SOME PECULIARITIES OF THE LAW OF INHERITANCE THE FORMATION OF IMĀMĪ AND ISMĀ^{c}ĪLĪ LAW*

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The question of the caliphate or imamate and similarly that of the *mut^{c}a* marriage (Imāmīs) are generally seen as the deepest differences distinguishing Šī^{c}ī law systems from those of the remaining law schools. Inheritance law, however, reveals an additional range of Šī^{c}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^{c}īlī doctrine, the influence of political elements on the law system, the question of the authenticity of the Zaydī *Mağmū^{c} al-fiqh,* and the dominance of practical considerations over strict legal rules.

Three things peculiar to Imāmīs and Ismā^{c}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-Kulaynī[1] (d. 328/939) and as a *terminus a quo* the *Qurb al-isnād* of Abū ʾl-^{c}Abbās al-Qummī[2] (d. 300/912 ca), including three *Musnad*s, of Ğa^{c}far al-Ṣādiq (d. 148/765), Mūsā al-Kāẓim (d. 183/799), and ^{c}Alī al-Riḍā (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. Šāḏān (d. 260/874).

1. Division of the heirs by kin into classes

The Šī^{c}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*).

[2] Beirut 1413/1993; cf. F. Sezgin, *Geschichte des arabischen Schrifttums,* Leiden 1967, I, 46, note 1; 165, no. 124 (cited as: *GAS*). *Ḥadīṯ*s related on the authority of al-Riḍā have been recently collected in a separate book: *Musnad al-imām al-Riḍā,* 2 vols., Beirut 1403/1983 (cited as: *Musnad*). However, it does not gather the whole of the material attributed to him.

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[4] in order to provide firm grounds for such a division is based exclusively on the interpretation of Qurʾānic 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 *ūlū ʾl-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 *ǧāhiliyya.*[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 *ḏawū ʾl-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 Bābawayh[6] 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 Sunnīs interpret this term in different ways in different Qurʾānic verses, the Šīʿīs give always the same meaning to *walad,* namely, male and female direct descendants, which is closer to Arabic usage and the letter of Qurʾān. Consistently the expression *walad al-*

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[3] A. A. A. Fyzee, *Outlines of Muhammadan Law,* 2nd ed., London, New York, Bombay 1955, 401f., 403. B. D. Tyabji (*Principles of Muhammadan Law,* 2nd ed., Calcutta, London 1919, 938–40) had already sketched some general principles followed by the Šīʿa.

[4] *Uṣūl,* VII, 72–75.

[5] The Ismāʿīlī al-Nuʿmān (d. 363/974) (*Daʿāʾim al-Islām,* 2 vols., Cairo 1379–83/1960–63, II, 380, no. 1358–60; cited as: *Daʿāʾim*) sets forth the same principles as al-Kulaynī.

[6] *K. man lā yaḥḍuruhu ʾl-faqīh,* 4 vols., al-Naǧaf 1377–78/1957–59, IV, 196–97, 201:4–5 (cited as: *K. man*).

walad also includes both male and female descendants, however remote. Al-Kulaynī accordingly solves three cases in opposition to the Sunnī 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-isnād*[7] only one case regarding the first class (daughter's son and son's daughter) is solved. On the authority of ᶜAlī, inheritance is to be given to the nearest in kin, but, according to al-Riḍā, the nearest in kin is here the son's daughter. This solution, although attributed to ᶜAlī, is hardly likely to go back to him, both because of the temporal gap between ᶜAlī and al-Riḍā and because of other contradictory doctrines attributed to ᶜAlī. 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-Ṭūsī[8] comments that this solution is not in force in the Imāmī 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 Ismāᶜīlī al-Nuᶜmān[10] follows the same doctrine as the Imāmīs, even if he gives a particular tone to his exposition, making constant reference to Fāṭima, 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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[7] *Qurb al-isnād,* 389, no. 1365; al-Ṭūsī, *Tahḏīb al-aḥkām,* 10 vols., al-Nağaf 1377–82/1957–62, IX, 318, no. 1144 (cited as: *Tahḏīb*); *Musnad,* II, 432, no. 5.

[8] al-Ṭūsī, *Al-Istibṣār fī-mā iḫtalafa min al-aḫbār,* 2nd ed., 4 vols., al-Nağaf 1376/1957 (cited as: *Istibṣār*), IV, 168, no. 636; *Tahḏīb,* IX, 319.

[9] *Uṣūl,* VII, 88–90.

[10] *Daᶜāᵓim,* 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 (*Daᶜāᵓim,* II, 365–66, nos. 1329–30).

tain Qurʾānic verses[12] and Prophetic traditions.[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.[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,[15] thus supposing two groups.

