

Islamic Injunctions on the Institutionalization of Aqilah: A Case Study of Vicarious Liability for Payment of Diyat

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Abstract *Islam gives detailed injunctions not only for individuals but also for collectivity, and the Constitution of the Islamic Republic of Pakistan makes it obligatory on State to enable Muslims to live their individual and a collective life in accordance with the Islamic teachings. An important aspect of the Islamic way of life is that individuals and collectivity provide help and support to each other. This aspect is particularly exemplified by the institution of 'Aqilah', which was established for sharing the burden of the payment of Diyat. Thus, it became an essential element of Muslim society, and it gave rise to the notion of vicarious liability. The present paper explores Islamic Injunctions on this issue and proposes the establishment of the institution of Aqilah for better enforcement of the law of Diyat in Pakistan.*

Key Words: Diyat, Aqilah, Vicarious Liability

Introduction

The Qur'an and the *Sunnah* envisage the concept of collective responsibility of the Muslim community to help oppressed and needy. There are various aspects of this responsibility. The present paper explores the details of only one aspect of this responsibility, namely the institution of *Aqilah*, for sharing the burden of *Diyat*. With the help of qualitative and deductive research methodology, operational framework of the research at hand has been divided into the following three categories: In part first, Islamic Injunctions about the general obligation of mutual help and support have been examined. In the part second, with the help of various examples, the notions of recommended and obligatory help and support have been explicated. In part three, provisions of Islamic law about the institution of *Aqilah* for the purpose of payment of *Diyat* has been examined.

The Obligation of Mutual Help and Support

The jurists present various provisions regarding the general doctrine of "help in furthering virtue and God-consciousness" (*ta'awun 'ala al-birr wa al-taqwa*). Thus, the Qur'an gives this general commandment to Muslims in the following words:

﴿وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ﴾ (المائدة: 2)

"Help one another in furthering virtue and God-consciousness and do not help one another in furthering evil and enmity" (Quran 5:2).

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Foundations of the Obligation of Mutual Help and Support

The Qur'an and the Sunnah have also given the foundations of this obligation. Thus, the Qur'an calls the believers as brethren (إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ) (Quran 49:10) and 'Awliya' (protecting friends) for each other:

﴿إِنَّ الَّذِينَ آمَنُوا وَجَاهَدُوا بِأَمْوَالِهِمْ وَأَنْفُسِهِمْ فِي سَبِيلِ اللَّهِ وَالَّذِينَ آوَوْا وَنَصَرُوا أُولَٰئِكَ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ وَالَّذِينَ آمَنُوا وَلَمْ يُوَافِقُوا مَا لَكُمْ مِنْ شَيْءٍ حَتَّىٰ يُهَاجَرُوا وَإِنْ اسْتَنْصَرُواكُمْ فِي الدِّينِ فَعَلَيْكُمْ النَّصْرُ إِلَّا عَلَىٰ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ وَاللَّهُ بِمَا تَعْمَلُونَ بَصِيرٌ﴾ (الانفال، 72)

“Lo! those who believed and left their homes and strove with their wealth and their lives for the cause of Allah, and those who took them in and helped them; these are protecting friends one of another. And those who believed but did not leave their homes, ye have no duty to protect them till they leave their homes; but if they seek help from you in the matter of religion, then it is your duty to help (them) except against a folk between whom and you there is a treaty. Allah is Seer of what ye do” (Quran 8: 72).

The Prophet (peace be on him) further elaborated these Qur'anic Injunctions in various ways. Thus, he declared:

مثل المسلمين في توادهم وتراحمهم وتعاطفهم كمثل الجسد إذا اشتكى منه عضو تداعى له سائر الجسد بالسهر والحمى-

“In their mutual love, mercy and care, Muslims are like one body; when any organ feels pain, the whole body responds to it by sleeplessness and fever” (Ṣaḥīḥ al-Bukhārī, 5665; Ṣaḥīḥ Muslim, 2586).

He explained the corollaries of Muslim brotherhood in the following words:

الْمُسْلِمُ أَخُو الْمُسْلِمِ، لَا يَظْلِمُهُ، وَلَا يَكْفُرُ بِهِ، وَلَا يَتَّقِرُ بِهِ-

“Muslim is the brother of Muslim; he does not do injustice to him; he does not abandon him; he does not lie to him; and he does not ridicule him” (Ṣaḥīḥ al-Bukhārī, Kitab al-Mazalim, Bab La Yazlim al-Muslim al-Muslim).

