SOME PECULIARITIES OF THE LAW OF INHERITANCE
THE FORMATION OF IMĀMĪ AND ISMĀ‘ĪLĪ LAW*

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The question of the caliphate or imamate and similarly that of the *mut'a* marriage (Imāmīs) are generally seen as the deepest differences distinguishing Shī'ī law systems from those of the remaining law schools. Inheritance law, however, reveals an additional range of Shī'ī idiosyncrasies: the division of heirs by kin into classes, certain privileges of the eldest son, and certain disadvantages of wives with respect to some goods in their husband’s estates. From a historical point of view, the analysis of these cases leads to some innovative conclusions about the origin and development of Imāmī and Ismā‘īlī doctrine, the influence of political elements on the law system, the question of the authenticity of the Zaydī *Maǧmū‘ al-fiqh*, and the dominance of practical considerations over strict legal rules.

Three things peculiar to Imāmīs and Ismā‘īlīs may throw light upon the origin of their law systems: the division of heirs by kin into classes, certain privileges of the eldest son, and certain disadvantages of wives with respect to some goods in their husband’s estates. I take as a *terminus ad quem* the *Uṣūl al-kāfī* of al-Kulaynī¹ (d. 328/939) and as a *terminus a quo* the *Qurb al-ismā‘īd* of Abū ‘l-‘Abbās al-Qummī² (d. 300/912 ca), including three Musnad, of Ğa‘far al-Ṣādiq (d. 148/765), Mūsā al-Kāzīm (d. 183/799), and ‘Alī al-Ridā (d. 203/818) respectively. The temporal gap between these works is not very great, but their doctrinal differences are considerable. An intermediate stage is represented by al-Faḍl b. Șādān (d. 260/874).

1. Division of the heirs by kin into classes

The Shī‘ī all-defined system avoids the fragmentary character of the Sunnī

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1 8 vols., Teheran 1388–89/1967–68 (cited as: *Uṣūl*).
inheritance law. However, “the real cause of the difference between the principle of the Sunnite law on inheritance and its Shiite counterpart is one of the most important problems remaining unexplored by modern research”.

3 The reasoning given by al-Kulaynī in order to provide firm grounds for such a division is based exclusively on the interpretation of Qur’ānic verses. He lists the revelations on inheritance in the following order: first, Q. 4:11, which seems to give the whole estate to walad, fixing, however, the share due to one or more daughters and specifying that a male has the right to a portion equal to that of two females. Then parents and spouses are admitted to succession with them (Q. 4:11–12). Later on, Q. 4:12 fixes the share of the uterine brothers, while Q. 4:176 deals with the full or consanguine brothers. Then Q. 8:75, concerning the ālū ‘l-arḥām, is revealed, which gives them precedence over confederates and patrons. Lastly, Q. 4:7 abolishes the category of agnates, since also women have a right to “little or much”, contrary to a rule in force during the ḡāhiliyya. 5 The non-abrogation of Q. 8:75 leads, as a consequence, to the fact that there is no distinction between heirs by kin, as the remaining law schools maintain (heirs by quota, agnates, and ādawā‘ ’l-arḥām). Relatives must be considered as a whole: cognates and agnates are placed on a footing of equality; the only important elements to be considered are their blood relation both on the paternal and maternal side and their proximity to the deceased.

For the first class, composed of two groups (parents; children, however remote), al-Kulaynī has a full elaboration. Descendants inherit according to their degree; the nearer bars the more remote, even if this doctrine was fluid, since Ibn Bābawayh6 maintains that descendants from the second degree onwards cannot inherit if parents are present. The real question involved here is the meaning of walad. While the Sunnis interpret this term in different ways in different Qur’ānic verses, the Šī’īs give always the same meaning to walad, namely, male and female direct descendants, which is closer to Arabic usage and the letter of Qur’ān. Consistently the expression walad al-


4 Usūl, VII, 72–75.

5 The Ismā‘īlī al-Nu’mān (d. 363/974) (Da‘ā’īm al-Islām, 2 vols., Cairo 1379–83/1960–63, II, 380, no. 1358–60; cited as: Da‘ā’īm) sets forth the same principles as al-Kulaynī.

walad also includes both male and female descendants, however remote. Al-Kulaynî accordingly solves three cases in opposition to the Sunnî doctrine: a daughter excludes a son’s daughter; a daughter excludes a full or consanguine sister; and walad al-bint take the place of the bint, i.e., daughters’ children take the same place as children, if descendants of the first degree are not present.

