

The Status of Insurance as an Alternative to Aqilah for Diyat Payments Pertaining to Road Accidents

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Abstract: In some Islamic countries, traffic accidents are categorised as unintentional harm or fatality cases. The laws of these countries allow for the aggrieved party to demand diyat (Compensation for the loss suffered) from the offender that may be paid by their aqilah (in its original context, means community or tribe) or male family members. The question that then arises is to what extent can the aqilah be replaced by insurance agencies as the payer of diyat to the victim(s) or their respected families? The objective of this study is to determine this extent, specifically with regards to traffic accidents. This is an issue of great significance because insurance agencies are better equipped and more effective at providing coverage and protection to their policyholders and as such have the potential to replace the aqilah system in situations where the financial means for such a payment is not present. Studies have shown that insurance agencies do indeed possess the potential to replace the aqilah system in the capacity of diyat compensation to victim(s) or their families, especially in the case of road accidents. It should be pointed out that insurance agencies possess inherent similarities to the aqilah system particularl in relation to its basic concept, role and execution in achieving the same goals.

Key words: Diyat compensation, insurance, aqilah, road accidents, tribe

INTRODUCTION

The system of diyat compensation to victims of traffic accidents and/or their families is still being practiced today and is applied in contemporary Islamic nations of the middle East such as Saudi Arabia, Jordan, Kuwait and several other Arabian Gulf countries. The application of diyat payments is based on an updated form of Islamic jurisprudence, especially with regard to the standardisation of payment-rates based on current currency values. The claiming and payment of diyat is still maintained as private law and thus suffers from no intervention from governing bodies in its application. Claims are brought before a court of law for trial and it is the prerogative of the courts to determine the amount to be paid by the aqilah. The aqilah system is recognized by Syariah as a means to share the burden of diyat payments as well as collectively bear responsibility, chiefly when faced with cases that involve injury or fatalities.

The question remains, to what extent can insurance agencies play the role of the aqilah with regards to the payment of diyat vis-a-vis road accidents? Can the

system of aqilah which is based on family-bonds be replaced with the system of insurance which is founded on the cooperation of individual policyholders?

A study of this nature is important as today's contemporary Muslim community has the choice of seeking coverage and protection through investing in various insurance products that are readily available. It is based on fact that in some Islamic countries, the family institution has become fractured, thus preventing the aqilah system from being effectively applied. As such, insurance agencies can be viewed as possessing the potential to replace the role of the aqilah with regard to diyat payments for road accidents.

The purpose of this study is to determine the extent to which insurance agencies have the potential to replace the role of the aqilah to pay diyat in the event of a road accident. Both the concepts of aqilah and insurance will thus be analysed in order to determine if there exist any parallels which will allow for such a replacement to occur. This study will then determine the extent to which an insurance agency can replace the aqilah system by taking into account and analysing the views of today's contemporary Muslim scholars.

This study will intentionally limit its scope to unintentional traffic accident cases. This is due to the fact that Islamic law already has different provisions in place for crimes that involve causing intentional physical harm or murder which this study will not touch upon.

DEFINITION AND CONCEPT OF AQILAH

From a linguistic standpoint, aqilah means the payer of aqil. The word aqilah is based on the Arabic 'aql, as the traditional payment of camels as diyat would be tied-up or aqil within the compound of the victim's heirs (Daradkah, 2008). From a Syariah perspective, it refers to the parties responsible for the payment of diyat on behalf of the offender whose actions resulted in injury or accidental death. It should also be pointed out that the aqilah may not then claim recompense for this payment from the offender (Daradkah, 2008).

Jurists are divided between two alternative interpretations on who exactly qualifies to be an aqilah which are as follows:

The aqilah are comprised of male heirs to the offender. This is the view held by a majority of Muslim jurists and consist of the jurists from the school of Maliki, Shafie, Hanbali (Qudamah *et al.*, 1981) and Zahiri (Hazm *et al.*, 1971). This view is based on a narration by Jabir stating that Prophet Muhammad (PBUH) declared each family bear the responsibility for its diyat (Muslim, 1992). This view is also derived from the consensus of the surviving companions during the time of Abu Bakar as Caliph (Al-Qurtubi, 1993).