Similarly, he instructed Muslims to support each other and used a formula which was very common in Arab society:

انصر أخاك ظالماً أو مظلوماً-

“Support your brother, be he just or unjust”.

When asked how he could be supported when he is unjust, the Prophet (peace be on him) replied:

تعجزة عن الظلم فذلك نصرك إياه-

“Prevent him from injustice; this is your support to him” (Kitab al-Ikrah, Bab Yamin al-Rajul li-Sahibihi).

These and other texts of the Qur'an and the Sunnah form the basis of the doctrines of ta'awun and nasr in Islamic law. Sharing the burden of financial liabilities with those in need is just one aspect of these broader doctrines.

Sacrifice for Helping the Oppressed

The Qur'anic verse quoted above explicitly denies this relationship of Wala (protecting friendship) for those Muslims who reside in the non-Muslim territory. We also noted earlier that the Qur'an also does not impose the obligation of the payment of Diyat for the unintentional killing of such a Muslim (Quran 4:92). However, the

Qur'an is explicit that if such Muslims face religious persecution and they seek support from us, it becomes obligatory on us to provide the military support without violating a treaty:

﴿وَمَا لَكُمْ لَأْتِفَاتِكُمْ فِي سَبِيلِ اللَّهِ وَالْمُسْتَضْعَفِينَ مِنَ الرِّجَالِ وَالنِّسَاءِ وَالْوِلْدَانِ الَّذِينَ يَتُوعُونَ رَبَّنَا أَخْرِجْنَا مِنْ هَذِهِ الْقَرْيَةِ الظَّالِمِ أَهْلِهَا وَاجْعَلْ لَنَا مِنْ لَدُنْكَ وَلِيًّا وَاجْعَلْ لَنَا مِنْ لَدُنْكَ نَصِيرًا﴾ (سورة النساء، 75)

'How should ye not fight for the cause of Allah and of the feeble among men and of the women and the children who are crying: Our Lord! Bring us forth from out this town of which the people are oppressors! Oh, give us from Thy presence some protecting friend! Oh, give us from Thy presence some defender' (Quran 4:75)

In other words, Muslims are obliged even to sacrifice their lives for helping their brethren. The obligation of providing financial support is; thus, a fortiori established. Thus, the Qur'an mentions among the qualities of the "Helpers," Companions of the Prophet (peace be on him) from Madinah who opened their hearts and homes to the "Emigrants" and offered them every possible support:

﴿وَالَّذِينَ تَبَوَّءُوا الدَّارَ وَالْإِيمَانَ مِنْ قَبْلِهِمْ لِيُجِئُوا مَنْ هَاجَرَ إِلَيْهِمْ وَلَا يَجِدُوا فِي ضُدُورِهِمْ حَاجَةً مِمَّا أُوتُوا وَيُؤْثِرُونَ عَلَىٰ أَنفُسِهِمْ وَلَوْ كَانَ بِهِمْ خَصَاصَةٌ وَمَنْ يُوقِ شَخِّ نَفْسِهِ فَأُولَئِكَ هُمُ الْمُفْلِحُونَ﴾ (سورة الحشر، 9)

"Those who entered the city and the faith before them love these who flee unto them for refuge, and find in their breasts no need for that which hath been given them but prefer (the emigrants) above themselves though poverty become their lot. And whose is saved from his own avarice such are they who are successful" (Quran 59:9).

Recommended and Obligatory Forms of Help and Support

It is worth mentioning here that ta'awun and nasr are not just recommended acts; rather, certain forms of ta'awun and nasr are obligatory. Followings are some of the examples of both obligatory and recommended forms.

Examples of Recommended Help and Support

To take the example of recommended ta'awun and nasr, the Qur'an gave the slaves the right to get freedom by concluding an agreement with their masters for payment of a certain amount of property. This arrangement was called mukatabah or kitab (written agreement between two parties), and such a slave would be called mukatab, the one who entered into a written agreement with his master for buying his freedom. The Qur'an asked Muslims to spend, the wealth that Allah has bestowed on you, on such a slave:

﴿وَالَّذِينَ يَبْتَغُونَ الْكِتَابَ مِمَّا مَلَكَتْ أَيْمَانُكُمْ فَكَاتِبُوهُمْ إِنْ عَلِمْتُمْ فِيهِمْ خَيْرًا وَأَوْهَمِهِمْ مِنْ مَالِ اللَّهِ الَّذِي آتَاكُمْ﴾ (النور، 33)

"And such of your slaves as seeking a writing [of emancipation], write it for them if ye are aware of aught of good in them, and bestow upon them of the wealth of Allah which He hath bestowed upon you" (Quran 24:33).