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

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[12] Ibn ʿAbbās refers Q. 42:23 to ʿAlī, Fāṭima, al-Ḥasan, al-Ḥusayn, and their offspring. This interpretation allows al-Nuʿmān 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 (*Daʿāʾim,* II, 367, no. 1332).

[13] Muḥammad 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" (*Daʿāʾim,* II, 367–68, no. 1332; 369:7ff.). This demonstrates that relationship through Fāṭima (thus, through females) has superseded the agnatic tie.

[14] *Uṣūl,* VII, 105–8.

[15] *Daʿāʾim,* II, 377–78, no. 1350.

[16] *Uṣūl,* VII, 112, no. 1; 113, no. 5.

[17] *Uṣūl,* VII, 115–16.

[18] *Uṣūl,* VII, 116–18.

vides the estate in halves between a paternal uncle and a brother's son;[19] al-Faḍl does not exclude male or female descendants of full brothers because of the presence of one or more uterine brothers;[20] and, according to a minority Imāmī doctrine, paternal and maternal grandfathers and grandmothers inherit with descendants from the second degree onwards, however low.[21] Al-Nuᶜmān admits a grandmother to the inheritance while her son is still alive,[22] 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. [23]

In *Qurb al-isnād* [24] 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.* Ḥammād b. ᶜUṯmān (d. 190/806) believed that the *sunna* mentioned by al-Riḍā would refer to the opinion of the people [*qawl al-nās;* Sunnīs?]. ᶜAlī, 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 Šīᶜīs about the reading of some Qurʾānic verses began to emerge at the latest by the time of al-Riḍā, although the attribution to ᶜAlī might not be authentic, either because of the temporal gap between ᶜAlī and al-Riḍā or because of other contradictory doctrines attributed to ᶜAlī.

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,[25] 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.[26] However, some cases are an exception to the

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[19] *Uṣūl,* VII, 121:4ff.

[20] *Uṣūl,* VII, 107:8ff.; *K. man,* IV, 200–201.

[21] Al-Ṭūsī, *K. al-Ḫilāf,* 3 vols., al-Nağaf 1956, II, 255:17f., *masʾala* 5 (cited as: *Ḫilāf*).

[22] *Daᶜāʾim,* II, 378, no. 1352.

[23] *Minhāǧ al-farāʾiḍ,* fols. 12v, 13r (cf. *GAS,* I, 578, no. 22).

[24] *Qurb al-isnād,* 346–47, no. 1254; *Tahḏīb,* IX, 270, no. 981; *Musnad,* II, 435, no. 12.

[25] *Daᶜāʾim,* II, 379, no. 1355.

[26] *Daᶜāʾim,* II, 379, no. 1353; 380:7f.

principle of proximity.[27]

In summary, *Qurb al-isnād* 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 Shīʿīsm began with al-Kulaynī, to be followed by such figures as Ibn Bābawayh, Šayḫ al-Mufīd and al-Ṭūsī, with whom the principal doctrinal works of Shīʿī 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 *Musnad*s 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 *ḥadīṯ*s list the sword, the armor (*dirʿ*), the signet ring, and the Qurʾān;[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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[27] See *Minhāǧ,* fol. 13v; *K. man,* IV, 212, 222; *Istibṣār,* IV, 170–71, no. 644; *Taḥḏīb,* IX, 326, no. 1172; 327, no. 1174*; Ḫilāf,* II, 257, *masʾala* 11; al-Ḥillī, *Šarāʾiʿ al-Islām,* 4 vols., al-Naǧaf 1389/1969 (cited as: *Šarāʾiʿ*), IV, 30:13ff.; A. Querry, *Recueil de lois concernant les musulmans schyites,* 2 vols., Paris 1871–72 (cited as: *Recueil*), II, 352, no. 210.

[28] S. H. Nasr, s.v. "Ithnā ʿAshariyya", in *EI*^{2}, 277b:48ff.

[29] *Uṣūl,* VII, 85, no. 1 (*Istibṣār,* IV, 144, no. 538; *Taḥḏīb,* IX, 275, no. 994); 86, no. 3 (*Istibṣār,* IV, 144, no. 540; *Taḥḏīb,* IX, 275, no. 996).

[30] *Uṣūl,* VII, 85, no. 2 (*Istibṣār,* IV, 144, nos. 539, 542; *Taḥḏīb,* IX, 275, no. 995; 276, no. 998).