In Qurb al-isnâd⁷ only one case regarding the first class (daughter’s son and son’s daughter) is solved. On the authority of ⁶Ali, inheritance is to be given to the nearest in kin, but, according to al-Riḍâ, the nearest in kin is here the son’s daughter. This solution, although attributed to ⁶Ali, is hardly likely to go back to him, both because of the temporal gap between ⁶Ali and al-Riḍâ and because of other contradictory doctrines attributed to ⁶Ali. Moreover, this report shows that the system of classes is not even outlined; the idea of proximity is not very clear; and the concept of agnation still prevails, since, whilst reaffirming the principle of proximity, a son’s daughter is considered as the nearest heir. Al-Ṭūsî⁸ comments that this solution is not in force in the Imâmî school and correctly perceives a contradiction between the general principle affirmed and the solution given, because both heirs are of the same degree.

The basic elements appropriate to outline this class can be traced back to al-Faḍl, who sets out general principles and solves accordingly a long series of cases: the walad al-walad always takes the same place as the direct walad; thus the walad of daughters must also be considered on the same footing as the direct walad; moreover, a sister is excluded from the inheritance when a daughter is present.⁹

The Iṣmâʿîlî al-Nuʿmân¹⁰ follows the same doctrine as the Imâmîs, even if he gives a particular tone to his exposition, making constant reference to Fâṭima, stressing the political rights of the Family of the Prophet, and mixing juridical with religious and political considerations,¹¹ basing himself on cer-

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⁹ Uṣūl, VII, 88–90.
¹⁰ Daʿāʾim, II, 366, no. 1331; 366–70.
¹¹ For instance, his opponents allot the residuum to a unique daughter as radd, not by virtue of raḥim, in order to render null and void the right of Fāṭima to succession to the Prophet (Daʿāʾim, II, 365–66, nos. 1329–30).
tain Qur’anic verses\textsuperscript{12} and Prophetic traditions.\textsuperscript{13} He makes juridical use of political elements.

In the absence of heirs of the first class, the nearest in kin follow, either male or female, divided in two groups (grandfathers and grandmothers, however high; brothers and their children, however low). The grandfather is treated as a brother since the distance of both to the deceased is the same, the first through the son and the other through the father. Since the principle of agnation is not acknowledged, both paternal and maternal grandfathers and grandmothers have the right to inherit on identical grounds. Grandfathers, grandmothers and brothers form the first degree of the second class, regarding which divergences do not exist.\textsuperscript{14} However, for the heirs from the second degree onwards, there was a debate concerning the grandfather and a brother’s son. According to the principles of proximity and agnation, the grandfather should exclude the brother’s son; but they are put on an equal footing,\textsuperscript{15} thus supposing two groups.

Al-Nu‘mān attributes this doctrine to the Prophet, but some evidence shows that the debate arose later. At the time of Muhammad b. Muslim al-Kūfī (d. 150/767) this rule was not fixed.\textsuperscript{16} Yūnus explains why they should inherit together,\textsuperscript{17} and al-Fadl gives further explanations and solves accordingly a series of cases.\textsuperscript{18} However, apart from this case, at the time of Yūnus, al-Fadl, and even later, the doctrine regarding the second class remained quite fluid. Thus, in contradiction to the principle of proximity, Yūnus di-

\textsuperscript{12} Ibn ʿAbbās refers Q. 42:23 to ʿAlī, Fāṭima, al-Ḥasan, al-Ḥusayn, and their offspring. This interpretation allows al-Nu‘mān to claim, in his time, the rights of the Holy Family against the ʿAbbāsid usurpers, who arrogated to themselves the imamate on the ground of being Ibn ʿAbbās’s progeny, while Ibn ʿAbbās himself never claimed anything similar for himself or any of his descendants. Also Q. 6:83–85, with its comparison between Fāṭima and Mary, demonstrates that Jesus, although belonging to the progeny of Abraham and Noah, inherits his place in the line from Mary, not from any of his male ancestors (Daʿāʾīm, II, 367, no. 1332).