Keeping in view the traditions of the Prophet (peace be on him), the practice of the Companions (God be pleased with them) and the general principles of Islamic law, the Muslim jurists generally construed this command as a recommendation, not as an obligation (Kasani, *Bada'i' al-Sana'i'*, 5:419-475). Many examples of such voluntary donations in the Prophetic era are found not only for slaves but also for other needy persons who could not pay their debts. Thus, Abu Sa'id al-Khudri (God be pleased with him) reports that a person suffered a great loss in a business transaction, and he could not pay his debts. The Prophet (peace be on him) advised his Companions to help him in paying his debts. People gave donations, but the aggregate was less than the total amount of debts. Then, the Prophet (peace be on him) advised the creditors to relinquish their remaining claims (al-Qushayri, *al-Sahih*, Kitab al-Musaqah).

Examples of Obligatory Help and Support

Now, to take an example of obligatory *ta'awun and nasr*, we may discuss the ransom (*fidyah*), which the adversary demands the release of a prisoner. This was a common practice in that era, and the Qur'an also permitted Muslims to demand ransom from their adversaries before releasing their prisoner:

﴿فَشُدُّوا الرِّبَاطَ فَإِنَّمَا مَتْنًا بَعْدُ وَإِنَّمَا فِدَاءٌ حَتَّى تَضَعَ الْحَرْبُ أَوْزَارَهَا﴾ (سورة محمد. 4)

"Then tighten their bonds, and afterwards [set them free] either by an act of grace or against ransom till the war lay down its burdens" (Quran 47:4).

Relying on the *Sunnah*, the jurists hold that 'ransom' here means any form of consideration and that it could take several forms, such as exchange of prisoners, providing some services, parole and obtaining some property from the adversary. The Prophet (peace be on him) also accepted services such as teaching writing skills to Muslim children as consideration for release to a prisoner. Likewise, a poet Abu 'Izzah from among the captives of the Battle of Badr was released by the Prophet on parole. He violated the conditions of parole and was again captured in the Battle of Uhud. There are examples of release on parole by non-Muslims as well. Thus, Hudhayfah b. al-Yaman and father (God be please with them both) were captured by Quraysh just before the Battle of Badr and were, then, released on the condition that they would not participate in the war. When they came to the Prophet (peace be on him) and expressed their eagerness to participate the first major encounter with non-Muslims, the Prophet (peace be on him) told them: "You go from here. We must abide by the promise that we made with them, and we will seek Allah's help against them." (Al-Qushayri, *al-Sahih*, Kitab al-Jihad wa 'l-Siyar). Similarly, the Prophet (peace be on him) received ransom in on several occasions, most famous being on the eve of the Battle of Badr.

Sometimes the adversary would demand ransom for the release of a Muslim prisoner. So, Muslim jurists discuss the various options available to the Muslim government for the purpose of getting its prisoners released by the adversary. In this regard, they discuss the permissibility of paying money to the adversary and cite many traditions of Prophet (peace be on him) in which he mentions this responsibility of the government towards its people:

﴿أَنَا أَوْلَى بِجَلِّ مُؤْمِنٍ مِنْ نَفْسِهِ فَمَنْ تَرَكَ رَيْبًا أَوْ حَبِيعَةً، فَإِلَيْنَا؛ وَمَنْ تَرَكَ مَالًا فَلِيَوْمِ تَيْبُو. وَأَنَا مَوْلَى مَنْ لَا مَوْلَى لَهُ: أَرَبُّ مَالِهِ، وَأَنَا كُفُّ عَائَتِهِ، وَالْحَالُ وَارِثُ مَنْ لَا وَارِثَ لَهُ:

بِرَبِّ مَالِهِ، وَيَكْفُّ عَائَتَهُ﴾

"I am closer to every believer than his self. So, if he leaves a debt or liability, it devolves on us. And I am the protector of the one who does not have a protector; I inherit him, and I get his prisoner released. And maternal-uncle inherits the one who does not have an heir; he inherits him, and he gets his prisoner released" (Al-Husayn, 2003).