[31] *Uṣūl,* VII, 86, no. 4 (*K. man,* IV, 251, no. 805; *Istibṣār,* IV, 144, no. 541; *Taḥḏīb,* 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 *isnād* in *Istibṣār,* IV, 145, no. 544; *Taḥḏīb,* IX, 276, no. 999) relates another *ḥadīṯ* in which he lists only the sword, the camel saddle, and the body clothes. Al-Ṭūsī (*Ḫilāf,* II, 301, *masʾala* 129) briefly relates the doctrine of his school. Two *ḥadīṯ*s are peculiar to him (*Istibṣār,* IV, 144–45, no. 543; *Taḥḏīb,* 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 *ḥadīṯ*[34] states that if the eldest child is a female, this privilege will be transmitted to the eldest among the sons. To this al-Ḥillī (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 Zaydī Ibn al-Murtaḍā[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"). Al-Ṭūsī gives as proof the *iğmāᶜ* of his school and its own traditions.[39] Implicitly he admits that neither Qurᵓānic references nor Prophetic traditions exist on the matter. Nothing exists in the *Qurb al-isnād* about this subject, and the name of al-Faḍl appears only in one *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 Šīᶜa as a rule. Al-Nuᶜmān[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-Nuᶜmān,[42] the only explanation of this rule is that it is a peculiarity of the *waṣī*s: nothing in their possession can be considered as

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[33] *Uṣūl,* VII, 85, no. 2.

[34] *Uṣūl,* VII, 86, no. 4.

[35] *Sarāᵓiᶜ,* IV, 25:14ff.; *Recueil,* II, 345, nos. 159–61.

[36] Manuals of Imāmī law generally repeat the doctrine of al-Ḥillī; cf. N. B. E. Baillie (*A Digest of Moohummadan Law,* 2nd ed., 2 vols., Lahore *s.d.,* II, 279), Tyabji (p. 917), and Fyzee (p. 385).

[37] *Ḫilāf,* II, 301, *masᵓala* 129.

[38] *K. al-Baḥr,* 5 vols., Cairo 1366–68/1947–49, V, 338:2f.

[39] *Ḫilāf,* II, 301, *masᵓala* 129.

[40] p. 385.

[41] *Daᶜāᵓim,* II, 394–96, no. 1393.

[42] *Daᶜāᵓim,* II, 348–49, no. 1297.

inheritance; it must be transmitted from the predecessor to the successor, that is, the seal of the imamate, the Qurʾān, the books of the sciences, and the arms, in accordance with what Prophet did with his *waṣī* ʿAlī 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[43] has only one tradition on this subject, on the authority of al-ʿAlāʾ b. Razīn 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.[44] 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.[45] With many variations in the *matn*s, 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).[46] In al-Kulaynī we also find a variant in the

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[43] p. 56, no. 182.

[44] *Uṣūl,* VII, 128–29, no. 5; *Istibṣār,* IV, 152, no. 573; *Tahḏīb,* IX, 298, no. 1067.

[45] *K. man,* IV, 252, no. 812; *Istibṣār,* IV, 154–55, no. 581; *Tahḏīb,* IX, 300–301, no. 1075.

[46] *Uṣūl,* VII, 127, no. 1 (*Istibṣār,* IV, 152, no. 572; *Tahḏīb,* IX, 298, no. 1066; a variant of this tradition is in *Uṣūl,* VII, 128, no. 4); 127–28, no. 2 (*Istibṣār,* IV, 151, no. 571; *Tahḏīb,* IX, 298, no. 1065. In *K. man,* IV, 252, no. 811, with a somewhat different *isnād,* related also in *Istibṣār,* IV, 154, no. 578; *Tahḏīb,* X, 299–300, no. 1072, with a different *isnād*); 128, no. 3 (*Istibṣār,* IV, 151, no. 570; *Tahḏīb,* IX, 297–98, no. 1064); 129, no. 6 (77–78, no. 3); 129, no. 7 (*K. man,* IV, 252, no. 810, with a different *isnād* and with an addition in the *matn,* related also in *Istibṣār,* IV, 152, no. 574, with the *isnād* of al-Kulaynī and the *matn* of Ibn Bābawayh; *Tahḏīb,* IX, 298–99, no. 1068, with the *matn* of al-Kulaynī); 129, no. 8; 129, no. 9 (*Istibṣār,* IV, 152, no. 576; *Tahḏīb,* IX, 299, no. 1070); 129–30, no. 10 (*Istibṣār,* IV, 152, no. 575; *Tahḏīb,* IX, 299, no. 1069); 130, no. 11 (*K. man,* IV, 251, no. 807; *Istibṣār,* IV, 152–53, no. 577; *Tahḏīb,* IX, 299, no. 1071). See also *K. man,* IV, 251–52, no. 808 (*Istibṣār,* IV, 153, no. 579; *Tahḏīb,* IX, 300, no. 1074), 809; *Istibṣār,* IV, 153–54,

justification of the restrictions, namely, that a widow might re-marry and thus prejudice the interests of the remaining co-heirs.[47] 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.[48] This argument is taken up again by Ibn Bābawayh: the special tie between husband and wife, the *ʿiṣma,* might be broken and another *ʿiṣma* take its place, causing as a consequence a transfer of property from one family group to another.[49] Moreover, Ibn Bābawayh 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).[50] However, al-Ṭūsī[51] rejects this distinction, pointing out that it conflicts with the principle of *taqiyya* (dissimulation).