\textsuperscript{13} Muhammad would call al-Ḥasan and al-Ḥusayn “his sons” and “his offspring”; the first day he saw each one of them he said: “Let me see my son” (Daʿāʾīm, II, 367–68, no. 1332; 369:7ff.). This demonstrates that relationship through Fāṭima (thus, through females) has superseded the agnatic tie.

\textsuperscript{14} Usūl, VII, 105–8.

\textsuperscript{15} Daʿāʾīm, II, 377–78, no. 1350.

\textsuperscript{16} Usūl, VII, 112, no. 1; 113, no. 5.

\textsuperscript{17} Usūl, VII, 115–16.

\textsuperscript{18} Usūl, VII, 116–18.
vides the estate in halves between a paternal uncle and a brother’s son; al-Faḍl does not exclude male or female descendants of full brothers because of the presence of one or more uterine brothers; and, according to a minority Imāmī doctrine, paternal and maternal grandfathers and grandmothers inherit with descendants from the second degree onwards, however low. Al-Nu‘mān admits a grandmother to the inheritance while her son is still alive, and he arbitrarily attributes the whole estate to the grandfather with uterine brothers’ and/or sisters’ descendants; but he admits that there is no explicit text supporting such a solution.

In Qurb al-īsnād only one report concerns the second class (mother and brother). Al-Riḍā asked whether the solution of the case should be based on the Qurʾān or on the sunna. Hammād b. ʿUṭmān (d. 190/806) believed that the sunna mentioned by al-Riḍā would refer to the opinion of the people [qawl al-nās: Sunnīs?]. ʿAlī, basing himself on the Qurʾān, made the nearest in kin inherit—the mother in this case. This report is interesting in many aspects. First, it shows that the technical meaning of sunna as sunnat al-nabī was not yet definitively fixed. Secondly, a certain divergence between Sunnīs and Ṣīʿīs about the reading of some Qurʾānic verses began to emerge at the latest by the time of al-Riḍā, although the attribution to ʿAlī might not be authentic, either because of the temporal gap between ʿAlī and al-Riḍā or because of other contradictory doctrines attributed to ʿAlī.

In the absence of heirs of the first two classes, the remaining relatives as a whole, including males as well as females, form the third class, according to the principle of proximity only, based on Q. 4:33 and on Q. 8:75. They are paternal and maternal uncles and aunts of the deceased and their descendants, then paternal and maternal uncles and aunts of an ancestor of the deceased and their descendants. However, some cases are an exception to the

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19 Usūl, VII, 121:4ff.
22 Daʿāʾim, II, 378, no. 1352.
23 Minhāḡ al-farāʾīd, fols. 12v, 13r (cf. GAS, I, 578, no. 22).
25 Daʿāʾim, II, 379, no. 1355.
26 Daʿāʾim, II, 379, no. 1353; 380:7ff.
principle of proximity.\(^{27}\)

In summary, *Qurb al-īsnād* has little on classes since it represents an archaic stage of Imāmī doctrine. At the time of al-Riḍā, the beginning of the third century H., an inheritance system did not yet exist. Only at the time of al-Faḍl can we find the elaboration of general principles, even if there is still much fluidity in some cases. This leads us nevertheless to reject Nasr’s assumptions. His statement that the “elaboration of Shi‘ism began with al-Kulaynī, to be followed by such figures as Ibn Bābawayh, Ṣayḥ al-Mufīd and al-Ṭūsī, with whom the principal doctrinal works of Shi‘i theology and religious sciences became established”,\(^{28}\) might be corrected so as to situate the beginning of the Imāmī doctrinal elaboration in an earlier period. I am inclined to believe that the three *Musnads* included in the *Qurb* reflect an early stage in Imāmī doctrine.