The aqilah are comprised of members of the Diwan or Muslim Army who received a stipend or salary from the bayt al-mal. In this case, the diyat is deducted from their salaries and not taken from their possessions. If the offender is not of the Diwan then the diyat is paid by the offender's male heirs. This is the view held by the jurists of the Hanafi School (Shamsuddin, 1986) and a few jurists of Maliki (Al-Dardir *et al.*, 1975). This view is also based on a report by Ibrahim al-Nakha'i which stated that diyat was originally borne by the offender's clan and after the Diwan was established by Umar, these payments were then borne by the latter (Al-Kasani, 2000). This action was taken while in the company of other companions and Umar received no objection from them, thus signalling their consensus (Shamsuddin, 1986).

According to Daradkah (2008), from the views stipulated before, aqilah refers to parties that render assistance and may consist of heirs, members of the Diwan or the Muslim community in general, based on their suitability and according to the times. This illustrates that the aqilah may not necessarily only be comprised of heirs or members of the Diwan, as any member of the Muslim community may render assistance and stand as an aqilah for the offender.

The provision of aqilah in Syariah serves to ease the burden of the offender as the injury of fatality caused was neither intentional nor malicious. This is because diyat payments may result in undue burden to the offender, especially if the amount is greater than the value of their wealth in its entirety. As such, an offender's heirs and the Muslim community in general should attempt to assist him/her in overcoming their difficulty. Apart from that, aqilah also serves to provide assistance to the victim (and their families) as they have unjustly received injury or been killed. Without the system of aqilah in place, it may become impossible for the offender to provide compensation to the victim.

Further study will determine the suitability of insurance as a possible replacement for aqilah as a means of easing the burden of the offender with regards to the provision of diyat. Furthermore, this study will also analyse the similarities that exist between insurance and the aqilah system.

PARTIES RESPONSIBLE FOR THE PAYMENT OF DIYAT AMONGST MEMBERS OF THE AQILAH

For the crime of manslaughter (accidental death), payers of diyat should consist of those family members who are emancipated of age and with means. Therefore, women, children and the insane do not qualify as members of the aqilah. However, there is view that they may be included amongst those required to pay diyat in the event that they themselves are members of the Diwan and were involved in the crime in question.

According to the opinions of the Hanafi and Maliki jurists, an individual who committed manslaughter during the execution of some other criminal act is required to pay the diyat in conjunction with the aqilah. This view is supported by records on Umar in his judgement on Salamah Ibn Nu'aym who had murdered a Muslim whom she mistook to be a non-Muslim: Unto you and your family diyat. Inversely, however, according to the school of Shafie and Hanbali, the killer himself is not required to pay the diyat.

SITUATIONS WARRANTING OR RELIEVING PAYMENT OF DIYAT AND KAFFARAH (ATONEMENT) FOR TRAFFIC ACCIDENTS

- In the event that a driver is breaking traffic laws such as sleeping while driving, not having a driver's licence, is stopped in a location that is neither suitable nor allowed or has not the visual capacity required for driving and as such causes a fatality then kaffarah is mandatory and the required diyat payment is to be made by his aqilah (Baz, 1999)

- If a driver is found to be negligent in the maintenance of his vehicle which as a result becomes the direct cause of a fatal accident, kaffarah is mandatory for him and the required diyat payment is to be made by his aqilah
- If the accident was caused by the driver's actions which were intended to prevent an accident from occurring such as swerving to avoid a large pot-hole, the driver is not liable for kaffarah and his aqilah need not pay any diyat (Baz, 1999)
- If the victim of the accident is one of the people who caused it in the first place, for example by running into a car that has stopped at a traffic light and causing his own death, therefore replacement for the damage caused must be taken from his assets and the diyat for the death of other victims involved in the accident is to be paid by his aqilah (Baz, 1999)
- If the driver did not break any traffic laws and was not negligent in maintaining his car such as the accident was caused by a perfectly good tyre suddenly puncturing or equipment failure causing the vehicle to careen out of control, he will not be liable for either kaffarah or diyat (Baz, 1999)
- In the original situation, a driver who causes a road accident resulting in fatalities must perform kaffarah and his aqilah must pay diyat even though he did not intentionally cause the accident because Allah has made it compulsory to pay diyat for unintentionally causing death

WHO IS LIABLE TO PAY DIYAT FOR PEOPLE WITH NO AQILAH?

