with a different *isnād* in each of these sources).

this rule, which was now attributed to the more compelling authority of ‘Umar (see *ḥadīth B*):

- A. Abū Bakr (b. Abī Shayba, d. 235/849, Kūfa) – Wakī‘ (b. al-Jarrāh, d. 197/812, Kūfa) – Ḥurayth (b. Abī Maṭar, d. ?, Kūfa) – al-Sha‘bī (d. 104/722, Kūfa): “Blood-money is to be paid over three years, one third every [year].”<sup>27</sup>
- B. Baḥr b. Naṣr (d. 267/880, Egypt) – ‘Abdallāh b. Wahb (d. 197/812, Egypt) – Sufyān al-Thawrī (d. 161/778, Kūfa) – al-Ash‘ath b. Sawwār (d. 136/753, Kūfa) – al-Sha‘bī: “Umar decreed (*ja‘ala*) [that the full] blood money [is to be paid] over three years, and two thirds of the [full] blood money in two years, and half of the [full] blood money in two years, and a third of the [full] blood money in one year.”<sup>28</sup>

Then came al-Shāfi‘ī, with his rules of *ḥadīth* transmission, and with the priority he assigned to the authority of the Prophet. The Companions’ authority that had satisfied al-Shāfi‘ī’s predecessors could no longer meet the increasing demand for Prophetic sanction. To increase its authority, al-Shāfi‘ī thus ascribed the three installments rule to the Prophet himself:

As for accidental [homicide], I know of no one who denies that God’s Apostle enjoined that blood money for it is to be paid over three years (*fa-ammā al-khaṭa’ fa-lā ikhtilāf bayna aḥad ‘alimtube fi an rasūl Allāh ṣallā Allāh ‘alayhi wa-sallama qaḍā fihi bi-l-diya fi thalāth sinīn*).<sup>29</sup>

Al-Shāfi‘ī failed, however, to provide an *isnād* for his statement, instead “he ascribed it to the Prophet as if its transmission [from the Prophet] were generally agreed upon (*fa-aḍāfabu ilā al-nabī ṣallā Allāh ‘alayhi wa-sallama wa-ja‘ala naqlahu ka-l-ijmā’*).”<sup>30</sup> That is, al-Shāfi‘ī’s ascription of the three installments rule to the Prophet did not conform to the requirements of transmission that later became commonly recognized, namely, that a *sunna* of the Prophet must be certified by a proper *isnād*. The traditionists faulted him for his negligence in this regard, and rejected the ascription to the Prophet:

<sup>27</sup> Ibn Abī Shayba, *Muṣannaf*, 5:406 (no. 27441).

<sup>28</sup> Bayhaqī, *Sunan*, 8:307 (no. 16390); and a variant in ‘Abd al-Razzāq, *Muṣannaf*, 9:420 (no. 17858). For other transmitters attributing the three installments rule to ‘Umar see ‘Abd al-Razzāq, *Muṣannaf*, 9:420 (no. 17857); Sarakhsī, *Mabsūt*, 27:126–127.

<sup>29</sup> Shāfi‘ī, *Umm*, 6:144–145; and variants in Muzanī, *Mukhtaṣar*, 333, and in Ibn Ḥajar, *Talkhīs al-ḥabīr*, 4:32.

<sup>30</sup> Māwardī, *al-Ḥāwī al-kabīr*, 12:343.

“(T)he traditionists were opposed to al-Shāfi‘ī on this score. They said, ‘Nothing about this has the authority of the Prophet – how could [al-Shāfi‘ī] say that it does? (*mā ṣaḥḥa ‘an al-nabī ṣallā Allāh ‘alayhi wa-sallama fī hādihā shay’ fa-kayfa qāla hādihā*)?’ Ibn al-Mundhir (Abū Bakr, Muḥammad b. Ibrāhīm, d. 318/930) said: ‘I do not know this [to have been transmitted] from the Prophet.’”<sup>31</sup> The Shāfi‘īs were uncomfortable with al-Shāfi‘ī’s failure to provide an *isnād*. They tried to explain it in various ways,<sup>32</sup> but because of this deficiency they too rejected the ascription to the Prophet, and contented themselves with the Companions’ authority for the three installments rule.<sup>33</sup>

The Prophet’s authority was too attractive, however, and the opposition to ascribing the three installments rule to him was doomed to failure – at least among the Ḥanafīs. By the sixth/twelfth century, they began to reinforce ‘Umar’s authority by adding that of the Prophet. Thus, while al-Sarakhsī presents the three installments *ḥadīths* under the authority of both Ibrāhīm al-Nakha‘ī and ‘Umar,<sup>34</sup> a few decades later, Ṣaḥīḥ al-Dīn Abū al-Faṭḥ al-Walwālījī (d. after 540/1145) introduces the Prophet’s name in addition to that of ‘Umar, and eliminates Ibrāhīm:

The obligation [to pay blood money] over three years [arises] because the Prophet decreed that [the blood money] for accidental homicide is to be paid by the *‘āqila* over three years; and because ‘Umar, at a time when stipends were paid once a year, determined that blood money should be paid by the men of the *dūwān* in three annual installments (*fī thalāth ‘aṭāyā*).<sup>35</sup>

Al-Walwālījī is obviously much less scrupulous than the Shāfi‘īs. The absence of an *isnād* ascribing the three installments rule to the Prophet posed no difficulty for him, nor indeed for later Ḥanafī jurists who, from al-Walwālījī’s time onward, regularly ascribe the three installments rule to

<sup>31</sup> *Ibid.*; for other versions see ‘Imrānī, *Bayān*, 11:517; Rāfi‘ī, ‘Azīz, 10:486–487, and Ibn Ḥajar, *Talkhīs al-ḥabīr*, 4:32.

<sup>32</sup> Māwardī, *al-Ḥawī al-kabīr*, 12:343–344; ‘Imrānī, *Bayān*, 11:517–518.

<sup>33</sup> Māwardī, *al-Ḥawī al-kabīr*, 12:344; ‘Imrānī, *Bayān*, 11:517. Ahmed El Shamsy has described how al-Shāfi‘ī’s first successor, Abū Ya‘qūb al-Buwayṭī (d. 231/846), scrutinized al-Shāfi‘ī’s opinions on positive law in accordance with al-Shāfi‘ī’s *ḥadīth* principle, and overruled them in cases in which they conflicted with the principle (El Shamsy, “The First Shāfi‘ī,” 321–322). Al-Buwayṭī’s students, and their students, adopted his attitude: their allegiance was to al-Shāfi‘ī’s methodology of *ḥadīth*, not to his personal opinions on positive law (*ibid.*, 328–330). Although in the case of the three installments *Ḥadīth* it is not al-Shāfi‘ī’s positive law that is criticized, the idea seems to be similar: making al-Shāfi‘ī’s claim the subject of critical examination based on his own methodology.

<sup>34</sup> Sarakhsī, *Mabsūṭ*, 27:127.

<sup>35</sup> Walwālījī, *Fatāwā*, 5:322.

both ‘Umar and the Prophet, while Ibrāhīm’s, or any other Successor’s name, is no longer mentioned after al-Sarakhsī.<sup>36</sup> It has become sufficient merely to state that the three installments rule was transmitted on the authority of both the Prophet and ‘Umar (*marwiyy ‘an al-nabī ‘alayhi al-ṣalāt wa-l-salām wa-maḥkiyy ‘an ‘Umar raḍiya Allāh ‘anhu*);<sup>37</sup> no corresponding *ḥadīth* was needed. The process by which the rule was transformed from an Umayyad practice to a Prophetic *sunna* was thus complete.

## 5.2 JUSTIFICATIONS OTHER THAN ḤADĪTH

As mentioned, the Shāfi‘īs took the position that the *dūwān* innovation is an abrogation of the Prophet’s *sunna*. In response to the Shāfi‘ī accusation, the Ḥanafīs advanced an argument by which they attempted to present ‘Umar’s innovation as not entirely novel. In other words, they tried to present their divergence from the legal tradition rather as continuation of it.<sup>38</sup> The argument revolved around the principle of *nuṣra*. *Nuṣra*, or *tanāṣur*, refers to mutual assistance among a group’s members against external enemies or in the event of misfortune. The Ḥanafīs pointed to an alleged shift in the source of *nuṣra*. While in pre-Islamic and early Islamic times the source of *nuṣra* was an individual’s tribal group (*ashīra* or *qabīla*), this obligation was transferred to the *dūwān* once ‘Umar had established it. It then became a man’s military unit that provided him with *nuṣra* by defending him against enemies. Regardless of the source of *nuṣra*, however, the principle remains that liability for the payment of blood money arises from the obligation of *nuṣra* (*al-‘aql tābī‘ li-l-nuṣra*). It follows that the obligation to pay blood money was also transferred to the *dūwān*.<sup>39</sup> On the basis of this logic, the Ḥanafīs argued against the Shāfi‘īs that ‘Umar did not deviate from the Prophet’s *sunna*; on the contrary, he continued to follow the *sunna* by applying its underlying principle to the new *nuṣra* group, the *dūwān* unit.<sup>40</sup> The Companions

<sup>36</sup> Marghīnānī, *Hidāya*, 4:1712 (and following him al-Zayla‘ī, *Tabyīn*, 7:366 and al-Aynī, *Bināya*, 13:366–367); Burhān al-Dīn (*Muḥīṭ*, 20:96) omits ‘Umar’s name, referring to the Prophet alone; Khusraw, *Durar al-ḥukkām*, 2:125; al-Qādirī, *Takmilat al-Baḥr al-rā‘iq*, 9:205.

<sup>37</sup> Marghīnānī, *Hidāya*, 4:1712.

<sup>38</sup> A method pointed out by Behnam Sadeghi in his *The Logic of Law Making*, 10.

<sup>39</sup> Shaybānī, *Aṣl*, 4:593; Jaṣṣās, *Aḥkām al-Qur’ān*, 3:196; Samarqandī, *Tuḥfat al-fuqahā’*, 3:121 (the quotation is from Jaṣṣās, *Aḥkām al-Qur’ān*, 3:197).

<sup>40</sup> Marghīnānī, *Hidāya*, 4:1711; Burhān al-Dīn, *Muḥīṭ*, 20:98–99; Zayla‘ī, *Tabyīn*, 7:365–366; Khusraw, *Durar al-ḥukkām*, 2:125.

would never have approved of ‘Umar’s change, al-Kāsānī and others argued, had they not recognized that it “rested upon the (old) principle of *nuṣra* (*kāna ma‘lūlan bi-l-nuṣra*),” which ‘Umar merely adapted to the new circumstances introduced by the establishment of the *dūwān*.<sup>41</sup>

The Ḥanafīs also argued that already before ‘Umar’s time, *nuṣra*, and the related liability for blood money, could arise not only from blood relationships but also from various types of agreements. *Nuṣra* could be provided by a *ḥalīf* (an ally), by an *‘adīd* (a fellow tribesman with whom one has no kinship),<sup>42</sup> or by a *mawlā*.<sup>43</sup> In the light of these early customs, the Ḥanafīs argued that in transferring the *‘āqila* to the *dūwān* ‘Umar did not change the practice followed in the Prophet’s days. Rather the opposite, he reaffirmed the principle on which this practice was based: “this (i.e., ‘Umar’s prescribing that blood money is to be paid from the stipends) is not an abrogation, but rather a reaffirmation of a principle (*wa-laysa dhālika bi-naskh bal huwa taqrīr ma‘nā*).”<sup>44</sup>

\*

The *nuṣra* argument differs from the *Ḥadīth* justifications previously examined in one significant respect. The *Ḥadīth* justifications related to the modification introduced in the method of blood-money payment, that is, its deduction, in three installments, from the stipends to which the members of the *‘āqila* are entitled, instead of the *‘āqila* paying from money already in their possession. The *nuṣra* argument is meant rather to justify the change in the composition of the *‘āqila*, namely, that it was no longer based on kinship but could now include men of various origins. The difference between the arguments reflects the fact that the Ḥanafī rules relating to the *‘āqila* and the *dūwān* in fact involve two related but separate innovations: the method of payment and the composition of the *‘āqila*. These two innovations are the subjects of the following Chapter.

<sup>41</sup> Kāsānī, *Badā’i*, 10:314–315; see also: Qudūrī, *Tajrīd*, 11:5747 (no. 27544); Sarakhsī, *Mabsūṭ*, 27:126, and Ibn ‘Ābidīn, *Radd al-muḥṭār*, 10:325.

<sup>42</sup> Landau-Tasserón, “Alliances in Islam,” 24; Lane, *Arabic-English Lexicon*, s.v. “*adīd*.”

<sup>43</sup> Shaybānī, *Aṣl*, 4:593; Sarakhsī, *Mabsūṭ*, 27:125; Marghīnānī, *Hidāya*, 4:1712; Burhān al-Dīn, *Muḥīṭ*, 20:98–99. It is of little concern that the exact meaning of *mawlā* in our context is not clear and that, in fact, the other two terms – *ḥalīf* and *‘adīd* – also represent categories which tend to overlap (these are dealt with in detail by Ella Landau-Tasserón in “Alliances in Islam,” 24–33 and 39–44 [appendixes D, E]). The terms are used here merely to illustrate the (correct) Ḥanafī claim.

<sup>44</sup> Marghīnānī, *Hidāya*, 4:1712, and variants in Khusraw, *Durar al-ḥukkām*, 2:125; Qārī, *Fath bāb al-‘Ināya*, 3:396.

## The *Dīwān* Innovation in Ḥanafī Law

A comparison of the Ḥanafī legal discussions of the *dīwān* innovation with the historical evidence of Umayyad administrative practice in this regard shows that Ḥanafī law corresponds to Umayyad practice. It is impossible to determine, however, the extent of this correspondence, for, as noted previously, the available evidence for Umayyad practice is very limited and permits only a patchy picture of the *dīwān* innovation and of the system in which it operated. By contrast, the description of this innovation in Ḥanafī literature is typically detailed. It covers all the related regulations and their various ramifications, so that the administrative context of the innovation can be reconstructed in a fairly complete manner. Whether or not the context that emerges from Ḥanafī law faithfully reflects Umayyad administrative practice, one thing seems clear: whoever was responsible for producing the Ḥanafī law on this subject was concerned with matters of state administration.

### 6.1 THOSE ON WHOSE BEHALF BLOOD MONEY IS PAID BY THE *DĪWĀN*

The Umayyad method, which the Ḥanafīs incorporated into the Sharī‘a, of deducting blood money from the stipends of the *dīwān*, was a part of what seems to have been a common administrative practice of taking various types of obligatory payments, notably alms, *zakāt*, from the stipends of the *dīwān*.<sup>1</sup> As mentioned earlier, Mu‘āwiya is said to have been the first to

<sup>1</sup> About *zakāt* in particular see Schacht, *Origins*, 199.

deduct *zakāt* from the stipends,<sup>2</sup> and, as with the *dūwān* innovation, this practice was credited to Companions, in this case to ‘Abdallāh Ibn Mas‘ūd<sup>3</sup> and the caliphs Abū Bakr and ‘Uthmān.<sup>4</sup> The later Umayyad caliph ‘Umar b. ‘Abd al-‘Azīz concurred with and even broadened Mu‘āwiya’s policy. Before paying a stipend, a wage, or a refund through the *maẓālim* (the institute of dispensing justice by the caliph, which was particularly active under ‘Umar b. ‘Abd al-‘Azīz<sup>5</sup>), ‘Umar would first inquire whether the man entitled to the money owed *zakāt*, and if so, would deduct any debt from the payment due to him.<sup>6</sup> Other debts were also deducted from the stipends. In one instance, three Iraqīs who were planning to assassinate the caliph Mu‘āwiya pretended that they wanted to talk to him about a debt deducted from their stipends, saying: “we suffered a deduction from our stipends because of a payment that was inflicted on us (*aṣābanā ghurm fī a‘ṭiyātina*).”<sup>7</sup> ‘Ubaydallāh b. Ziyād, the Umayyad governor of Khurāsān, Baṣra, and Kūfa from 54/673,<sup>8</sup> admitted that when the *kharāj* collected from a certain area was insufficient, he would sometimes fine the tax collector in charge of that area and deduct the fine (or the remaining *kharāj*) from the stipends of his fellow tribesmen: “I would fine him, and charge his tribesmen’s stipends (*aghramtuhu fa-ḥamaltu ‘alā ‘aṭā’ qawmihi*).”<sup>9</sup> The Umayyad caliph al-Walīd b. ‘Abd al-Mālik (r. 86–96/705–715) agreed to release members of the Muhallabid family whom the able governor al-Ḥajjāj b. Yūsuf imprisoned, if they paid three million dirhams. The money was paid on their behalf by the Yamaniyya of Damascus (as well as by other Syrians) in installments, from their stipends (*fa-taḥammala ‘anhum al-Yamaniyya min ahl Dimashq min a‘ṭiyātibim najman, wa-taḥammala ‘anhum sār ahl al-Sha’m najman*).<sup>10</sup> In 96/715, the newly enthroned caliph Sulaymān b. ‘Abd al-Mālik (r. 96–99/715–717) imprisoned Mūsā b. Nuṣayr, the conqueror of the western Maghrib and of Spain who had recently arrived in Damascus. The caliph imposed on him a

<sup>2</sup> See p. 45.

<sup>3</sup> Schacht, *Origins*, 199; Abū ‘Ubayd, *Amwāl*, 417 (no. 1128).

<sup>4</sup> Abū ‘Ubayd, *Amwāl*, 416 (nos. 1125 and 1127, respectively).

<sup>5</sup> Ibn ‘Abd al-Ḥakam, *Sīrat ‘Umar b. ‘Abd al-‘Azīz*, 129, 141, 152–153.

<sup>6</sup> Abū ‘Ubayd, *Amwāl*, 437 (no. 1226).

<sup>7</sup> Ibn ‘Abd al-Ḥakam, *Futūḥ Miṣr*, 105 (I owe this reference to Patricia Crone); Ibn ‘Asākir, *Ta’rīkh madīnat Dimashq*, 59:143.

<sup>8</sup> For the problems of dating the terms of his governorship see *EI*(2), s.v. “‘Ubayd Allāh b. Ziyād” (Robinson).

<sup>9</sup> Balādhurī, *Ansāb*, 4/2:109 (a version in Ṭabarī, *Ta’rīkh*, II:458 does not mention the stipends).

<sup>10</sup> Ya‘qūbī, *Ta’rīkh*, 3:33–34 (for *thalāthat ālāf* read *thalāthat ālāf alf*, as in the Beirut 1960 edition).

large fine for alleged corruption. It is said that Lakhm, the tribe of Mūsā b. Nuṣayr's wife, paid 70,000 dīnārs on his behalf out of their stipends (*fa-yuqālu inna Lakhman ḥamalat 'anhu fī i'ṭā'ihā* [or *a'ṭā'ihā*] *sab'īn alfan dhahaban*).<sup>11</sup> In the year 126/743, Naṣr b. Sayyār, the last Umayyad governor of Khurāsān, enumerated the favors that he had conferred upon al-Kirmānī as a way of rebuking the latter for ungratefully leading opposition to him, asking rhetorically: "Did I not relieve you of your debts by charging them to people's stipends (*a-lam aghrim 'anka mā kāna lazimaka min al-ghurm wa-qasamtuhu fī a'ṭiyāt al-nās*)?"<sup>12</sup>

In some cases, loans could be made on the security of the stipends, and paid back when the stipends were due. Iyās b. Mu'āwiya, the *qādī* of Baṣra under 'Umar b. 'Abd al-'Azīz, would borrow money on the security of his stipend, use it for charity, and repay the loan when he received his stipend (*yastaqrīḍu 'alā 'aṭā'ihī, wa-yataṣaddaḡu ḥattā yakhrūja 'aṭā'uhu*).<sup>13</sup> Some Yamanites, presumably tribesmen of Hamdān, seem to have acted in a similar fashion. When, in the year 64/684 or 65/685, al-Nu'mān b. Bashīr, the governor of Ḥimṣ, asked them to donate money to their famous fellow tribesman, the needy poet A'shā Hamdān (d. 83/702), they agreed to give him two dīnārs each, but only when their stipends were to be paid. The governor urged them to reduce the amount by half and to pay immediately. They responded by suggesting that he pay the poet from the treasury and deduct the money from their stipends (when due) (*a'tihī iyyāhu min bayt al-māl wa-iḥtasibhā 'alā kull rajul min 'aṭā'ihī*). This he did, taking the money from them when their 'aṭā' was paid (*fa-fa'ala al-Nu'mān . . . wa-irtaja'ahū minhum 'inda al-'aṭā'*).<sup>14</sup>

Deducting debts from the stipends saved the government much trouble – notably, the need to send officials to collect the debts. The collection of various kinds of debts, including taxes, was a notorious source of tension between collectors and debtors. Taxpayers were often ill-treated and abused by the collectors,<sup>15</sup> and reacted accordingly. Abū Yūsuf's advice to the 'Abbāsīd caliph to accompany the *kharāj* collectors with soldiers<sup>16</sup> – which is in line with the Ḥanafī opinion that the *kharāj*

<sup>11</sup> Anon., *Akbbār majmū'a*, 30 (I thank Patricia Crone for this reference).

<sup>12</sup> Ṭabarī, *Ta'rikh*, II:1859; Ibn al-Athīr, *Kāmil*, 5:304; Nuwayrī, *Nihāyat al-arab*, 21:498 (the last reference, which led me to the other two in this note, was given to me by Patricia Crone).

<sup>13</sup> Wakī', *Akbbār al-quḍāt*, 1:354.

<sup>14</sup> Iṣfahānī, *Aghānī*, 6:58–59 (I owe this reference to Patricia Crone).

<sup>15</sup> For a list of examples see Duri, *Early Islamic Institutions*, 128ff.

<sup>16</sup> Abū Yūsuf, *Kharāj*, 107.

can be levied by force<sup>17</sup> – testifies to the amount of tension involved in collecting debts. The abhorrence felt toward tax collectors is reflected in a report by al-Jāḥiẓ (d. 255/868), the well-known ‘Abbāsīd man of letters. He describes a popular belief of the Bedouin, according to which abusive tax collectors were punished by metamorphosis: God had transformed (*masakha*) one into a wolf, and another into a hyena.<sup>18</sup> The collection of blood money seems also to have been a point of friction. This is suggested by Mālik’s previously mentioned reservation about the policy of sending officials to collect blood money “lest this will lead to great evil.”<sup>19</sup> A sense of the trouble avoided by deducting blood money from the stipends is also given in the aforementioned section about the imprisonment of debtors in *Kitāb al-Mabsūt*: ‘*āqila* members who pay blood money from their stipends are never imprisoned, al-Sarakhsī writes; because the money can be deducted from their stipends even against their will, they never fail to pay.<sup>20</sup> Deducting various debts from the stipends thus obviated the need to imprison the non-payers, the regular procedure for dealing with debtors who were not registered in a *dūwān*.

### 6.1.1 The *Sawād* Dwellers

It is thus clear that deducting blood money from the stipends was an ideal solution. The deduction was relatively easy to operate and allowed for state control over the payments. But to broaden this control, the system of payment had to extend to those who were not registered in the *dūwān*. Registration in the *dūwān* was the prerogative of the residents of the *amṣār*, the garrison towns, while the peasants who dwelled in the vast lands of the *sawād*, the rural areas surrounding these towns, lacked this privilege. In the early days of the Islamic occupation, the boundaries between the garrison towns and the *sawād* also separated the Muslim new comers who resided in the towns from the non-Muslim natives living in the areas surrounding them.<sup>21</sup> The land tax, *kharāj*, and poll tax, *jizya*, which were paid by non-Muslims, were the principal source of revenue for the Muslim treasury and

<sup>17</sup> Johansen, “*Amwāl Zāhira*,” 146.

<sup>18</sup> Jāḥiẓ, *Kitāb al-Ḥayawān*, 6:79–80.

<sup>19</sup> See p. 40.

<sup>20</sup> See p. 40.

<sup>21</sup> This applies for Iraq and Egypt. In Syria the Muslims settled in existing towns among the local population (Hawting, *The First Dynasty*, 38).

hence for the stipends received by the town's residents.<sup>22</sup> Before long, however, the separation between town and country ceased to reflect the division between Muslims and infidels. The latter converted in significant numbers as a way of avoiding taxes, while many Muslim townspeople purchased or were granted cultivable land in the countryside. The growing proportion of Muslims living in the rural areas led to a substantial decrease in the state income from *kharāj* and *jizya*. In the second half of the first/seventh century, *kharāj* was therefore also extended to Muslims. Al-Ḥajjāj b. Yūsuf, in Iraq, was the first to levy *kharāj* from anyone who owned cultivable land, whether Muslim or not.<sup>23</sup> Land tax was subsequently imposed on Muslims in the rural areas in Khurāsān and Egypt as well,<sup>24</sup> and this practice continued throughout the Umayyad period.<sup>25</sup> The burden of *kharāj* was heavy,<sup>26</sup> and attempts of the inhabitants of the *sawād* to leave their land, together with the burden of *kharāj*, and to move to the town and join the *dīwān* with its privileges, are well known. Equally well known are the methods that the Umayyads, and al-Ḥajjāj in particular, used to impede these attempts, in order to retain the *kharāj* as a significant source of tax.<sup>27</sup> In sum, an increasing number of Muslims lived in the *sawād*, and these Muslims were not registered in the *dīwān*.

As a way of broadening the system of blood-money deduction, the Ḥanafī jurists (perhaps reflecting an Umayyad policy) extended the liability of those living in the town and registered in the *dīwān*. They were made responsible for blood money owed by Muslim dwellers of the *sawād* who were not registered in the *dīwān* and had no right to stipends. In al-Shaybānī's words, copied by many later Ḥanafī authors: "the residents of Kūfa are to pay blood money on behalf of the inhabitants of their *sawād* and their villages (i.e., the villages in the region of Kūfa), and the residents of

<sup>22</sup> Abū Yūsuf, *Kharāj*, 24ff; Yaḥyā b. Ādam, *Kharāj*, 27–28 (no. 49); 48 (no. 121). Abū 'Ubayd (*Amwāl*, 511–512 [no. 1567]) provides a long list of districts and countries whose tax was a source for *riḡ* and 'aṭā' payments, and for other public expenditure.

<sup>23</sup> Wellhausen, *The Arab Kingdom*, 279–280; Duri, *Early Islamic Institution*, 115. For *ḥadīths* justifying the imposition of *kharāj* on Muslims in the *sawād*, and ascribing this procedure to 'Umar and 'Alī, see Yaḥyā b. Ādam, *Kharāj*, 61–62. Ḥanafī legal material also shows that "*kharāj* tends to become a land tax without religious connotations" (Johansen, *Land Tax*, 12).

<sup>24</sup> Duri, *Early Islamic Institutions*, 119–120 and 122.

<sup>25</sup> A fiscal reform in the area of Marw in 121 resulted in imposing *kharāj* on Muslims and non-Muslim alike (*EI*[2], s.v. "Naṣr b. Sayyār" [Bosworth]).

<sup>26</sup> In the Abbāsīd period the land tax sometimes amounted to 60 percent of the crop's value (Duri, *Early Islamic Institutions*, 126).

<sup>27</sup> Wellhausen, *The Arab Kingdom*, 280; 285–286; Katbi, *Islamic Land Tax*, 58ff; Duri, *Early Islamic Institutions*, 115; Hawting, *The First Dynasty*, 70.

Baṣra are to pay blood money on behalf of the inhabitants of their *sawād* and their villages, and the same applies to the residents of al-Sha'm (*wa-ahl al-Kūfa ya'qilūna 'an ahl sawādihim wa-qurāhum wa-ahl al-Baṣra ya'qilūna 'an ahl sawādihim wa-qurāhum wa-ka-dhālika ahl al-Sha'm*).<sup>28</sup>

Later Ḥanafī authors furnish this rule with a rationale referring to the *nuṣra* principle:

The residents of each town are to pay the blood money on behalf of the inhabitants of their *sawād*, because they (i.e., the latter) depend upon the residents of the town (*li-annahum atbā' li-ahl al-miṣr*); when a misfortune befalls them (i.e., those living in the *sawād*) they turn to them (to the town residents) for assistance (*istanṣarū bihim*). The residents of the town are to pay blood money on their behalf because of the tie inherent in the *nuṣra* (*fa-ya'qiluhum ahl al-miṣr bi-i'tibār ma'nā al-qurb fi al-nuṣra*).<sup>29</sup>

In other words, because those who provide a man's *nuṣra* are also liable for the payment of his blood money, and because those who live in the town and receive stipends constitute the Islamic army that defends the inhabitants of the *sawād*, that is, provides them with *nuṣra*, the former should also pay blood money on behalf of the latter.

Behind this rationale lies an administrative reason. The town and the rural district around it were considered, for various purposes, as a single unit. In the 'Abbāsīd period the register of land tax, *dīwān al-kharāj*, of both Kūfa and Baṣra, included both the town and its surroundings.<sup>30</sup> According to a definition ascribed to Abū Ḥanīfa, a town large enough for the Friday prayer to be validly performed in it, is one to which the surrounding rural areas (*rasātiq*) are connected; such a town is "a large locality (*balda*) in which there are streets and markets, to which rural districts belong."<sup>31</sup> Imposing blood-money payments on the residents of a town on behalf of those living in its countryside is another administrative connection between the two areas. In each such unit, composed of a town and the rural surrounding areas, the tax collected from the peasants, which

<sup>28</sup> Shaybānī, *Aṣl*, 4:597.

<sup>29</sup> Marghīnānī, *Hidāya*, 4:1715. See also: Sarakhsī, *Mabsūṭ*, 27:132 (for *sūqihim* read *sawādihim*); Walwālījī, *Fatāwā*, 5:319.

<sup>30</sup> Jahshiyārī, *Wuzarā'*, 124 (cited by Duri in *Early Islamic Institutions*, 175).

<sup>31</sup> Kāsānī, *Badā'i'*, 2:190 (cited by Johansen, whose translation I follow, in "The All-Embracing Town," 85); also in Samarqandī, *Tuḥfat al-ḥuqabā'*, 1:162; and Shaykhizāde, *Majma' al-anhur*, 1:247. Al-Shaybānī (in his *al-Siyar al-kabīr*, 4:261) similarly takes the town to include the villages surrounding it. The fourth/tenth-century Balkhī *muftī* Abū Bakr al-Iskāf rules that if a man takes an oath that he would not live in Balkh, his oath applies both to the town of Balkh and to its villages (Samarqandī, *Fatāwā*, 305).

was the source of the town's dwellers stipends, could eventually serve to cover the blood-money debts of both the peasants who paid the tax and the townsmen who were entitled to it. This system was very efficient. First, it dispensed with the need to collect blood money even from people not registered in the *dīwān*, and second, in practice the money was transferred from the taxpayers to the treasury and from there to the injured party, without ever reaching the hands of those from whose account it was subtracted. Moreover, because the taxes levied in a province were used for paying stipends in that province with very little surplus being transferred to the state treasury,<sup>32</sup> the entire system of blood-money payment, and the supervision over it, could operate efficiently on a provincial level.