2. Privileges of the eldest son

In al-Kulaynī the doctrine that the eldest son of the deceased is entitled to take some goods as his special privilege and right is fully developed. However, there is no unanimity about its extension; some *ḥadīṣ* list the sword, the armor (*dirā‘*), the signet ring, and the Qur‘ān;\(^{29}\) one of them mentions only the sword and the arms;\(^{30}\) another omits the arms, but adds the deceased’s books, camel saddle, female riding camel, and garments.\(^{31}\) Moreover, while a tradition\(^{32}\) specifies that if something happens to the

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\(^{29}\) *Uṣūl*, VII, 85, no. 1 (Istibsār*, IV, 144, no. 538; *Tahdīb*, IX, 275, no. 994); 86, no. 3 (Istibsār*, IV, 144, no. 540; *Tahdīb*, IX, 275, no. 996).

\(^{30}\) *Uṣūl*, VII, 85, no. 2 (Istibsār*, IV, 144, nos. 539, 542; *Tahdīb*, IX, 275, no. 995; 276, no. 998).

\(^{31}\) *Uṣūl*, VII, 85, no. 4 (*K. man*, IV, 251, no. 805; *Istibsār*, IV, 144, no. 541; *Tahdīb*, IX, 275–76, no. 997). Ibn Bābawayh (*K. man*, IV, 251, no. 806; this *matn* is inserted in a more extensive report and related with a completely different *īsnād* in *Istibsār*, IV, 145, no. 544; *Tahdīb*, IX, 276, no. 999) relates another *ḥadīt* in which he lists only the sword, the camel saddle, and the body clothes. Al-Ṭūsī (*Ḥilāf*, II, 301, *mas‘ala* 129) briefly relates the doctrine of his school. Two *ḥadīts* are peculiar to him (*Istibsār*, IV, 144–45, no. 543; *Tahdīb*, IX, 276–77, nos. 1000–1001), but there is nothing new.

\(^{32}\) *Uṣūl*, VII, 85, no. 1.
firstborn male, his right should be transmitted to the eldest among the surviving male children, another tradition\(^{33}\) adds that when the male children are more than one, only the eldest can claim this privilege. Lastly, another \(\textit{hadīt}\)^{34} states that if the eldest child is a female, this privilege will be transmitted to the eldest among the sons. To this al-Ḥilli (d. 676/1277)^{35} adds the conditions that this son be neither a prodigal nor deficient in understanding, that the deceased should have left some other property besides, and that the son is liable for the payment or fulfillment of prayers and fasts which the deceased may have left unperformed.\(^{36}\)

All the law schools diverge on this doctrine, as al-Ṭūsī himself admits.\(^{37}\) Generally they ignore it. Only the Zaydı Ibn al-Murtaḍa\(^{38}\) (d. 840/1437) has a reference to the question in the context of reaffirming the doctrine according to which the whole estate is to be given as inheritance (Q. 4:7: “be it little or much’\(^{39}\)). Al-Ṭūsī gives as proof the \(\textit{iğmā’}\) of his school and its own traditions.\(^{39}\) Implicitly he admits that neither Qur’ānic references nor Prophetic traditions exist on the matter. Nothing exists in the \(\textit{Qurb al-isnād}\) about this subject, and the name of al-Faḍl appears only in one \(\textit{isnād}\). I am inclined to believe that this doctrine cannot be traced back to an early period and that its formulation might be not earlier than the third century. Fyzee\(^{40}\) pointed out that these special privileges recall the primogeniture and the legitimistic tendency prevalent amongst the Šī‘a as a rule. Al-Nu‘mān\(^{41}\) seems to refer to a recent origin of the doctrine when he distinguishes between what was transmitted from the past generations and what some judges had taught according to the Imāmī doctrine of his time on this and other similar matters. For al-Nu‘mān,\(^{42}\) the only explanation of this rule is that it is a peculiarity of the \(\textit{waṣīfs}:\) nothing in their possession can be considered as

\(^{33}\) \(\textit{Usūl}\), VII, 85, no. 2.