In al-Ṭūsī[52] 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-Ṭūsī[53] brings no other evidence than the *iǧmāʿ* of his school and its traditions. So no basis in either Qurʾān or Prophetic *ḥadīṯ* exists to support his argument. The Imāmī doctrine is generally ignored by the other law schools. However, it seems that the Zaydī *Corpus*[54] makes reference to it when it adapts the well-known *ḥadīṯ* to the effect that estates divided during the *ǧāhiliyya* continue to be divided accordingly, while those [established]

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no. 580; *Taḥḏīb,* IX, 301, no. 1077.

[47] *Uṣūl,* VII, 129, no. 7.

[48] *Uṣūl,* VII, 130, no. 11.

[49] *K. man,* IV, 251–52, no. 808.

[50] *K. man,* IV, 252, nos. 812–813; *Istibṣār,* IV, 155:5ff., and no. 582; *Taḥḏīb,* IX, 300–301, nos. 1075–76. Al-Ḥillī (*Šarāʾiʿ,* IV, 34–35/*Recueil,* II, 356, no. 242) agrees with this principle; however his exposition reflects the uncertainty of the doctrine. Manuals of Imāmī law generally repeat his teaching; cf. Baillie, II, 295; Tyabji, 914, 915–16; Ameer Ali, *Mahommedan Law,* 2 vols., Calcutta 1912–29 (reprint New Delhi 1985), II, 123; Fyzee, 383.

[51] *Istibṣār,* IV, 155:1ff.

[52] *Istibṣār,* IV, 153, no. 579; *Taḥḏīb,* IX, 300, no. 1073.

[53] *Ḫilāf,* II, 301, *masʾala* 131.

[54] Zayd b. ʿAlī, *Maǧmūʿ al-fiqh,* Milan 1919, 261, no. 911.

under Islam, but not yet divided, follow the Islamic rules[55] as follows: All residences and lands divided during the *ğāhiliyya* 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 *Maǧmūᶜ* and could be evidence of a late origin.[56]

The most convincing refutation of the Imāmī doctrine is provided by al-Nuᶜmān.[57] Once established that it is in contrast with the Qurᵓān, the *sunna,* and the *iǧmāᶜ* of the *imām*s 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.*[58]

Summary

The Imāmī and Ismāᶜīlī 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 Qurᵓān. 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 Jaᶜfar aṣ-Ṣādiq], 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".[59] The formation of the Ismāᶜīlī system was secondary, almost a re-examination of the Imāmī law. The presence of these

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[55] See ᶜAbd al-Razzāq, *Al-Muṣannaf,* 11 vols., Karachi 1390–92/1970–72, X, 248:15f.

[56] See my *Teorie sulle origini del diritto islamico,* Rome 1990, 19–35: «Il 'Corpus Iuris' di Zayd b. ᶜAlī».

[57] *Daᶜāᵓim,* II, 396–97, no. 1394.

[58] The only concern of the jurists is generally to avoid fractional numbers. See *Daᶜāᵓim,* II, 397–400; al-Saraḫsī, *Kitāb al-Mabṣūṭ,* 30 vols., Cairo 1324–31/1906–13, XXX, 55–59; Ḫalīl, *Il "Mukhtaṣar",* trans. by I. Guidi and D. Santillana, 2 vols., Milano 1919, II, 465–76, 830–32, 832f., 833–36, 837; al-Nawawī, *Minhâj aṭ-Ṭâlibîn,* trans. by L. W. C. van den Berg, 3 vols., Batavia 1882–84, II, 248–57; Baillie, II, 312–21; D. Santillana, *Istituzioni,* 2 vols., Rome 1938, II, 529.

[59] H. M. Jafri, *Origins and Early Development of Shi'a Islam,* Beirut 1979 (reprint 1990), XI, 310.

doctrines in the Šīᶜī law also discredits the widespread opinion according to which only a limited number of differences distinguish Šīᶜī law from that of the Sunnī schools.[60]

[60] J. Schacht, *The Origins of Muhammadan Jurisprudence,* Oxford 1950, 262; Jafri, 253.