### 6.1.2 *The Townsmen*

Despite the extension of the payment system to include the countryside, there were still individuals in each district who were outside the system, for not all the residents of a town were registered in its *dīwān*. One case in point is the aforementioned Egyptian *mawlā* whose horse accidentally killed that unfortunate woman, and whose *'āqila* refused to pay the blood money on his behalf. As the *qādī* implied in his letter to the caliph, had the man been registered in the *dīwān* and in receipt of a stipend, his case would not have posed a problem.<sup>33</sup> The number of those registered in the *dīwān* dwindled toward the end of the first/seventh century, after 'Abd al-Mālik's reforms confined the army to professional warriors. Many townsmen who had previously been registered were now excluded from the *dīwān*, and were deprived of their stipends.<sup>34</sup> In his *al-Siyar al-kabīr*, al-Shaybānī seems to have been aware of this change. When discussing the immigration (*hijra*) of the countrymen to the *amṣār* he first cites al-Ḥasan (al-Baṣrī?) (d. 110/728), according to whom "the *hijra* of the countrymen [is effected only] when they join their *dīwān* (*hijrat al-a'rāb idhā ḡammahum dīwānuhum*)."<sup>35</sup> Then al-Shaybānī modifies al-Ḥasan's

<sup>32</sup> Kennedy, "From Polis to Madina," 20.

<sup>33</sup> See p. 48.

<sup>34</sup> See p. 73.

<sup>35</sup> I adopt almost *verbatim* the translation of Patricia Crone in her "The First-Century Concept of *Hijra*," 363, but the word *a'rāb*, which she translated as Bedouin (not in the regular sense of nomads, see p. 39 n. 26), is translated here as countrymen. By countrymen I mean those who lived outside the cities, whether nomads or not.

definition: immigration of a countryman is effected once he settles in a garrison town, whether or not he joins the *dūwān* (*idhā waṭana al-a'rābī miṣran min amṣār al-Muslimīn fa-qad kharaja min al-a'rābiyya wa-ṣāra min ahl al-amṣār iltahaqa fī al-dūwān aw lam yalhaqa*).<sup>36</sup> Al-Shaybānī's explanation seems to reflect the conditions under the 'Abbāsids, when, in contrast to the early Umayyad period, the *amṣār* were no longer military centers, and settling in them was not necessarily connected with military service and enrollment in the *dūwān*. Ḥanafī doctrine, responding to this change, extended the *dūwān* innovation to townsmen who were not registered in the *dūwān*: those registered in the *dūwān* of a town should pay blood money on behalf of all the residents of that town, whether enrolled in the *dūwān* or not. The following rule, from al-Shaybānī's *Kitāb al-Aṣl*, expresses this notion: "if a townsman commits an offense, then even if he is not in receipt of a stipend, and even if he is more closely related to the countrymen (than to the townspeople), then provided that he is resident in the town, the men of the *dūwān* of that town are to pay blood money on his behalf, despite his not being registered in their *dūwān*. (*wa-man janā jināyatan min ahl miṣr wa-laysa fī 'aṭā' wa-ahl al-bādiya aqrab ilayhi wa-maskanuhu fī al-miṣr 'aqala 'anhu ahl al-dūwān min dhālika al-miṣr wa-in lam yakun lahu fihim 'aṭā'*)."<sup>37</sup> Al-Sarakhsī and later Ḥanafīs followed al-Shaybānī and again proposed the *nuṣra* rationale: because those registered in the *dūwān* "provide *nuṣra* and defence to [all] the townspeople, irrespective of whether the townspeople in question receive stipends (*lā yakhuṣṣūna bi-dhālika man kāna lahu fī al-miṣr 'aṭā' dūma man lā 'aṭā' lahu*), they [also] serve as an '*āqila* for all the townspeople (i.e., including those who do not receive a stipend)."<sup>38</sup> A single administrative unit was thus constructed. It included all the residents of the town, both those registered in the *dūwān* and receiving stipends and those not registered, as well as all the inhabitants of the rural area, the *sawād*. Blood money owned by any Muslim in such a unit could be deducted from the stipends, that is, it could be guaranteed by the authorities with not much trouble.

As said previously, it is not clear to what extent the Ḥanafī law reflects Umayyad practice in this regard. It should be noted, however, that a

<sup>36</sup> Shaybānī, *al-Siyar al-kabīr*, 1:68–69.

<sup>37</sup> Shaybānī, *Aṣl*, 4:598.

<sup>38</sup> Sarakhsī, *Mabsūt*, 27:133; also Marghīnānī, *Hidāya*, 4:1715–1716; Qādirī, *Takmilat al-Baḥr al-rā'iq*, 9:207–208; Ibn 'Ābidīn, *Radd al-muḥtār*, 10:327. According to another opinion, the obligation of *ahl al-dūwān* to pay for non-registered townsmen depends on kinship between them (see the last three references).

discrepancy between law and practice emerges from the case of the Egyptian *maulā*.<sup>39</sup> Had the *dīwān* of Egypt covered blood money on behalf of Egyptians not registered in it, then the problem referred by the *qāḍī* to the caliph would not have arisen.

The rule in the preceding citation from al-Shaybānī's *Kitāb Aṣl* – that the *ahl al-dīwān* are liable for blood money on behalf of any townsman even if his closest kinsmen are countrymen (and therefore are not registered in the *dīwān*) – is significant. It shows that Ḥanafī law not only constructed separate administrative units for the purpose of blood-money deduction; it also bolstered them by annulling liability for blood money stemming from kinship that crossed the lines of these units, as discussed later.<sup>40</sup>

We thus see that Ḥanafī law gave the government complete control over blood-money payments through a fairly simple system. On the basis of this system, the government could guarantee that each individual received the blood money due to him, although in contrast to the pre-Islamic Arab society, not all individuals were associated with a solidarity group. The only Muslims who were not included in this system were *ahl al-bādiya* and *ahl al-Yaman*, that is, those who did not migrate to the *amṣār*, were not registered in the *dīwān*, and were not among the inhabitants of the *sawād*. Ḥanafī law determined that they continue the pre-Islamic tradition of paying blood money according to a solidarity group based on kinship, even if they are dispersed over large geographical areas.<sup>41</sup>

## 6.2 THOSE WHO PAY ON BEHALF OF OTHERS: THE RECIPIENTS OF RIZQ

Extending the liability of those registered in the *dīwān* to cover payments on behalf of so many non-registered Muslims could have meant that a heavy financial burden was laid on the stipends. Presumably as a way of lightening this possible burden and maintaining the proportion between payers and those who do not pay, Ḥanafī law ruled that blood money would be deducted not only from stipends but also from *arzāq* (sing.: *rizq*). If the members of one's *'āqila* received both a stipend and a *rizq*, then blood money was to be deducted from their stipends, not from

<sup>39</sup> See p. 48.

<sup>40</sup> See pp. 78f.

<sup>41</sup> Shaybānī, *Aṣl*, 4:596, 598; Sarakhsī, *Mabsūt*, 27:130–131; 132.

their *arzāq*;<sup>42</sup> but “if a man’s *‘āqila* are entitled [only] to *rizq* that they receive every month, [the *qādī* should] impose on his *‘āqila* the payment of blood money from their *arzāq* over three years, one third each year.”<sup>43</sup> *Rizq*, in this kind of context, means broadly speaking “a subsistence payment,” but exactly what it refers to here, and how it differs from a stipend, *‘atā*’, is difficult to establish. Generally speaking, according to the interpretation of most Ḥanafī jurists, which concurs with the historical evidence, *rizq* was paid more than once a year – daily, monthly, or every six months – while *‘atā*’ was an annual payment.<sup>44</sup> In addition, the Ḥanafīs generally defined *‘atā*’ as a reward for what one does on behalf of Islam, and *rizq* as a ration intended to meet one’s needs.<sup>45</sup> The former was given to warriors (for military service) and the latter to the poor (for their subsistence);<sup>46</sup> or, according to a slightly different meaning that emerges from historical sources, *‘atā*’ referred to the stipend of the troops and *rizq* to that of their dependents.<sup>47</sup> *Rizq* could, however, also be a payment for a service that an individual provided to the government. ‘Umar b. ‘Abd al-‘Azīz is said to have sent two men to the Bedouin to teach them *fiqh*; for this he paid them *rizq*.<sup>48</sup> Ziyād b. Abī Sufyān, while serving as governor of Baṣra under Mu‘āwiya, inscribed five hundred local notables among his companions (*wa-kataba khamsami’a min mashyakhat ahl al-Baṣra fi ṣahābatihī*), and granted them *rizq* of between three hundred and five hundred dirhams, as a way of consolidating his control over the city.<sup>49</sup> *Rizq* sometimes refers to a regular salary, and by the early ‘Abbāsīd period

<sup>42</sup> Shaybānī, *Aṣl*, 4:596; Sarakhsī, *Mabsūt*, 27:130; Walwālījī, *Fatāwā*, 5:323; Marghīnānī, *Hidāya*, 4:1714; Burhān al-Dīn, *Muḥīṭ*, 20:104.

<sup>43</sup> Shaybānī, *Aṣl*, 4:595.

<sup>44</sup> Sarakhsī, *Mabsūt*, 27:130; Marghīnānī, *Hidāya*, 4:1714; Burhān al-Dīn, *Muḥīṭ*, 20:103–104; Ḥaddād, *Jawhara*, 2:370. According to historical sources, Muṣ‘ab b. al-Zubayr paid his troops their *rizq* every month and their *‘atā*’ every year (Ṭabarī, *Ta’rīkh*, II:755, cited by Kennedy, *Armies*, 72); the newly enthroned Yazīd III promised in his accession speech, in the year 126/744, to pay the *‘atā*’ every year and the *rizq* every month (Ṭabarī, *Ta’rīkh*, II:1835, cited by Kennedy, *Armies*, 73), and Abū Yūsuf advises the caliph to pay the soldiers accompanying the *kharāj* collector their *rizq* from the *dāwān* every month (Abū Yūsuf, *Kharāj*, 107).

<sup>45</sup> Walwālījī, *Fatāwā*, 5:323; Burhān al-Dīn, *Muḥīṭ*, 20:103; Quhīstānī, *Jāmi’ al-rumūz*, 2:364; Ḥaṣkafī, *al-Durr al-mukhtār*, 10:326.

<sup>46</sup> Bābartī, *‘Ināya*, 10:428.

<sup>47</sup> Abū ‘Ubayd, *Amwāl*, 23 (no. 42); 243 (no. 564); 266 (in the title preceding no. 626, which may, however, be a later addition); Ṭabarī, *Ta’rīkh*, II:439.

<sup>48</sup> Abū ‘Ubayd, *Amwāl*, 275, (no. 645).

<sup>49</sup> Ṭabarī, *Ta’rīkh*, II:78 (cited by Kennedy, *Armies*, 73).

this had become its usual meaning;<sup>50</sup> even the troops' wages were now called *arzāq*,<sup>51</sup> as were those of other officials, such as *qādīs*, governors, or postal couriers.<sup>52</sup>

However we, or the Ḥanafīs, understand *rizq*, in our context a few points are obvious: it is distinguished from '*aṭā*'; it is a regular payment from the treasury to which recipients are entitled more often than once a year; and while some people are entitled to both '*aṭā*' and *rizq*, others receive only *rizq*. Combining the recipients of *rizq* together with the recipients of '*aṭā*' thus meant increasing the group from whose accounts blood money could be deducted. This extension did not include women and children who, according to Ḥanafī law, were not part of the '*āqila* and were not liable for blood money,<sup>53</sup> but it did include men entitled to *rizq* but not to '*aṭā*'.

Extending the deduction of blood money to *arzāq* may have been particularly significant because of the changes that the *dīwān* institution underwent. These changes led to a considerable reduction in the number of people receiving stipends. The early Umayyad *dīwān*, a military register including virtually all the Muslims living in the garrison towns and providing them with regular stipends, lasted for only a few decades. Under the caliph 'Abd al-Mālik, during the second half of the first/seventh century, the army became more professional and more clearly distinguished from civil society. By the end of the Umayyad period, Islamic society as a whole was demilitarized; only active soldiers were now numbered amongst the army ranks, and only they were entitled to a regular stipend. The regular distribution of stipends to every member of the urban society ceased, and many were forced to turn to civilian professions for a living.<sup>54</sup> If *arzāq* are taken to refer to governmental salaries independent of the *dīwān*, then the rule that adds the recipients of *rizq* to the body of payers may have the effect of extending the '*āqila* beyond the military *dīwān*, and compensating (at least to some extent) for the reduction in the number of stipend

<sup>50</sup> According to Kennedy, by the third/ninth century, the term '*aṭā*' for salary had been replaced by *rizq* (Kennedy, *Armies*, 74).

<sup>51</sup> Abū Yūsuf, *Kharāj*, 107.

<sup>52</sup> *Ibid.*, 186–187; Wakī', *Akhhbār al-quḍāt*, 1:342.

<sup>53</sup> Shaybānī, *Aṣl*, 4:592; Sarakhsī, *Mabsūt*, 27:128; Marghīnānī, *Hidāya*, 4:1715. The exclusion of women and children from the '*āqila* was qualified under later Ḥanafī law (e.g., Zayla'ī, *Tabyīn*, 7:370).

<sup>54</sup> Crone, "The Early Islamic World," 315–316; Crone, "The First-Century Concept of Hīgra," 378; Kennedy, *Armies*, 18, 77–78. For a description of the process by which this change took place in Kūfa and Baṣra see Kennedy, *Armies*, 38ff.

receivers, thereby adjusting it to the conditions of the late and post-Umayyad conditions.

Let us now look at the Ḥanafī rules concerning installments. These rules reflect the close connection of the new *‘āqila* to the state financial system, and reveal the extent to which Ḥanafī law in this regard was motivated by administrative considerations rather than by any notion of group solidarity. The Ḥanafīs would not explicitly admit that the principle of solidarity was no longer a major consideration. According to the *nuṣra* argument, which they developed for justifying the *dīwān* innovation, liability for blood-money payment was transferred from a man’s tribal group to his *dīwān* because the latter replaced the former in defending him, that is, in serving as his solidarity group.<sup>55</sup> What really united the men of a *dīwān* unit was, however, not an obligation of mutual defense, but rather the fact that they all belonged to the same administrative division. That is, they served as one *‘āqila* not because they fought together, but rather because they all belonged to one payroll unit. Their stipends were taken jointly from the treasury, and it was therefore more convenient to collect the blood money from them collectively. Al-Sarakhsī provides a statement that hints at such a consideration. Arguing against al-Shāfi‘ī, who held that liability for blood money should remain with an individual’s kin, al-Sarakhsī explains why it should rather be imposed on those in a common pay-roll: “The men of the same *dīwān* unit are tantamount to a single being by virtue of the grant given to them in the form of *‘aṭā’* (*wa-ahl dīwān wāḥid fīmā yakhruju min al-ṣila lahum bi-‘ayn al-‘aṭā’ ka-naḥs wāḥida*).”<sup>56</sup>

Administrative considerations are reflected in the schedule of installments that Ḥanafī law established. As discussed previously, a full blood-money payment was to be paid in three installments, which were to be deducted from three annual payments of stipends.<sup>57</sup> Historical evidence testifies, however, that the stipends were not always paid regularly. For example, when Qutayba b. Muslim, in the year 96/715, recruited troops in an attempt to revolt against the Umayyad caliph Sulaymān b. ‘Abd al-Mālik, he boasted that he paid them their stipends in full and with no delay,<sup>58</sup> implying that this was not to be taken for granted. Muṣ‘ab b. Zubayr paid

<sup>55</sup> See p. 61.

<sup>56</sup> Sarakhsī, *Mabsūt*, 27:126, and a variants in *ibid.*, 132, and in Mawṣilī, *Ikhtiyār*, 5:65.

<sup>57</sup> See Chapter 5, sec. 5.1.2 in particular.

<sup>58</sup> Kennedy, *Armies*, 43 (I am unable to locate his references).

the warriors their ‘*aṭā*’ annually,<sup>59</sup> but in Baṣra he paid it twice a year, at the beginning and at the end of the year (*wa-ja‘ala yu‘ṭī al-nās al-‘aṭā fī kull sana marratayn fī auwalihā wa-ākhirihā*), probably as a way of gaining popularity.<sup>60</sup> In the year 126/743, when Naṣr b. Sayyār, the Umayyad governor of Khurāsān, was informed of an incipient revolt in Khurāsān, he paid a portion of the stipends immediately, as a way of preventing it.<sup>61</sup>

The Ḥanafī blood-money rules take account of possible irregularity in the payment of stipends. They dictate that if the intervals between issuing the stipends are longer or shorter than a year, then the intervals between blood-money installments should be modified accordingly. To illustrate this point, al-Shaybānī presents the case of three annual stipend payments that happen to be made all at once. In such a case, the full blood money would also be paid in one payment.<sup>62</sup> And if the payment of stipends was put on hold for a number of years, the blood-money payment was to be delayed accordingly.<sup>63</sup> The Egyptian Abū Ja‘far al-Ṭahāwī (d. 321/933) explains in his *Mukhtaṣar* that the meaning of “three years” “is merely three [payments of] stipends, whether they are paid to those entitled to them within less than three years or postponed and paid to those entitled over more than three years (*innamā huwa thalāth a‘ṭiya quddimat li-ablihā qabla thalāth sinīn aw ukhkhirat ‘an ablihā ilā akthar min dhālika min al-sinīn*).”<sup>64</sup> The same rule applied to blood money deducted from *rizq*. Because *rizq* was paid more than once a year, the number of installments deducted from it each year, and the amount of each installment, had to correspond to the number of payments per year. If, for example, *rizq* was issued every six months, a sixth of the full blood-money payment was to be deducted from each *rizq* payment.<sup>65</sup> This Ḥanafī rule thus closely connected the deduction of blood money to the state financial system.

### 6.3 ADJUSTING THE ‘*ĀQILA*

We have seen so far how the tribal method of blood-money payment was modified in response to social and political transformation. We now turn to

<sup>59</sup> Ṭabarī, *Ta’rīkh*, II:755 (cited by Kennedy, *Armies*, 72).

<sup>60</sup> Balādhurī, *Ansāb*, 5:271 (cited by Kennedy, *Armies*, 72).

<sup>61</sup> Ṭabarī, *Ta’rīkh*, II:1855–1856; Ibn al-Athīr, *Kāmil*, 5:302; Nuwayrī, *Nihāyat al-arab*, 21:496.

<sup>62</sup> Shaybānī, *Aṣl*, 4:594.

<sup>63</sup> Sarakhsī, *Mabsūt*, 27:128–129.

<sup>64</sup> Ṭahāwī, *Mukhtaṣar*, 233, and a shorter version in Qudūrī, *Mukhtaṣar*, 103.

<sup>65</sup> Shaybānī, *Aṣl*, 4:595–596.

the adjustment that was consequently required in the ancient ‘*āqila*’ institution, as it appears in Ḥanafī legal doctrine. Two related but separated modifications were introduced in the traditional ‘*āqila*, which greatly affected its size and composition and allowed for a reasonable division of the burden of payment. One of these modifications (also introduced by the Shāfi‘īs) was to limit the share of each ‘*āqila*’ member in a blood-money payment. The limit established by the Ḥanafīs was either three or four dirhams, to be paid in three – usually annual – installments; that is, a dirham or a dirham and a third per year.<sup>66</sup> This limit was set, according to the jurists, to lessen the financial burden of payment laid upon each ‘*āqila*’ member; it makes no sense to impose a heavy load on those who are there to relieve the heavy load of others.<sup>67</sup> The maximum amount required from each ‘*āqila*’ member was now negligible. For the sake of comparison, the monthly wage of the *qādī* Ibn Abī Laylā, who was appointed in Kūfa in 122/739, was 150 or, according to another report, 100 dirhams,<sup>68</sup> and this amount falls within the range of salaries earned by *qādīs* in the Umayyad and early ‘Abbāsīd periods, which were usually between 100 and

<sup>66</sup> Sarakhsī, *Mabsūt*, 27:129; Samarqandī, *al-Fiqh al-nāfi‘*, 3:1399; Nasafī, *Kanz al-daqa’iq*, 7:15; Khusraw, *Durar al-ḥukkām*, 2:125. It is not stated how to determine which of these two amounts (three or four dirhams) is due in a given case, and a few jurists indicate only one of them (Qudūrī, *Tajrīd*, 11:5753 [no. 27576] [four dirhams]; Bukhārī, *Khulāṣat al-fatāwā*, 2:247 [three dirhams]). According to another Ḥanafī opinion, three or four dirhams is the yearly amount per individual, so that the share of each ‘*āqila*’ member in a full blood money payment is nine or twelve dirhams. This opinion (which Peters preferred in *EI*[3], s.v. “*Āqila*,” and which he wrongly ascribed to the Shāfi‘īs as well) is wrong (*ghalat*), as al-Sarakhsī (*Mabsūt*, 27:129) correctly maintains, and is usually rejected (Marghīnānī, *Hidāya*, 4:1713; Zayla‘ī, *Tabyīn*, 7:367; Bābartī, *‘Ināya*, 10:426; Ḥaddād, *Jawhara*, 2:370–371; Ḥalabī, *Multaqā al-abḥur*, 4:412). This opinion is ascribed to al-Qudūrī (Marghīnānī, *Hidāya*, 4:1713), but it seems to have resulted from a distortion in one transmission of al-Qudūrī’s *Mukhtaṣar*. This is revealed from a comparison of two transmissions of the text: *lā yuzād al-wāḥid ‘alā arba’at darāhim fī kull sana [dirham wadaniqān]*. The last two words, in the square brackets, are missing from the *Mukhtaṣar*’s edition I use (p. 103), but appear in the Medina 1437/2016 edition (p. 297). The Shāfi‘īs’ maximum is a half or a quarter of a *ḍnār*, depending on the payer’s financial condition (Shāfi‘ī, *Umm*, 6:151), although they are not unanimous (Māwardī, *al-Ḥawī al-kabīr*, 12:354–355). This is also one of the opinions ascribed to Ibn Ḥanbal. The other is that there is no limit, each member of the ‘*āqila*’ paying an amount that matches his financial abilities, as decided by the *qādī* (Ibn Qudāma, *Mughnī*, 12:45). This opinion is in line with pre-Islamic custom, according to which each tribesman’s share was determined by the amount of his property (Procksch, *Über die Blutrache*, 58). The Mālikīs likewise set no limit (Ibn Rushd, *Bidāyat al-mujtahid*, 2:490).

<sup>67</sup> Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 3:194; Sarakhsī, *Mabsūt*, 27:129; Walwālījī, *Fatāwā*, 5:323; Kāsānī, *Badā’i*, 10:315.

<sup>68</sup> Wakī‘, *Akbbār al-quḍāt*, 3:129–130.

200 dirhams per month.<sup>69</sup> The *qāḍī*'s scribe received about thirty dirhams a month.<sup>70</sup> Under al-Manṣūr (r. 136–158/754–775) a carpenter would make two dirhams a day, and a construction worker four or five dirhams.<sup>71</sup> The daily wage of a weaver in Tunisia around the year 200/815 was half a dirham.<sup>72</sup> In eastern Iran the sum of four dirhams was enough to rent a beast for a day.<sup>73</sup> The yearly *jizya* said to have been imposed by 'Umar upon each non-Muslim man in Syria was forty dirhams, in addition to supplies in kind.<sup>74</sup> It is easy to see, against this list of wages and other payments, that according to the Ḥanafī modification, each '*āqila* member was liable for a quite insignificant amount of each blood-money payment.

Limiting the share of each individual to such a small portion of the blood money meant that a very large '*āqila* was required to pay the full blood money. In Ḥanafī law full blood money amounts to 10,000 dirhams (which was the equivalent of 1,000 dinars), and there is evidence showing that this was also the amount of blood money required and paid in practice, at least in some cases, under the Umayyads and the 'Abbāsids.<sup>75</sup> An '*āqila* had to include at least 2,500 men to pay this amount.

The need for such a large '*āqila* was to be met, according to Ḥanafī law, by supplementing the original '*āqila* with another group or groups, thus forming an extended, *ad hoc* '*āqila* of the desired size. The discussion of the criteria for selection of the group or groups appended to the '*āqila* raises the issue of the '*āqila*'s composition, and it is here that the Ḥanafīs introduced their second modification. According to al-Shaybānī, such an auxiliary group would ideally be "the one closest to them (i.e., to the primary '*āqila*) in terms of lineage, from among the men of the *dīwān*

<sup>69</sup> Ibn Shubruma, *qāḍī* of Kūfa preceding Ibn Abī Laylā, and Iyās b. Mu'āwiya, *qāḍī* of Baṣra under 'Umar II, earned 100 dirhams a month each (Wakī', *Akbbār al-quḍāt*, 3:90 and 1:342, respectively); al-Ḥasan al-Baṣrī was offered a salary of 200 dirhams, and the same amount was paid monthly to each of Sawwār b. 'Abdallāh and 'Ubaydallāh b. al-Ḥasan, the two successive *qāḍīs* of Baṣra under al-Manṣūr and al-Mahdī (r. 158–169/775–785) (Wakī', *Akbbār al-quḍāt*, 2:86 and 121, respectively). The latter's salary was at some point doubled, reaching 400 dirhams a month (ibid., 108).

<sup>70</sup> For an example from Baṣra see Jahshiyārī, *Wuzarā'*, 113 and 126 (the amount indicated in the second reference, 300 dirham, must refer to the yearly rather than the monthly salary). For an example from Wāsiṭ under the early 'Abbāsids see Wakī', *Akbbār al-quḍāt*, 3:310.

<sup>71</sup> Shaykhī, *Aṣnāf*, 89 (with more examples).

<sup>72</sup> Dūrī, "Nushū' al-aṣnāf," 31 (with more examples).

<sup>73</sup> Walwālījī, *Fatāwā*, 5:437 (this book was compiled in the sixth/twelfth century, but it contains *fatwās* from a much earlier period).

<sup>74</sup> Abū 'Ubayd, *Amwāl*, 159 (no. 393); Balādhurī, *Futūḥ al-buldān*, 1:148, 206 (Raḡqa); 209 (Ra's al-'Ayn).

<sup>75</sup> See pp. 37 and 40–41.

(*aqrab al-qabā'il ilayhim fī al-nasab min ahl al-dūwān*).<sup>76</sup> The principle underlying the tribal 'āqila is here combined with the new principle: common descent still produces joint liability, but only within the limits of the *dūwān*, and only when the auxiliary group (not the original 'āqila) is concerned. In discussing the auxiliary 'āqila, Ḥanafī jurists developed this combination in two divergent directions. Some of them followed, refined, and extended the new notion of liability based on common *dūwān*, and detached this liability from blood ties. Others, especially later Ḥanafīs, remained loyal to the traditional notion of kinship, and seem to have given it priority over the *dūwān*. The following discussion focuses mainly on the former opinion, but the second one is also presented.

The solution offered by al-Shaybānī, that the 'āqila of the *dūwān* was to be supplemented by the *dūwān* unit closest to it in lineage, applied only to an 'āqila whose members, or at least most of them, claimed to be of common descent, for only then was it possible to determine which other group was closest to it. Al-Shaybānī also considers, however, the case where it is necessary to expand an 'āqila whose members are not of the same lineage: if the men (*qawm*) of Khurāsān who are registered in one *dūwān* are of diverse origins (*mukhtalifīn fī ansābihim*), "some of them *mawālī*, some Arabs, and others not [even] *mawālī*," and if this *dūwān* unit is too small to pay blood money on behalf of its members, then the supplementary 'āqila cannot be the group closest to it in lineage because there is no such group. Instead the supplementary 'āqila consists of whoever the *Imām* (i.e., the ruler) sees fit to designate for this purpose from among the men of the *dūwān* (*ḍamma ilayhim al-imām man ra'ā min ahl al-dūwān*).<sup>77</sup> Al-Shaybānī's example of Khurāsān is part of a discussion intended to illustrate the second modification of the *dūwān* innovation related to the 'āqila's composition, on which the Ḥanafīs put considerable emphasis: the units of the *dūwān* need not coincide with kinship boundaries, but could rather cut across them, and the obligation to pay blood money on behalf of men of one's *dūwān* – even if they were of a different lineage – superseded the obligation based on shared descent. In this vein, al-Ṭahāwī says that a man does not pay blood money on behalf of his relative, unless they share a *dūwān* (*lā ya'qilu fī dhālika dhū raḥim 'an dhī raḥimihī idhā lam yaḥma'hu wa-iyyāhu dūwān wāḥid*).<sup>78</sup> Some Ḥanafīs applied this principle to both the supplementary and the primary 'āqila.

<sup>76</sup> Shaybānī, *Aṣl*, 4:595, followed by Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 3:195; Sarakhsī, *Mabsūt*, 27:129.

<sup>77</sup> Shaybānī, *Aṣl*, 4:597.

<sup>78</sup> Ṭahāwī, *Mukhtaṣar*, 233.

As to the supplementary *‘āqila*, the rule formulated by al-Shaybānī according to which the heterogeneous *‘āqila* was to be enlarged when needed by any division of the *dūwān* chosen by the *imām*, was further developed by later Ḥanafīs. They distinguished an *‘āqila* that is not part of the *dūwān* and is based on kinship from an *‘āqila* of the *dūwān*.<sup>79</sup> The former was extended according to descent: first the close kinsmen are added, then more remote ones. In regard to the *‘āqila* of the *dūwān*, whereas al-Shaybānī’s rule applied specifically to a heterogeneous *dūwān* unit, later Ḥanafīs broadened this rule to include all the *‘āqilas* of the *dūwān*, irrespective of their composition. Burhān al-Dīn al-Bukhārī (d. 616/1219) aptly demonstrated this point in his *al-Muḥīṭ al-Burhānī*: if the *dūwān* division that forms the original *‘āqila* is too small, then the division closest to it (i.e., in terms of the military structure of the *dūwān*) in the *dūwān* of the town is appended to it. If further extension is required, the most remote division of the *dūwān* of the town is to be added.<sup>80</sup> According to Burhān al-Dīn, this order of enlarging the *‘āqila* is to be followed even if blood ties would dictate a different sequence – that is, even if the remote division is formed of agnates of the offender (*min ‘ashīrat al-qātil min jānib al-ab*), while the closest one is comprised of men alien (*ajānib*) to him. Only when a combination of all the divisions of the *dūwān* is still found to be insufficient for the payment of blood money are agnates of the offender who are not in the *dūwān* to be drawn into the *‘āqila*.<sup>81</sup> Al-Marghīnānī (d. 593/1197) also follows al-Shaybānī. He dwells on the authority given to the *imām* in defining the supplementary *‘āqila*, and explains the principle that should guide him in such cases: “If the military unit is too small, the closest unit is to be appended to it, that is, the first unit to be called upon when a misfortune befalls them (the primary *‘āqila*), and so on. It is for the *imām* to decide which units to add because he is the one who knows this (i.e., the order of the units) (*idhā lam yattasī‘ li-dhālika ahl rāya ḍumma ilayhim aqrab al-rāyāt ya‘nī aqrabuhum nuṣratan idhā ḥazabahum amr al-aqrab fa-l-aqrab wa-yufawwaḍu dhālika ilā al-imām li-annahu huwa al-‘ālim bihī*).”<sup>82</sup>

The ultimate authority to determine the makeup of this extended *‘āqila* was thus vested in the ruler, who was guided by considerations of military organization rather than kinship.

<sup>79</sup> Marghīnānī, *Hidāya*, 4:1713; Walwālījī, *Fatāwā*, 5:319; Zayla‘ī, *Tabyīn*, 7:367 (following al-Marghīnānī); Quhistānī, *Jāmi‘ al-rumūz*, 2:365.

<sup>80</sup> The meaning is that the *dūwān* divisions are added to the original *‘āqila* according to their proximity to it, from the nearest to the most distant.

<sup>81</sup> Burhān al-Dīn, *Muḥīṭ*, 20:101.

<sup>82</sup> Marghīnānī, *Hidāya*, 4:1713, followed by Mawṣilī, *Ikhtiyār*, 5:66 and Zayla‘ī, *Tabyīn*, 7:367, and preceded by Sarakhsī, *Mabsūṭ*, 27:132.