\(^{34}\) \(\textit{Usūl}\), VII, 86, no. 4.


\(^{36}\) Manuals of Imāmī law generally repeat the doctrine of al-Ḥilli; cf. N. B. E. Baillie (\textit{A Digest of Moorhammadan Law}, 2nd ed., 2 vols., Lahore \(s.d., II, 279\)), Tyabji (p. 917), and Fyzee (p. 385).

\(^{37}\) \(\textit{Ḥilāf}, II, 301, \textit{mas’ala} 129.


\(^{39}\) \(\textit{Ḥilāf}, II, 301, \textit{mas’ala} 129.

\(^{40}\) p. 385.

\(^{41}\) \(\textit{Da’ā’im}, II, 394–96, no. 1393.

\(^{42}\) \(\textit{Da’ā’im}, II, 348–49, no. 1297.\)
inheritance; it must be transmitted from the predecessor to the successor, that is, the seal of the imamate, the Qur’ān, the books of the sciences, and the arms, in accordance with what Prophet did with his waṣī ’Ali and ordered him to do with his son al-Ḥasan, and so on in each generation.

3. Disadvantage of wives regarding some goods in their husband’s estates

Qurb al-isnād has only one tradition on this subject, on the authority of al-ʿAlā’ b. Rāzīn on the authority of Ǧaʿfar al-Ṣādiq; but this isnād is given in more credible form in later sources, which have Muḥammad b. Muslim between the two. According to the matn, wives inherit bricks, but not residences, on the ground that they have no blood relation with the remaining relatives; they are in-laws, and nobody becomes an in-law through them in the family of their husbands. By creative work this scanty material was much increased in al-Kulaynī, even if traditions are related on the authority either of Ǧaʿfar al-Ṣādiq or Abū Ǧaʿfar, or both. The unreliability of the attribution of this doctrine to Ǧaʿfar al-Ṣādiq is evidenced by a report on his authority according to which either husband or wife has the right to inherit everything of the property the other has left as inheritance. With many variations in the matns, generally three kinds of goods are listed in this connection: those which wives are entitled to inherit (money, household effects, clothes, household furnishings); those which they can never receive (soil, land, villages, houses, arms, livestock); and those which wives have the right to inherit after they have been appraised (bricks, buildings, wood, canes, doors, trunks, trees, and palms). In al-Kulaynī we also find a variant in the

43 p. 56, no. 182.
44 Uṣūl, VII, 128–29, no. 5; Istībṣār, IV, 152, no. 573; Tahdhīb, IX, 298, no. 1067.
45 K. Ṣanāʾ, IV, 252, no. 812; Istībṣār, IV, 154–55, no. 581; Tahdhīb, IX, 300–301, no. 1075.
46 Uṣūl, VII, 127, no. 1 (Istībṣār, IV, 152, no. 572; Tahdhīb, IX, 298, no. 1066; a variant of this tradition is in Uṣūl, VII, 128, no. 4); 127–28, no. 2 (Istībṣār, IV, 151, no. 571; Tahdhīb, IX, 298, no. 1065. In K. Ṣanāʾ, IV, 252, no. 811, with a somewhat different isnād, related also in Istībṣār, IV, 154, no. 578; Tahdhīb, X, 299–300, no. 1072, with a different isnād); 128, no. 3 (Istībṣār, IV, 151, no. 570; Tahdhīb, IX, 297–98, no. 1064); 129, no. 6 (77–78, no. 3); 129, no. 7 (K. Ṣanāʾ, IV, 252, no. 810, with a different isnād and with an addition in the matn, related also in Istībṣār, IV, 152, no. 574, with the isnād of al-Kulaynī and the matn of Ibn Bābawyah; Tahdhīb, IX, 298–99, no. 1068, with the matn of al-Kulaynī); 129, no. 8; 129, no. 9 (Istībṣār, IV, 152, no. 576; Tahdhīb, IX, 299, no. 1070); 129–30, no. 10 (Istībṣār, IV, 152, no. 575; Tahdhīb, IX, 299, no. 1069); 130, no. 11 (K. Ṣanāʾ, IV, 251, no. 807; Istībṣār, IV, 152–53, no. 577; Tahdhīb, IX, 299, no. 1071). See also K. Ṣanāʾ, IV, 251–52, no. 808 (Istībṣār, IV, 153, no. 579; Tahdhīb, IX, 300, no. 1074), 809; Istībṣār, IV, 153–54,
justification of the restrictions, namely, that a widow might re-marry and thus prejudice the interests of the remaining co-heirs. The restrictions are meant to avoid a widow’s new husband or one of his children, born from other women and thus belonging to other groups, sharing the property of a group alien to them. This argument is taken up again by Ibn Bâbaweyh: the special tie between husband and wife, the ‘isma, might be broken and another ‘isma take its place, causing as a consequence a transfer of property from one family group to another.