أَنَا وَارِثُ مَنْ لَا وَارِثَ لَهُ: أُنْكَتُ عَائِيَتَهُ، وَأَرَبُّ مَالِهِ. وَالْحَالُ وَارِثُ مَنْ لَا وَارِثَ لَهُ: يُكْفُّ عَائِيَتَهُ، وَيَرِثُ مَالَهُ.

I am the guardian of the one who does not have a guardian. I get his prisoner released, and I inherit his property (Sunan Abi Dawud, Kitab al-Fara'id, Bab Mirath Dhawi al-Arham).

We may also mention here the verdict of Caliph 'Umar (God be pleased with him) quoted by Imam Abu Yusuf in reply to a reference sent to him by Caliph Harun al-Rashid:

كل أسير كان في أيدي المشركين، ففكاكته من بيت مال المسلمين.

"Ransom for every Muslim prisoner in the hands of the non-Muslims must be paid from the bayt al-mal of the Muslims" (Al-Ansari, 1989).

It may be recalled that *Imam Abu Yusuf* was the then Chief Justice and he wrote this book in response to an official reference sent to him by the Caliph. This verdict was issued in the context of the release of prisoners of war from the adversary. However, the general principle that a needy Muslim has to be helped from the government resources is well-established. In this regard, one may refer to the heads of *zakat*, which is an obligatory act:

﴿إِنَّمَا الصَّدَقَاتُ لِلْفُقَرَاءِ وَالْمَسْكِينِ وَالْعَامِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِي الرِّقَابِ وَالْغَارِمِينَ وَفِي سَبِيلِ اللَّهِ وَاللَّوَانِ السَّيِّئِ فَرِيضَةً مِّنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ﴾
(سورة التوبة، 60)

“The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be won over, and to free those in bondage and the debtors, and for the cause of Allah, and for the wayfarers; a duty imposed by Allah. Allah is knower, Wise” (Quran 9:60).

Thus, *zakat* is spent not only on the poor (*fuqara'*) and the needy (*masakin*), but also for the release of those in bondage (*riqab*) and for helping those who are overburdened by debts (*gharimin*). Now, even if the *riqab* is confined to *mukatab*, as opined by many jurists ([Al-Quduri, 2011](#)), the heads of *fuqara*, *masakin*, and *gharimin* are surely relevant for the case at bar, and this verse establishes the responsibility of the government for providing help to these persons from its resources.

Sharing the burden of *Diyat* by the *Aqilah* is another example of obligatory *ta'awun* and *nasr*. Thus, we quoted many traditions of the Prophet (peace be on him) in the previous section wherein he imposed the *Diyat* on the *Aqilah* of the person who caused the killing of a fetus or committed *qatl-shibh-i-amd* or *qatl-i-khata*. In the present section, we also quoted the traditions of the Prophet (peace be on him) which imposed on the maternal-uncle the liability to pay ransom and *diyat* and also established his right of inheritance. As the jurists explain, these traditions relate to a situation where other near relatives don't exist.

Before discussing further details about *Aqilah*, it is pertinent to note here that these Prophetic traditions establish the principle that the responsibility for payment of debts or ransom devolves on the government only when the person does not have a *wali*. Conversely, the property of such a person goes to the government only when he does not have an heir. So, the principal acts in both ways. Importantly, the Prophet (peace be on him) devised several mechanisms for fulfilling the obligation of mutual help and support. Thus, the liability would devolve on government only when these mechanisms would not be sufficient for fulfilling the obligation. The institution of *Aqilah* for sharing the burden of *Diyat* was just one such mechanism. This point needs further elaboration.