In regard to the primary *‘āqila*, the Ḥanafīs further focused on the criterion of kinship when they compared the *‘āqila* of the *dīwān* with the tribal group that it came to replace. “After the *dīwāns* came into being,” al-Shaybānī says, “it was the men of the *dīwān* who provided support (*nuṣra*), to each other, not kinsmen . . . therefore it (i.e. blood money) falls on the men of the *dīwān*, not on kinsmen.”<sup>83</sup> Abū Bakr al-Jaṣṣāṣ stressed the same contrast: the payment of blood money is the obligation of the men registered in the liable individual’s *dīwān*, not of his relatives (*awjabahā aṣḥābunā* [i.e., the Ḥanafīs] *‘alā ahl dīwānihi dūna aqribā’ihi*).<sup>84</sup> Loyalties based on blood ties were so deeply affected by obligations to the *dīwān* that a man would fight against his own tribe in defense of the men of his *dīwān* (*kāna al-mar’ yuqātilu qabīlatahu ‘an dīwānihi*); alleged historical examples from the battles of the Camel and Siffīn are invoked by al-Sarakhsī as an illustration.<sup>85</sup>

Furthermore, because each location had its own *dīwān*, the lines of previous *‘āqilas* based on kinship might also be crossed by administrative and regional divisions. Al-Shaybānī, in a formulation that reads like an administrative instruction, maintains that people who were originally obliged to pay blood money on behalf of each other by virtue of common descent are no longer obliged to do so if they do not live in the same city. “[T]he residents of Baṣra should not pay blood money on behalf of the residents of Kūfa, and the residents of Syria (al-Sha’m) should not pay blood money on behalf of the residents of Kūfa, for their *‘āqilas* are in the *dīwān*, and the[ir] *dīwāns* are different (from one another).”<sup>86</sup> Al-Shaybānī makes it as clear as possible that the administrative division annuls the obligation arising from kinship: two full brothers, one of them registered in the *dīwān* of Kūfa and the other in that of Baṣra, are not to pay blood money on behalf of each other; instead, blood money imposed upon them is to be paid by their respective *dīwāns*.<sup>87</sup> The clear separation

<sup>83</sup> Shaybānī, *Aṣl*, 4:593. The same distinction between the men of the *dīwān* and kinsmen is made by al-Layth b. Sa’d, al-Shaybānī’s contemporary and the leading jurist of Egypt in his time. He is not known to have been connected to the Ḥanafī school, but, as mentioned, he accepted the *dīwān* innovation, perhaps before it became a point of dispute between the Ḥanafīs and the other schools (see p. 51).

<sup>84</sup> Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 3:195.

<sup>85</sup> Sarakhsī, *Mabsūṭ*, 27:126, and see also Qudūrī, *Tajrīd*, 11:5747–5748 (no. 27545).

<sup>86</sup> Shaybānī, *Aṣl*, 4:597, and an abridged articulation in Walwālījī, *Fatāwā*, 5:319. An exception to this is a man who is registered in the *dīwān* of one town but happens to live in another town. Blood money owed by him is to be paid by residents of the town where he is registered (Shaybānī, *Aṣl*, 4:597).

<sup>87</sup> Shaybānī, *Aṣl*, 4:597; Zayla’ī, *Tabayūn*, 7:371.

between the *dīwāns* of different towns determines that when the ‘*āqila* is extended by adding other units of the *dīwāns*, these additional units are limited to the town of the original ‘*āqila*, “because the men of one town do not pay blood money on behalf of those of another.”<sup>88</sup>

We thus see that although in the specific instance of the supplementary ‘*āqila* al-Shaybānī does consider the lineage, his other rules lay the basis for replacing the traditional lineage-based ‘*āqila* by an ‘*āqila* of the *dīwān* that is not based on kinship. Later Ḥanafīs developed this rule further.

It follows that, as mentioned,<sup>89</sup> the Ḥanafī *dīwān* innovation was twofold. One aspect of it was a modification of the method of blood-money payment, that is, by deduction from the stipends instead of direct payment from funds already in the possession of ‘*āqila* members. The other aspect was a change in the ‘*āqila*’s composition, in that it was no longer defined by blood ties. A close reading of the following paragraph, in the opening of the chapter on blood money (*Kitāb al-Aql*) in al-Shaybānī’s *Kitāb al-Aṣl*, reveals this dichotomy (the numbers in what follows are my own):

- 1) ‘Umar b. al-Khaṭṭāb imposed the payment of blood-money on the *ahl al-dīwān*, because it was he who founded the *dīwān*,
- 2) and prescribed that blood-money is to be paid from it (i.e., from the stipends).  
Formerly,
- 3) the payment of blood-money fell on a man’s clan (*‘ashīrat al-rajul*),
- 4) from their money (i.e., from the money in their possession).<sup>90</sup>

The structure of the paragraph is comparative and symmetric: phrases 1 and 2 describe the new system, while 3 and 4 describe the old one that it came to replace. The first phrase, contrasted with the third, reflects the change introduced in the composition of the ‘*āqila*; the second phrase, in contrast with the fourth, reflects the change introduced in the method of payment.

Only one of these two modifications corresponds to Umayyad practice as it emerges from the evidence presented in [Chapter 4](#). The evidence does testify, as we have seen, to a change in the method of payment in that the debt was deducted from the stipends, but it contains no suggestion of a change in the ‘*āqila*’s composition. According to al-Kindī’s description of the introduction of the *dīwān* innovation by Mu‘āwiya, blood money was

<sup>88</sup> Burhān al-Dīn, *Muḥīṭ*, 20:101.

<sup>89</sup> See p. 62.

<sup>90</sup> Shaybānī, *Aṣl*, 4:590, quoted by Sarakhsī, *Mabsūṭ*, 27:125.

deducted from the stipends, but the stipends that were drawn on continued to be those of the perpetrator's clan (*'ashīrat al-jāriḥ*).<sup>91</sup> The blood money paid to Azd and Bakr in Baṣra was taken from the stipends of Tamīm,<sup>92</sup> and 'Abd al-Mālik paid blood money to the Fazārīs on behalf of Kalb by deducting it from the stipends of Quḍā'a, to which Kalb belonged.<sup>93</sup> If Ṭufayl b. al-Ḥāritha's debt was indeed for blood money, then it is another example.<sup>94</sup> It may be that the Umayyads did indeed modify the composition of the *'āqila* in the way indicated by Ḥanafī law, but the historical evidence available does not reveal this change because the *dīwān* largely retained tribal divisions,<sup>95</sup> so that in practice the *dīwān* unit that served as the *'āqila* remained the tribal group. It is also possible, however, that a change in the *'āqila*'s composition was not part of early Umayyad administrative practice, and that Ḥanafī law preceded the state on this point, providing a legal basis for a post-Umayyad reality in which administrative considerations increasingly superseded tribal tradition.

An administrative problem that the Ḥanafī *dīwān* innovation tackled is illustrated by the juristic discussions of the Shāfi'īs, who retained the traditional *'āqila* based on blood ties. The dispersion of tribes resulting from the Islamic emigration following the conquest gave rise to the question of how blood money could be collected from an *'āqila* whose members no longer dwelt in a single territory, but were rather scattered over various regions, often remote from each other. This question was already discussed by al-Shāfi'ī, and, following him, al-Māwardī devoted a whole chapter to it.<sup>96</sup> For the Ḥanafī jurists, the *dīwān* innovation solved this problem.

The new *'āqila* that emerged from these Ḥanafī rules retained only a few characteristics of its predecessor, the pre-Islamic *'āqila*. From a tribal solidarity group of limited size, whose members paid blood money on behalf of one another out of an obligation of mutual assistance – whether this obligation arose from kinship, alliance, or some other agreement – Ḥanafī jurists transformed the *'āqila* into a group of thousands of men, among whom neither blood ties nor any other obvious connection

<sup>91</sup> See pp. 45 and 57.

<sup>92</sup> See p. 47.

<sup>93</sup> See p. 48.

<sup>94</sup> See p. 49.

<sup>95</sup> *EI*(2), s.v. "Dīwān (i.-The Caliphate)" (Duri); Crone, *Slaves on Horses*, 30–31; Kennedy, *Armies*, 43–44, 61.

<sup>96</sup> Shāfi'ī, *Umm*, 6:152; Māwardī, *al-Ḥāwī al-kabīr*, 12:361–364. See also: Shīrāzī, *Muhadhḥab*, 3:242.

necessarily existed. Many of them were not even acquainted with each other; they were added to the *‘āqila ad hoc*, according to a decision of the ruler based on considerations that “he is the one who knows.” A sense of solidarity could hardly have existed among all the members of such a gigantic *‘āqila*, and, in fact, solidarity was no longer needed. The payment of blood money, previously the most important expression of solidarity and mutual obligation among tribesmen, was transformed into a compulsory toll that the government levied by deduction from a much larger group, selected by the government according to its own considerations.

In no way does this Ḥanafī *‘āqila* correspond to Schacht’s description of the *‘āqila* as “a rudimentary form of corporation.”<sup>97</sup> It was no longer a corporation in any sense. Only its name, and perhaps some theoretical idea of sharing responsibility remained, as mere justification for imposing payment upon men far removed from, and with no necessary connection to the perpetrator.

The administrative motives that led to the dramatic expansion of the *‘āqila* and to the extension of liability for a single case of homicide to thousands of men, stand in sharp opposition to the idea of individual responsibility that guided the Ḥanafī jurists on the religious level, as discussed in Part I. The desire to modify the law by limiting joint liability in favor of individual responsibility influenced the law in one respect, but in another respect the law was determined by the state interest in extending joint liability to the utmost.<sup>98</sup>

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Beside this line of development, another view about how to extend the *‘āqila* developed among the Ḥanafīs: “If the *‘āqila* is too small,” ‘Alā’ al-Dīn al-Samarqandī (d. 539/1144) maintained, “then the tribal group closest to it in terms of descent (*aqrab al-qabā’il minhum fī al-nasab*) is to be appended to it, whether or not [this group] consists of men of the *dīwān*.”<sup>99</sup> Where the auxiliary *‘āqila* is concerned, lineage thus superseded affiliation with the *dīwān*. Al-Kāsānī, whose monumental work is a

<sup>97</sup> Schacht, *Introduction*, 155, followed by Johansen in “*Amwāl Zāhira*,” 129 n. 3, further dwelling on the *‘āqila* as a corporation in “*Eigentum*,” 411–412, n. 264 in particular.

<sup>98</sup> Ian Cunnison points to a similar contradiction in the modern Sudan: “Thus the political officers were asserting the principle of joint responsibility, whose validity the legal officers had abolished by their introduction of a criminal code” (Cunnison, “Blood Money,” 124).

<sup>99</sup> Samarqandī, *Tuhfat al-fuqahā’*, 3:120.

commentary on al-Samarqandī's, follows him.<sup>100</sup> In addition to al-Samarqandī and al-Kāsānī, an increasing number of Ḥanafī jurists held that the 'āqila should be extended, when needed, according to descent.<sup>101</sup> These jurists make no mention of the *dīwān*. When it came to supplementing the original 'āqila, they seem to have attempted to draw the 'āqila concept back toward its traditional agnatic structure.

Other methods of extending the 'āqila arose from the conditions of life in the Islamic communities in the eastern areas of the caliphate. By the sixth/twelfth century a new question emerging from these conditions had appeared in the discussion of the 'āqila's structure. It originated in a *fatwā* issued some centuries earlier. The *fatwā* raised the question of whether an 'āqila based on common descent was relevant at all to the Persian Muslims, who, unlike the Arabs, "do not remember their genealogies." According to what criteria, then, should their 'āqila to be enlarged and on what basis was it to rest initially? The following part is devoted to the Persian Ḥanafīs and to the theory and practice of the 'āqila among them.

<sup>100</sup> Kāsānī, *Badā'i'*, 10:315.

<sup>101</sup> Ṭahāwī, *Mukhtaṣar*, 233; Samarqandī, *al-Fiqh al-nāfi'*, 3:1400; Ūshī, *Fatāwā*, 567; Qāḍī-khān, *Fatāwā*, 3:359; Tāj al-Sharī'a, *Wiqāya*, 7:576; Ibn al-Sa'ātī, *Majma' al-balḥayn*, 641; Nasafī, *Kanz al-daqa'iq*, 7:15; Ḥaddād, *Jawhara*, 2:371; Ḥalabī, *Multaqā al-abḥur*, 4:412–413; Timurtāshī, *Tanwīr al-abṣār*, 218; Qārī, *Fath bāb al-'Ināya*, 3:397.

### PART III

## The Contribution of the Persians

#### INTRODUCTION

The *dīwān* innovation and related modifications to the ‘*āqila*’ institution that were discussed in Part II, were developed during the second/eighth century under the influence of the Umayyad administrative regulations. Their originators were jurists in Iraq, proto-Ḥanafīs or Ḥanafīs. The Iraqī origin of these modifications is discernable, *inter alia*, from the fact that various legal points are illustrated by reference to Iraqī towns, namely Kūfa and Baṣra, rather than towns in Iran or elsewhere. The doctrine of the ‘*āqila*’ as developed in Iraq, including the various modifications made during its transition from Arab custom to Islamic law, is registered in its more or less complete form in the *Kitāb al-Aṣl* of Muḥammad b. al-Ḥasan al-Shaybānī. The *Kitāb al-Aṣl* contains the oldest stratum of Ḥanafī legal doctrine. This had developed in Iraq by the second/eighth century and constitutes the basis of later Ḥanafī law. The *Kitāb al-Aṣl* is one of the six books, all attributed to al-Shaybānī, whose content later Ḥanafīs classified as *zāhir al-riwāya*. The *zāhir al-riwāya* are the most authoritative opinions of the school. They earned their status by virtue of the highly reliable transmission through which they were handed down from the school founders, Abū Ḥanīfa and his two disciples, Abū Yūsuf al-Anṣārī and al-Shaybānī himself.<sup>1</sup>

The Ḥanafī law that was produced in Iraq spread to Persian lands, and particularly to eastern Iran, at a very early date. Al-Shaybānī’s Persian students brought his works to the east and disseminated them there,

<sup>1</sup> *EI*(2), s.v. “al-Shaybānī” (Chaumont), and see p. 110.

probably already in al-Shaybānī's lifetime.<sup>2</sup> This law was discussed and examined by the eastern Iranian jurists, and rules related to the *'āqila* institution, among many others, were the subject of creative legal thinking. The Ḥanafī jurists of eastern Iran were evidently not unduly encumbered by the opinions of the school's masters from Iraq, and so developed their own, independent legal opinions. For them, the law of the *'āqila* as well as other laws that appear in al-Shaybānī's works were not the last word; in certain ways they were, rather, a point of departure. By the fifth/eleventh century, legal opinions developed by the eastern Iranian jurists had been incorporated into and enriched Ḥanafī law. Part III is devoted to the opinions of the Ḥanafī jurists of eastern Iran concerning the *'āqila*, and to their contribution to standard Ḥanafī law. I refer to the law that originated in Iraq as "Iraqī Ḥanafī law" (although most of the works that contain this law, such as the *Mabsūṭ* of al-Sarakhsī or the *Hidāya* of al-Marghīnānī, were written by non-Iraqīs), to distinguish it from the body of opinions developed by the east Iranian Ḥanafīs.

<sup>2</sup> See pp. 88–89.

## The Eastern Iranian Ḥanafī Views on the ‘*Āqila*: A Presentation

According to both al-Shaybānī’s *Kitāb al-Aṣl* and to all subsequent Ḥanafī works up to the fifth/eleventh century, the ‘*āqila* is either the *dūwān* or, for those who are not registered in the *dūwān*, the tribal group or extended family. This represents an administrative division between those entitled to regular governmental payments,<sup>1</sup> from whom a debt of blood money could easily be collected by means of deduction, and those who were not part of the state administration and did not receive governmental payments. With respect to the latter, Iraqī Ḥanafī law sanctioned the traditional tribal ‘*āqila* and, by bringing it under the Sharī’a, legitimized the enforcement of blood-money payment upon its members. The Ḥanafī jurists of eastern Iran retained the division between those with a regular salary and those without, but they modified the composition of both groups.

The modifying rule of the eastern Iranians emerges from a lucid presentation by al-Walwālījī (d. after 540/1145), a resident of Samarqand, in his *al-Fatāwā al-Walwālījīyya*. This work is not, as its title might suggest, a collection of *responsa*, but rather a compilation that brings together Iraqī Ḥanafī law and the legal opinions of eastern Iranian Ḥanafīs. The following quotation is part of al-Walwālījī’s description of the ‘*āqila*:

If the killer has a *dūwān*, then his ‘*āqila* are the men of his *dūwān*. If he is a warrior and has a *dūwān*, then his ‘*āqila* are those registered in the *dūwān* of the warriors. If he is a scribe, then his ‘*āqila* are those registered in the *dūwān* of the scribes if *nuṣra*

<sup>1</sup> And also nonregistered townsmen and the *sawād* inhabitants, whose debt of blood money is covered by the *dūwān*.

exists among them. If he has no *dūwān*, then his ‘*āqila* are those who provide him with *nuṣra*. If his *nuṣra* [group] is [based on living] in the [same] neighborhood or [on the same] road, then these men are liable for blood money on his behalf. If his *nuṣra* is provided on the basis of common occupation, then [the payment of blood money on his behalf falls upon] the men who share his occupation and who provide him with *nuṣra*, so, for instance, the fullers and the coppersmiths in Samarqand or the shoemakers in Isbijāb (*al-qātil idhā kāna lahu dūwān fa-‘āqilatuhu ahl dūwānihi in kāna ghāziyan wa-lahu dūwān fa-‘āqilatuhu man kāna fī dūwān al-ghuzāt wa-in kāna kātiban fa-‘āqilatuhu man kāna fī dūwān al-kuttāb in kānū yatanāṣarūna fihā wa-in lam yakun min ahl al-dūwān fa-‘āqilatuhu anṣāruhu fa-in kānat nuṣratuhu bi-l-mahāll wa-l-durūb fa-‘aqluhu ‘alayhim wa-in kānat nuṣratuhu bi-l-ḥiraf fa-‘alā al-muḥtarifin alladbīna hum anṣāruhu ka-l-qaṣṣārīn wa-l-ṣaffārīn bi-Samarqand wa-l-asākifa bi-Isbijāb*).<sup>2</sup>

Walwālījī’s composition of the ‘*āqila* thus differs considerably from that of the Iraqī Ḥanafī law. Like the Iraqī rule, Walwālījī’s covers both those who are or are not part of the state administration, but the nature of the two categories changes. In his definition, the ‘*āqila* no longer reflects merely Umayyad administration and society, but is rather adapted to post-Umayyad conditions and to a geographical area beyond Iraq. It reflects a reality in which the army has lost its supremacy and centrality, and the Arab tribal warriors have been replaced by a heterogeneous collection of bureaucrats and men of learning, professional soldiers, merchants, and artisans.

Al-Walwālījī’s formulation differs from the Iraqī version not only in content but also in terminology. The term *ghuzāt* (sing. [*al-ghāzī*]), which he employs to refer to “warriors,” is at striking variance with the word *muqātila* used in the same meaning by al-Shaybānī and all the discussions of the ‘*āqila* in works that follow him. The deviation from the Iraqī terminology is not fortuitous. In al-Walwālījī’s lifetime, the term *ghuzāt* was specifically associated with the eastern provinces, namely Khurāsān and Transoxania, where it denoted mobile groups of mercenaries, mainly of Turkish descent and of nomadic character, inspired by the idea of a holy war.<sup>3</sup> In this area, and later in other frontier zones – notably the Arab-Byzantine border – the *ghuzāt* served as a reservoir of warriors that could be drawn on by the sultans either to defend Islamic lands against infidel invasion, or to attack non-Islamic

<sup>2</sup> Walwālījī, *Fatāwā*, 5:318, and a shorter version in Bukhārī, *Khulāṣat al-fatāwā*, 2:246.

<sup>3</sup> For the association of the root *gh.z.w* with holy war already in early Islam, and for other meanings of *ghāzī* see Imber, “What Does Ghazi Actually Means,” 203–204.

territories.<sup>4</sup> In the early fifth/eleventh century, a few decades before the time of al-Walwālījī, Maḥmūd of Ghazna (r. 388–421/998–1030) relied extensively on such *ghuzāt* in his invasion of India,<sup>5</sup> and Tūghān Khān, the Qarākhānī ruler, recruited such fighters to confront a force coming from China that threatened to capture the eastern provinces.<sup>6</sup> Replacing the term *muqātīla*, reminiscent of classical, ancient Islam, by the term *ghuzāt* therefore seems natural for an author writing in Samarqand in that time.

The locations to which al-Walwālījī refers by way of example, namely, Samarqand and Isbijāb, also reflect the region in which his work originated, and differentiate it from the Iraqī writings, which, as mentioned, often used Kūfa and Baṣra in examples. Both the terminology selected and the locations referred to by al-Walwālījī are characteristic of similar works compiled by authors of the same century and geographical area, for instance, *khulāṣat al-fatāwā* by Iftikhār al-Dīn Ṭāhir b. Aḥmad al-Bukhārī (d. 542/1147), and the well-known and widely cited *al-Fatāwā al-Khāniyya* by al-Ḥasan b. Maṣṣūr (d. 592/1196), known as Qāḍīkhān, from Ūzjand in Farghāna. These and other features suggest that the sources for such works were at least partly distinct from those of the Iraqī Ḥanafī line, and indicate eastern Iran as their place of origin. The more important difference between Iranian and Iraqī Ḥanafī law is, however, substantive, namely, in rules relating to the nature and the composition of the ‘*āqila*.

#### 7.1 THE ‘*ĀQILA* OF THOSE WHO HAVE A *DĪWĀN*

In al-Shaybānī’s *Kitāb al-Aṣl* the term *dīwān* refers to the military *dīwān*, and the term *ahl al-dīwān* refers to the warriors, *muqātīla*.<sup>7</sup> Later authors follow this usage; for al-Marghīnānī, *ahl al-dīwān* are “the men of the military units (*ahl al-rāyāt*); that is, the soldiers whose names are listed in the *dīwān* (*al-jaysh alladhī kutibat asāmīhim fī al-dīwān*)”;<sup>8</sup> Alā al-Dīn al-Samarqandī, al-Kāsānī, and others repeat more or less the same definition.<sup>9</sup> Al-Walwālījī updates the meaning of the term *dīwān* by extending it

<sup>4</sup> *EI*(2), s.v. “Ghāzī” (Mélíkoﬀ); Bosworth, *The Ghaznavids*, 33, 114, 167; Cahen, “Economy, Society, Institutions,” 534, and on the *ghāzīs* see also Cahen, “Tribes, Cities and Social Organization,” 322–323.

<sup>5</sup> *EI*(2), s.v. “Ghāzī.”

<sup>6</sup> Anoošahr, *The Ghazi Sultans*, 60.

<sup>7</sup> Shaybānī, *Aṣl*, 4:590.

<sup>8</sup> Marghīnānī, *Hidāya*, 4:1711.

<sup>9</sup> Samarqandī, *Tuhfat al-fuqahā’*, 3:121; Kāsānī, *Badā’i’*, 10:314, and earlier, Jaṣṣāṣ understood it in the same way, although he does not provide a definition (*Aḥkām al-Qur’ān*, 3:196).

beyond the military realm. According to his doctrine, the *dūwān* whose members serve as an *‘āqila* may also be a civilian institution, namely, the *dūwān al-kuttāb*. Qāḍīkhān, in his *Fatāwā*, defines this extension of the *dūwān* even more explicitly: “if the killer is a warrior who has a *dūwān*, his *‘āqila* are those who make their living from his *dūwān* (*fa-in kāna al-qātil ghāziyan wa-lahu dūwān fa-‘āqilatuhu man yartaziqū min dūwānihi*), and if he is a scribe, his *‘āqila* are those who make their living from the *dūwān* of the scribes (*wa-in kāna kātiban fa-‘āqilatuhu man yartaziqū min dūwān al-kuttāb*) if *nuṣra* exists among them.”<sup>10</sup>

#### 7.2 THE *‘ĀQILA* OF THOSE WHO DO NOT HAVE A *DŪWĀN* (THE EARLIER BALKHĪ VIEW)

The second legal point on which al-Walwālījī’s definition differs from the Iraqī Ḥanafī law is with regard to men who have no *dūwān*, that is, who do not receive a salary from the government. The *‘āqila* of such a man is not necessarily composed of his tribesmen, as in the Iraqī Ḥanafī law, but rather of whoever provides him with *nuṣra*, that is, assistance based on group solidarity. On the basis of this principle, any solidarity group may serve as an *‘āqila*. Having stated the principle explicitly, al-Walwālījī offers two examples as illustrations: an *‘āqila* based on residence in the same quarter, and an *‘āqila* based on a common occupation. This view is also presented, in a polemical vein, by Qāḍīkhān in his *Fatāwā*:

The Persians do have *‘āqilas* which operate when they give each other *nuṣra* or when they unite to help each other in a fight. Examples include the shoemakers and the coppersmiths in Marw, and [the residents of] the street of the timber merchants; and likewise in Azerbaijan (read Isbijāb?). If a man is killed by accident, and blood money is due, the men of the killer’s quarter or his village constitute his *‘āqila*, and this applies also to scholars (i.e., they also serve as an *‘āqila* for each other) (*li-l-‘Ājam ‘āqila ‘inda al-tanāṣur wa-l-muqātala ma’a al-ba’d li-ajl al-ba’d naḥwa al-asākifa wa-l-ṣaffārīn bi-Marw wa-[da]rb al-khashshābīn wa-kadhā bi-Adharbijān. Wa-idhā qūtila wāḥid khaṭa’an wa-wajabat al-dīya fa-ahl maḥallat al-qātil wa-rustāqibi ‘āqilatuhu wa-ka-dhālika ṭalabat al-‘ilm*).<sup>11</sup>

<sup>10</sup> Qāḍīkhān, *Fatāwā*, 3:358; see also: Bukhārī, *Khulāṣat al-fatāwā*, 2:246.

<sup>11</sup> Qāḍīkhān, *Fatāwā*, 3:358; my correction of [da]rb is based on another edition of the *Fatāwā*, printed on the margin of Niẓām’s *al-Fatāwā al-Hindīyya* (Cairo 1310 repr. Diyarbekir, Turkey 1973), 3:448, although the text is distorted in that edition too.

The opinion that the ‘*āqila* of the Persians could be based on a common occupation goes back to Muḥammad b. Salama (d. 278/892),<sup>12</sup> a leading Ḥanafī jurist from Balkh, whom later Ḥanafīs count among the *mujtahids* of the school.<sup>13</sup> Whether Muḥammad b. Salama was also the first to introduce an ‘*āqila* based on residence, or whether this option was added by later jurists, is impossible to say. This new doctrine of the ‘*āqila*’s composition later spread beyond Balkh and was endorsed by ‘Abd al-‘Azīz b. Aḥmad al-Ḥalwānī (d. 456/1064 or a few years earlier) – the head of the Ḥanafīs in Bukhārā and the teacher of al-Sarakhsī – who seems to have brought this opinion to the fore.<sup>14</sup>

The principle of *nuṣra* was not new. As discussed in Part II, those who developed the Iraqī Ḥanafī law relied upon it in justifying the transformation of the ‘*āqila* from a tribal group to a *dūwān* unit. The payment of blood money, they maintained, depends not on kinship but rather on *nuṣra*. The group that provides a man with *nuṣra* – and is, consequently, liable for any blood money debt he incurs – may change according to circumstances. Transferring the liability for blood money to the *dūwān* could thus be justified by an alleged shift of *nuṣra*. In the *dūwān* as established by ‘Umar, they argued, military divisions replaced tribal groups in providing a man’s *nuṣra*, and consequently, in the obligation to pay blood money on his behalf. We see that the Ḥanafī jurists of eastern Iran took up the principle that liability for an individual’s blood-money payment devolves upon the group that provides him with *nuṣra*, and, more important, they adopted the argument that this group may change according to circumstances. Upon this basis, the eastern Iranians sought to define other varieties of ‘*āqila*. They did not intend to limit the definition of ‘*āqila* to the examples they cite, but rather to demonstrate that, given the existence of *nuṣra*, any group, including the ones they mention, may serve as an ‘*āqila*. This point is stated by al-Walwālījī in the preceding quotation, where he says that in the absence of a *dūwān*, a man’s ‘*āqila* are “those who provide him with *nuṣra*.” Burhān al-Dīn al-Bukhārī further stresses the *nuṣra* principle and its wide range of possible applications in his *al-Muḥīṭ al-Burhānī*:

<sup>12</sup> Burhān al-Dīn, *Muḥīṭ*, 20:99; Quhistānī, *Jāmi‘ al-rumūz*, 2:366. In the event of a disagreement regarding the death dates of Ḥanafīs from Balkh, I usually followed the information in the biographical section (*Bāb al-Tawārīkh*) in al-Samarqandī’s *Kitāb al-Nawāzil*; this biographical section is missing from the printed edition of the *Nawāzil*.

<sup>13</sup> Ibn ‘Abidīn, *Sharḥ al-manzūma*, 12; Ibn ‘Abidīn, *Radd al-muḥtār*, 1:169.

<sup>14</sup> Qāḍīkhān, *Fatāwā*, 3:358; Quhistānī, *Jāmi‘ al-rumūz*, 2:366. For al-Ḥalwānī’s status in Bukhārā see Qurashī, *Jawābir*, 2:429.

The conclusion is that what should be taken into account in this rule is *nuṣra* and mutual support (*qiyām al-ba'd bi-amr al-ba'd*). If the relationship between the people of the same neighborhood, the same market, the same village or the same tribal group is such that they support each other in a case of a misfortune, then they form an *'āqila*; if not (i.e., if such relationships do not prevail among them), then not (i.e., they are not an *'āqila*).<sup>15</sup>

More than a century later, 'Ubaydallāh b. Mas'ūd Ṣadr al-Sharī'a (d. 747/1346) of Bukhārā offers an even more general statement in his *Mukhtaṣar al-Wiqāya*: "Among the Persians, the criterion [that determines whether men belong to the same *'āqila*] is that they offer each other *nuṣra*, irrespective of whether this is because they belong to the same profession or for some other reason (*al-mu'tabar fī al-'Ajam ahl al-nuṣra sawā' kānat bi-l-ḥirfa aw ghayrihā*)."<sup>16</sup> By thus generalizing the *nuṣra* principle, Ṣadr al-Sharī'a's statement accentuates the position of the eastern Iranians. Their rule is designed to detach the *'āqila* concept from any particular type of group, thus permitting the maximum flexibility to this institution. The *'āqila* could then assume a composition suited to the demands of the structure of the society in which it operates.

Thus, while the *nuṣra* principle was first invoked by the Iraqī Ḥanafīs, the application of this principle to groups beyond, indeed far beyond, kin groups and the military *dīwān* is an innovation introduced by the Ḥanafīs of eastern Iran. In terms of legal method, stressing the broad application of the *nuṣra* principle was their way to legitimize an *'āqila* that suited them without excluding other types of *'āqila*. In other words, it was a way for the Persians to adapt the *'āqila* institution by extending rather than replacing the *'āqila* of the Iraqī law.

### 7.3 THE PERSIANS HAVE NO 'ĀQILA (THE LATER BALKHĪ VIEW)

Alongside the Balkhī view just discussed, an opposing view also developed in Balkh. It claimed to have adapted the Iraqī Ḥanafī law to the eastern Iranian social structure in a different way. This view, diverging even more significantly from the *dīwān* innovation, originated in the generation immediately after Muḥammad b. Salama, the jurist to whom the earlier Balkhī view is ascribed. The originator was his student Abū Bakr al-Iskāf

<sup>15</sup> Burhān al-Dīn, *Muḥīṭ*, 20:99–100; and a different version in Quhistānī, *Jāmi' al-rumūz*, 2:365–366.