Moreover, Ibn Bâbaweyh introduces a new element, since he distinguishes the case when the wife has had a child by the deceased (she inherits out of all that he has left) from the case when there is no walad (one applies the above rules). However, al-Ţusî rejects this distinction, pointing out that it conflicts with the principle of taqiyya (dissimulation).

In al-Ţusî a mitigation in the limitation of the wife’s right is introduced, since a distinction is made between ancient and modern buildings: wives cannot inherit either houses or landed estates, unless they are recently established.

Al-Ţusî brings no other evidence than the iğmâ’ of his school and its traditions. So no basis in either Qur’ân or Prophetic hadîth exists to support his argument. The Imâmî doctrine is generally ignored by the other law schools. However, it seems that the Zaydî Corpus makes reference to it when it adapts the well-known hadîth to the effect that estates divided during the gãhiliyya continue to be divided accordingly, while those! established

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47 Uṣûl, VII, 129, no. 7.
48 Uṣûl, VII, 130, no. 11.
49 K. man, IV, 251–52, no. 808.
51 Istibsâr, IV, 155:1ff.
52 Istibsâr, IV, 153, no. 579; Tahdîb, IX, 300, no. 1073.
53 Hîlîf, II, 301, mas’ala 131.
under Islam, but not yet divided, follow the Islamic rules as follows: All residences and lands divided during the gāhiliyya remain divided accordingly; while all residences and lands divided under Islam must follow the rules of Islam. The adaptation of this tradition leads to many doubts about the authenticity of the Mağmū‘ and could be evidence of a late origin.

The most convincing refutation of the Imāmī doctrine is provided by al-Nu‘mān. Once established that it is in contrast with the Qurān, the sunna, and the iǧmā‘ of the imāms and of the umma, from the Islamic point of view the only remaining justification can be that goods that wives cannot claim as inheritance were immobilized as waqf exclusively in favor of men. The reason for this rule rests on the will to keep family property undivided. For economic, social and patrimonial reasons, precedence is given to a blood tie over a relation based on subūb (marriage and patronage) in the transfer of property causa mortis.

Summary
The Imāmī and Ismā‘īlī reasoning regarding the three questions discussed above developed completely within an Islamic framework that excluded any foreign influence. The Imāmī law system was formed beginning from the third century H. onwards as a reaction to the Sunnī interpretation of the Qurān. An important stage in this evolution is attested by a series of doctrines attributed to some preeminent Imāmī jurists, such as Yūnus and al-Faḍl. Therefore I do not believe that “by this time [the Imamate of Ja‘far aś-Šādiq], all the fundamental elements of Shi‘ism had appeared, and were being formulated into what would eventually become the Twelver system of doctrine and legal practice”. The formation of the Ismā‘īlī system was secondary, almost a re-examination of the Imāmī law. The presence of these

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57 Da‘ā‘im, II, 396–97, no. 1394.
doctrines in the Shi'i law also discredits the widespread opinion according to which only a limited number of differences distinguish Shi'i law from that of the Sunnī schools.\textsuperscript{60}

\footnote{J. Schacht, \textit{The Origins of Muhammadan Jurisprudence}, Oxford 1950, 262; Jafri, 253.}