Vicarious Liability and 'Aqilah

'*Aqilah* (pl. of '*Aqil*) means those who pay '*aql*, i.e., *Diyat*. The word '*aql* literally means to tie up. Intellect or reason is called '*aql* because it restrains a person from making foolish statements or actions. The jurists say that those who paid *Diyat* were called '*Aqilah* because they would tie up camels in the courtyard of the heirs of the victim. Another explanation is that payment of *Diyat* would tie up the tongue of the heirs of the victim so that they would no longer talk of revenge (Ibn Qudamah, *al-Mughni*, 12:39; Kasani, *Bada'i'al-Sana'i'*, 10:312-314; *al-Mawsu'ah al-Fiqhiyyah*, [Encyclopedia of Islamic Law](#); Kuwait: Ministry of Religious Affairs, 1983). A renowned Egyptian scholar Dr. 'Awd Muhammad 'Awd wrote a concise but comprehensive booklet on the concept of '*Aqilah* which Dr Sajid al-Rahman Siddiqi translated into Urdu under the title *عاقلة کا تصور اسلامی فقہ میں*, published by the Shariah Academy, Islamabad, in 1993. As this institution existed in the Arab society before the Prophet (peace be on him) gave instructions about it, some contemporary scholars have expressed their opinion that the traditions about *Aqilah* were relevant only in the context of the tribal society in Arabs and that it is no longer relevant in the contemporary world. This necessitates a discussion on the relationship of the *Sunnah* with the Arab customs.

An Arab Custom or a Perpetual Precept of the Shari'ah

It is true that some rules of Islamic law were based on custom and that these rules may change with the change of the customs of the society (Section 39 of the *Majallat al-Ahkam al-'Adliyyah*). However, the first presumption of the Muslim jurists is that any rule found in the texts of the Qur'an and the *Sunnah* is meant to be perpetual unless proved otherwise. Undoubtedly, the institution of 'Aqilah existed in the Arab society, and the Prophet (peace be on him) adopted this institution with a few changes through his sayings, acts and tacit approvals. However, the same is true for prayer, fasting, *zakat*, and *haji*. Arabs were well aware of these concepts, and they were practising them as well (Ali, 2001). The Qur'an testifies that these practices were there since the time of Prophet Ibrahim (peace be on him). However, several innovations were added to them, and they were practised in a corrupted form. The Prophet (peace be on him) introduced them in their purest form, removing innovations from them, made changes in them, added new dimensions to them, and established them in the Muslim society for perpetual existence. The same is true of the institution of *Aqilah*.

One argument for *Aqilah* being a perpetual concept of the *Shari'ah* is that the Prophet (peace be on him) established this institution in *Madinah* as well even though *Madinah* society was quite different from the *Makkan* society (Al-Rahman, 1997; Hamidullah, 2006). For instance, *Makkah* was inhabited by one major tribe of the *Quraysh*. This tribe had many clans and sub-clans which had alliances with each other through the concept of *hifl* (oath). Non-*Qurayshites* could not survive in that society without having some formal relationship such as *jiwar* (refuge) or *wala'* (clientage) with any of these clans. When the Prophet (peace be on him) migrated to *Madinah*, that society was quite different. It had two major Arab tribes, *Aws* and *Khazraj*, and three major tribes of the Jews, *Banu Qaynuqa'*, *Banu al-Nadir* and *Banu Qurayzah*. Each of these tribes had clans and sub-clans. When Muslims from *Makkah* wanted to settle there, they faced a peculiar problem as they left their major tribe in *Makkah*. Moreover, they were joined by Muslims from across the Arabian Peninsula belonging to different tribes. When the Prophet (peace be on him) introduced the institution of *Mu'akhah* (brotherhood) between the Migrants and the Helpers, it was a new form of mutual support which was based on a modified version of the concepts of *hifl*, *jiwar* and *wala'*. Moreover, as the sub-clans of the Arab and the Jewish tribes of *Madinah* already had alliances with each other and they also had agreements about mutual support for payment of *Diyat* etc., the Prophet (peace be on him) included special provisions about these issues in the treaty between Muslims and Jews, commonly known as the Pact of *Madinah*.

Aqilah in the Constitution of the State of Madinah

Dr. Muhammad Hamidullah (2002) compiled the text of this significant document in his collection of the legal documents of the era of the Prophet (peace be on him) and the Rightly-guided Caliphs (God be pleased with him). He also translated the text of this document into English and wrote a detailed introduction on it. This translation has been published as "*The First Written Constitution in the World*" (Hamidullah, 1987; Al-Buti, 1991). Some scholars prefer to call this document as an international treaty, instead of a constitution. In the US constitutional law, there is also an interesting debate on whether or not the Constitution of a federation is a treaty (Martin, 2007). For instance, with an Islamic perspective, it provided the following provision about the *diyat* imposed on the emigrants from among the *Quraysh*:

المهاجرون من قريش على ربعتهم . يتعاقلون بينهم . وهم يقدون عانئهم بالمعروف والقسط بين المؤمنين .