<sup>16</sup> Ṣadr al-Sharī'a, *Mukhtaṣar al-Wiqāya*, 2:404.

(d. 333/944), a prominent scholar.<sup>17</sup> The innovation was then endorsed by al-Iskāf’s own student, the celebrated Balkhī scholar Abū Ja‘far al-Hinduwanī (d. 362/972).<sup>18</sup> These two jurists contended that the ‘*āqila* is an institution of the Arabs. The Persians, in contrast to them, have no ‘*āqila* at all, for “they have forgotten their lineages, there is no *nuṣra* among them, and they do not have a *dūwān*.”<sup>19</sup> The followers of this view maintained (correctly) that “burdening one person with [the liability of] another person’s crime is a custom contrary to the general principle (*wa-taḥammul al-jināya ‘alā al-ghayr ‘urf bi-khilāf al-qiyās*),”<sup>20</sup> implicitly criticizing the Arabs for preserving the ‘*āqila* institution contrary to the Islamic principle of individual responsibility. The Persians do not share this custom, they argued, it applies only to the Arabs, who remember their genealogies, and among whom *nuṣra* prevails.

The Iraqī Ḥanafī jurists also considered the possibility that the perpetrator might have no ‘*āqila*, and discussed the question of who was liable for blood money in such a case. This question appears already in the *ḡāhir al-riwāya* opinions,<sup>21</sup> and at least one *fatwā* suggests that it had practical application in Iraq. The Baghdadī Ḥanafī Abū al-‘Abbās al-Nāṭifī (d. 446/1054) included in his *fatwā* collection a *fatwā* concerning the case of a pregnant woman who took drugs to bring about a miscarriage. As a result her fetus was born, and died shortly after birth. The *muftī* to whom the case was addressed advised that if the woman in question had no ‘*āqila*, then liability for blood money would fall upon her alone.<sup>22</sup> In the discussions of the Iraqī Ḥanafīs, however, the absence of an ‘*āqila* was viewed as an exception, which they illustrated by examples such as a foundling (*laqīṭ*), or a non-Muslim (whether a *dhimmī* or not) who converted to Islam.<sup>23</sup> In contrast, according to the view that developed in Balkh the absence of an ‘*āqila* was not the exception but rather the rule,

<sup>17</sup> For information on him see Qurashī, *Jawāhir* 3:76; 4:15; Laknawī, *Fawā'id*, 263; and Mangera, “al-Samarqandī’s *Nawāzil*,” 364–365.

<sup>18</sup> For Abū Ja‘far al-Hinduwanī see Qurashī, *Jawāhir*, 3:192; Laknawī, *Fawā'id*, 295. According to these references he was not the direct student of al-Iskāf, but of Abū Bakr al-‘Amash, al-Iskāf’s student; according to the references in the previous note, however, he did study directly under al-Iskāf.

<sup>19</sup> Qāḍīkhān, *Fatāwā*, 3:358; Burhān al-Dīn, *Muḥīṭ*, 20:99; Quhistānī, *Jāmi‘ al-rumūz*, 2:366; Qārī, *Fath bāb al-‘Ināya*, 3:398.

<sup>20</sup> Qāḍīkhān, *Fatāwā*, 3:358, quoted in Ibn ‘Ābidīn’s *Radd al-muḥṭār*, 10:333.

<sup>21</sup> Burhān al-Dīn, *Muḥīṭ*, 20:103, 106; Khusraw, *Durar al-ḥukkām*, 2:126.

<sup>22</sup> Ibn Māzah, *Wāqī‘āt*, 187a–187b. The *fatwā* is also included in al-Walwālījī, *Fatāwā*, 5:315, with no reference to its source.

<sup>23</sup> Kāsānī, *Badā’i‘*, 10:315.

and the institution as applied to the Persians was rejected completely. Thus, unlike the first Balkhī view, which extended the Iraqī rules by applying the *nuṣra* principle, this view stood in opposition to the Iraqī law by completely rejecting the *‘āqila* for the Persians.

This fourth/tenth-century Balkhī opinion spread from Balkh to other locations. In the sixth/twelfth century it was supported by al-Ḥasan b. ‘Alī, Ṣahīr al-Dīn al-Marghīnānī, a member of a famous family of scholars from Farghāna.<sup>24</sup> He argued against the earlier Balkhī view claiming that “what counts is *nuṣra*; the [professional] groups of the shoemakers and of the scholars and so on do not exist for the purpose of providing *nuṣra*, and for this reason, they (i.e., their members) are not liable for blood money payment on behalf of each other (*al-‘ibra bi-l-tanāṣur fa-ijtimā‘ al-asākifa wa-ṭalabat al-‘ilm wa-naḥwihim lā yakūnu li-l-tanāṣur fa-lā yalzamuhum al-taḥammul ‘an ḡayrihim*).”<sup>25</sup> The use of similar wording by proponents of the two opposing views in Balkh, invoking shoemakers and scholars, gives a sense of the polemics between them. Both sides agreed that the principle of *nuṣra* must underlie the *‘āqila*. They also agreed about the existence of professional groups among the Muslims in eastern Iran. Their opinions differed, however, as to the nature of these groups, namely, whether their members could be considered to be united by *nuṣra*; or in other words, they disagreed on how to interpret social reality in legal terms.

<sup>24</sup> For his biography see Qurashī, *Jawābir*, 2:74; Laknawī, *Fawā'id*, 107.

<sup>25</sup> Qāḍikhān, *Fatāwā*, 3:358.

## The Eastern Iranian Ḥanafī Views: The General Context

The views on the *‘āqila* that originated in Balkh represent a large body of legal opinions developed by Ḥanafī jurists between the second/eighth and the fourth/tenth centuries in Khurāsān and Transoxania, mainly in the towns of Balkh and Bukhārā and, to a lesser extent, in Samarqand. By the fifth/eleventh century such opinions had started to become incorporated into the standard Ḥanafī law. The opinions developed in eastern Iran raise a number of questions. One concerns the historical context: To what degree do the opinions reflect the society within which they were produced? Other questions relate to legal literature: In what legal works were these opinions recorded and preserved? By what literary channels were they handed down? How were they introduced into standard Ḥanafī works? The rest of Part III is devoted to discussing these questions. It first deals with them in relation to the legal opinions of the eastern Iranian Ḥanafīs in general, then in relation to the rules of the *‘āqila* in particular.

### 8.1 THE HISTORICAL CONTEXT

In the third/ninth century, when Muḥammad b. Salama issued the opinion that allows for an *‘āqila* based on a common profession, the Ḥanafī school had already existed for more than a century in Balkh. The Ḥanafīs spread into eastern Iran very early, and enjoyed great success, particularly in Balkh, which became the most important Ḥanafī center in this region.<sup>1</sup> From as early as 142/759 – that is, already in Abū Ḥanīfa’s lifetime and

<sup>1</sup> Madelung, “The Early Murji’a,” 38.

about three decades before the Ḥanafīs secured the office of *qāḍī* in Kūfa and Baṣra<sup>2</sup> – until at least the early third/ninth century, the *qāḍīs* of Balkh were overwhelmingly Ḥanafīs, or men close to Abū Ḥanīfa. ‘Umar b. Maymūn al-Rammāḥ (d. 171/787), who studied law under Abū Ḥanīfa, was the *qāḍī* of Balkh for more than two decades from 142/759.<sup>3</sup> Following him, Abū Muṭīr al-Balkhī (d. 199/815), a student of Abū Ḥanīfa and a leading *faqīh* in Balkh held the judgeship of the city for sixteen years,<sup>4</sup> and at least two of the four remaining *qāḍīs* who held office in Balkh before the *miḥna*, which started in 218/833, were Ḥanafīs.<sup>5</sup> It is said indeed that the inhabitants of Balkh were already followers of Abū Ḥanīfa in his lifetime.<sup>6</sup> Some of his most distinguished students were from Balkh, among them Abū Mu‘ād̄h Khālīd b. Sulaymān (d. 199/814),<sup>7</sup> and we know the names of about twenty men of Balkh who transmitted *ḥadīth* or law from Abū Ḥanīfa.<sup>8</sup> Balkh was sometimes nicknamed Murji‘ābād, by reference to the Murji‘ī doctrine of which Abū Ḥanīfa was an important representative,<sup>9</sup> and which was prevalent in the city.<sup>10</sup>

Despite Abū Ḥanīfa’s large early following in eastern Iran, Ḥanafī legal doctrine was first formulated and written down in Iraq, by Abū Ḥanīfa’s Iraqī disciples, and not by those in eastern Iran, who in this early stage still depended on the Iraqīs. An independent center of Ḥanafī legal studies was only established in Balkh toward the end of the second/eighth century, that is, several decades after those in Baṣra and Kūfa. An important figure in establishing this center was Abū Sulaymān Mūsā b. Sulaymān al-Jūzjānī (d. early third/ninth century), Jūzjān being a broad district south of Balkh.<sup>11</sup>

<sup>2</sup> Tsafir, *The History of an Islamic School of Law*, 30, 39.

<sup>3</sup> Madelung, “The Early Murji‘a,” 36.

<sup>4</sup> Qurashī, *Jawābir*, 4:87.

<sup>5</sup> Madelung, “The Early Murji‘a,” 36–37. For a list of the *qāḍīs* of Balkh see Azad, *Sacred Landscape*, 174–176. At least six of the eight *qāḍīs* on her list between the years 142/759 and 369/979 were connected to the Ḥanafī school: ‘Umar b. Maymūn al-Rammāḥ, Abū Muṭīr al-Balkhī, Shaddād b. Ḥukaym (Qurashī, *Jawābir*, 2:247); Layth b. Musāwir (not Musāfir, as appears in *ibid.*, 2:722; cf. Samarqandī, *Fatāwā*, 154); Makkī b. Ishāq al-Bukhārī (Qurashī, *Jawābir*, 3:500); and ‘Ubaydallāh b. Muḥammad al-Bukhārī (*ibid.*, 2:501) (the references to the *Jawābir* are meant to show these *qāḍīs*’ connection to the Ḥanafī school).

<sup>6</sup> Madelung, “The Early Murji‘a,” 36.

<sup>7</sup> Qurashī, *Jawābir*, 2:162.

<sup>8</sup> They are listed by al-Kardārī in his *Manāqib*, 2:515. For a list of legal scholars from Balkh who were connected to the Ḥanafī school see also Melchert, “The Spread of Ḥanafism,” 15.

<sup>9</sup> Madelung, “The Early Murji‘a,” 36; Kardārī, *Manāqib*, 2:515 (text distorted).

<sup>10</sup> It was argued that Ibrāhīm b. Yūsuf “outwardly adhered to Murji‘ism but inwardly to the Sunna,” suggesting the broad influence of the Murji‘a in Balkh (Melchert, “The Spread of Ḥanafism,” 16, citing Ibn Ḥibbān, *Thiqāt*, 8:76).

<sup>11</sup> Yāqūt, *Mu‘jam al-Buldān*, 2:211.

It is worth dwelling upon al-Jūzjānī's biography because most of the sources about him are Iraqī, and they are unaware of his connection to Balkh, or even to eastern Iran. They inform that he settled in Baghdād in the last decade of the second/eighth century or a few years later, and remained there until his death,<sup>12</sup> after the year 200/815.<sup>13</sup> It is not mentioned from where he came to Baghdād. It is also said that al-Jūzjānī transmitted *ḥadīth* in Baghdād,<sup>14</sup> and studied there under al-Shaybānī and Abū Yūsuf. Mu'allā b. Manṣūr (d. 211/826) was a fellow student who also lived in the city, and they both transmitted the works of their two teachers.<sup>15</sup> Fortunately, we possess a compilation from Balkh that contains information about al-Jūzjānī derived from entirely different sources. This is the *Faḍā'il Balkh*, written by 'Abdallāh b. 'Umar b. Muḥammad al-Wā'iz al-Balkhī, who completed it by 610/1214. The Arabic original was then translated into Persian by 'Abdallāh b. Muḥammad b. al-Qāsim al-Ḥusaynī; the translation was completed in the year 676/1278.<sup>16</sup> The *Faḍā'il Balkh* belongs to the common genre of city histories that are, in fact, biographical dictionaries in which the history of the city is indirectly and fragmentarily documented through biographical information about men who lived in the city, or were otherwise connected to it.<sup>17</sup> The *Faḍā'il Balkh* contains seventy biographies of distinguished scholars who either lived in, or were connected with Balkh,<sup>18</sup> and who lived between the first/seventh and the sixth/twelfth century.<sup>19</sup> One of the entries is devoted to al-Jūzjānī. That is, unlike the biographical dictionaries that connect al-Jūzjānī with Iraq and contain no hint of his connection to Khurāsān, a local historian included his biography in a biographical dictionary of those he considered the most significant figures of Balkh.<sup>20</sup> From this biography

<sup>12</sup> Ibn al-Nadīm, *Fihrist*, 255.

<sup>13</sup> Qurashī, *Jawāhir*, 3:518; Laknawī, *Fawā'id*, 354.

<sup>14</sup> Al-Khaṭīb al-Baghdādī, *Ta'rikh Baghdād*, 13:36.

<sup>15</sup> Ṣaymarī, *Akhhār*, 161; Shīrāzī, *Ṭabaqāt*, 144; Dhahabī, *Siyar*, 10:194; Qurashī, *Jawāhir*, 3:124, 492.

<sup>16</sup> Azad, *Sacred Landscape*, 25–27. The translator's name as it appears on the title page of the translation is 'Abdallāh Muḥammad b. Muḥammad b. Ḥusayn Ḥusaynī Balkhī. For a list of the major sources of *Faḍā'il Balkh*, most of which are either unknown or lost, see Radtke, "Theologen und Mystiker," 537–538.

<sup>17</sup> A well-known example of this genre is *Ta'rikh Baghdād* by al-Khaṭīb al-Baghdādī (d. 463/1071).

<sup>18</sup> Radtke, "Theologen und Mystiker," 536.

<sup>19</sup> Azad, *Sacred Landscape*, 29.

<sup>20</sup> One of the criteria that guided al-Wā'iz in selecting the people to be included in his work is that they remained in Balkh for a significant length of time (Azad, *Sacred Landscape*, 148–149). In al-Mudarris' *Mashāyikh Balkh*, 1:88, 158, he appears as "al-Jūzjānī al-Balkhī," probably on the strength of his having a biography in *Faḍā'il Balkh*.

we learn that it was al-Jūzjānī who brought al-Shaybānī's works from Iraq to Khurāsān.<sup>21</sup> We also learn that another scholar who studied with him under al-Shaybānī (in addition that is, to Mu'allā b. Maṣṣūr from Baghdād) was Aḥmad b. Ḥaḥḥ (d. 217/832), known as Abū Ḥaḥḥ al-Kabīr, from Bukhārā. According to al-Wā'iz, after al-Jūzjānī and Abū Ḥaḥḥ had completed their studies, they both returned to eastern Iran. Al-Jūzjānī seems to have returned to Balkh or the surrounding area, while Abū Ḥaḥḥ returned, sometime later, to Bukhārā. Both taught al-Shaybānī's doctrine.<sup>22</sup> According to the Iraqī sources al-Jūzjānī died in Iraq, but according to *Faḍā'il Balkh* his grave is in Fāriyāb, close to Balkh, in the district of Jūzjān; al-Wā'iz testifies that he visited it.<sup>23</sup> If al-Jūzjānī died in Jūzjān, then even if he settled in Baghdād, as the Iraqī sources maintain, he must later have returned home. That he did indeed return some time before his death is supported by the fact that in the first half of the third/ninth century, al-Jūzjānī taught a number of Ḥanafīs from Balkh and other locations in Khurāsān, who are not known to have traveled to Baghdād.<sup>24</sup>

In addition to al-Jūzjānī, the Ḥanafīs who contributed to the foundation of the Ḥanafī center in Balkh were Shaddād b. Ḥukaym (d. 213/829), Khalaf b. Ayyūb (d. 205/821), Abū 'Iṣma 'Iṣām b. Yūsuf (d. 215/830), and his brother Ibrāhīm b. Yūsuf (d. 239/853). All these early Ḥanafīs in Balkh looked to Iraq for legal guidance. They had received their legal training from Abū Ḥanīfa's Iraqī disciples,<sup>25</sup> and the Ḥanafī legal works used by

<sup>21</sup> Wā'iz, *Faḍā'il Balkh*, 211.

<sup>22</sup> *Ibid.*, 211–212.

<sup>23</sup> *Ibid.*, 213.

<sup>24</sup> His Iranian students include the Balkhīs Muḥammad b. Salama and Nuṣayr b. Yaḥyā (Qurashī, *Jawābir*, 3:162, 193; Laknawī, *Fawā'id*, 276, 363); Ghassān b. Muḥammad al-Naysābūrī (Qurashī, *Jawābir*, 2:687), Muḥammad b. Aḥmad Abū Rajā' al-Jūzjānī, the chief *qādī* in Nīshāpūr (Qurashī, *Jawābir*, 3:82; Sam'ānī, *Ansāb*, 2:117); and Aḥmad b. Iṣḥāq al-Jūzjānī (Qurashī, *Jawābir*, 1:144, 177; Laknawī, *Fawā'id*, 33). Their biographies contain no mention of their being in Baghdād, and none of them has an entry in al-Khaṭīb al-Baghdādī's *Ta'rikh Baghdād*, which includes biographies of scholars who were born in Baghdād, lived there, or visited the city (*Ta'rikh Baghdād*, 1:212–213). Thus, al-Jūzjānī must have taught them in his native region. The life spans of these Khurāsānī students – Muḥammad b. Salama was born in 192/807 (Laknawī, *Fawā'id*, 276), and Abū Rajā' al-Jūzjānī died in Jūzjān in 285/898 – date al-Jūzjānī's teaching in Khurāsān to the first quarter of the third/ninth century.

<sup>25</sup> Shaddād b. Ḥukaym studied under Zufar (*Jawābir*, 2:247); Khalaf b. Ayyūb was a student of Abū Yūsuf, Shaybānī, and Zufar; and Ibrāhīm b. Yūsuf was a student of Abū Yūsuf (Madelung, "The Early Murjī'a," 37 n. 23); 'Iṣām b. Yūsuf studied under Abū Ḥanīfa (*ibid.*), or, more likely under Abū Yūsuf and al-Shaybānī (Mudarris, *Mashāyikh Balkh*, 1:158). The connection of the early Balkhī Ḥanafīs to Iraq is mentioned by Melchert, "The Spread of Ḥanafism," 15.

them at that time also came from Iraq. Abū Sulaymān al-Jūzjānī taught the works of al-Shaybānī in Khurāsān, particularly in Balkh, having brought copies of them from Baghdād. He transmitted al-Shaybānī's *al-Siyar al-kabīr* to the Balkhī Nuṣayr b. Yaḥyā (d. 268/882), who transmitted it further in Balkh;<sup>26</sup> he circulated *amālī* of Abū Yūsuf and al-Shaybānī;<sup>27</sup> and he taught al-Shaybānī's *Kitāb al-Aṣl* – his *riwāya* (transmission) of *Kitāb al-Aṣl* has survived and been published.<sup>28</sup> Abū Ḥaḥṣ al-Kabīr brought al-Shaybānī's works to Bukhārā.<sup>29</sup>

The dependence of the eastern Iranians on the Iraqī Ḥanafīs did not last long. By the time of Muḥammad b. Salama, Balkh had become a self-sustaining Ḥanafī community, and young Ḥanafīs of the town no longer had to travel to Iraq to study. Muḥammad b. Salama and his contemporary Nuṣayr b. Yaḥyā are the major representatives of the first generation of Balkhī jurists to study Ḥanafī doctrine in Balkh (or at least in Khurāsān). Muḥammad b. Salama studied under Shaddād b. Ḥukaym and Abū Sulaymān al-Jūzjānī;<sup>30</sup> the latter was also the teacher of Nuṣayr b. Yaḥyā.<sup>31</sup> This generation consolidated the basis laid by their predecessors, and an illustrious Ḥanafī center was consequently constructed in Balkh. At the same time or somewhat later, similar centers started to develop in other places in Khurāsān and Transoxania, notably in Bukhārā, where Abū Ḥaḥṣ al-Kabīr was the leading scholar.<sup>32</sup> Eastern Iran soon became a major center of Ḥanafism, a status that it retained for centuries.

The Ḥanafīs of Khurāsān and Transoxania must have had mixed feelings about the Ḥanafī legal doctrine as produced and recorded in Iraq. On the one hand, it was the doctrine in which they were trained, and which they took it upon themselves to transmit to their students. On the other hand,

<sup>26</sup> Sarakhsī, *Sharḥ Kitāb al-Siyar al-kabīr*, 1:5.

<sup>27</sup> Ṣaymarī, *Akbbār*, 161; Qurashī, *Jawābir*, 3:492.

<sup>28</sup> Shaybānī, *Aṣl*, 1:8 (editor's Introduction); 3:334 n. 2.

<sup>29</sup> Wā'iz, *Faḍā'il Balkh*, 211–212. Al-Shaybānī's *Kitāb al-Aṣl* in the *riwāya* of Abū Ḥaḥṣ is extant, at least in part (Shaybānī, *Aṣl*, 3:334 n. 2). Al-Sarakhsī remarks that al-Shaybānī's latest work, *al-Siyar al-kabīr*, was not transmitted by Abū Ḥaḥṣ because the latter left Iraq before its compilation (Sarakhsī, *Sharḥ Kitāb al-Siyar al-kabīr*, 1:3). This suggests that Abū Ḥaḥṣ did transmit other works of al-Shaybānī.

<sup>30</sup> Qurashī, *Jawābir*, 3:162, 193; Laknawī, *Fawā'id*, 276.

<sup>31</sup> Laknawī, *Fawā'id*, 363.

<sup>32</sup> Madelung, "The Early Murjī'a," 38–39. For a description of the Ḥanafī centers in Balkh and Bukhārā, their nature, and the legal doctrines developed in each of them, see Kaya, "Continuity and Change." For Abū Ḥaḥṣ's leading position in the area of Bukhārā, and for a few general notes about his students see Qurashī, *Jawābir*, 1:166, and Melchert, "The Spread of Ḥanafism," 18.

the founding figures of the school upon whose views Ḥanafī doctrine was based were all Iraqī: Abū Ḥanīfa and his two major disciples Abū Yūsuf and al-Shaybānī, as well as his other important disciples Zufar b. Hudhayl (d. 158/774), from Baṣra, and al-Ḥasan b. Ziyād al-Lu'lu'ī (d. 204/819), a Kūfī who lived in Baghdād.<sup>33</sup> The practices that their doctrine considered, and the practical exigencies to which it was designed to respond, were those of the mainly Arab society of Iraq, rather than those of their own, eastern Iranian community, which had developed under different conditions and in which different customs prevailed. So it was that soon after the Ḥanafīs of eastern Iran encountered Ḥanafī law, they began to develop their own legal opinions. For them, the Iraqī Ḥanafī law that represented (or claimed to represent) the opinions of the school's founders was not of unquestionable authority and hence subject to *taqlīd*. In many cases, the Iraqī rules were viewed rather as a convenient basis from which the local scholars freely deviated, or on which they elaborated to suit the conditions of their own society.

This attitude of the eastern Iranians toward the Iraqī Ḥanafī law of the school's masters is demonstrated by a statement of Aḥmad b. 'Iṣma, Abū al-Qāsim al-Ṣaffār (d. 326/938), a Balkhī scholar who received his Ḥanafī training in Balkh under Nuṣayr b. Yahyā.<sup>34</sup> Abū al-Qāsim al-Ṣaffār made his living from the manufacture of brass or copper, as his last name indicates. He could therefore dispense with outside support,<sup>35</sup> and it was perhaps his freedom from political patronage that permitted him to be an independent and creative legal thinker. Abū al-Qāsim boasts his independence: "I took issue with Abū Ḥanīfa over a thousand legal questions, and [regarding them] I gave *fatwās* according to my own preference and my independent judgment. Nowadays, these thousand questions are being adjudicated according to my legal opinions."<sup>36</sup> Abū al-Qāsim al-Ṣaffār, who so regularly disagreed with the legal opinions attributed to Abū Ḥanīfa, was not an unimportant figure in Balkh, rather the contrary. Muḥammad b. Salama, one of the leading Balkhī jurists of his generation, considered Abū al-Qāsim his successor in teaching and giving *fatwās*.<sup>37</sup> Students who traveled to Balkh to seek knowledge came specifically to study under him (*ilayhi al-riḥla bi-Balkh*);<sup>38</sup> and he was the teacher

<sup>33</sup> For al-Ḥasan b. Ziyād see Qurashī, *Jawābir*, 2:56–57, and for Zufar *ibid.*, 207–209.

<sup>34</sup> Laknawī, *Fawā'id*, 50.

<sup>35</sup> As implied by Mudarris, *Mashāyikh Balkh*, 1:161.

<sup>36</sup> Wā'iz, *Faḍā'il Balkh*, 291.

<sup>37</sup> *Ibid.*, 289.

<sup>38</sup> Laknawī, *Fawā'id*, 50.

of the eminent Ḥanafī Balkhī jurist of the next generation, Abū Ja‘far al-Hinduwanī.<sup>39</sup> Abū al-Qāsim’s prominence in the town, and his self-aggrandizing statement that he disagreed with so many of Abū Ḥanīfa’s legal opinions, suggest that independent legal thinking, and deviation from the Iraqī Ḥanafī law was not merely accepted in Balkh but laudable.

From the fifth/eleventh century onward legal opinions of Abū al-Qāsim al-Ṣaffār can be found under his name in the standard Ḥanafī legal literature.<sup>40</sup> They indicate that his claim, even if exaggerated, was not entirely without foundation, and they also give a sense of his contribution to Ḥanafī law. The development of Ḥanafī legal opinions at variance with the Ḥanafī rules of the school’s masters in Iraq was not unique to Abū al-Qāsim al-Ṣaffār. This was rather a common practice among the eastern Iranian Ḥanafīs between the end of the second/eighth and the end of the fourth/tenth centuries. As Eyyup Said Kaya has demonstrated in detail, the jurists in the Ḥanafī centers in both Balkh and Bukhārā produced legal doctrines distinct from those developed by the Ḥanafīs of Iraq (and also from those of each other).<sup>41</sup>

Numerous such opinions later became part of standard Ḥanafī law. Their source is often easy to identify, for in Ḥanafī literature many of them are referred to by the names of the scholars who issued them, as in the case of al-Qāsim al-Ṣaffār. Some also appear under more general titles, which nevertheless reveal their area of origin, for example, *mashāyikh* Balkh, *mashāyikh* Bukhārā,<sup>42</sup> or more generally, *mashāyikh* Khurāsān or *mashāyikh mā warā’ al-nahr* (Transoxania).<sup>43</sup> These designations are sometimes used when an Iranian opinion is juxtaposed with an exclusively Iraqī one. In such a case, the latter opinion is preceded by *qāla mashāyikh al-‘Irāq* (“the Iraqī scholars opined”), or a variant of this.<sup>44</sup> Thus, Ḥanafī literature retains a distinction between the two major geographical areas in which Ḥanafī law developed: Iraq and Iran.

<sup>39</sup> Mudarris, *Mashāyikh Balkh*, 1:91, 162. Abū al-Qāsim al-Ṣaffār also figures prominently in al-Samarqandī’s *Nawāzil* (discussed later), with 670 references to his legal opinions (Kaya, “Continuity and Change,” 215 n. 26).

<sup>40</sup> See, e.g., Sarakhsī, *Mabsūt*, 6:159; 11:254; 30:173; Samarqandī, *Tuḥfat al-fuqahā*, 3:74; Kāsānī, *Badā’i*, 1:412.

<sup>41</sup> Kaya, “Continuity and Change.”

<sup>42</sup> E.g., Sarakhsī, *Mabsūt*, 2:146; 30:200; Samarqandī, *Tuḥfat al-fuqahā*, 1:78, 2:86; Marghīnānī, *Hidāya*, 4:1436, 1439.

<sup>43</sup> E.g., Sarakhsī, *Mabsūt*, 2:149; Samarqandī, *Tuḥfat al-fuqahā*, 3:269; Kāsānī, *Badā’i*, 2:408, 421.

<sup>44</sup> For examples see Kāsānī, *Badā’i*, 1:414 (following Samarqandī, *Tuḥfat al-fuqahā*, 1:58), and 427.

In the introduction to his *Kitāb al-Nawāzil*, a collection of *fatwās* issued by Ḥanafīs mainly from Balkh, Abū al-Layth al-Samarqandī (d. 375/985), says that the jurists, in offering their individual opinions, paid careful attention to “what they saw in their own time of the differing circumstances and the differing customs of the people (*mā ra’aw min ikhtilāf al-aḥwāl wa-‘ādāt al-nās fī ‘aṣrihim wa-zamānihim*).”<sup>45</sup> That is to say, in many cases a new Ḥanafī legal opinion or the modification of an existing Ḥanafī rule developed in eastern Iran in response to particular conditions experienced by the Muslim inhabitants of the Persian lands. In other words, the Persian jurists provided the solutions that the *ratio legis* determined, as the following examples clearly demonstrate.

The climatic differences between Iraq and eastern Iran gave rise to one relevant example. This concerns the question of whether a man who shovels the snow accumulated in his personal property onto a public road is liable for any consequent damage caused to a human being or to a beast using the road. Iraqī Ḥanafī law, as represented by al-Shaybānī, distinguishes between a thoroughfare (*ṭarīq nāfidh*) and a blind alley (*sikka lā manfadh lahā*). It rules that if the road in question is a thoroughfare, then a man who shovels snow onto it is liable for any damage caused, but that he is not liable if the road is a blind alley.<sup>46</sup> Al-Shaybānī’s guiding principle for distinguishing between a thoroughfare and a blind alley is applied in Ḥanafī law to similar cases. Since a blind alley serves mainly its abutters, they are considered to be joint owners of the alley (*dhālika al-mawḍi’ mushtarak baynahum sharika khāṣṣa*), and therefore have more rights than other people with respect to it. Consequently, if an abutter uses the alley for the necessities of daily life (*ḍarūrāt al-suknā*), such as pouring water during ablution, or binding a beast, he is not liable for any resulting damage. In contrast, the rights of way in a public thoroughfare are the same for all, so that no one is allowed to infringe another’s rights by using the road for such purposes.<sup>47</sup> Following this principle, the abutters of a blind alley are permitted to shovel the snow onto it, but this would not be allowed in a thoroughfare. Abū al-Layth al-Samarqandī adopted a different opinion. Applying *istiḥsān* (juristic discretion) in favor of those who need to clear the snow from their

<sup>45</sup> Samarqandī, *Fatāwā*, 9.

<sup>46</sup> Samarqandī, *Uyūn al-masā’il*, 140.

<sup>47</sup> Sarakhsī, *Mabsūt*, 27:7; Qāḍīkhān, *Fatāwā*, 5:368–369; Marghīnānī, *Hidāya*, 4:1665; Schacht, *Introduction*, 182–183.

abodes, he deviated from al-Shaybānī's opinion and ruled that because in eastern Iran shoveling the snow is a general necessity, and because "the accepted custom among the people which no one rejects (*wa-bihi jarat al-'āda bayna al-nās min ḡhayr nakīr*)" is to throw it onto the road, no one who throws snow on a road, be it a blind alley or a thoroughfare, is liable for any damage that the snow might cause.<sup>48</sup> The reason for the difference between these opinions is explained by the climatic difference: for the Iraqīs clearing the snow was not a general necessity because the amount of snow that falls in their land is small (*lam yakun 'indahum balwā 'amma li-annahū yaqillu al-thalj fī bilādihim*).<sup>49</sup> Al-Shaybānī could, therefore, afford to limit the right to use the road for snow clearance. In eastern Iran, however, where snow falls more often, it was important that the law not place obstacles in the way of clearing private property.