The consensus of the jurists is of the view that the bayt al-mal should pay the diyat for people with no heirs or are not members of the Diwan. According to the researcher, Gharar al-Ahkam, whosoever is not a member of the Diwan and has no heirs, his aqilah is from the bayt al-mal based on a strong narration. This is also the view of Abu Hanifah in one of his narrations. Al-Shafie states that the bayt al-mal should bear the cost of the diyat for an offender if he has no next of kin by saying that all those with no kith or kin are like strangers, abandoned young and the like, therefore all Muslims become their aqilah based on their religious kinship and the property of such an offender becomes theirs if and when he passes. The reasoning behind this view is a hadith from Prophet Muhammad (PBUH):

I am the heir for those with no heirs; I am his aqilah as his heirs would be. Al-Dardir *et al.* (1975) also says that, the bayt al-mal (should pay) if the offender is a Muslim

Further, the bayt al-mal should also bear the diyat despite the existence of aqilah if their numbers are few or if they cannot afford to pay it. On the other hand, Hazm *et al.* (1971) is of the view that if the aqilah cannot afford to pay the diyat then the diyat can be taken out of zakat from the al-gharimin allocation because they are presumed to be in debt. However, the Hanbali jurists (Qudamah *et al.*, 1981) have a different view as they make it compulsory for the diyat to be paid out of the offender's property if he has no aqilah.

ABSENCE OF BAYT AL-MAL

The jurists have dissenting opinions on situations if the bayt al-mal ceases to exist or is unstable or is incapable of paying diyat. The view of the consensus is that diyat is mandatory upon offenders because initially, the diyat arises from him and the aqilah is merely there to assist him. If there is no aqilah and no bayt al-mal either, the liability to pay the diyat goes back to the offender so that the victim did not lose his life for nought. Contrarily, some of the jurists opine that the offender is not liable to pay anything because the diyat arises from the aqilah (Qudamah *et al.*, 1981).

THE RATE OF DIYAT PAYABLE BY THE AQILAH OR THE BAYT AL-MAL

The jurists have dissenting opinions on the rate of diyat that should be paid by each individual aqilah. The Hanafi jurists are of the view that each individual need only pay four dirhams. If that is not enough, it should then be taken from the qabilah with the closest relation to the offender, regardless of whether they are members of the Diwan or not (Al-Kasani, 2000). The Shafie jurists, however, are of the view that for those with moderate means, they need only pay a quarter of a dinar while those who are wealthy are required to pay half a dinar. Overall, though the majority of jurists is of the view that there is no particular limit to how much needs to be paid by each aqilah for the diyat and that it is to be determined by the judge presiding over the case to divide the diyat (Hazm *et al.*, 1971). Al-Syarbini is quoted as stating that the determination of half a dinar for the rich and a quarter dinar for the moderately wealthy is neither based on any precedent nor hadith but rather the intrinsic meaning of rendering assistance. Therefore, it can be stated that the meaning of rendering assistance is not immutable and is subject to change according to the times and the situation involved.

If the responsibility of the diyat is based on the decision of the courts, it is then incumbent upon the bayt al-mal to bear the entire diyat of a hundred camels. This

payment can also be made based on the value of a camel (Shamsuddin, 1986) which is equivalent to a thousand dinars. If, the diyat amount was determined through an out-of-court settlement and it is less than what would normally be paid, then the bayt al-mal need only pay that which was agreed upon.

During the time of Prophet Muhammad (PBUH), a single camel was considered to be sufficient to feed a 100 people, thus a 100 camels could feed 10,000 people. Taking that into consideration, the value of the diyat should be sufficient to feed 10,000 people (Daradkah, 2008). However, it should be mentioned that it would be considerably better if the value of the diyat were to be determined by experts such as what is currently being done in Saudi Arabia, the Emirates and Jordan.

The jurists are unanimous in the opinion that the timeframe for the diyat to be paid should be no >3 years if it is borne by the aqilah such as in the case of manslaughter. This is based on the actions of Umar who provided this timeframe for the settlement of the diyat.

However, some of the jurists are of the view that a judge may order the immediate settlement of the diyat as stated by Ibn Kamiah:

The payment of the diyat may not be delayed unless it is determined by a judge to be for the greater good

This view explains that payment of the diyat can be delayed or prolonged if it serves another or greater good such as in the case of the accused not possessing the means to make immediate payment. On the other hand, if payment of the diyat is to be borne by the bayt al-mal then it is to be paid accordingly over a period of time so that its overall functions are not compromised. Similarly, even if the offender is wealthy, a judge may determine the timeframe for the diyat payments and whether it is to be expedited or delayed.