The emigrants from the Quraysh shall be responsible for their own ward; and shall pay their blood-money in mutual collaboration and shall secure the release of their own prisoners by paying their ransom from themselves so that the mutual dealings between the believers be in accordance with the principles of goodness and justice (Hamidullah, Majmu'at al-Watha'iq, 59).

Then the following general provisions are given about it:

وَأَنَّ الْمُؤْمِنِينَ لَا يَتْرُكُونَ مَفْرَحًا بَيْنَهُمْ أَنْ يَعْطُوهَ بِالْمَعْرُوفِ فِي فِدَائِهِ أَوْ عَقْلٍ -
وَأَنَّ لِإِيحَالِ مَوْلَى مُؤْمِنٍ دُونَهُ -

And the believers shall not leave anyone, hard-pressed with debts, without affording him some relief, in order that the dealings between the believers be in accordance with the principles of goodness and justice. Also, no believer shall enter into a contract of clientage with one who is already in such a contract with another believer.

Aqilah during the Reign of Caliph 'Umar (God be Pleased with him)

Similarly, when the Companions of the Prophet (peace be on him) conquered new lands where societies were quite different from the tribal setup of the Arab society, they devised new ways for establishing *Aqilah* there. For instance, *Umar* (God be pleased with him), the second caliph, decided that all those soldiers would be deemed forming *Aqilah* for each other who belonged to one battalion and whose names were recorded in one register (*diwan*), which would also contain a record of the allowances that the government gave them. They were called "people of the same register" (*ahl al-diwan*) (*Musannaf Ibn Abi Shaybah*, *Kitab al-Diyat*, Bab al-Diyah fi Kam Tu'adda). Similarly, registers were made for people belonging to various professions. None of the Companions objected to this decision, and it was implemented throughout the lands which were ruled by Muslims. As noted earlier, this was a kind of tacit consensus of the Companions (Kasani, *Bada'i'al-Sana'i'*, 10:314).

Minimum Core of Aqilah

The claim of the contemporary scholars that *Aqilah* does not exist in the contemporary world is not well-founded because many Muslim countries have provisions in their legal system for *Aqilah*. Moreover, the bare minimum core of *Aqilah* exists in the form of the *asabat* (agnates) from among the relatives of the convict. As mentioned above, the Prophet (peace be on him) imposed *Diyat* on the 'asabat of the convict (*Sahih al-Bukhari*, *Kitab al-Diyat*, Bab Janin al-Mar'ah). On the basis of the traditions on this issue, jurists have generally included 'asabat in the 'aqilah, including *Shi'ah* jurists (Section 468 of the Islamic Penal Code, Iran). Even the *Hanafi* jurists, who relying on the precedent of Caliph *Umar* (God be pleased with him) opined that the *ahl al-diwan* were to act *Aqilah*, also asserted that in the absence of the *ahl al-diwan* the liability reverts to the 'asabat (Kasani, *Bada'i'al-Sana'i'*, 10:315).

It may be recalled that the provisions of Chapter XVI, PPC, entitle the heirs of the victim to *Diyat* and also give them the right to waive or compound the right of *Qisas*, but they are silent on corresponding liabilities of the heirs of the convict. Similarly, these provisions make the government the *wali* for the victim when there is no other *wali*, but they are silent on the government being *wali* for the convict when he does not have any other *wali*. This gap on the liability side needs to be filled through interpretation in the light of the Islamic Injunctions.

Aqilah and Individual Criminal Responsibility

Some texts of the Qur'an are sometimes cited against the concept of *Aqilah*. One of the most oft-quoted verses in this regard is the following:

﴿وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ ۗ﴾ (سورة بنى اسرائيل، 15)

"And no burdened soul shall bear another's burden" (Quran 17:15).

Here the first thing to note is that this verse relates to accountability on the Day of Judgment. This is quite obvious from the context in which this sentence appears here and elsewhere in the Qur'an:

﴿مَنْ اهْتَدَىٰ فَإِنَّمَا يَهْتَدِي لِنَفْسِهِ وَمَنْ ضَلَّ فَإِنَّمَا يَضِلُّ عَلَيْهَا ۗ وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ ۗ وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا﴾ (سورة بنى اسرائيل، 15)

"Whosoever goeth right, it is only for (the good of) his own soul that he goeth right, and whosoever erreth, erreth only to its hurt. And no burdened soul shall bear another's a burden. We never punish until We have sent a messenger" (Quran 17:15).