A particularly Iranian legal opinion seems to have stemmed from a political difference, namely, the limits of the ruler's authority over public spaces. According to standard Iraqī Ḥanafī law, as it appears in *ẓāhir al-riwāya*, a man who digs a drain (*bālū'a*) in a public space, following the ruler's order, is not liable for any ensuing damage.<sup>50</sup> His action is taken to be authorized by the ruler's instruction because the ruler has authority over public spaces,<sup>51</sup> as if he owns them.<sup>52</sup> The Ḥanafīs of eastern Iran argued that while this rule might apply to public markets or public roads in Kūfa, it was not appropriate for their area. This is because in Kūfa the ruler was tantamount to the owner of the markets and the public roads, and therefore, decisions regarding organization or construction in these places were made by him (*al-sultān bi-manzilāt al-mālik fī ṭarīq al-'amma wa-sūq al-'amma li-anna al-tadbīr fihimā wa-'imāratāhā ilā al-sultān*), whereas in eastern Iran the market belonged to the shopkeepers, and the ruler had no such authority (*hādihā fī aswāqihim bi-l-Kūfa, fa-ammā fī bilādinā fa-l-sūq li-aṣḥāb al-ḥawānūt fa-lā yakūnu al-tadbīr fī ṭarīq hādihā al-sūq ilā al-sultān*). In Iran, therefore, the ruler had no power to authorize private building in the market,

<sup>48</sup> Samarqandī, 'Uyūn al-masā'il, 140; Walwālījī, *Fatāwā*, 5:295 (the quotation is from the latter); Samarqandī, *Multaqaṭ*, 439. This example of *istiḥsān* is in line with Kaya's observation that *istiḥsān* is the term employed by the Ḥanafīs of Balkh to justify opinions deviating from those of the school's founders (Kaya, "Continuity and Change," 32).

<sup>49</sup> Samarqandī, 'Uyūn al-masā'il, 140.

<sup>50</sup> Shaybānī, *al-Jāmi' al-ṣaḡhīr*, 514.

<sup>51</sup> Sarakhsī, *Mabsūṭ*, 27:25; Marghinānī, *Hidāya*, 4:1666.

<sup>52</sup> Walwālījī, *Fatāwā*, 5:302.

and an individual who constructed a private building was liable for any consequent damage, even if the ruler had approved his action.<sup>53</sup>

Another legal modification in eastern Iran arose from the distribution of the non-Muslim population. Al-Shaybānī ruled that *dhimmīs* were prohibited from offending the Muslims by building new houses of worship, publicly selling wine or pork, or practicing their religion in public. According to his rule, however, the prohibition applied only to *dhimmīs* living in the towns, where major symbolic practices of Islam are maintained, that is, the *ḥudūd* are enforced and Friday prayer is performed. The *dimmīs* of the countryside, where the Muslim population was sparse, were not subject to this prohibition.<sup>54</sup> According to the Balkhī Muḥammad b. Salama, the situation in Khurāsān in his time (i.e., the third/ninth century, about a century after al-Shaybānī) required that the prohibition should also apply to *dhimmīs* who live in the countryside. He explains that when al-Shaybānī made this concession for the countryside he had in mind the *sawād* of Iraq, which in his time was inhabited mainly by *dhimmīs*. In contrast, the *sawād* of Khurāsān was populated mostly by Muslims; the law should therefore prevent the *dhimmī* minority in this area from engaging in practices that might offend their Muslim neighbors (*mā dhakarahu Muḥammad raḥimahu Allāh ta‘ālā fī sawād al-‘Irāq fa-inna ‘āmmat ablihā fī dhālika al-zamān ahl al-dhimma wa-ammā fī sawād Khurāsān fa-innahum yumna‘ūna ‘an dhālika li-anna al-ghālib fīhi al-Muslimūn*).<sup>55</sup> There are other legal opinions issued in eastern Iran, which reflect the reality of the Muslim Persian communities.<sup>56</sup> While some of these opinions result merely from applying an Iraqī legal principle to the different circumstances in eastern Iran (i.e., practicing

<sup>53</sup> Walwālijī, *Fatāwā*, 5:302. According to another opinion, the Iraqī rule applies only to a market crossed by a thoroughfare (ibid.). Markets established on state land, where the shops were owned by the government and rented to the artisans and merchants, are known from Wāsiṭ and Baghdād under the ‘Abbāsids; in the markets of Fāṭimid Cairo and of al-Andalūs shops were also rented from the government (Dūrī, “Nushū’ al-aṣnāf,” 30; Shaykhī, *Aṣnāf*, 151–152). The argument of the eastern Iranian jurists suggests a different situation in their geographical area.

<sup>54</sup> The same applies to towns whose most residents are *dhimmīs* (Shaybānī, *al-Siyar al-kabīr*, 4:263).

<sup>55</sup> Nizām, *al-Fatāwā al-Hindiyya*, 4:509. It is implied here that Muḥammad b. Salama’s was a one man’s opinion, but according to al-Sarakhsī (in *Sharḥ Kitāb al-Siyar al-kabīr*, 4:263), who does not mention Muḥammad b. Salama, this was the opinion followed by many jurists in Balkh.

<sup>56</sup> See, e.g., Samarqandī, *Tuḥfat al-fuqahā*, 3:267–268; Kāsānī, *Badā’i*, 8:273; ‘Aynī, *Bināya*, 11:482–483; Laknawī, *al-Nāfi’ al-kabīr*, 121. More examples are provided by Kaya, “Continuity and Change,” 31–32.

*qiyās*; Muḥammad b. Salama's unique opinion regarding non-Muslims is an example of this), other opinions amount to a deviation from the Iraqī principle.

The Ḥanafī jurists of eastern Iran did not limit their legal production to supplementing the existing law according to the requirements of daily life in their region. They also engaged in discussions of principles and general definitions.<sup>57</sup> A case in point is a question concerning the purity of water used for ablution. According to Ḥanafī law an impure object defiles a small body of stagnant water into which it falls, but not a large one, which can still serve for ablution.<sup>58</sup> The question is how to determine whether a body of water is large or small. The discussion of this minor legal point, involving endless hairsplitting questions, demonstrates the success of eastern Iranian jurists in influencing Iraqī Ḥanafī law.

All the Ḥanafī jurists agree that the size of a pond is defined by whether *khulūṣ* is possible, that is, whether water from one side of the pond can reach the water on the other side and mix with it. The founding authorities of Ḥanafī law, Abū Ḥanīfa, Abū Yūsuf, and al-Shaybānī, tested whether this condition was fulfilled by *taḥrīk*, or moving.<sup>59</sup> That is, if something that disturbs the water on one side of a pond causes movement on the other side too, then the pond is considered small; otherwise it is large and can be used for ablution even if tainted by an unclean object. This is the rule that appears in the early *mukhtaṣars* (or *mutūn*, sing. *matn*, compendium) of the Ḥanafī school.<sup>60</sup> Toward the end of the second/eighth century, the eastern Iranian Ḥanafīs joined the discussion, and introduced various other criteria. Abū Ḥaḥṣ al-Kabīr from Bukhārā estimated the size of the pond by using color: if dye (or saffron) added to the water on one side of a pond affects the color of the water on the other side, then the pond is considered small.<sup>61</sup> A variant of this method, according to which the size is determined by turbidity, was added by Abū Naṣr Muḥammad b. Muḥammad b. Sallām (d. 305/917) from Balkh: if a man who washes himself in the water on one side makes the water on the other side turbid, then the pond is small.<sup>62</sup> Another group of jurists from eastern Iran defined a large or small body of water by measurement. According to Abū Sulaymān al-Jūzjānī, a pond of ten by ten cubits or

<sup>57</sup> Kaya, "Continuity and Change," 32–33.

<sup>58</sup> Samarqandī, *Tuḥfat al-fuḡahā*, 1:56; Kāsānī, *Badā'i*, 1:404.

<sup>59</sup> Kāsānī, *Badā'i*, 1:410; Marghīnānī, *Hidāya*, 1:44.

<sup>60</sup> Ṭaḥāwī, *Mukhtaṣar*, 16; Qudūrī, *Mukhtaṣar*, 3.

<sup>61</sup> Sarakhsī, *Mabsūṭ*, 1:70; Laknawī, *Umdat al-ri'āya*, 1:377.

<sup>62</sup> Andrapatī, *Fatāwā*, 1:128; Laknawī, *Umdat al-ri'āya*, 1:377.

more is considered large, otherwise it is considered small.<sup>63</sup> ‘Abdallāh b. al-Mubārak (d. 181/797), from Marw, and Abū Muṭṭī‘ al-Balkhī established the lower limit of a large pool as fifteen by fifteen cubits, Muḥammad b. Salama as eight by eight or, according to another report, ten by ten. In the fourth/tenth century, an antithetical view of ‘Ubaydallāh b. Ḥusayn al-Karkhī (d. 340/952), from Baghdād, left the decision as to whether a body of water is large or small to the believer’s discretion: if, to his mind, the impurity of the unclean object does not reach the water intended for ablution, then he is allowed to use it.<sup>64</sup> In a long process that can be traced in detail (but that is beyond the scope of our discussion), the ten by ten cubits opinion of Abū Sulaymān al-Jūzjānī gradually prevailed. At the end of this process, in the sixth/twelfth century, al-Marghīnānī gave priority, in his *Hidāya*, to al-Jūzjānī’s rule. He says that this rule, whose purpose is to make the estimation easier for the people (*tawsi‘atan li-l-amr ‘alā al-nās*), is the accepted opinion (*wa-‘alayhi al-fatwā*).<sup>65</sup> Nevertheless, al-Marghīnānī did not include this opinion in his *mukhtaṣar*, *Bidāyat al-mubtadī*, upon which the *Hidāya* is based. In this work he instead remained faithful to the *taḥrīk* opinion, that is, to the opinion of the school’s founders.<sup>66</sup> In the following century, however, al-Jūzjānī’s rule did enter the *mukhtaṣars*, or *mutūn*. In the *mukhtaṣar* of al-Mawṣilī (d. 683/1284), *al-Mukhtār*, al-Jūzjānī’s is the only rule given on this question – “Ablution is not allowed in stagnant water into which an impure object has fallen, unless it [the body of water] is [at least] ten by ten cubits in size.”<sup>67</sup> This is also the only rule in regard to this question in *Wiqāyat*

<sup>63</sup> It is said that al-Jūzjānī heard this opinion from ‘Abdallāh b. al-Mubārak, and then presented it to al-Shaybānī who approved it (Samarqandī, *Fatāwā*, 11, where the text is distorted, but see Mangera, “al-Samarqandī’s *Nawāzil*,” 114). In the Ḥanafī sources, however, this opinion came to be identified with al-Jūzjānī (Kāsānī, *Badā’i*, 1:411; Andrapatī, *Fatāwā*, 1:128; Laknawī, *Umdat al-ri‘āya*, 1:379), with the jurists (*mashāyikh*) of Balkh in general (Samarqandī, *Tuḥfat al-fuqahā*, 1:57), or even more generally, with the eastern Iranian jurists (*‘annmat al-mashāyikh*) (Qāḍikhān, *Fatāwā*, 1:14; Mawṣilī, *Ikhtiyār*, 1:17), and it was claimed that al-Shaybānī abandoned this opinion (Sarakhṣī, *Mabsūt*, 1:71; Ibn Nujaym, *al-Baḥr al-rā’iq*, 1:137, 139), or that it was merely ascribed to him (and to Abū Ḥanīfa and Abū Yūsuf) (Laknawī, *Umdat al-ri‘āya*, 1:379).

<sup>64</sup> For all these views see Kāsānī, *Badā’i*, 1:410–411. Al-Karkhī’s view is attributed to Abū Ḥanīfa as well (Sarakhṣī, *Mabsūt*, 1:71), but this attribution was rarely made until the Ottoman period, Abū Ḥanīfa was rather identified with the opinion of *taḥrīk*.

<sup>65</sup> Marghīnānī, *Hidāya*, 1:44.

<sup>66</sup> Marghīnānī, *Bidāyat al-mubtadī*, 5.

<sup>67</sup> Mawṣilī, *Mukhtār*, 1:17. In his *Ikhtiyār* (1:17), which is a short commentary on *al-Mukhtār*, al-Mawṣilī tries to compromise between the al-Jūzjānī’s view and that of the school’s masters.

*al-ri'āya*, a *mukhtaṣar* by al-Mawṣilī's contemporary, Tāj al-Sharī'a al-Maḥbūbī (d. around 673/1274), and in the later *mukhtaṣar*, the *Kanz al-daqa'iq* of al-Nasafī (d. 710/1310).<sup>68</sup> Ibrāhīm al-Ḥalabī (d. 956/1549) in his *mukhtaṣar*, *Multaqā al-abḥur*, cites both the view of al-Jūzjānī and that of the school's founders.<sup>69</sup>

This development is significant. In the seventh/thirteenth century the eastern Iranian doctrine entered the *mutūn*. These are textbooks that form the most authoritative genre of Ḥanafī legal literature. In them, the core of the school's doctrine is presented in a concise form, which reflects the author's selection of what to include and what to leave out.<sup>70</sup> Authors of *mutūn* regularly resolved disputed questions within the school by presenting only the opinion they favored.<sup>71</sup> By so doing, the author gave priority, or even exclusive authority to this view. The four *mutūn* that contain the view of al-Jūzjānī on pond size – the *Mukhtār*, the *Wiqāya*, the *Kanz*, and the *Multaqā* – are rated very highly in the Ḥanafī school; they are among “the most esteemed of the *mutūn* (*al-mutūn al-mu'tabara*),” which were “compiled with the purpose of transmitting the *zāhir al-riwāya*.”<sup>72</sup> According to the prolific Indian Ḥanafī author Muḥammad 'Abd al-Ḥayy al-Laknawī (d. 1304/1886), it happens, nevertheless, that the author of a *matn* would include in it a rule that was developed after the time of the school's masters. As an example, al-Laknawī mentions al-Jūzjānī's view of pond size.<sup>73</sup> The inclusion of al-Jūzjānī's view in these *mutūn* – in one case juxtaposing it with the opinion of Abū Ḥanīfa and his disciples, and in the other three as the only opinion – symbolizes the triumph of the view developed by a jurist of eastern Iran over the original opinion of the school's founders in Iraq.<sup>74</sup>

<sup>68</sup> Tāj al-Sharī'a, *Wiqāya*, 1:376–379; Nasafī, *Kanz al-daqa'iq*, 1:17

<sup>69</sup> Ḥalabī, *Multaqā al-abḥur*, 1:46–47.

<sup>70</sup> For the hierarchy of the Ḥanafī legal genres, with the *mutūn* at its top, see p. 110.

<sup>71</sup> For examples from al-Qudūrī's *Mukhtaṣar* see Tsafirī, “Abū Ja'far al-Ṭaḥāwī,” 133 n. 62 and 134 n. 68. Another method was to present the opinions in dispute while indicating the preferred one – as does, e.g., Abū Ja'far al-Ṭaḥāwī; see his *Mukhtaṣar*, 75, 80, 162, 285, 316.

<sup>72</sup> Ibn 'Ābidīn, *Sharḥ al-manzūma*, 31–32; for other lists of the most authoritative *mutūn*, which include the *Wiqāya*, the *Kanz*, and the *Mukhtār*, but not the *Multaqā*, see Ibn 'Ābidīn, *Sharḥ al-manzūma*, 7; Laknawī, *al-Nāfi' al-kabīr*, 23; Laknawī, *Umdat al-ri'āya*, 1:47.

<sup>73</sup> Laknawī, *Umdat al-ri'āya*, 1:48.

<sup>74</sup> From the eighth/fifteenth century, the opinion of al-Jūzjānī was gradually superseded by the ancient opinion of al-Karkhī. The status of *zāhir al-riwāya* was now attached to al-Karkhī's opinion (Ibn al-Humām, *Fath al-qadīr*, 1:83; Ibn Nujaym, *al-Baḥr al-rā'iq*, 1:138; Ḥaṣḥakafī, *al-Durr al-mukhtār*, 1:340). This, however, is beyond the scope of our discussion.

Opinions originating among the Ḥanafīs of Central Asia also determined the direction of the development of Ḥanafī law in subjects more significant than the size of a pond. Baber Johansen has suggested that Ḥanafī law of land rent and of land tax underwent gradual but major changes, and that these changes adversely affected the peasants, in that lands cultivated and owned by them were transferred to state ownership. By the Ottoman period, the peasants, who had previously been the proprietors of the land that they cultivated, had become mere laborers with the state as their landlord. The legal process responsible for this change of law started in the fourth/tenth century and continued until the Ottoman period, by which time the land tax, *kharāj*, had changed from a payment that proved the payer's title to the land into the kind of rent paid to a landlord. Johansen identified the legal opinions of Ḥanafī jurists of Central Asia issued between the fourth/tenth and the sixth/twelfth centuries as the starting point for this process.<sup>75</sup>

Yohanan Friedmann has noticed that a turning point in the Ḥanafī discussion of apostasy has resulted from the influence of opinions of eastern Iranian jurists. Until a certain date, Ḥanafī authors discussed extensively the question of how an apostate was to be treated, but the question of how a believer becomes an apostate was dealt with only in a limited fashion. Later, a substantial change can be discerned, in that attention is given mainly to the transgressions that lead to apostasy, and the legal works provide long and detailed lists of such transgressions.<sup>76</sup> Friedmann identifies the source of this change as Ḥanafīs in Transoxania beginning in the fourth/tenth century.<sup>77</sup> An examination of Qāḍikhān's *Fatāwā* supports Friedmann's identification: it shows that it was mainly fourth/tenth-century eastern Iranian jurists, particularly those from Balkh and Bukhārā, who were responsible for the change.<sup>78</sup>

The list of the legal opinions developed by the Ḥanafīs of eastern Iran is much longer than these few examples might suggest. Muḥammad Maḥrūs 'Abd al-Laṭīf al-Mudarris gathered more than five hundred such opinions in his al-Azhar doctoral dissertation (published: Baghdād 1978), which he devoted to legal opinions of the Ḥanafīs of Balkh alone.<sup>79</sup> Many more opinions were issued in other places in eastern Iran. In the second/eighth

<sup>75</sup> Johansen, *Land Tax*; Johansen, "Legal Literature," 454–463.

<sup>76</sup> See, for an example, Ibn Nujaym, *al-Baḥr al-rā'iq*, 5:202–210.

<sup>77</sup> Friedmann, "Conversion, Apostasy and Excommunication," 118–119.

<sup>78</sup> Qāḍikhān, *Fatāwā*, 3:511–522.

<sup>79</sup> Mudarris, *Mashāyikh Balkh*.

and the early third/ninth centuries, Abū Ḥaḥṣ al-Kabīr, in Bukhārā, is known to have issued independent legal views that deviated from the Iraqī Ḥanafī doctrine (*Ikhtiyārāt yukhālifu fihā jumbūr al-aṣḥāb*),<sup>80</sup> and Abū Bakr Muḥammad b. al-Faḍl al-Kamārī (d. 381/991) gave many *fatwās* in Bukhārā in the following century; “the famous *fatwā* collections are replete with his *fatwās* and transmissions.”<sup>81</sup> The unique views of these two jurists are preserved, at least in part, and can be traced in the Ḥanafī legal corpus into which they were incorporated.<sup>82</sup> Adding the legal output of other locations in Khurāsān and Transoxania to Mudarris’ list of the particularly Balkhī views would give an idea of the extensive eastern Iranian contribution to Ḥanafī law, a contribution whose nature and significance still await the examination they deserve.

## 8.2 THE LITERARY CONTEXT

Many Iranian doctrines came into being as *responsa*, or *fatwās*, that is, answers to questions solicited from local legal experts, and given on the basis of the legal reasoning of these experts. *Fatwās*, also called *nawāzil* or *wāqī’āt*, sometimes dealt with cases for which no relevant opinion of the school’s masters was to be found,<sup>83</sup> and sometimes with cases in which the opinions of the masters appeared to be incompatible with contemporary practice. It therefore “happens that they [the jurists who issued the *fatwās*] disagree with the school’s masters, because of guiding indications and reasons that became apparent to them (*li-dalā’il wa-asbāb ḡaharat lahum*).”<sup>84</sup> Many of the legal opinions issued in eastern Iran contain details testifying to their origin in situations of daily life. In addition to the examples already discussed, many examples of direct speech quoted in vernacular Persian in legal works, and particularly in *fatwa* collections, that are otherwise written in Arabic, demonstrate the emergence of material from daily practice.<sup>85</sup>

<sup>80</sup> Laknawī, *Fawā’id*, 39. Abū Ḥaḥṣ is held in high esteem by Ḥanafīs of later generations; in disputable questions about which no opinion of the school’s master is known, he is among the authorities whose opinion is to be followed (Laknawī, ‘*Umdat al-ri’āya*, 1:66).

<sup>81</sup> Laknawī, *Fawā’id*, 303.

<sup>82</sup> For legal opinions of Abū Ḥaḥṣ al-Kabīr see Sarakhsī, *Mabsūt*, 1:70; Kāsānī, *Badā’i*, 1:426. For those of Muḥammad b. al-Faḍl al-Kamārī see Samarqandī, *Tuḥfat al-fuqahā*, 1:61 (repeated in Kāsānī, *Badā’i*, 1:421); Qāḍikhān, *Fatāwā*, 2:225–228, 230, 241; 3:511.

<sup>83</sup> Ibn ‘Ābidīn, *Radd al-muḥtār*, 1:169; Ibn ‘Ābidīn, *Sharḥ al-manẓūma*, 12; Laknawī, *al-Nāfi’ al-kabīr*, 18, 19 (quoting Ibn ‘Ābidīn).

<sup>84</sup> Ibn ‘Ābidīn, *Radd al-muḥtār*, 1:169; Ibn ‘Ābidīn, *Sharḥ al-manẓūma*, 12.

<sup>85</sup> Friedmann, “Conversion, Apostasy and Excommunication,” 119–120, referring to utterances indicating apostasy, in *Kitāb al-Siyar* of Qāḍikhān’s *Fatāwā*, 3:511–522, and in

The *fatwās* issued by the eastern Iranians constitute possibly the most important contribution to the pre-Ottoman Ḥanafī *fatwā* corpus. When Ibn ‘Ābidīn named the *muftīs* whom he considered to have contributed most to the Ḥanafī *fatwā* collections, seven out of nine names he cited were jurists from eastern Iran.<sup>86</sup> This is confirmed by the information listed by Carl Brockelmann; most of the Ḥanafī *fatwā* collections from before the seventh/fourteenth century that are mentioned in his *Geschichte der arabischen Litteratur* are the work of jurists from eastern Iran.

*Fatwās* are rated at the lowest level of legal authority in the three-level hierarchy of Ḥanafī doctrine. At the top, the most authoritative level, are the *ẓāhir al-riwāya* or *masā’il al-uṣūl*, which, as mentioned, are the legal opinions mainly of the three masters of the school, as well as of a few other leading figures of the school’s first generation. These are contained in six books, all said to have been compiled by al-Shaybānī: *al-Jāmi‘ al-kabīr*, *al-Jāmi‘ al-ṣaghīr*, *al-Siyar al-kabīr*, *al-Siyar al-ṣaghīr*, *al-Ziyādāt*, and *Kitāb al-Aṣl*. The transmission of these opinions from al-Shaybānī are considered to be of the highest degree of reliability.<sup>87</sup> Below the *ẓāhir al-riwāya* but above the *fatwās* are the *masā’il al-nawādir*, comprising views of the same first-level authorities, but less reliably transmitted.<sup>88</sup>

There is also a three-level hierarchy of Ḥanafī legal literature, which partly reflects the hierarchy of doctrine. At the top of the literary hierarchy are the *mutūn*, the most authoritative genre; in the middle are the *shurūḥ*, which are commentaries on the *mutūn*; and at the bottom are the collections of *fatwās*, which constitute a distinct legal genre. This means that in a case of contradiction between them, a rule in a *matn* is, generally

other sources. For further examples of utterances in Persian within *fatwās* that are otherwise written in Arabic see Qāḍīkhān, *Fatāwā*, 3:262; Kirmānī, *Jawābir al-fatāwā*, 290b–291a; 293a–294a. For the use of Persian in Kirmānī’s *Jawābir al-fatāwā* see Najmiddinov, “On Kirmānī’s Method,” 761. For a list of arguments in support of the view that *fatwās* in general were anchored in reality, see Hallaq, “From *Fatwās* to *Furū’*,” 32–37; Hallaq, *Authority*, 175–179.

<sup>86</sup> The nine are ‘Iṣām b. Yūsuf (Balkh), Ibn Rustam (d. 211/826, Marw), Muḥammad b. Samā’a (d. 233/847, Baghdād), Abū Sulaymān al-Jūzjānī (Balkh), Abū Ḥafṣ al-Kabīr (Bukhārā), Muḥammad b. Salama (Balkh), Muḥammad b. Muqātil (Rayy), Nuṣayr b. Yahyā (Balkh), and Abū al-Naṣr al-Qāsim (read Muḥammad?) b. Sallām (Balkh) (Ibn ‘Ābidīn, *Sharḥ al-manzūma*, 12).

<sup>87</sup> Ḥājī Khalīfa, *Kashf al-zunūn*, 2:1281–1282.

<sup>88</sup> Ibn ‘Ābidīn, *Sharḥ al-manzūma*, 11–12; Ibn ‘Ābidīn, *Radd al-muḥtār*, 1:168–169; Laknawī, *al-Nāfi‘ al-kabīr*, 17–18 (citing *Katā’ib a’lām al-akhyār* by Maḥmūd b. Sulaymān al-Kaffawī); Hallaq, *Authority*, 47–48. Some Ḥanafī scholars propound other divisions of Ḥanafī doctrine (Laknawī, *al-Nāfi‘ al-kabīr*, 19 and 22–23).

speaking, to be preferred to one in a *sharḥ*, and a rule in a *sharḥ* is to be preferred to one in a collection of *fatwās*.<sup>89</sup>

As Wael Hallaq has shown in detail, *fatwās* constantly crossed the literary boundaries, despite their inferior status.<sup>90</sup> Many of them moved from the collections in which they were first compiled into more authoritative works, both *shurūḥ* and, eventually, *mutūn*, thereby penetrating into higher levels of legal doctrine, and becoming an integral part of the Shari‘a.

The process by which the early eastern Iranian *fatwās*, issued between the second/eighth and the fourth/tenth centuries, permeated Iraqī Ḥanafī law lasted for centuries. First, the *fatwās* were collected and compiled. The earliest Ḥanafī *fatwā* compilation is the previously mentioned *Kitāb al-Nawāzil* by Abū al-Layth Naṣr b. Muḥammad al-Samarqandī,<sup>91</sup> a prolific author and one of the leading Ḥanafīs of Balkh,<sup>92</sup> whose legal views were held in high esteem by later generations of Ḥanafī jurists.<sup>93</sup> The *Nawāzil*, which was published only recently,<sup>94</sup> is a work of immense value. It preserves the *fatwās* of the important jurists of Balkh from the end of the second/eighth up to the second half of the fourth/tenth century. Al-Samarqandī lists some of them in the introduction to the *Nawāzil*: Muḥammad b. Salama, Nuṣayr b. Yaḥyā,

<sup>89</sup> Laknawī, *al-Nāfi‘ al-kabīr*, 25–26; Ibn ‘Ābidīn, *Sharḥ al-manẓūma*, 32; Johansen, “Legal Literature,” 448–449, 452.

<sup>90</sup> Hallaq, “From *Fatwās* to *Furū’*”; Hallaq, *Authority*, 180–190.

<sup>91</sup> Ḥājī Khalīfa, *Kashf al-zunūn*, 2:1282; Ibn ‘Ābidīn, *Radd al-muḥtār*, 1, 169; Ibn ‘Ābidīn, *Sharḥ al-manẓūma*, 12, quoted in Laknawī, *al-Nāfi‘ al-kabīr*, 19.

<sup>92</sup> Kaya, “Continuity and Change,” 28.

<sup>93</sup> According to the sixth/twelfth-century *qāḍī* Muḥammad b. Nūḥ al-Qābisī, if scholars disagree about an issue concerning which no previous opinion of the school’s early jurists is known, then the opinions of certain later jurists, among them al-Samarqandī, are to be followed (Laknawī, *‘Umdat al-ri‘āya*, 1:66).

<sup>94</sup> A work under the title *Fatāwā al-nawāzil*, which was published in Hyderabad in 1355/1936 and again in Beirut in 2004 and ascribed to Abū al-Layth al-Samarqandī, is, in fact, a work by a different author (apparently *Mukhtārāt al-Nawāzil* by al-Marghīnānī), which the editors erroneously identified as al-Samarqandī’s *Nawāzil* (Lu‘ay al-Khalīlī, *La’ālī’ al-maḥār*, 1:403; Mangera, “al-Samarqandī’s *Nawāzil*,” 8–10). A critical edition of the first six chapters was made by Abdur Rahman Mangera as part of his (unpublished) PhD dissertation (SOAS 2013). The entire or almost the entire work was edited by Muḥammad Sālim Hāshim and published in Beirut in 2017 under the title *al-Fatāwā min aqāwīl al-mashāyikh fī al-aḥkām al-shar‘iyya*. This edition is based on a single manuscript, from which, in comparison to other manuscripts of the work, the last two chapters are missing (one is a chapter on theology, the other is a biographical chapter), as well as the last lines of the chapter before them. I do not know if the missing chapters were part of the original *Nawāzil*.

Muḥammad b. Muḥammad b. Sallām,<sup>95</sup> Abū al-Qāsim al-Ṣaffār, Abū Bakr al-Iskāf, ‘Alī b. Aḥmad (Abū al-Ḥasan al-Fārisī, d. 355/966), and al-Samarqandī’s teacher, Abū Ja‘far al-Hinduwanī.<sup>96</sup> The collection also contains opinions of earlier Balkhīs belonging to the first Ḥanafī generation in the town, such as Khalaf b. Ayyūb and Shaddād b. Ḥukaym, as well as some scholars from elsewhere, including Muḥammad b. Muqātil al-Rāzī (d. 248/862), from Rayy, and Muḥammad b. Shujā‘ al-Thaljī, who died in 266/879, from Baghdād. The *fatwās* in the *Nawāzil* are arranged in chapters according to subject matter (albeit in a rather rudimentary fashion). Although the exact wording of the *fatwās* may have been altered, they retain the questions as well as the answers, and also the names of the jurists who issued them. Al-Samarqandī often comments on the *fatwās*, adding details, interpreting, or expressing disagreement with them.

As he says in the introduction to the *Nawāzil*, al-Samarqandī also included in it opinions of the school’s masters that were not embodied in other works. A work devoted entirely to such opinions of the school’s masters, entitled ‘*Uyūn al-masā’il*’, was also compiled by al-Samarqandī; he mentions this work too in the introduction to the *Nawāzil*.<sup>97</sup> Al-Samarqandī differentiates between the school’s masters and later jurists who lived between the late second/eighth and the fourth/tenth centuries, by referring to the former as *aṣḥāb*, and to the latter as *mashāyikh*.<sup>98</sup> These distinguishing terms, in addition to the fact that al-Samarqandī always presents the opinions under the names of the jurists who issued them, emphasize the different authority of the two groups, and of their opinions. At the same time, however, including opinions of the *aṣḥāb* and the *mashāyikh* in the same compilation is a preliminary step toward intertwining them. In other words, the importance of the *Nawāzil* lies not only in preserving the legal material from eastern Iran but also in juxtaposing it with the opinions of the school masters from Iraq.