SIMILARITIES BETWEEN INSURANCE AGENCIES AND THE AQILAH SYSTEM

There are several forms of insurance that are practiced by countries in the middle East. At its most basic form, it is divided into categories which have been determined and discussed by Daradkah (2008) as follows:

Social Protection Insurance (Al-Ta'min al-Ijtima'i): Which provides an employed individual coverage from risks; such as traffic accidents, illness, disability, old age and retrenchment.

Cooperative insurance (Al-Ta'min al-Ta'awuni/al-Tabaduli): It refers to a group of individuals who provide coverage for each other from a variety of risks and unfortunate occurrences that may befall them. Members of the group are required to contribute to a fund via instalments that are then used to provide funding for the necessary coverage.

Commercial insurance (Al-Ta'min al Tijari): Where individuals invest in insurance companies. The insurance companies in turn provide protection to the investors according to their coverage.

All three insurance types will provide coverage and protection to participants in the event that they are befallen by calamities. Contemporary scholars have differing views with regards to the appropriateness of all three insurance types as replacements for the system of aqilah. Amongst the scholars who are known to discuss the rulings in this matter are Daradkah (2008) and Shahatah (2006). Each of these scholars has extensively discussed the theoretical aspects with regards to what extent this may be allowed to occur. This study will thus analyse their views and choose the strongest arguments amongst them to be presented as serving the greater good for society.

THE PROSPECTS OF INSURANCE IN REPLACING THE AQILAH SYSTEM

This study has discovered that the views amongst the scholars on the extent to which insurance may be used as a replacement to the system on aqilah are disparate based on its type and form.

Social protection insurance (Al-Ta'min al-Ijtima'i): According to Shahatah (2006), this form of insurance cannot play a role as a replacement to aqilah as the funds involved do not come entirely from individual investments but rather the bulk of it originates from the government which is the primary investor to the fund. Alternatively, according to Daradkah (2008), this form of insurance may be used as an alternative to aqilah as both possess similarities from the aspect of its operation that being that payment is provided as compensation for injury or death.

Cooperative insurance (Al-Ta'min al-Ta'awuni/al-Tabaduli): As quoted by Shahatah (2006), there are scholars who feel that this form of insurance cannot be used to replace aqilah as it is a system, determined by Islamic law to provide relief and assistance to offenders and thus there is no need for it to be replaced with another. This system has been seen to be analogous to

the systems of zakat and alms-giving (sadaqah) which cannot be replaced as they have themselves been specifically determined by Islamic law.

The majority of contemporary middle Eastern scholars however, such as members of the Majma'Fiqh, agree that this form of insurance can be used to replace aqilah (Shahatah, 2006). Their arguments are based on verses from the Quran such as chapter al-Maidah: 2 and Chapter al-Nisa: 102 that command Muslims to help and assist in the carrying out of good deeds thus showing that this form of insurance is indeed in accordance with it. It therefore, follows that based on this interpretation, the payment of diyat via insurance is in accordance with the command of Allah.

Commercial insurance (Aal-Ta'min al-Tijari): According to Shahatah (2006), this form of insurance is considered to be permissible overall. This view was developed from the opinions of Mustafa Zarqa', Muhammad al-Bahi and Abd al-Razzaq al-Sanhuri. Their arguments are that the original intent is considered to be permissible, thus any muamalat that brings benefit to humanity should be utilised unless there exists any evidence that prohibits it. Commercial insurance also possesses traits that cater to the greater good which are endorsed by syarak due to the fact that modern existence is not without its risks. Commercial insurance has become popular amongst people and fiqh methodology states that custom may become recognised as legal rule. Commercial insurance is considered to be an emergency measure and must be used by all in order to mitigate the risk of disaster and is based on the concept of darurah (extreme necessity) which allows for the use of that which is clearly prohibited (Daradkah, 2008; Shahatah, 2006). Only certain provisions within commercial insurance such as accident and injury coverage may be used whilst other aspects of it remain prohibited.

The International Islamic Fiqh Academy has, in its own capacity, declared all forms of commercial insurance to be prohibited. Thus by their arguments, commercial insurance cannot be used to replace the system of aqilah. They base their argument on the fact that commercial insurance possesses too many obfuscated traits. According to them, investors do not possess sufficient information during the moment of contract ('aqad) with regards to the instalment rates and rates of return/compensations to which they are eligible to receive. Additionally, insurance companies in themselves are unable to determine the rate of compensation which will be given during the time of the contract ('aqad). Commercial insurance also appears to involve uncertain risk, not to mention the form of coverage offered is

unclear. Due to fact that such uncertainties exist during the moment of contract ('aqad), it is thus rendered null and void. An additional concern is that, commercial insurance also possesses traits similar to that of gambling as the company is in a position to reap profit from the various investments whilst the investors themselves stand to gain nothing if they experience no accident or calamity. This is further compounded by the fact that insurance companies stand to lose money in the event that they are required to provide a payout that exceeds the value of their total investments (Daradkah, 2008; Shahatah, 2006).