﴿وَالَّذِينَ إِذَا زُرُّوا بِهِمْ مَخْرُجًا مِمَّا كَانُوا عَلَىٰ مِنْه جَاهِلِينَ خَالُوا بِهِمْ فَسَادَةً مِّنْ أَنفُسِهِمْ أَنزَلَ اللَّهُ الْوَحْيَ الَّذِي يُنذِرُ بِهِ الَّذِينَ ظَلَمُوا وَأُولَٰئِكَ هُمُ الْمُضْلِمُونَ﴾ (سورة النجم، 38-42)

"That no burdened soul shall bear another's burden; And that man hath only that for which he maketh effort; And that his effort will be seen; And afterwards he will be repaid for it with fullest payment; and that to thy Lord is the final goal" (Quran 53:38-42).

﴿وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ وَإِن تَدْعُ مُثْقَلَةٌ إِلَىٰ جِهْلِهَا لِالِئْتِمَالِ مِنْهُ بَشَرٌ ذُو لُؤْلُؤٍ مَّا تَدْعُ إِلَىٰ جِهْلِهَا إِتْمَانًا يَتَذَكَّرُ إِلَىٰ نَفْسِهِ﴾ (سورة فاطر، 18)

"And no burdened soul can bear another's burden, and if one heavy laden crieth for (help with) his load, nought of it will be lifted even though he (unto whom he crieth) be of kin. Thou warnest only those who fear their Lord in secret and have established worship. He who groweth (in goodness), groweth only for himself, (he cannot by his merit redeem others). Unto Allah is the journeying" (Quran 35:18).

Second, as the jurists explain, *Aqilah* does not put one's burden on another; rather, it is the individual burden of each and every member of the *Aqilah*. The jurists give the example of imposing the obligation on an individual for the maintenance of his wife, children, and other relatives. As one cannot hold the obligation of maintenance to be a violation of the dictum, *no burdened soul can bear another's burden*; the same is true of the obligation of the *Aqilah* to contribute to the payment of *Diyat*. As noted earlier, it is an example of the obligatory *ta'awun* and *nasr*.

Third, as per the Islamic Injunctions, *Diyat* is not a punishment and, hence, the argument of individual criminal responsibility is not attracted here. As noted earlier, it is a token that signifies the value of human life; no human life should go waste. Moreover, it is a kind of compensation to the heirs of the victim. This point will be further elaborated in the next section.

Aqilah in the Contemporary World

Today, we can develop other mechanisms for this purpose. It is worth noting here that the system of *Aqilah* exists in many Muslim countries in the contemporary world which have enforced the concepts of *Qisas* and *Diyat* in their legal system. These include Afghanistan, Iran, the Kingdom of Saudi Arabia, and the Hashimite Kingdom of Jordan. Thus, for instance, Section 468 of the Islamic Penal Code, Iran, says:

عاقله عبارت از پدر، پسر و بستگان ذکور نسبی پدری و مادری یا پدری به ترتیب طبقات ارث است. همه کسانی که در زمان فوت میتوانند ارث ببرند به صورت مساوی مکلف به پرداخت دیه می باشند.

Aqilah comprises the father, son, and male blood relatives from mother or father's side, or from father's side, as per the categories of inheritance. All individuals qualified to receive a share in inheritance at the time of death are equally obliged to pay *diyat*.

There are detailed provisions in this Code about the liability of *Aqilah* in various instances of *qatl* and *hurts*.

Conclusion

From the above arguments, it can be safely concluded that the institution of *Aqilah* is an essential part of the scheme of the *Shari'ah* pertaining to the concept of *Diyat*, although it may take new forms and shapes in new social contexts. It serves many purposes, but not restricted to, developing a mechanism of mutual help and support by individuals within a society, sharing of burden with the destitute and better prevention of

crimes. The institution of *Aqilah* forms an essential part of the Islamic dispensation of justice and enforcing the law of *Diyat* without establishing the institution of *Aqilah* has created many anomalies in Pakistan. This paper established that the institution of *Aqilah* is based on the concept of vicarious liability and it has its roots in the notions of mutual help and support which, in turn, form the backbone of the Muslim society. Hence, it is essential to make proper legislation for establishing this institution. This will not only help in the effective implementation of the law of *Diyat*, but will also help in strengthening the family relations and the social fabric.

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