<sup>95</sup> Sometimes referred to as Muḥammad b. Sallām (Mangera, “al-Samarqandī’s *Nawāzil*,” 362).

<sup>96</sup> Samarqandī, *Fatāwā*, 9.

<sup>97</sup> The ‘*Uyūn al-masā’il*’ has been published, and is cited later.

<sup>98</sup> Samarqandī, *Fatāwā*, 9–10. These distinguishing terms are not unique to al-Samarqandī; they have been employed in Ḥanafī literature since the fourth/tenth century (Kaya, “Continuity and Change,” 27). The term *mashāyikh*, by which al-Samarqandī refers to the eastern Iranians in particular, may refer in other contexts to scholars from other locations. For the use of this distinguishing terminology by Qāḍīkhān, see p. 116; see also Laknawī, ‘*Umdat al-ri‘āya*’, 1:25, where the early Ottoman Ḥanafī al-Kaffawī is cited. In what follows I shall adopt this Ḥanafī terminology, referring to Abū Ḥanīfa and his direct disciples as *aṣḥāb*, and to the later Ḥanafī jurists as *mashāyikh*.

*Fatwās* were also collected from places other than Balkh. A compilation was made of the *fatwās* of the aforementioned Muḥammad b. al-Faḍl al-Kamārī, a leading scholar and apparently the most fruitful *muftī* of Bukhārā in the fourth/tenth century,<sup>99</sup> and *fatwās* issued by the Ḥanafī jurists of Samarqand (*Fatāwā ahl Samarqand*) were also collected.

These three *fatwā* collections, from three Ḥanafī centers of eastern Iran, namely, Balkh, Bukhārā, and Samarqand, are included in a larger collection by Ḥusām al-Dīn ‘Umar b. ‘Abd al-‘Azīz Ibn Māzah, who was killed by infidels in 536/1141, and was therefore called al-Ṣadr al-Shahīd (meaning “the great [scholar] who died a martyr’s death”).<sup>100</sup> His collection, entitled *Kitāb al-Wāqī‘āt* or *al-Wāqī‘āt al-Ḥusāmīyya fī madhhab al-Ḥanafīyya*, is of prime importance in preserving early *fatwā* material.<sup>101</sup> In addition to the three compilations mentioned, it contains al-Samarqandī’s *‘Uyūn al-masā’il*, and the *Wāqī‘āt* of Abū al-‘Abbās al-Nāṭifī, from Baghdād. Ibn Māzah not only collected *fatwās*, but also processed them, removing details unnecessary for law books. As Wael Hallaq has demonstrated, *tajrīd*, that is, removing from the *fatwās* details irrelevant for the standard law books, is a step toward incorporating the *fatwās* in the standard law.<sup>102</sup> Ibn Māzah stripped the *fatwās* of their question-and-answer structure, and omitted the names of the jurists who issued them, as well as other irrelevant details, leaving the bare legal decision. In this way, he prepared the *fatwā* to become a Shar‘ī rule. At the same time, when dealing with material from the *Nawāzil* he often added al-Samarqandī’s comments to a *fatwā*, producing a combination of the original *fatwā* and its commentary. In cases in which al-Samarqandī disagreed with the opinion in the *fatwā*, Ibn Māzah sometimes decided the dispute by leaving only one of the two opinions.<sup>103</sup>

<sup>99</sup> Kaya, “Continuity and Change,” 29; for his works see Mangera, “al-Samarqandī’s *Nawāzil*,” 375.

<sup>100</sup> Dhahabī, *Siyar*, 20:97; Laknawī, *Fawā’id*, 242. Ibn Māzah was killed in or around Samarqand in the battle of Qaṭawān (or Qaṭwān), between Sanjar, the Saljūq ruler of Khurāsān, and the Qarā Khitāy (Ibn al-Athīr, *Kāmil*, 11:86). The *Fatāwā ahl Samarqand* at Ibn Māzah’s disposal may not refer to a compilation, but rather to *fatwās* that were issued by jurists of Samarqand on various occasions, and were first compiled by Ibn Māzah (Marghīnānī, *Tajnīs*, 1:58 [editor Introduction]; Khalīlī, *La’ālī’ al-mahār*, 1:443). After Ibn Māzah, the *Fatāwā ahl Samarqand* became a source used by many other Ḥanafī authors (listed in Khalīlī, *La’ālī’ al-mahār*, 1:443), including al-Walwālījī (e.g., Walwālījī, *Fatāwā*, 5:208).

<sup>101</sup> I thank Murteza Bedir for drawing my attention to this work. The title on the manuscript I use is *al-Fatāwī al-Shahīdīyya al-Ḥusāmīyya*, but see Brockelmann, *GAL*, 1:462.

<sup>102</sup> Hallaq, “From *Fatwās* to *Furū’*,” 44–48 (including examples).

<sup>103</sup> Compare, e.g., the answer given by Muḥammad b. Muqātil regarding a man who was insulted by another, to which al-Samarqandī added his own opinion, in Samarqandī,

Ibn Māzah did not mix the material from his five sources. The opinions in each chapter of the *Wāqī'āt* remain in separate blocks according to the source from which they were derived, each such block being preceded by a letter that indicates its source. The material from the 'Uyūn, devoted to opinions of the *aṣḥāb*, thus appears under the letter 'ayn, separated from the opinions from the *Nawāzil*, mostly of the *mashāyikh*, which are indicated by a *nūn*.<sup>104</sup> At the same time, however, by omitting the names of the jurists who issued the *fatwās*, Ibn Māzah detached the *fatwās* from those who gave them, thereby blurring the difference in legal authority between opinions of the *mashāyikh* and those of the *aṣḥāb*. This method further contributed to the process of equalizing the authority of the opinions from the two sources, which began in al-Samarqandī's *Nawāzil*.

The process of combining the opinions of the *mashāyikh* with those of the *aṣḥāb* continued after Ibn Māzah. Ibn Māzah left behind him an incomplete draft of a legal work based on his *Wāqī'āt* collection. His student, Alī b. Abī Bakr al-Marghīnānī, the well-known author of the *Hidāya*, undertook the completion of this unfinished work in his *al-Tajnīs wa-l-mazīd* (*Classification and Addition*). As the title of his work suggests, al-Marghīnānī both improved the arrangement of the material found in Ibn Māzah's *Wāqī'āt* and expanded its scope. While al-Marghīnānī follows Ibn Māzah's method of keeping the opinions in blocks according to the works from which they are derived, he breaks these blocks into smaller units, allowing for a more refined division of the material. The Chapter on Purity (*Kitāb al-Ṭahārāt*), for example, is divided into five parts in the *Wāqī'āt*, according to the five sources from which the material was gathered, while in the *Tajnīs* the same chapter is divided into seventeen sections, according to subtopics.<sup>105</sup> In each such section the separation of opinions according to their source is retained, as are the letters identifying these sources, according to the method of Ibn Māzah. Nevertheless, the division of the large blocks of material into much smaller ones results in a more frequent juxtaposition of the material, notably of the opinions of the *aṣḥāb* and those of the *mashāyikh*. Al-Marghīnānī also supplemented the *Wāqī'āt* of Ibn Māzah with legal opinions from two types of sources not

*Fatāwā*, 492, with its revised version in Ibn Māzah, *Wāqī'āt*, 180b (the text of the *Fatāwā* is significantly distorted; for *jā'a wazghunnahu* read *tajāwaza 'anhu*; for *yantaṣira* read *yaqtaṣsa*, according to Samarqandī, *Kitāb al-Nawāzil*, 243a).

<sup>104</sup> Material from the other three sources, the *Fatāwā ahl Samarqand*, the compilation of Muḥammad b. al-Faḍl's *fatwās*, and al-Nāṭifī's *Wāqī'āt* are indicated by *ṣīn*, *bā'*, and *wāw*, respectively.

<sup>105</sup> Marghīnānī, *Tajnīs*, 1:118–374.

used by Ibn Māzah. One type is later *fatwās*, issued by Iranian jurists during the fifth/eleventh and sixth/twelfth centuries (among them the fifth/eleventh-century Muḥammad b. Aḥmad b. Shujā‘ from Samarqand, and the eminent ‘Umar b. Muḥammad Abū Ḥafṣ al-Nasafī, born in Nasaf and died in Samarqand in 537/1142<sup>106</sup>). The other type of material is standard Ḥanafī law, taken apparently from the three works of al-Ḥākim al-Shahīd al-Marwazī (d. 334/945), *al-Kāfī*, *al-Mukhtaṣar*, and *al-Muntaqā*, and from al-Sarakhsī’s *Mabsūṭ*.<sup>107</sup> Placing *fatwās* side by side with legal rules from major works of standard Ḥanafī law, such as those written by al-Ḥākim al-Shahīd and al-Sarakhsī,<sup>108</sup> blurred the distinction between the two categories of legal material.

More important, however, in the elevation of the legal opinions originating in eastern Iranian *fatwās* to the level of standard Ḥanafī law was a series of works by other eastern Iranian authors of the sixth/twelfth century. These books interweave, and sometimes completely integrate, the *fatwā* material with Ḥanafī authoritative legal doctrine. They do this by combining the two kinds of material, often seamlessly, into a single legal discussion. Among these books, most of which were already mentioned, are *al-Fatāwā al-Walwālīyya* by al-Walwālījī; the *Khulāṣat al-fatāwā* of Iftikhār al-Dīn Ṭāhir b. Aḥmad al-Bukhārī;<sup>109</sup> *al-Fatāwā al-Sirājiyya* by Sirāj al-Dīn ‘Alī b. ‘Uthmān al-Ūshī (d. 569/1173), from Farghāna (according to his *nisba*); and the best known and most frequently quoted in later Ḥanafī works, *al-Fatāwā al-Khāniyya* by Qāḍikhān.<sup>110</sup> I refer to these works collectively as “the intermediate works.” The term indicates their role in the process by which the Iranian *fatwās* were merged with the standard Ḥanafī law produced in Iraq.

Each of the intermediate works has its own characteristics, but they all have one thing in common: a large number of opinions originating in Iranian *fatwās* are intermixed, on an equal footing, with the

<sup>106</sup> A few details about Ibn Shujā‘ can be inferred from his son’s biography in al-Qurashī’s *Jawāhir*, 3:317, in addition to the meagre information in his own biography (*ibid.*, 28). For Abū Ḥafṣ al-Nasafī see Laknawī, *Fawā’id*, 243; his *fatwās* were collected also by Abū Bakr Muḥammad b. ‘Abd al-Rashīd al-Kirmānī, as he indicates in the introduction to his *Jawāhir al-fatāwā*, 2a (for *Jawāhir al-fatāwā* see p. 129).

<sup>107</sup> Marghīnānī, *Tajmīs*, 1:59 (editor’s Introduction).

<sup>108</sup> For the authority of these works, see Ibn ‘Ābidīn, *Radd al-muḥtār*, 1:169–170.

<sup>109</sup> The death date 542/1147 which appears in Laknawī, *Fawā’id*, 146 is hardly compatible with the statement that appears on the same page, according to which Iftikhār al-Dīn studied under Qāḍikhān, who died in 592/1196.

<sup>110</sup> For the high reputation of Qāḍikhān in the eyes of later jurists, see Ibn ‘Ābidīn, *Radd al-muḥtār*, 10:333.

authoritative opinions of the school's founders. There are earlier examples of similar blending. In the fifth/eleventh century, only a few decades after al-Samarqandī, Abū al-'Abbās al-Nāṭifī compiled a short legal compendium, entitled *Jumal al-aḥkām*. It has an unusual structure in that material from al-Samarqandī's three works, the *Nawāzil*, the '*Uyūn al-masā'il*', and *Khizānat al-fiqh*, is intertwined with al-Shaybānī's works of *ẓāhir al-riwāya*.<sup>111</sup> More often than not, al-Nāṭifī gives no reference to the source of an opinion, and the result is a body of law in which equal authority is given to opinions derived from works of unequal authority. It appears, however, that al-Nāṭifī's work is an early example of a trend that intensified considerably in the following century, when the practice of integrating *fatwā* material with Ḥanafī standard doctrine became much more widespread. This tendency was observed critically by later Ḥanafī authors. In the early Ottoman period, Maḥmūd b. Sulaymān al-Kaffawī (d. 990/1582) noted, in his *Katā'ib a'lām al-akhyār*, that while some authors retained the division between the *uṣūl*, the *nawādir*, and the *fatāwā* (which represent three levels of legal authority) in their arrangement of legal material, in other compilations, such as Qāḍikhān's *Fatāwā* and *Khulāṣat al-fatāwā* by al-Bukhārī, doctrine from the different genres was mixed,<sup>112</sup> so that the *fatwās* appear "mixed with, and not distinguished from (*mukhtaliṭa ghayr mutamayyiza*) [the doctrine of the school's Iraqī masters]."<sup>113</sup> A warning was issued against the danger of being misled by this mixture into ascribing the legal opinions of later scholars to Abū Ḥanīfa and his two disciples.<sup>114</sup>

In fact, both al-Walwālījī and Qāḍikhān testify, each in the introduction to his *fatwā* collection, to their method of combining *fatwā* material with the legal views of the school founders. Qāḍikhān says: "I have mentioned in this book the [opinions concerning] the issues which occur most frequently (*al-masā'il allatī yaḡhlibu wuq'ūhā*), and which are needed most (*wa-tamassu al-ḥāja ilayhā*), . . . some of them were transmitted from our early masters ('*an aṣḥābinā al-mutaqaddimīn*), others were handed down from the later jurists ('*an al-mashāyikh al-muta'akhhirīn*)."<sup>115</sup> By his own testimony, then, the principle that guided Qāḍikhān in his selection of material was not how authoritative a

<sup>111</sup> Nāṭifī, *Jumal al-aḥkām*, 89 (editor's Introduction).

<sup>112</sup> Laknawī, '*Umdat al-ri'āya*, 1:43.

<sup>113</sup> Ibn 'Ābidīn, *Sharḥ al-manzūma*, 12; Ibn 'Ābidīn, *Radd al-muḥtār*, 1:169.

<sup>114</sup> Laknawī, *al-Nāfi' al-kabīr*, 20.

<sup>115</sup> Qāḍikhān, *Fatāwā*, 1:7.

legal opinion was, but rather the extent to which that opinion could be useful.<sup>116</sup> In this way, opinions of the *mashāyikh* are given the same weight as those of Abū Ḥanīfa. The method of al-Walwālījī as explained in his introduction was similar. The basis for his *Fatāwā* is a work by Ibn Māzah, *al-Jāmi‘ li-nawāzil al-aḥkām allatī ta‘ummu bihi balwā al-anām* (A Collection of Legal Judgments Necessary for All Human Beings). To this al-Walwālījī added important cases of an ordinary kind, while excluding rare or bizarre ones (*al-wāqī‘āt al-muhimma al-qarība dūna mā yanduru wuqū‘uhu min al-nawā‘ib al-gharība*). Finally, he imported material from the works of al-Shaybānī, producing (he claims) a collection in which everyone can find what he seeks.<sup>117</sup>

The extent to which the intermediate works of the sixth/twelfth century succeeded in incorporating eastern Iranian legal views into the Ḥanafī standard law as it developed in Iraq can be determined by a comparison of the Ḥanafī legal works that preceded the intermediate works with those that came after them. Such a comparison can show whether a significant number of the views of the schools’ masters were replaced by, or were juxtaposed with, eastern Iranian views after the sixth/twelfth century.

This question is to be examined in the historical context of the expansion of the Turks, who had been predominantly Ḥanafis since the fifth/eleventh century. With their advance westward from Central Asia into the central Islamic lands, the uniquely eastern Ḥanafī doctrines, of both theology (namely, Māturīdism) and law, also spread in these lands. The Saljūqs, who had a strong predilection for the Ḥanafī school, made constant efforts to establish it in the areas under their rule. While favoring and officially supporting the Ḥanafis in general, they clearly preferred Ḥanafī scholars from eastern Iran to other authorities, and invited them to occupy high-ranking positions in politics, administration, and particularly, institutions of learning. These attractive opportunities gave rise to a large-scale migration of Ḥanafis from the eastern Islamic world to its center, and the Ḥanafī tradition that they represented enjoyed a growing respect. This process continued in the Mongol period, so that in the sixth/twelfth and the seventh/thirteenth centuries, eastern Iranian Ḥanafis played an extremely important role in the system of education. They occupied the main teaching positions in western Iran, Iraq, Syria, Egypt, and of course,

<sup>116</sup> The tendency represented by Qāḍīkhān, to determine the content of works of substantive law by its current relevance, is discussed by Wael Hallaq (“From *Fatwās* to *Furū‘*,” 49), who cites the same words from Qāḍīkhān’s *Fatāwā*.

<sup>117</sup> Walwālījī, *Fatāwā*, 1:27–28.

in Anatolia. They determined the curriculums of the *madrasas* in these locations, and established the basis of Ḥanafī scholarship for future generations.<sup>118</sup> Against this historical background, it is easy to see how the opinions of eastern Iranian Ḥanafīs would make inroads into Ḥanafī standard law.

One example of this happening relates to the question of pond size, discussed previously.<sup>119</sup> On this topic, al-Jūzjānī's opinion was fully incorporated into the *mutūn* in the seventh/thirteenth century, replacing or juxtaposed with the masters' rule. Muḥammad b. Salama's view on the composition of the *'āqila* provides a further example, as discussed in the next [Chapter](#).

<sup>118</sup> Madelung, "The Spread of Maturidism," 124ff.

<sup>119</sup> On pp. 105–107.

## The Eastern Iranian Ḥanafī Views on the ‘*Āqila*: An Examination

Against the historical and literary background of the Ḥanafī *fatwās* in eastern Iran, this section deals with the three distinctive opinions regarding the ‘*āqila* that developed there, and that were presented in Chapter 7: the opinions about the ‘*āqila* of those who have a *dīwān* (Section 7.1) and of those who do not have a *dīwān* (Section 7.2), and the opinion that the Persians have no ‘*āqila* at all (Section 7.3). I attempt to show how and to what extent each of these views penetrated Ḥanafī literature, and the historical context within which each of them developed.

### 9.1 THE ‘*ĀQILA* OF THOSE WHO HAVE A *DĪWĀN*

As was noted in Section 7.1, this view extends the *dīwān* innovation of Iraqī Ḥanafī law in such a way that not only a military but also a civilian *dīwān*, *dīwān al-kuttāb*, may serve as an ‘*āqila*, on the condition that *nuṣra* exists among its members. This implies a division of government employees into military personnel and scribes (or secretaries), under the designations *ghuzāt* and *kuttāb*, respectively.

#### 9.1.1 *The Literary Context*

This view has left few traces in the surviving literature, and its history is correspondingly obscure. In the sixth/twelfth century it appears in Ḥanafī literature in the works of al-Walwālījī and his contemporary İftikhār al-Dīn al-Bukhārī, but it may have been formulated before that century because the material that these works contain usually originates from before the lifetime of the authors. This view was subsequently recorded by later

authors: Burhān al-Dīn al-Bukhārī, Shams al-Dīn Muḥammad al-Quhistānī (d. 962/1554), and the Syrians ‘Alā’ al-Dīn al-Ḥaṣkaḥī (d. 1088/1677) and Ibn ‘Ābidīn.<sup>1</sup> None of these jurists, however, developed it beyond al-Walwālījī’s formulation; in fact this view is barely discussed in Ḥanafī literature. It clearly did not gain much of a following, and its absence from the Ḥanafī *mutūn* reveals that it did not acquire high authority. It is nevertheless worth pointing to some evidence that connects the administrative division implied by this view to the environment of the jurists who produced it.

### 9.1.2 *The Historical Context*

In al-Shaybānī’s *Kitāb al-Aṣl* and in subsequent works of the Iraqī Ḥanafī law, the term *dūwān* refers to the military *dūwān*. But even in al-Shaybānī’s lifetime this had ceased to be the exclusive or even the main meaning of the term. As Umayyad administration developed, the *dūwāns* grew in number and specialization,<sup>2</sup> reducing the all-embracing military *dūwān* – which figured so prominently in early Umayyad administration and inspired the Iraqī Ḥanafī law of the *‘āqila* – to just one *dūwān* among many. The term *dūwān* came to indicate any register used for keeping records in any official field, and, by implication, a governmental department. Many such *dūwāns* are known to us, from the Umayyad down to the Mamlūk period,<sup>3</sup> and state manuals provide detailed information on a number of them.<sup>4</sup> The unqualified designation *dūwān* consequently gave way to *dūwān al-jund*, or *dūwān al-jaysh*, as a way of distinguishing it from other, civilian *dūwāns*.<sup>5</sup> Al-Walwālījī, representing a view that also appears in the works of other eastern Iranian Ḥanafīs, seems to have taken this change into account, and adjusted the law accordingly.

<sup>1</sup> Burhān al-Dīn, *Muḥīṭ*, 20:98; Quhistānī, *Jāmi’ al-rumūz*, 2:364; Ḥaṣkaḥī, *al-Durr al-muntaqā*, 4:411; Ibn ‘Ābidīn, *Radd al-muḥtār*, 10:326.

<sup>2</sup> For the gradual expansion of the *dūwān* system under the Umayyads and more so under the Abbāsids see Duri, *Early Islamic Institutions*, 168–173.

<sup>3</sup> *EI*(2), s.v. “Dīwān” (Duri et al.). Notable among the *dūwāns* were the *dūwān al-kharāj* and *dūwān al-ṣadaqa*, which registered land taxes and alms payments, the *dūwān al-rasā’il*, documenting the caliph’s official correspondence, and the *dūwān al-naḥāqāt*, which recorded state expenditure (Duri, *Early Islamic Institutions*, 168–169). For a survey of the Abbāsīd *dūwāns* see also: Løkkegaard, *Islamic Taxation*, 147ff. The building in which the *dūwān* was kept was also called a *dūwān* (Jahshiyārī, *Wuzarā’*, 106, 166).

<sup>4</sup> E.g., Qudāma b. Ja’far, *Kharāj*, 33ff; Māwardī, *al-Aḥkām al-sulṭāniyya*, 252–272.

<sup>5</sup> Cf. Kennedy, *Armies*, 59.

Extending the ‘*āqila* to those registered in the *dūwān al-kuttāb* is compatible with an administrative and social model that must have been familiar to al-Walwālījī and his contemporary Ḥanafī jurists, as also to earlier ones. The dichotomy between *kuttāb* and *ghuzāt* that emerges from their opinions echoes theories about social classes in medieval Islamic Iran, and perhaps also the reality. Theories of social classes developed in Islamic Iran under the influence of the Sasanian quadripartite theory and practice of social stratification (and were also affected by the political philosophy of Plato).<sup>6</sup> The establishment of social classes in pre-Islamic Iran is ascribed to the legendary Iranian hero Jamshīd.<sup>7</sup> According to al-Ṭabarī, Jamshīd classified (*ṣannafa*) the people into four classes (*Ṭabaqāt*): warriors (*muqātila*), jurists (*fuqahāʾ*), scribes (or government functionaries) (*kuttāb*), and craftsmen and farmers (*ṣunnāʾ* and *ḥarrāthīn*).<sup>8</sup> A similar division had in fact been established in Sassanid Iran by the fifth century CE. In this division the classes of the society were men of religion (including judges), warriors, scribes (a class comprising the members of the bureaucracy), and craftsmen (including merchants and farmers).<sup>9</sup>

This quadripartite division also appears in a theory formulated by Naṣīr al-Dīn Ṭūsī (d. 673/1274), in his highly esteemed and influential book of ethics and practical philosophy, *Akhlāq-i Nāṣiri* or *Nasirean Ethics*, written under the influence of Greek philosophy and completed around 633/1235.<sup>10</sup> In the third part of the work, which Ṭūsī devoted to politics, he divides society into four groups, each having a particular function in the society. The first of these groups is composed of the men of the pen (*ahl-i qalam*), “such as the masters of the sciences and the branches of knowledge, the canon-lawyers, the judges, secretaries (*kuttāb*), accountants, geometers, astronomers, physicians and poets.” The second group consists of the men of the sword (*ahl-i shamshīr*), namely, “fighters, warriors, volunteers, skirmishers, frontier-guards (*ghāziyān*), sentries, valiant men, supporters of the realm and guardians of the state.” The third category is men of negotiation (*ahl-i muʿāmala*), “merchants who carry goods from one region to another, tradesmen, masters of crafts, and

<sup>6</sup> *Enc. Iranica*, s.v. “Class System (iv. Classes in Medieval Islamic Persia)” (Ashraf and Banuazizi).

<sup>7</sup> *El*(2), s.v. “Djamshīd” (Huart [Massé]).

<sup>8</sup> Ṭabarī, *Taʾrīkh*, I:180.

<sup>9</sup> Perikhanian, “Iranian Society and Law,” 633.

<sup>10</sup> Madelung, “Naṣīr al-Dīn Ṭūsī’s Ethics,” 85; *Enc. Iranica*, s.v. “Class System (iv. Classes in Medieval Islamic Persia)” (Ashraf and Banuazizi).

tax-collectors,” and the fourth group consisted of men of husbandry (*ahl-i muzāra‘a*) “such as sowers, farmers, ploughmen and agriculturalists.”<sup>11</sup> Ann Lambton suggests that this “classification is more than a theoretical abstraction and that it reflects in some measure the underlying structure of Islamic society in general and Islamic society in Persia in particular.”<sup>12</sup> Ṭūsī was commissioned to write his work by a political patron, namely, the Ismā‘īlī governor of Quhistān under whom he was serving,<sup>13</sup> and this fact is consistent with Lambton’s suggestion, for it is likely that the work of an author sponsored by the governor would relate to practice.

The first two groups in Ṭūsī’s classification, namely the men of the pen and the men of the sword, are, generally speaking, different from the other two groups in that they were part of the state administration. These men served the ruler in return for payment from the government. Men of the other two groups made their living from other sources, and their status was somewhat lower. In other words, the functions of the sultan were roughly divided between those responsibilities delegated to the military personnel, that is, men of the sword (or *umarā’*), and those delegated to the men of the pen (in the broad sense of the word), including bureaucrats and men of learning (both religious and profane), headed by the wazīr.<sup>14</sup> By the Saljūq period, this dichotomy had acquired an ethnic dimension: the Turkish element predominated among the men of the sword, whereas most of the officials of the bureaucracy and of the religious institutions were Persians.<sup>15</sup> Even if the lines of demarcation between the bureaucrats and the soldiers, and between their functions, were fluid,<sup>16</sup> and even if medieval Islamic Iran could be divided according to other criteria,<sup>17</sup> the distinction between men of the sword and men of the pen must have been obvious, for the two groups competed for resources and status, and each side developed arguments to demonstrate its superiority over the other.<sup>18</sup>

<sup>11</sup> Ṭūsī, *Akhlāq-i Nāṣirī*, 218 (362–363 in the Arabic translation); I followed G. M. Wickens’s English translation, *The Nasirean Ethics*, 230, but added to it the terms in Persian.

<sup>12</sup> Lambton, “Islamic Society in Persia,” 4.

<sup>13</sup> Madelung, “Naṣīr al-Dīn Ṭūsī’s Ethics,” 85.

<sup>14</sup> Lambton, *Continuity and Change*, 28, 297; Cahen, *Islam*, 118.

<sup>15</sup> Lambton, “Internal Structure,” 203, 228, 247; *Enc. Iranica*, s.v. “Class System (iv. Classes in Medieval Islamic Persia)” (Ashraf and Banuazizi).

<sup>16</sup> Lambton, *Continuity and Change*, 28.

<sup>17</sup> For different ways in which historians portrayed social order in medieval Islamic Persia see *Enc. Iranica*, s.v. “Class System (iv. Classes in Medieval Islamic Persia)” (Ashraf and Banuazizi).

<sup>18</sup> *Ibid.*

The extension of the military *dīwān*, and the division between *dīwān al-ghuzāt* and *dīwān al-kuttāb* as it appears in the works of the eastern Iranian Ḥanafīs such as al-Walwālījī, may well mirror the dichotomy between men of the sword and men of the pen in the medieval Persian state. By bringing this dichotomy into their definition of the ‘*āqila*, the eastern Iranian Ḥanafīs reflected the social and administrative context within which they were writing, as did their counterparts who produced Iraqī Ḥanafī law. On the basis of the source material available to me it is impossible to say whether their definition of the ‘*āqila* remained a theoretical formulation or whether administrative divisions of warriors or bureaucrats did indeed serve as blood-money groups. Under the Saljūqs, in whose time al-Walwālījī was writing, the military *dīwān*, which in the Persian lands was called *dīwān al-‘arḍ* or *dīwān al-jaysh*, was also a financial unit. Among many other matters, such as recruitment and supply, the *dīwān al-‘arḍ* controlled everything related to the payment of soldiers, either by cash or by land allocation (*iqṭā’*).<sup>19</sup> But whether, as in the Umayyad times, blood money was collected by deduction from the payments due to soldiers registered in the *dīwān*, remains a question.

## 9.2 THE ‘*ĀQILA* OF THOSE WHO DO NOT HAVE A *DĪWĀN* (THE EARLIER BALKHĪ VIEW)

As was noted in [Chapter 7](#), two mutually incompatible views came into being in Balkh. According to one of them, among the Persian Muslims who were not included in a *dīwān* any group united by the mutual obligation of *nuṣra* could serve as an ‘*āqila*. Supporters of this view illustrated this principle by considering groups based on a common occupation or common neighborhood. According to the other view, which came into being about half a century later, the ‘*āqila* institution was entirely alien to the Persian Muslims.

### 9.2.1 *The Literary Context*

The earlier Balkhī view goes back to the third/ninth-century Balkhī scholar Muḥammad b. Salama.<sup>20</sup> By the fifth/eleventh century it had entered standard Ḥanafī law by being included in the *Mabsūṭ* of al-Sarakhsī<sup>21</sup> – whose

<sup>19</sup> Lambton, “Internal Structure,” 230, 259–260; Cahen, “Economy, Society, Institutions,” 533.

<sup>20</sup> See p. 91.

<sup>21</sup> Sarakhsī, *Mabsūṭ*, 26:66.

teacher al-Ḥalwānī is known to have followed this view<sup>22</sup> – and in the following century it was seamlessly incorporated into the *Hidāya* of Abū Bakr al-Marghīnānī: “When he (‘Umar) founded the *dūwān* he imposed the payment of blood money on the men of the *dūwān* . . . because [before him] blood money fell on [one’s] *nuṣra* group. [*Nuṣra*] could (at that time) be based on [ties] of [various] types: kinship, alliance, *walā’*, and ‘*idd*;<sup>23</sup> in the days of ‘Umar it (i.e., *nuṣra*) came to be derived from the *dūwān*, so following the principle (*itbā’an li-l-ma’nā*, i.e., that liability for blood money falls on the group that provides *nuṣra*), he imposed it (i.e., liability) on its (i.e., the *dūwān*’s) men. Therefore they (i.e., the jurists) said: if today the *nuṣra* of (certain) people is based on occupation, their ‘*āqila* are the men who follow [this] occupation (*law kāna al-yawm qawm tanāsuruhum bi-l-ḥ iraf fa-‘āqilatuhum ahl al-ḥirfa*); and if it (i.e., *nuṣra*) is based on alliance, then [the ‘*āqila* are] those included in it (i.e., in the alliance) (*wa-in kāna bi-l-ḥilf fa-abluhu*).”<sup>24</sup> We see that al-Marghīnānī achieved the smooth assimilation of the Balkhī view into Iraqī Ḥanafī law in two ways. Firstly, he presented it as emerging naturally from the same principle that ‘Umar followed in transposing the ‘*āqila* from the tribe to the *dūwān*. That is, just as the *dūwān* innovation was justified before him, al-Marghīnānī gives the impression that the Persian opinion does not diverge from previous Ḥanafī tradition, but is rather a continuance of it.<sup>25</sup> Secondly, and perhaps more important, he, like al-Sarakhsī before him, omitted any reference to the Persian origin of the opinion. As a consequence of this omission the opinion that had originally come into being specifically to accommodate Persian Muslims was detached from a particular ethnic group, and became applicable to all Muslims.