This study, therefore, supports the view that insurance agencies may be used to replace the system of aqilah via its three most common forms: Social protection insurance (Al-Ta'min al-Ijtima'i), cooperative insurance (Al-Ta'min al-Ta'awuni/al-Tabaduli) and commercial insurance (Al-Ta'min al-Tijari). However, it should also be stated that this study also has come to the conclusion that commercial insurance would be required to possess and/or revamp several intrinsic traits so as to ensure that it does not come into conflict this the principles of Islamic law. Overall, however this demonstrates that insurance agencies possess great potential to replace the system of aqilah.

According to Daradkah (2008), insurance agencies can be used as a substitute for aqilah because the reason for their inception mirrors the intent of aqilah that being providing assistance and acting as a guarantor. According to Shahatah (2006), the role of aqilah is to reduce the burden on the offender (in the case of manslaughter) as well as protect the rights of the victim via the provision of compensation. The existence of insurance agencies can reduce the burden of the aqilah by drawing the required compensation from other investors who have voluntarily contributed the fund. Further, insurance agencies can serve to reduce or eliminate the burden placed on the shoulders of the offender (in the case of accidental death or manslaughter), especially in the event that the aqilah does not have the means to effect payment of the diyat unto the victim. It is not unprecedented for victims or their heirs to demand compensation from accidental offenders to such a degree that it may unjustly burden them (Shahatah, 2006). With this in mind, it is clear that the role of insurance agencies is in line with that of aqilah. Insurance agencies that are committed to providing coverage to their investors possess traits similar to family members who have been ordered by the courts to render assistance in the payment of the diyat. Aside from that, the payment made by insurance agencies can prevent the death or injury of the victim from being in vain as a result of the inability of the

offender and by extension their aqilah (as a result of poverty) to pay the diyat. Further, there exists the feature of mutual assistance between the investors to ease the burden of the guilty party, similar to that which forms the basis of aqilah (Daradkah, 2008).

The suitability of social protection insurance (Al-Ta'min al-Ijtima'i) as an alternative to the system of aqilah is based on the role it plays in fulfilling the rights of the victim if the offender is incapable of paying the diyat. Social protection insurance is a form of insurance whereby the vast majority of its funds is provided by the government. In accordance to this, the government plays or should play a role in assisting people with problems such as debt. As narrated by Abu Huraira, Prophet Muhammad (PBUH) said (Al-Bukhari, 1992):

I am more rightful than other believers to be the guardian of the believers, so if a Muslim dies while in debt, I am responsible for the repayment of his debt and whoever leaves wealth (after his death) it will belong to his heirs

This hadith illustrates that the government has the duty to bear responsibility for any debts that are unable to be paid by its people. This duty is to be borne by the government after the passing of Prophet Muhammad (PBUH). Even though, this hadith only touches upon the issue of debt, it can be expanded to include the rights of one individual unto another such as diyat as it is similar in nature to debt. What this, therefore means is that today's governments are bound to assist its citizens in resolving any claims that involve their rights. Thusly, it is through the use of social protection insurance that the government has and can continue to perform its duty in helping its citizens in the payment of diyat.

CONCLUSION

Insurance can be used to replace the institution of aqilah in the payment of diyat for traffic accidents as it implements the concept of rendering assistance as promoted by Islam. It can be used to ease the burden of the offender and secure the rights of the victim which cannot be fulfilled as a result of lack of means on the part of the offender. This is because the aqilah system is

unable to satisfy the same role as it once did in the majority of Islamic nations and as a result causes massive loss and a burden that has to be borne by the victim.

The concept of the payment of diyat via insurance is something that should be introduced in Islamic nations as road accidents represent an unavoidable problem. The payment of diyat in this way can be used to assist accident victims in seeking treatment for their injuries.

On a final note, it is important to point out that the discussions in this study have been limited to the forms of insurance available in various countries in the middle East, so as a result this discussion does not review the Islamic insurance systems known as, *takaful* currently in use in several other Islamic nations as their concept and implementation is dissimilar.

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