Having been introduced into standard Ḥanafī law, the Balkhī opinion gained more and more authority through a process that lasted for several centuries. When al-Sarakhsī, at the beginning of this process, referred to this view in his *Mabsūt*, he did so almost in passing, and there is no reference to it where one would expect to find it, namely, in the main discussion of the structure of the ‘*āqila* in his *Kitāb al-Ma‘āqil* (the Chapter on Blood Money).<sup>26</sup> He included it rather in another chapter, *Kitāb al-Diyāt* (the Chapter on Indemnities), within a discussion justifying the

<sup>22</sup> See p. 91.

<sup>23</sup> For the meaning of ‘*adīd* see p. 62.

<sup>24</sup> Marghīnānī, *Hidāya*, 4:1712.

<sup>25</sup> Cf. sec. 5.2.

<sup>26</sup> That is, in his *Mabsūt*, 27:125–126.

very existence of the ‘*āqila* institution,<sup>27</sup> a context in which the composition of the ‘*āqila* is marginal. In contrast to al-Sarakhsī, al-Marghīnānī in his *Hidāya* did cite the Balkhī opinion in the appropriate place, that is, in the discussion of the makeup of the ‘*āqila*. The Balkhī opinion is missing, however, from al-Marghīnānī’s *Bidāyat al-mubtadī*, the *matn* of which the *Hidāya* is a *sharḥ*.<sup>28</sup> This omission can hardly be accidental. As already mentioned, the *mutūn*, at the top level of the Ḥanafī literary hierarchy, were perceived as containing the most authoritative doctrine of the school (although some *mutūn* were considered more authoritative than others), notably the *ẓāhir al-riwāya*, as developed by the school’s founders.<sup>29</sup> They were, therefore, less open to changes than the *shurūḥ*. The authors of the *shurūḥ*, less bound by the core of school doctrine, permitted more variability of legal opinions and responded more easily to changes in practice.<sup>30</sup> The fact that al-Marghīnānī incorporated the Balkhī rule in his *sharḥ* but not in his *matn* reveals the status that this view had acquired by his time: it was sufficiently established to enter standard law, but not at its most authoritative level. This gradual elevation of Muḥammad b. Salama’s view is similar to the process undergone by al-Jūzjānī’s view concerning the pond, as discussed in Section 8.1: al-Marghīnānī included it in his *Hidāya*, but not yet in his *Bidāyat al-mubtadī*. About a century after al-Marghīnānī, al-Jūzjānī’s view was further upgraded when it was incorporated in al-Mawṣilī’s *Mukhtār*, thus entering the *mutūn* genre, at the highest level of Ḥanafī literature.<sup>31</sup> In a similar fashion, Muḥammad b. Salama’s view regarding to the composition of the ‘*āqila* advanced from the *shurūḥ* level to that of the *mutūn* when al-Mawṣilī included it in his *al-Mukhtār*: “[A]nd if he (i.e., the perpetrator) is from those whose *nuṣra* is based upon occupation, then the men who follow this occupation [will be his ‘*āqila*] (*wa-in kāna mimman yatanāṣarūna bi-l-ḥiraf fa-ahl ḥirfatihī*).”<sup>32</sup> As already mentioned, al-Mawṣilī’s *Mukhtār* was held in the greatest esteem by the Ḥanafīs and considered among the most respected *mutūn* of the school, *al-mutūn al-mu‘tabara*.<sup>33</sup> Its inclusion in this *matn* therefore elevated the Balkhī view sanctioning an ‘*āqila* based on

<sup>27</sup> *Ibid.*, 26:66.

<sup>28</sup> Marghīnānī, *Bidāyat al-mubtadī*, 257–258.

<sup>29</sup> Ibn ‘Ābidīn, *Sharḥ al-manẓūma*, 31–32; Laknawī, *al-Nāfi‘ al-kabīr*, 23; Johansen, “Legal Literature,” 452.

<sup>30</sup> Johansen, “Legal Literature,” 448–449.

<sup>31</sup> See p. 106.

<sup>32</sup> Mawṣilī, *Mukhtār*, 5:66.

<sup>33</sup> See p. 107.

occupation (and, by implication, on any other common denominator) to the highest level of legal doctrine, and heralded its triumph. But the triumph was as yet incomplete. Ḥanafī authors of *mutūn* contemporary with al-Mawṣilī still hesitated, and as a result, the Balkhī view is missing from their works: the *Wiqāya* of Tāj al-Sharī‘a al-Maḥbūbī, the *Majma‘ al-baḥrayn* of Ibn al-Sa‘ātī Aḥmad b. ‘Alī (d. 694/1294), and the *Kanz al-daqā’iq* of ‘Abdallāh b. Aḥmad al-Nasafī. Shortly afterward, however, this view was disseminated throughout the legal literature, and became fully integrated into Ḥanafī doctrine, as embodied in both the *shurūḥ*<sup>34</sup> and the *mutūn*.<sup>35</sup>

The new status of the Balkhī view is illustrated by a comparison of the chapter on the ‘*āqila* in *Mukhtaṣar al-Wiqāya* (also known as *al-Nuqāya*), of ‘Ubaydallāh b. Mas‘ūd al-Maḥbūbī, Ṣadr al-Sharī‘a (d. 747/1346), with the same chapter in the *Wiqāya*, written two generations earlier by Ṣadr al-Sharī‘a’s grandfather, Tāj al-Sharī‘a. The Balkhī view is missing from the latter, as just mentioned, but is present in the former: “Among the Persians, the criterion [that determines whether men belong to the same ‘*āqila*] is that they offer each other *nuṣra*, irrespective of whether this is because they belong to the same profession or for some other reason (*wa-l-mu‘tabar fī al-‘Ajam ahl al-nuṣra, sawā’ kānat bi-l-ḥirfa aw ghayrihā*).”<sup>36</sup> By including a view that is missing from the *Wiqāya* of his grandfather, Ṣadr al-Sharī‘a deviated from the method he usually followed in compiling its *Mukhtaṣar*. As he attests, and as a comparison of the two texts confirms, the purpose of writing the *Mukhtaṣar* was further to abbreviate the already succinct text of the *Wiqāya* to make it easier to memorize.<sup>37</sup> By adding the new rule Ṣadr al-Sharī‘a rather lengthened the text, which is a testament to how essential and authoritative the Balkhī opinion had become by his time.

By a process of evolution that continued over several centuries, Muḥammad b. Salama’s view, for which no room was found in early Ḥanafī works, had, by the eighth/fourteenth century, become an integral part of the nucleus of Ḥanafī literature. This literary process represents a significant development of legal content, through which Ḥanafī doctrine,

<sup>34</sup> Ṣadr al-Sharī‘a, *Sharḥ al-Wiqāya*, 7:575; Ḥaddād, *Jawhara*, 2:371; ‘Aynī, *Bināya*, 13:366; Quhistānī, *Jāmi‘ al-rumūz*, 2:365–366; Qārī, *Fath bāb al-‘Ināya*, 3:398; Shaykhizāde, *Majma‘ al-anbur*, 4:413.

<sup>35</sup> Ṣadr al-Sharī‘a, *Mukhtaṣar al-Wiqāya*, 2:404; Ḥalabī, *Multaqā al-abḥur*, 4:413.

<sup>36</sup> Ṣadr al-Sharī‘a, *Mukhtaṣar al-Wiqāya*, 2:404, and compare it with Tāj al-Sharī‘a’s *Wiqāya*, 7:574.

<sup>37</sup> Ṣadr al-Sharī‘a, *Mukhtaṣar al-Wiqāya*, 1:16 (author’s introduction).

by combining elements from both Iraq and eastern Iran, allowed the ‘*āqila* institution to assume a wide range of possible configurations. Limited by only one requisite, namely the existence of *nuṣra*, a *qāḍī* enjoyed great flexibility in selecting the group upon which to impose a blood-money payment; he was free to choose an ‘*āqila* according to the structure of the society to which the perpetrator belonged, and the nature of every particular perpetrator’s affiliations. By avoiding a clear definition of the term *nuṣra*, Ḥanafī jurists, whether intentionally or otherwise, lessened the force of even this last criterion for the composition of the ‘*āqila*, allowing the *qāḍī* very wide discretion.

### 9.2.2 *The Historical Context*

The opinion that concerns us here originated in polemics among the eastern Iranian Ḥanafī jurists as to the existence of the ‘*āqila* among the Persians. One group of scholars claimed that the ‘*āqila* institution did indeed exist among the Persians, for “the practice of *tanāṣur* prevails among them (*labum ‘āda fī al-tanāṣur*).” Thanks to this *tanāṣur*, when one of their number owes blood money, the members of his professional group or the residents of his neighborhood or village share the financial burden with him, that is, they constitute his ‘*āqila*. Those opposing this opinion claimed that the ‘*āqila* institution is alien to the Persians, for mutual assistance, on which the ‘*āqila* is based, did not exist among them (*al-‘Ajām lā yatanāṣarūna fīmā baynahum*).<sup>38</sup> A leading representative of the latter opinion is quoted as saying that professional groups do exist in this society, but there is no *tanāṣur* among their members, and hence no mutual liability for blood-money payment.<sup>39</sup> These opposing views thus offer different interpretations of the social bonds characterizing the professional groups and neighborhood communities in eastern Iranian cities, and consequently support different methods of dealing with the payment of blood money. The two views do not necessarily reflect mutually exclusive practice. As Ibn ‘Ābidīn was to point out centuries later, they may have referred to a different practice, arising from different conditions within the same society,<sup>40</sup> and reflect a struggle between two groups of jurists, each group striving to shape legal practice according to its

<sup>38</sup> Qāḍīkhān, *Fatāwā*, 3:357–358; Burhān al-Dīn, *Muḥīṭ*, 20:99 (the quotations are from the latter).

<sup>39</sup> See p. 94.

<sup>40</sup> See p. 142.

own view. A lively account reflecting a struggle for influence among the *muftīs* of Transoxania appears in the biography of a leading *muftī* in Samarqand, Aḥmad b. Maṣṣūr al-Isbījābī (d. late fifth/eleventh century). After his death, a chest (*ṣundūq*) was found in his home. In it he kept many *fatwās* of contemporary *muftīs* which he considered to be mistaken. Al-Isbījābī had concealed these *fatwās* lest they should mislead those who solicited them. He rewrote the questions, and provided them with what he considered to be the correct answers.<sup>41</sup>

Our sources for daily life of the Muslims in medieval eastern Iran are generally meager,<sup>42</sup> and we cannot determine which of these interpretations, if either, better reflects reality. Some information about the ‘*āqila* in the practice of this area can be gathered, however, from a few surviving *fatwās*. *Qunyat al-munya*, a *fatwā* collection compiled by Mukhtār b. Maḥmūd al-Zāhidī (d. 658/1259) of Khwārizm, includes the case of an unfortunate butcher (*qaṣṣāb*) who was using a hatchet to cut up an animal’s bones when the hatchet slipped and seriously injured another man’s limb. A fifth/eleventh(?)-century *muftī* of Bukhārā<sup>43</sup> determined that the whole of the compensation due for the injury was to be taken from the butcher’s own property, for the Persians have no ‘*āqila* (*wa-l-diyā fī mālihi li-annahū lā ‘āqila li-l-‘Ajām*).<sup>44</sup> This *fatwā* is particularly relevant to our discussion because it pertains to a tradesman. In line with the Iranian view that among the Persians men of the same trade form an ‘*āqila*, we would have expected the butcher to have been affiliated with a group of butchers whose members would be collectively liable for the blood money he incurred. The *muftī*’s response suggests, however, that this was not the case. Should the *muftī*’s opinion, then, be taken to reflect the prevailing legal practice?

Other *fatwās* from eastern Iran suggest that it should not, and that blood money was regularly imposed on an ‘*āqila* rather than on the perpetrator alone. One example comes from the *Fatāwā ahl Samarqand*; the collection was at Ibn Māzah’s disposal, as discussed in Section 8.2,<sup>45</sup>

<sup>41</sup> Qurashī, *Jawābir*, 1:335–336; Dhahabī, *Ta’rīkh al-Islām*, 354 (years 481–490).

<sup>42</sup> Lambton, *Local Particularism*, 4 (referring to daily life in premodern Iran in general).

<sup>43</sup> It is impossible to tell who the *muftī* in question was because the abbreviation *bkb*, by which al-Zāhidī indicates his name, stands, according to al-Zāhidī’s list of abbreviations, for two *muftīs*: Abū Bakr Khwāharzādah, from Bukhārā, who died in 483/1090, and Burhān al-Fatāwā al-Bukhārī, whom I am unable to identify. The date of the *fatwā* is therefore uncertain.

<sup>44</sup> Zāhidī, *Qunyat al-munya*, 378.

<sup>45</sup> On p. xref (“killed by infidels”).

and the *fatwā* in question is included in his *Wāqī‘āt*. It concerns a man who had sexual intercourse with a girl incapable of sexual relations (*jāriya lā yujāma‘u mithlubā*) and consequently caused her death. According to the Samarqandī *muftī* to whom the case was presented, liability for the girl fell not on the perpetrator, but rather on his ‘*āqila*.<sup>46</sup> A number of *fatwās* similarly reflecting the existence of an ‘*āqila* were issued by a contemporary of Ibn Māzah, ‘Abd al-Raḥmān Abū al-Faḍl al-Kirmānī, an eminent Ḥanafī jurist of Khurāsān who was born in Kirmān, studied and settled in Marw, and died there in 544/1150.<sup>47</sup> The *fatwās* issued by al-Kirmānī were compiled by his student, Muḥammad b. ‘Abd al-Rashīd Abū Bakr al-Kirmānī (d. around 565/1169), together with *fatwās* by other contemporary *muftīs*, in a collection entitled *Jawāhir al-fatāwā*, which survives in manuscript form.<sup>48</sup>

When Abū al-Faḍl al-Kirmānī’s opinion was solicited regarding a minor who had destroyed the eye of another minor by throwing a stone, he ruled that liability for the injury rested with the offender’s ‘*āqila*.<sup>49</sup> The same opinion was given by al-Kirmānī in a similar case of a man who lost his eye as a result of being injured by a minor: the indemnity was to be imposed on the minor’s ‘*āqila*.<sup>50</sup> Yet another *fatwā* concerns the digging of a pit or a well (*bi‘r*), during which a bucket was dropped by one workman upon another, who was killed in the accident. Again, al-Kirmānī ruled that liability for the blood money fell on the ‘*āqila* of the man who dropped the bucket.<sup>51</sup>

The picture that emerges from the *fatwās* is that the Balkhī opinion that denied the ‘*āqila* institution did not accurately reflect prevailing practice, and that imposing blood money on the ‘*āqila* was a regular procedure, even if not the only one.

Furthermore, other *fatwās* indicate that in some cases at least, the ‘*āqila* of the Persian Muslims rested neither on a common occupation nor on common residence but rather on agnatic ties, like the traditional ‘*āqila* of the Arabs. *Fatwās* of this kind were issued by Abū al-Faḍl al-Kirmānī. Regarding a minor who lost an eye as the result of a stone thrown,

<sup>46</sup> Ibn Māzah, *Wāqī‘āt*, 188a.

<sup>47</sup> Sam‘ānī, *Ansāb*, 5:57; Qurashī, *Jawāhir*, 2:388–390; Laknawī, *Fawā‘id*, 156–157.

<sup>48</sup> Khalīlī, *La‘ālī‘ al-mahār*, 1:225–226 (According to Brockelmann [GAL, 1:463] Abū Bakr al-Kirmānī was alive in 577/1181). For a preliminary study of *Jawāhir al-fatāwā* see Najmiddinov, “On Kirmānī’s Method.”

<sup>49</sup> Kirmānī, *Jawāhir al-Fatāwā*, 290a.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, 290b.

or an arrow shot at him by another minor with whom he was playing, al-Kirmānī advised that an indemnity of 500 dinars (which is the amount dictated by the Sharīʿa) was due for the loss of the eye, and that liability fell “upon the injuring minor’s *‘āqila*, namely, male relatives of his father, that is, his *‘aṣaba* (*‘alā ‘āqilat al-ḍarīb wa-hum rijāl min aqribā’ al-ab wa-hum ‘aṣabatuhu*).”<sup>52</sup> In another *fatwā*, this one concerning a minor who killed a man, al-Kirmānī similarly responded that the relatives of the minor’s father were liable for the blood money due (*fa-l-diya ‘alā aqribā’ al-ab*).<sup>53</sup> A *fatwā* by Abū al-Faḍl al-Kirmānī that concurs with these rules is included in al-Zāhidī’s *Qunyat al-munya*. It concerns two minors who were playing when one of them knocked the other down and broke his thigh.<sup>54</sup> The thigh never recovered and the injured minor was left unable to walk. The *muftī* ruled that compensation of 500 dinars was due, to be paid by “the minor’s relatives on his father’s side (*aqribā’ al-ṣabī min jihat abihī*).”<sup>55</sup>

Some modern scholars have taken the Balkhī opinion that among the Persians a professional group could serve as an *‘āqila* to refer to a social reality. According to Claude Cahen, the Sharīʿ texts discussed previously point “to the existence, in the parts of Central Asia under Persian influence and in Āzarbāijān, of several crafts in which, exceptionally, there was an organization for mutual assistance between members, *tanāsur*, operative at least for the collection of judicial compensation where damages were due.”<sup>56</sup> Cahen notes that the texts on which this observation is based are rare and late. Following Cahen, W. M. Flood says that just before the Mongol invasion, in Isbījāb, Samarqand, and Marw (i.e., the places mentioned by al-Walwālījī and Qāḍikhān in their discussions of the *‘āqila*<sup>57</sup>), mutual assistance existed among members of certain crafts, and he then adds, with appropriate prudence, that there is no further information about this practice.<sup>58</sup> Baber Johansen also believes, on the basis of the Ḥanafī texts starting from the fifth/eleventh century, that corporations based on profession or quarter, whose members were jointly liable for each other’s crimes, existed at that time in the Muslim world.<sup>59</sup>

<sup>52</sup> *Ibid.*, 290a–290b.

<sup>53</sup> *Ibid.*, 290a.

<sup>54</sup> For *ḍaraʿa* read *ṣaraʿa*, knocked down.

<sup>55</sup> Zāhidī, *Qunyat al-munya*, 379.

<sup>56</sup> Cahen, “Tribes, Cities and Social Organization,” 325; and less decisively in Cahen, “Corporations professionnelles,” 59.

<sup>57</sup> pp. 88, 90.

<sup>58</sup> *Enc. Iranica*, s.v. “Aṣnāf” (Flood), 773; Flood, “The Guilds in Iran,” 104.

<sup>59</sup> Johansen, “Eigentum,” 411–412 n. 264.

Cahen’s conclusion, based on the slim evidence of legal sources, that blood money in eastern Iran was paid by groups of craftsmen, is tempting, but as he noted, the evidence for such a conclusion is rather tenuous. To the best of my knowledge, the evidence is limited, in fact, to the Ḥanafī legal texts concerning the ‘*āqila* discussed previously.<sup>60</sup> Moreover, the evidence of the *fatwās* just presented is incompatible with such a conclusion. These *fatwās*, while admittedly scanty and concerned mainly with minors, nevertheless show that at more or less the same time that al-Walwālījī, al-Ūshī, and Qāḏīkhān introduced in their works the eastern Iranian option of an ‘*āqila* based on shared neighborhood or common profession, their contemporary in Khurāsān, al-Kirmānī (and perhaps other *muftīs* of eastern Iran) was issuing *fatwās* indicating that the custom of imposing blood-money payment on an ‘*āqila* based on kinship was taken for granted.

It is possible, of course, that by the third/ninth or fourth/tenth century, when the eastern Iranian opinion of the occupational or neighborhood group is said to have been developed, ‘*āqilas* based on common profession or on other common characteristics existed alongside agnatic ‘*āqilas* in eastern Iran, and that the evidence for their existence awaits discovery in the numerous *fatwā* collections from this area that remain in manuscript form. Another possibility, however, which seems to me more likely, is that the eastern Iranian opinion does not testify to an organization for mutual assistance, or to current legal procedure, but rather represents an attempt to allow for extending the current procedure by legitimizing other types of groups that could be exploited by the authorities or the *qāḏī* when an ‘*āqila* of kinsmen was unavailable.

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The types of ‘*āqila* that the eastern Iranian jurists may have sought to legitimize, that is, those based on occupation or common neighborhood, are well suited to the social and administrative framework of Islamic urban society. The medieval Islamic city was generally divided into two major zones: private and public. The private zone was the residential area while economic activities and commercial life were concentrated in the public zone.<sup>61</sup> The occupants of each zone were divided into groups, whose

<sup>60</sup> Except for one rather obscure piece of evidence from late sixth/twelfth-century al-Anbār, Iraq (see p. 137).

<sup>61</sup> Raymond, “The Spatial Organization of the city,” 59; and for the city structure in the geographical area than concerns us see Petruccioli’s note on the building fabric in Bukhārā and Samarqand in his “Bukhārā and Samarqand,” 491.

members were bound together by common characteristics and shared interests. Generally speaking, the residential area was divided into neighborhoods, while divisions in the public zone ran along the lines of occupation. Admittedly, Islamic cities and urban Islamic society were much too complex to be fully described by such a simplified dichotomy. The occupants of the two zones sometimes overlapped: bonds connecting residents of a certain quarter could originate in their common occupation, so that in many cases people belonged both to the community of their quarter and to their professional group.<sup>62</sup> Furthermore, the society was composed of multiple overlapping groups and communities, ranging from ethnic groups and tribal networks to legal schools and religious sects. However, the groups selected by the government for administrative purposes were usually those based upon a common trade or a common neighborhood, which together encompassed the entire population of the medieval city.

Our knowledge of professional groups in the Islamic world, including medieval eastern Iran, before the eighth/fourteenth century is rather limited, and is insufficient for a complete reconstruction of their nature and early history. The theory proposed by Louis Massignon and developed by Bernard Lewis, that already in the third/ninth and fourth/tenth centuries these groups constituted guilds<sup>63</sup> – that is, autonomous corporations with juristic personality that selected their members and supervised the standard of their products, holding a monopoly over their craft – was rejected by other scholars on the basis of lack of evidence. The first signs of guilds in the Islamic world, including Iran, do not appear until the seventh/thirteenth century, or a little earlier.<sup>64</sup> The evidence in the Geniza documents about the daily life of craftsmen, studied by Goitein, confirms that no “rigidly organized professional corporations” existed, at least in the Islamic Mediterranean, before the seventh/thirteenth century;<sup>65</sup> according to Maya Shatzmiller, professional guilds started to appear in Islamic cities only in the eighth/fourteenth century;<sup>66</sup> and other scholars

<sup>62</sup> Lapidus, *Muslim Cities*, 86–87; Lapidus, “Muslim Cities,” 49, 51; Lambton, “Internal Structure,” 274.

<sup>63</sup> *EI*(1), s.v. “*Ṣinf*” (Massignon); Lewis “The Islamic Guilds.”

<sup>64</sup> Stern, “The Constitution of the Islamic City,” 37ff; Cahen, “Corporations Professionnelles”; Cahen, *Islam*, 121–123; Floor, “The Guilds in Iran,” 103–104; *EI*(2), s.v. “*Ṣinf*” (Floor), 645b; Ḥamdānī, “The *Rasa’il Ikhwan al-Safa’*,” 166; Lapidus, *Muslim Cities*, 96, 98; Lambton, *Continuity and Change*, 343.

<sup>65</sup> Goitein, *A Mediterranean Society*, I:82ff; Goitein, “The Working People,” 267–270 (the quotation is from the latter source, p. 267).

<sup>66</sup> Shatzmiller, *Labour*, 392, 403. Shatzmiller also says that “none of the available evidence confirms the existence of mediaeval Islamic professional guilds for the artisanal labour

argue that no substantial evidence is available for the existence of guilds in the Middle East before the ninth/fifteenth century.<sup>67</sup>

It is generally accepted, however, that by the third/ninth century, when Muḥammad b. Salama issued his opinion that the ‘*āqila* of the Persians might be based on common occupation, occupational associations of some kind, however loose, rudimentary, and heterogeneous, did exist in the cities of Iran and Central Asia, as well as in the rest of the Islamic world.<sup>68</sup> Professional associations, named *aṣnāf* (sing. *ṣinf*), were not peculiar to Islamic countries. They constituted an indispensable and major element of many preindustrial cities,<sup>69</sup> and professional connections, giving rise to social bonds, still exist in the modern world.<sup>70</sup> It is well known that in medieval Islamic towns, including those of Iran and Central Asia, members of a certain handicraft or trade tended to be concentrated in their own area of the market or the town. Such a tendency is documented as early as the first/seventh century,<sup>71</sup> and the names of various market streets and neighborhoods testify to the handicraft or trade pursued there. The water carriers’ road (*darb al-saqqā’īn*) in Baghdād and the saddlers’ market (*sūq al-sarrājīn*) in Damascus,<sup>72</sup> the market of the money changers and the cloth sellers (*sūq al-ṣayārifa wa-l-bazzāzīm*) in Bukhārā or the felt makers’ road (*sikkat al-labbādīm*) in Samarqand<sup>73</sup> are just a few of the numerous examples available. The conditions required by the different trades and manufacturers, and the common interests and needs of those who shared the same craft or trade, as well as the need to protect the town population from the nuisance caused by some of the activities involved, all motivated such physical division.<sup>74</sup>

Aspects other than physical vicinity distinguished the trade groups from each other and sharpened their boundaries. Professional bonds were

force”; the artisans must have been organised in other ways, she says, and suggests alternative frameworks (*EI*[3], s.v. “Artisans [pre-1500]”).

<sup>67</sup> Baer, “Guilds in Middle Eastern History,” 12–17 (especially the conclusion on p. 17).

<sup>68</sup> Cahen, “Tribes, Cities and Social Organization,” 323–324.

<sup>69</sup> *Enc. Iranica*, s.v. “*Aṣnāf*” (Floor).

<sup>70</sup> In 1917, when the Ottomans evacuated the residents of Gaza while preparing to defend the city against British attack, a group of cobblers, with their families, moved together to Nablus (Halevy, “Gaza and Its People,” 43).

<sup>71</sup> Al-Ṭabarī, in his description of the events of the year 60/679, mentions an area in the market of Kūfa where small livestock (*ghanam*) were sold (Ṭabarī, *Ta’rīkh*, II:268, referred to by Dūrī, “Nushū’ al-*aṣnāf*,” 15).

<sup>72</sup> Ibn al-Jawzī, *Muntaẓam*, 8:87; Ibn ‘Asākir, *Ta’rīkh madīnat Dimashq*, 11:40, respectively.

<sup>73</sup> Narshakhī, *Ta’rīkh Bukhārā*, 128, and Nasafī, *al-Qand fī dhikr ‘ulamā’ Samarqand*, 196, 474, 559, respectively.

<sup>74</sup> Raymond, “The Economy of the Traditional City,” 745–749; Lapidus, *Muslim Cities*, 86.

extended to social connections as the members of an occupational group associated with each other also in their extraprofessional life.<sup>75</sup> Al-Jāhīz refers to the mutual affection (*ta'āṭuf*) that usually prevailed among the members of the same craft, and to the group spirit (*ta'aṣṣub*) they displayed when dealing with other professional groups.<sup>76</sup> To demonstrate the level of mutual assistance among craftsmen, he related a story about butchers in the market who helped a colleague out of a financial crisis by closing their shops for a whole day, thus enabling his shop to supply the entire market demand on that day and enjoy the ensuing profit.<sup>77</sup> A *fatwā* found in the monumental *fatwā* collection *al-Mi'yār al-mu'rib* by the Maghribī al-Wansharīsī (d. 914/1508) testifies to such practice. The *fatwā* is about butchers and green-grocers who closed their shops for a day or two, leaving the market demand to be supplied exclusively by one of them, who lost his property or needed money to get married.<sup>78</sup>

Another example is an anecdote concerning an incident said to have taken place during the reign of Hārūn al-Rashīd (r. 170–193/786–809). It describes how an old scribe who had served under the Umayyads reminds the young al-Faḍl b. Marwān (d. 250/864), who later became the 'Abbāsīd vizier, that the bonds arising from common occupation were considered tantamount to those based upon common descent (*kunna na'uddu al-ṣinā'a nasaban*).<sup>79</sup> Various types of partnerships, financial or otherwise, derived from shared professional interests.<sup>80</sup> There are further examples of mutual assistance among members of a professional group (including cooperation in defense against an external enemy), and also of confrontations between professional groups and the government.<sup>81</sup> All these testify to a sense of group affiliation.

Claude Cahen argued that this sense of affiliation may have been stronger among Iranian Muslim craftsmen than it was among Arab ones: whereas the latter recorded, following their name, the genealogy that indicated their family and tribe, the former tended to indicate their profession or trade instead.<sup>82</sup>

The creation and maintenance of professional groups were not brought about, however, merely by the spontaneous actions of their members.

<sup>75</sup> Shaykhī, *Aṣnāf*, 135–136.

<sup>76</sup> Jāhīz, *Rasā'il*, 2:199–200 (referred to by Shaykhī, *Aṣnāf*, 132).

<sup>77</sup> *Ibid.*, 200–201 (referred to by Shaykhī, *Aṣnāf*, 134).

<sup>78</sup> Wansharīsī, *Mi'yār*, 6:415.

<sup>79</sup> Tanūkhī, *Nishwār al-muḥāḍara*, 8:43–44 (referred to by Shaykhī, *Aṣnāf*, 132).

<sup>80</sup> Goitein, *A Mediterranean Society*, I:83, 85.

<sup>81</sup> Dūrī, "Nushū' al-Aṣnāf," 21–22; Shaykhī, *Aṣnāf*, 105, 133–134, 156.

<sup>82</sup> Cahen, "Tribes, Cities and Social Organization," 325.

The government contributed a great deal to their development because their existence served its interests. It was much more efficient and convenient for government officials to deal with group representatives rather than with each individual. Such dealings were necessary for the purpose of controlling the town economy, supervising production and commerce, collecting payments, and maintaining order. The existing professional groups were a natural choice for these ends, and the government further nourished the associations and sharpened their boundaries by treating the craftsmen and merchants as collectives.<sup>83</sup> In some cases at least, it was the caliph or his representatives who dictated the location of certain crafts in the market, grouping the members of the same craft.<sup>84</sup> More important, however, was the appointment, from as early as the Umayyad period, of an ‘*arīf*’ (supervisor) for groups of tradesmen. Abū Ḥanīfa, who manufactured and traded in a certain kind of cloth, is said to have been the ‘*arīf*’ of the weavers, and other ‘*arīfs*’ are attested to in Kūfa during the term of its famous Umayyad *qāḍī* Shurayḥ b. al-Ḥārith.<sup>85</sup> The ‘*arīfs*’ filled a variety of functions. They advised and informed the *muḥtasib*, the market inspector, about the practices of their trade, and were responsible for ensuring that the craftsmen complete the tasks assigned to them. They also enforced the collection of taxes imposed on the craftsmen, and settled their internal disputes.<sup>86</sup>

The ‘*arīfs*’ were not independent spokesmen and true representatives of the artisans or traders to whose group they belonged; the level of unity, organization, and cooperation among these groups’ members did not allow for the nomination of their own representatives.<sup>87</sup> They were rather imposed by the government on the existing professional groups,<sup>88</sup> and served as its agents. By offering financial support to particular professional groups, or imposing collective taxes upon them (sometimes inciting their vehement protest),<sup>89</sup> the authorities further sharpened the divisions between the professions.

<sup>83</sup> Cf. Floor, “The Guilds in Iran,” 101, and *Enc. Iranica*, s.v. “Aṣnāf” (Floor).

<sup>84</sup> Dūrī, “Nushū’ al-Aṣnāf,” 15–16; Shaykhli, *Aṣnāf*, 24–25, 77.

<sup>85</sup> Al-Khaṭīb al-Baghdādī, *Ta’rīkh Baghdād*, 3:67; and Wakī, *Akbbār al-quḍāt*, 2:347 (both referred to by Dūrī, “Nushū’ al-Aṣnāf,” 18), respectively.

<sup>86</sup> Lapidus, *Muslim Cities*, 99; Shaykhli, *Aṣnāf*, 148–149.

<sup>87</sup> Cahen, “Tribes, Cities and Social Organization,” 324. For followers of the view that in later periods ‘*arīfs*’ of the craftsmen’s and traders’ groups did denote the autonomy of these groups, see Ḥamdānī, “The *Rasa’il Ikhwan al-Safa’*,” 162.

<sup>88</sup> Cf. Goitein, *A Mediterranean Society*, I:84.

<sup>89</sup> Dūrī, “Nushū’ al-Aṣnāf,” 21; Shaykhli, *Aṣnāf*, 152–153, 155.

A similar policy was applied by the Islamic government to the communities created by the division of the city into quarters. The quarter was a basic unit of Islamic urban social life, which reflected “the transformation of Arab communal life from a pure kinship to a neighborhood communal style which merged kinship with other social considerations.”<sup>90</sup> In the quarters, communities previously based on kinship or ethnicity were now “bound by residence and by economic and social interests as well as by blood.”<sup>91</sup> A community could consist of the inhabitants of one or more quarters. Shared facilities that existed in many quarters, such as a market, public bath, or, notably, a mosque, contributed to a sense of community, as did the fact that at least some of the quarters were enclosed within their own walls.<sup>92</sup> Perhaps even more fundamental units than the professional groups, “neighborhood communities seem everywhere to have been the keynote of Muslim urban life.”<sup>93</sup> Rivalries and confrontations that took place between quarters, or hostile feelings, reflected their separation from each other.<sup>94</sup> As in the case of the professional groups, the sense of community among the residents of a quarter was fortified by the government, who treated them as administrative units upon which it devolved administrative and legal responsibilities, with the quarter’s appointed heads, or *shaykhs*, being responsible for their fulfillment.<sup>95</sup>

It follows that the payment of blood money would naturally have been included among the obligations of a professional or neighborhood group. In the cities of Syria and Egypt under the late Mamlūks it was a regular procedure for a governor to levy the blood money for manslaughter from

<sup>90</sup> Lapidus, “The Evolution of Muslim Urban Society,” 29.

<sup>91</sup> *Ibid.*, 28. For the quarter as a social and administrative unit in the Mamlūk period see Muira, “The Structure of the Quarter” (focusing on the Šālīhiyya quarter in Damascus).

<sup>92</sup> Lapidus, *Muslim Cities*, 85; Lapidus, “Muslim Cities,” 64 n. 17 (about Persian cities whose quarters are walled); Lambton, *Local Particularism*, 15; Lambton, “Islamic Society in Persia,” 9; Lambton, “The Internal Structure,” 274. The local mosque as a uniting force of the quarter’s community is reflected in Ḥanafī law, which recognizes the particular privileges that this community enjoys with regard to its mosque, and also establishes the community’s joint responsibility for the mosque’s maintenance (Johansen, “The All-Embracing Town,” 101–102).

<sup>93</sup> Lapidus, “Muslim Cities,” 51 (referring to a list of studies and sources about various Islamic cities in various periods).

<sup>94</sup> *Ibid.*, 64; The traveler Yāqūt al-Ḥamāwī, who visited Rayy in 617, attests that two of the city’s quarters, the Shī‘ī and the Ḥanafī ones, were completely destroyed as a result of conflicts, first between Sunnīs and Shī‘īs, and then between Ḥanafīs and Shāfi‘īs, each of which had their own quarter (Yāqūt, *Mu‘jam al-buldān*, 3:132, cited by Madelung, “The Spread of Māturīdism,” n. 73).

<sup>95</sup> Lambton, *Local Particularism*, 15; Lapidus, “Muslim Cities,” 49 (about Aleppo and Damascus in the Mamlūk period).

the inhabitants of the perpetrator’s quarter, a policy the inhabitants often opposed.<sup>96</sup>

In a case of a homicide that occurred in 596/1199, some decades before the Mamlūk period, in al-Anbār, in Iraq, both craftsmen and the heads of the quarters were made liable for the blood-money payment. It is reported that the official in charge of the district (*nāẓir*)

imposed upon five men [the payment of] five thousand dinars, then he imposed a thousand dinars upon the poor: five [hundred] upon the *jlyt*(?) and five hundred upon the brass founders. Responsibility for this (i.e., for the payment) was assigned to the head of each quarter, whom he oppressed and whose money he took (*fa-qaṭa’a ‘alā khamsat nafar khamsat ālaf dīnār, thumma alzama al-ḍu’afā’ alf dīnār: ‘alā al-jlyt(?) khamsat [mi’a] wa-‘alā al-ṣaffārīn khams mi’a wa-darraka bi-dhālika shaykh kull maḥalla fa-ḍayyaqahum wa-akhadha amwālahum*).<sup>97</sup>

When the caliph, al-Nāṣir li-Dīn Allāh (r. 575–622/1180–1225), was informed of this, he condemned the official’s instruction in the strongest terms, and ordered the blood money to be reduced to 1,000 dinars (the amount stipulated by the Sharī’a), to be collected from the killer’s ‘*āqila* (regarding whose nature the report is unfortunately silent).

The eastern Iranian doctrine that occupational or neighborhood groups could act as ‘*āqila*, developed long before this event took place, was perhaps intended to provide a legal basis for the very same policy, namely, to allow the authorities to levy blood money from groups based on common occupation or neighborhood. It is difficult to say with certainty whether this view was designed to sanction administrative practice in eastern Iranian cities, in the same way that the Ḥanafī *dūwān* innovation was designed to sanction the Umayyad practical policy in Iraq, or whether it was rather a precursor of a policy that would be carried out later.

### 9.3 THE PERSIANS HAVE NO ‘*ĀQILA* (THE LATER BALKHĪ VIEW)

The view that rejected the ‘*āqila* institution with regard to Persian Muslims originated with Abū Bakr al-Iskāf in the fourth/tenth century.<sup>98</sup> In the legal literature this view was less successful than the other Balkhī view. Although it was not completely neglected and continued to appear in the literature, it did not gain much support and did not enter the core of

<sup>96</sup> Lapidus, *Muslim Cities*, 93–94; Miura, “The Structure of the Quarter,” 415–417 (I owe the last reference to Koby Yosef).

<sup>97</sup> Ibn al-Sā’ī, *al-Jāmi’ al-mukhtaṣar*, 19–20 (referred to in Dūrī, “Nushū’ al-aṣnāf,” 24).

<sup>98</sup> See pp. 92–93.

the Ḥanafī doctrine as represented by the major *mutūn*. In practice, however, this view became increasingly prevalent. It was followed in at least one *fatwā* after the fourth/tenth century, spreading afterward far beyond the Muslim population of eastern Iran.

### 9.3.1 *The Literary Context*

The path of this view into the Sharī'a is traceable from its beginnings; the *fatwā* of Abū Bakr al-Iskāf from which it originates is preserved in al-Samarqandī's *Nawāzil* (al-Samarqandī was a younger contemporary and fellow-townsmen of al-Iskāf, and the two were undoubtedly acquainted with each other):

Abū Bakr (al-Iskāf) was asked about two boys who were playing at shooting [arrows]. One of the boys shot an arrow which happened to injure and destroy the eye of a passing woman. The boy was nine years old or thereabout. Is the boy's father liable for the damage? He replied: his father is not liable, the blood money falls rather on the boy's property. If he has no property, then 'let it be postponed to the time of ease (*fa-naẓira ilā maysara*<sup>99</sup>)' (i.e., let the payment be postponed to a time when it can be paid).<sup>100</sup>

Al-Samarqandī interprets the response as follows: "He (i.e., Abū Bakr al-Iskāf) imposed the blood money on the boy's property because he took the opinion that the 'Ajam have no 'āqila. He used to say: "The 'āqila applies to the Arabs, for *nuṣra* exists among them. But among the Persians there is no *nuṣra*, therefore blood money does not fall on them (collectively) (*innamā qāla yajibū fī māli al-ṣabī li-annahū kāna lā yarā li-l-'Ajam 'āqila wa-kāna yaqūlu al-'āqila li-l-'Arab li-annahum yatanāṣarūna fīmā baynahum wa-ammā al-'Ajam fa-lā yatanāṣarūna fīmā baynahum fa-lā yajibū 'alayhim al-'aql*)."

Al-Samarqandī felt it necessary to supplement Abū Bakr al-Iskāf's answer: "If the boy does have an 'āqila, and witnesses testify to his action, then his 'āqila is liable." The purpose of this addition is certainly to make the point that al-Iskāf's *fatwā* did not entail a principle rejection of the concept of the 'āqila, but was rather limited to places where it did not exist.

Two centuries after it was issued, this *fatwā* was included in the *Wāqī'āt* of Ibn Māzah, but he eliminated from it the answer given by Abū Bakr

<sup>99</sup> Qur'ān 2(*al-Baqara*):280.

<sup>100</sup> Samarqandī, *Fatāwā*, 494.

al-Iskāf, leaving only al-Samarqandī’s supplement.<sup>101</sup> The view that denies the existence of the ‘*āqila* does appear, however, in the intermediate works of the eastern Iranians – al-Bukhārī presents it and lists its supporters, and Qāḍīkhān cites a complete version of it.<sup>102</sup> After that, there is sporadic mention of it in other Ḥanafī legal works.<sup>103</sup>

### 9.3.2 *The Historical Context*

Although the eastern Iranian view that denied the existence of the ‘*āqila* institution among the Persians had little success in penetrating the legal literature, in practice cases of homicide and injuries where the perpetrator had no ‘*āqila* became increasingly common within Persian society and beyond it, among the Arabs and other Muslims. An early example of the absence of an ‘*āqila* is the previously mentioned *fatwā* of the butcher, from al-Zāhidī’s *fatwā* collection. In this *fatwā*, the Bukhārī *muftī* responded that the butcher alone was liable for the limb that he injured because “the ‘*Ajam* have no ‘*āqila*.”<sup>104</sup>

The *muftī*’s advice was compatible with the social reality familiar to al-Zāhidī from his own homeland, Khwārizm, in the seventh/thirteenth century. In his *Sharḥ al-mujtabā*, a commentary of al-Qudūrī’s *Mukhtaṣar*, al-Zāhidī writes that in Khwārizm in his own time, blood money was imposed only on the perpetrator’s property, unless he was from a village or a neighborhood among whose residents *nuṣra* existed. This was because clan loyalties had weakened in Khwārizm, so that the blessing of *nuṣra* was no longer to be found among its inhabitants, and the treasury had been ruined (*al-‘ashā’ir fīhā qad wahat wa-rahmat al-tanāsur min baynihim qad rufi’at wa-bayt al-māl qad inhadama*).<sup>105</sup> “It is true” al-Zāhidī says, “that the names of its residents are registered in the *dīwān* in [groups of] thousands and hundreds, but they do not provide *nuṣra* to each other

<sup>101</sup> Ibn Māzah, *Wāqī’āt*, 181a.

<sup>102</sup> Bukhārī, *Khulāṣat al-fatāwā*, 2:247; Qāḍīkhān, *Fatāwā*, 3:356.

<sup>103</sup> Khusraw, *Durar al-ḥukkām*, 2:125; Quhistānī, *Jāmi’ al-rumūz*, 2:366; Qārī, *Fath bāb al-‘Ināya*, 3:398; Ḥaṣkafī, *al-Durr al-mukhtār*, 10:333; Ḥaṣkafī, *al-Durr al-muntaqā*, 4:413. The only author who perhaps accepted this view is Muḥammad b. ‘Abdallāh al-Timurtāshī (d. 1004/1595) of Gaza, who records it in his *Tanwīr al-abṣār*, 219, to the exclusion of the opposing Balkhī view.

<sup>104</sup> See p. 128.

<sup>105</sup> The treasury is supposed to replace the ‘*āqila* if the latter does not exist. For the decline of the *bayt al-māl* in eighth/fourteenth-century Syria see Winter, “Inter-Madhab Competition,” 199–200. For the empty treasury in the Saljūq period see Lambton, “The Internal Structure,” 255–256.

on this basis. It (i.e., blood money) ought therefore to be imposed on his (the perpetrator's own) property."<sup>106</sup> In seventh/thirteenth-century Khwārizm, according to al-Zāhidī's evidence, those who had an 'āqila were clearly an exception; the rule was an absence of 'āqila.

Later, under the Ottomans, localities outside Iran also provided similar examples of communities lacking the social solidarity, or *nuṣra*, required for the existence of an 'āqila. Egyptian society in the tenth/sixteenth century, as perceived by Muḥammad b. 'Umar al-Ḥānūtī (d. 1010/1601), in his time a leading *muftī* of Cairo, provides such an example, echoing the Balkhī view of the fourth/tenth century. In his famous *fatwā* collection *Ijābat al-sā'ilīn bi-fatwā al-muta'akhhbirīn*, al-Ḥānūtī describes how social relations have had deteriorated in his time, blaming this decline for the disappearance of the 'āqila:

Tribes do not exist among the people of Egypt because they have forgotten their genealogies and have become like the Persians; and clans do not exist either, for their existence is contingent upon mutual assistance, which does not exist nowadays . . . and by my life, this [mutual assistance] is no longer to be found in our days, since people have come to envy and to hate each other, and because each one wishes ill to his fellow (*fa-l-qabā'il min jamī' ahl miṣr muntafiya li-annahum ḍayya'ū ansābahum wa-šarū min al-Ajam wa-l-'ashā'ir aydan muntafiya li-anna shartabā al-tanāsur wa-huwa muntaf al-ān... wa-la-'amrī hādhā shay' lā yūjadu fī hādhā al-zaman li-ghalabat al-ḥasad wa-bughḍ al-nās ba'ḍuhum li-ba'ḍ wa-tamannī kull wāḥid al-makrūh li-šāḥibihī*).<sup>107</sup>

Al-Ḥānūtī's melancholy observation leads him to the inevitable conclusion that "where no clan and no *tanāsur* exist, blood money falls upon the treasury (*wa-ḥaythu lā qabila wa-lā tanāsur fa-l-diya fī bayt al-māl*)." This is repeated, with a significant extension, a few decades later by al-Ḥaṣkafī, of Damascus.<sup>108</sup>

A similar spirit was also familiar in Mamlūk Damascus, where the government tried to enforce a policy of collective liability for blood money, against the sentiments of the population. In 911/1506, a few years

<sup>106</sup> Ibn 'Ābidīn, *Radd al-muḥtār*, 10:332; Ibn 'Ābidīn, *al-Uqūd al-durriyya*, 2:290. A manuscript of al-Zāhidī's *Sharḥ al-muḥtabā* is extant (Khalīlī, *La'ālī' al-maḥār*, 2:546), but was not available to me.

<sup>107</sup> Ḥānūtī, *Ijābat al-sā'ilīn*, 272b, paraphrased in Ḥaṣkafī, *al-Durr al-mukhtār*, 10:334; Ḥaṣkafī, *al-Durr al-muntaqā*, 4:413; Ibn 'Ābidīn, *al-Uqūd al-durriyya*, 2:289. Rudolph Peters (in *EI*[3], s.v. "'Āqila") wrongly ascribed al-Ḥānūtī's observation to al-Ḥalwānī, who lived more than five centuries before al-Ḥānūtī.

<sup>108</sup> "Where no clan and no *tanāsur* exist, blood money falls either upon his (the perpetrator's) property or upon the treasury" (Ḥaṣkafī, *al-Durr al-mukhtār*, 10:334).

before the city fell to the Ottomans, the governor imposed the payment of blood money for a local homicide upon the inhabitants of the city’s Qubaybāt quarter. The inhabitants protested vigorously, demanding that liability should rest with the killer alone.<sup>109</sup> Later in the century, Abū al-Su‘ūd (d. 982/1574), the famous Grand Muftī of Istanbul, was asked whether the ‘*āqila* of a killer who was unable to pay was liable for his blood-money debt. He replied decisively that “There is no ‘*āqila* in these lands.”<sup>110</sup> His reply is compatible with the prevailing practice as reflected in court records and *fatwā* collections: the obligation to pay blood money fell on the offender, not on his ‘*āqila*.<sup>111</sup>

But the judicial practice under the Ottomans was perhaps less uniform than Abū al-Su‘ūd’s reply might suggest. Questions regarding the ‘*āqila* were also addressed to another Ottoman *muftī*, the Palestinian Khayr al-Dīn al-Ramlī (d. 1081/1671). As has been shown by Haim Gerber, al-Ramlī’s *fatwās* are not a theoretical exercise, but rather responses deeply anchored in the *muftī*’s surroundings.<sup>112</sup> It is obvious from al-Ramlī’s responses that he took the ‘*āqila* institution to exist. Evidence for this includes a *fatwā* concerning two shepherds who hit each other on the head with sticks. Both were injured, although not enough for either to become bedridden as a result. One of the shepherds died afterward of plague. His relatives, however, maintained that his death was caused by his head injury, a claim that the other shepherd denied. The question addressed to al-Ramlī was whether the second shepherd and his ‘*āqila* were liable for any blood-money payment. He replied that in the absence of evidence of a direct link between the head injury and the death there was no claim and no blood money was due, but added that if such evidence were produced, then the shepherd’s ‘*āqila* would be liable for the blood money.<sup>113</sup> The ‘*āqila* is also referred to both in other questions presented to al-Ramlī, and in his responses to these questions.<sup>114</sup> It seems that the institution was familiar to those who solicited his opinions.

More than a century and a half later, Ibn ‘Ābidīn of Damascus presented the two opposing views – that the ‘*āqila* exists and that it does not – as complementing rather than contradicting each other. Citing al-Ḥaṣkafī’s statement that “where no tribe and no *tanāṣur* exist, blood

<sup>109</sup> Miura, “The Structure of the Quarter,” 416 (I owe this reference to Koby Yosef).

<sup>110</sup> Imber, *Ebu’s-su‘ud*, 38 and 247.

<sup>111</sup> Peters, *Crime and Punishment*, 92.

<sup>112</sup> Gerber, *Islamic Law*, 34–39.

<sup>113</sup> Ramlī, *al-Fatāwā al-Khayriyya*, 2:215.

<sup>114</sup> *Ibid.*, 214–216.

money falls either upon his (the perpetrator's) property or upon the treasury," Ibn 'Ābidīn concluded that "a reconciliation of the two views was thus achieved (*fa-qad ḥaṣala al-tawfīq bayna al-'ibāratayn*),"<sup>115</sup> meaning that either opinion was applicable, depending on the nature of the perpetrator's society. Ibn 'Ābidīn admits, however, that it is the latter view, originally developed among the Ḥanafīs of eastern Iran, which reflects the conditions prevailing in the Islamic cities of his own time: "there is no doubt that townspeople nowadays have become like the Persians (*wa-lā shakk anna ahl al-amṣār al-ān qad šārū ka-l-'Ajam*), for they have forgotten their lineages, and there is no *tanāsur* among them, while the *mashāyikh* (i.e., of eastern Iran) made it clear that *tanāsur* is a necessary condition [for the existence of an 'āqila] (*wa-šarraḥa al-mashāyikh anna al-tanāsur shart*)."<sup>116</sup> Due to the lack of *nuṣra*, Ibn 'Ābidīn says, there is no 'āqila among the city residents of his time.

As a consequence of these social changes, some points of the old legal discussion related to blood-money payment required fresh attention in the Ottoman period. The question of whose duty it is to pay blood money when the perpetrator has no 'āqila, which had already been discussed by the school's founders,<sup>117</sup> was reexamined by al-Quhistānī in the tenth/sixteenth century, by al-Ḥaṣkafī in the following century,<sup>118</sup> and most notably by Ibn 'Ābidīn in the thirteenth/nineteenth century. The latter extended the discussion and further developed another early question, which seems to have become more urgent, regarding the time limit and the amount of each installment when the responsibility for payment falls upon the perpetrator alone. In such a case, Ibn 'Ābidīn says, the schedule of payments as established by Ḥanafī law, namely, three years, with one small payment a year, must be changed. This is because three such payments by a single individual are insufficient to make up the whole amount due, and the question thus arises as to where the rest of the money is to come from. Even without a time limit, with the perpetrator bound to pay one installment of three or four dirham a year (i.e., the maximum amount per individual payer, according to Ḥanafī law<sup>119</sup>) for the rest of his life, a problem still remains, Ibn 'Ābidīn adds, for the perpetrator would still only be able to pay a small portion of the full amount in his lifetime,

<sup>115</sup> Ibn 'Ābidīn, *al-'Uqūd al-durriyya*, 2:289.

<sup>116</sup> *Ibid.*, 290.

<sup>117</sup> Ṭahāwī, *Mukhtaṣar*, 233.

<sup>118</sup> Quhistānī, *Jāmi' al-rumūz*, 2:366; Ḥaṣkafī, *al-Durr al-mukhtār*, 10:332–333; Ḥaṣkafī, *al-Durr al-muntaqā*, 4:415–416.

<sup>119</sup> See p. 76.

leaving open the question as to how the payment would be completed. After the perpetrator’s death, Ibn ‘Ābidīn asks, should the balance of the debt be canceled or should it be taken from his estate or from some other source?<sup>120</sup> With these as yet unanswered questions, Ibn ‘Ābidīn implies the need for major changes to the rules that impose liability for blood-money payment on the killer alone; this need has become more pertinent due to social change. He merely poses the questions, leaving future generations to face the challenge of providing the tools for the Sharī‘a to tackle the issues associated with modern social settings.

A legal development that points to a modern solution emerges from the present-day discussion of the question as to whether an insurance company may serve as a substitute for the ‘*āqila*. This question arises from the tension between, on the one hand, the problematic legal status of insurance companies and of insurance contracts from the view of the Sharī‘a,<sup>121</sup> and on the other hand, the nature of modern society in the Middle East and elsewhere, where “it is becoming increasingly apparent that social structure can also be conceived with *individuals* as the fundamental units of social structure rather than their attributes or statuses as members of groups,”<sup>122</sup> and where group solidarity and mutual support have weakened, and insurance of various kinds has become a common way of coping with potential financial risks. The modern ‘*ulamā*’ unanimously answer this question in the affirmative as it relates to social insurance (*ta’mīn ijtimā’ī*) and to mutual insurance (*ta’mīn ta’āwunī*) (such as professional liability insurance, where each individual in a professional group contributes a certain amount of money for the purpose of indemnifying other members against certain kinds of financial loss). Because, like the ‘*āqila*, these two kinds of insurance, particularly the latter, are based on the idea of mutual support, or *tanāṣur*, they are accepted as legitimate substitutes for an ‘*āqila* when the latter does not exist.<sup>123</sup> Some of the participants in the eighth conference of The Islamic Fiqh Academy (*majma‘ al-fiqh al-Islāmī*) in 1994 did, in fact, sanction the possibility that a mutual insurance company could substitute for the ‘*āqila*, and pay blood money on behalf of policy holders.<sup>124</sup> More revealing,

<sup>120</sup> Ibn ‘Ābidīn, *Radd al-muḥtār*, 10:332, and a variation in Ibn ‘Ābidīn, *al-Uqūd al-durriyya*, 2:290.

<sup>121</sup> E.g., Sadeghi, “The Evolution of Islamic Insurance,” 102–103 (with references to further literature).

<sup>122</sup> Eickelman, “Is There an Islamic City?,” 281.

<sup>123</sup> Darādīkah, *Daf‘ al-diya*, 148, 151–152.

<sup>124</sup> *Ibid.*, 152.

however, is the fact that some modern Muslim scholars are willing to recognize the legally more problematic *ta'mīn tijārī*, that is, regular insurance, as a substitute for the *'āqila*.<sup>125</sup> The substitute of regular insurance for the *'āqila* was accepted also in practice. According to the Sudanese Civil Transactions Act (1984) the blood-money payment is the obligation of the perpetrator's insurance company, and this rule has been applied by the Sudanese court;<sup>126</sup> the Sudanese Penal Code (1991) similarly rules that in certain cases one's insurance company may serve as one's *'āqila*.<sup>127</sup> The difference between an *'āqila* and a regular insurance company is obvious: the latter is usually motivated by the desire for financial profit, and designed to secure against losses suffered by people with no connection to each other. The concession that is necessarily involved in accepting this kind of insurance company as a substitute for the *'āqila* is therefore significant, suggesting that the need to offer the individual in a modern society an alternative way of paying blood money has become a pressing one.

<sup>125</sup> For a list of scholars who follow this opinion see Darādīkah, *Daf' al-diya*, 155–157. Muṣṭafā al-Zarqā', who appears on al-Darādīkah's list, does indeed recognize the legality of *ta'mīn tijārī*, but does not talk of replacing the *'āqila* by an insurance company. He merely justifies his opinion on the basis of the *'āqila* institution by way of analogy (al-Zarqā', *Niẓām al-ta'mīn*, 60–62, 92). The rest of Darādīkah's sources for this list are not available to me.

<sup>126</sup> Layish and Warburg, *The Reinstatement of Islamic Law in Sudan*, 208–209.

<sup>127</sup> *EI*(3), s.v. “‘Āqila” (Peters); Peters, *Crime and Punishment*, 168.

## Conclusion

The *‘āqila* is an institution that relates to the sanctity of the believer’s life, the relationship between believers, and the foundations of the social order. Its evolution has not been divorced from historical processes, but is rather a response to them. I have tried to show how this essential Islamic institution was shaped and reshaped within various historical contexts. One such context is the transformation of Islamic law into a branch of religion. As Schacht describes it, this process involved the activity of specialists, whose main concern was

to know whether the customary law conformed to the Koranic and the generally Islamic norms. . . . These pious persons surveyed all fields of contemporary activities, including the field of law. . . . They considered possible objections that could be made to recognized practices from the religious and, in particular, from the ritualistic or the ethical point of view, and as a result endorsed, modified, or rejected them. They impregnated the sphere of law with religious and ethical ideas, subjected it to Islamic norms, and incorporated it into the body of duties incumbent on every Muslim.<sup>1</sup>

Some aspects of the *‘āqila* institution are clearly the result of the process of Islamization that Schacht describes. Harmonizing the law with religion demanded that major elements of the law of homicide be adjusted to suit Islamic tenets. As a consequence, the principle of individual responsibility,

<sup>1</sup> Schacht, *Introduction*, 26–27.

which is emphasized by the Qur'ān, led to limiting the liability of the *'āqila* and expanding that of the killer. As a part of this modification, more attention became focused on the intention and fault of the perpetrator, and the punitive aspect of the obligation to pay blood money was stressed. These changes transformed homicide from something like a tort into something closer to a crime.

Schacht also observed that Umayyad administrative practice was “the starting-point of Muḥammadan jurisprudence.”<sup>2</sup> Umayyad practice provided the context for another major modification of the *'āqila*. The change from a tribal society to a community in which state institutions gradually replaced tribal ones gave rise to the *dīwān* innovation, according to which blood money was paid by deduction from the stipends of the military enrolled in the *dīwān*. In this way, blood-money payment was brought under the jurisdiction of the state, thus allowing the ruler to regulate the transaction. This innovation, introduced by the Umayyads, was sanctioned by proto-Ḥanafī scholars, and it was Ḥanafī jurists who turned it into Islamic law and incorporated it into the Shari'a, having first provided it with the required religious support. This division of labor, so to speak, between the Umayyads and the Ḥanafī jurists – the former introducing an innovative regulation, the latter turning it into a religious law – belongs in the realm of the relationship between the state and the scholars, and more specifically, between the state and Ḥanafī scholars.

The Umayyad regulation was a starting point, not the last word. The Ḥanafīs developed the *dīwān* innovation further by claiming the precedence of the military division as an *'āqila* over one based on blood ties. With this claim they opened the way to detaching the *'āqila* from kinship, and laid the theoretical ground for using various alternative criteria to impose liability for blood-money payment on any particular group.

To make the *dīwān* innovation effective, most of the Muslims had to be enrolled in the *dīwān* as warriors. The decrease in the size of the army and in the number of those in receipt of stipends starting in the late Umayyad period, and the accompanying development of a civil bureaucracy may have triggered the change that led the Ḥanafīs to develop the *dīwān*

<sup>2</sup> Schacht, *Origins*, 198, with many examples in the following pages.

innovation further. The first steps are documented in Ḥanafī works of eastern Iranian origin from the sixth/twelfth century. These contain rules that allow blood money to be deducted not only from military salaries but also from the earnings of civilian officials.

Other elements of the *‘āqila* represent the mark that the Persian Muslims left on the Sharī‘a. Persian Ḥanafī jurists from eastern Iran contributed to the Sharī‘a new legal opinions that reflected conditions in Persian rather than Iraqī lands. One such opinion extended the criteria for determining the composition of the *‘āqila*, apparently to adapt it to the social and administrative organization in eastern Iran. Relying on the theoretical basis laid down by the jurists of Iraq, according to which an *‘āqila* need not be based upon blood ties, this Persian opinion allows for an *‘āqila* based upon common occupation, or common neighborhood or any other criterion upon which solidarity may rest. The combination of an Iraqī basis with a Persian extension thus legitimized endless varieties of *‘āqila*, from which a *qāḍī* could choose the one most suitable to the circumstances. This extension of the law testifies to the elastic nature of the Sharī‘a, which allows for the addition of new legal options without driving the old ones out of existence. A large variety of legal options thus accumulates, rendering the law ever richer and more flexible. The Persians contributed another, antithetical view, which rejected the *‘āqila* entirely, claiming that it did not suit the structure of Persian society.

Whether the opinions introduced by the Persian jurists reflected the actual practice of blood-money payment as witnessed by them is difficult to say on the basis of the source material at my disposal. However, even if one or both of these views did reflect a contemporary practice, there must have been considerable heterogeneity of custom in the eastern Persian lands, as other views from this area, recorded in *fatwās*, suggest that joint liability for blood-money payment continued to be based on agnatic kinship.

In the course of time, Islamic societies seem to have developed in such a way that social groupings that could form the basis of an *‘āqila* became less common. Whether a substitute for the *‘āqila* will develop in the future, what nature such a surrogate will assume, and how the Sharī‘a will react, is yet to be seen.

Finally, I wish to point out a recurring problem of source material in the book. With the exception of a few pieces of evidence for the Umayyad practice, and of sporadic *fatwās*, I had almost no direct evidence available

to me concerning how blood money was paid in practice, or of the actual composition of the *'āqila*. The dearth of available evidence means that the connections proposed here between the law of the *'āqila* and the historical reality are for the moment conjecture. It is to be hoped, however, that sources will come to light that make it possible to reach more definite conclusions.

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