THE FATIMID LAW OF INHERITANCE

1. GENERAL OBSERVATIONS

The law of inheritance deals with the rules whereby property is transferred from the estate of a dead person to his heir. It presupposes the existence of property, of laws determining the heirs and of rules of escheat, that is, a state of affairs where there are no known heirs and the property by virtue of certain rules escheats to the crown or the state. In Islam the laws of inheritance depend not only on the Koranic rules but are also profoundly influenced by custom. As they deal with transfer of property, they have a close relationship with the laws of gifts.

When a man transfers his property to another during his lifetime it is called a gift (*hiba*); and when a man makes a will (*wasiyya*), the property goes to the legatee after his death and is called a legacy. Sometimes a man may wish to give his friend or relative a house or a garden immediately, during his own lifetime; but often he prefers to give it later, after enjoying it himself during his life. Therefore the process is the same; only, in the latter case, the transfer is delayed for a certain period. Hence, there is a close relationship between the law of Gifts and the law of Wills.

Gifts and bequests have always been common among Arabs and strongly recommended by the spirit of generosity animating the people; they were also used to propitiate enemies and to tighten the bonds of friendship. In a brief handbook of aphorisms, authoritative both among Sunnites and Shiites, *Kitab'u'sh-Shihab,* republished recently in India, by the head of the Sulaymani Bohoras and furnished with an Urdu translation are found such traditional sayings as "Make mutual gifts, so that love may increase," "Make gifts among yourselves for this will remove rancour," "Make gifts to one another, for verily it will increase affection." [1] Such traditions are of common occurrence and are mentioned both by Wensinck and Muhammad Ali, to mention only two of the recent compendia.[2]

In comparing the law of wills and gifts and the spirit which should animate them, there is a great distinction which must not be overlooked.

1. *Tahadaw tazdadu hubban* (No. 539), *tahadaw* fa *inna'l-hadiyyata tudhhibu bi's-sakhmata* (No. 542), *tahadaw tahabbii* (No. 543), in *Kitab'u 'sh-shihab fi'l hikam wa'l-amthal wa'l-Adab* of Abu Abdul-lah Md. b. Salama b. Ja'far b. Ali b. Hakmun al-Quda'i al-Misri Ash-Shafi'i. Published with an Urdu translation by Mawlana al-haj Md. Ishaq b. Md. Ibrahim Diya'i (of Hyderabad), the head (*mansub*) of the Sulaymani Community in India. Hyderabad, Deccan, 1372/1952. Repeatedly printed.

2. Wensinck, *Handbook,* s.v. Gifts; Muhammad Ali, *Manual of Hadith,* (Lahore, 1944), 325.

In spite of the famous tradition that a Muslim who possesses property should not sleep even for two nights without making a written will,[3] there is no doubt that the disposition of property by means of a will was not considered a very proper act. A man is entitled to give away his property during his life-time; but how can he dispose of it after his death when God Himself had distributed it according to His plan ? This principle is embodied in the famous tradition which teaches us that no bequest is valid which exceeds one-third of the net assets of the deceased. [4] The law followed the sentiment of the people, and the principle was firmly established in Islamic Jurisprudence that while gifts may be made to any person and to any extent, wills could only be made to the extent of the "bequeathable third" and that too only to non-heirs.[5] For, in the words of the leading Fatimid authority, *Da'a'im'l-Islam,* "he who bequeaths to his heir...belittles the decision of God...and he who acts contrary to the Book of Allah...acts unlawfully." [6]

This brings us to the distinction between wills and inheritance. A will in ordinary parlance is a document which disposes of property in accordance with the wishes of a testator. In Islamic law a will may be either oral or written. Thus in construing a will the predominant consideration is "What is the intention of the testator?" In the law of inheritance, on the other hand, the intention of the donor is immaterial. The only question is what are the rules of law whereby the property of a deceased person — or *propositus* — is to be distributed, regardless of the wishes of the deceased ?

The Koran, as is too well known for elaboration, gives us the most detailed rules regarding the specific shares to which each heir is entitled. Here we have two sets of rules: (a) the mode of distribution, called Administration and (b) the substantive rules of law by which the share of each heir is to be determined. This body of rules is called Inheritance, *'ilmu' l-fara'id,* or simply, *fara'id.* In the following pages we shall be concerned mainly with the latter, the former being of lesser importance, and constituting only the machinery of distribution.

It may be mentioned in passing that there is no real law of administration in Islam. Property does not remain intact after the death of a propositus. As soon as a man dies his heirs are entitled to a specific portion each, and the distribution in the eye of the law takes place even earlier than the distribution by metes and bounds. Thus, immediately after a man dies, his heirs can deal with their own specific shares in the

3. Md. Ali, *Manual of Hadith,* 344; Cadi Nu'man, *Da'a'imu'l-Islam,* II, Fyzee, *Ismaili Law of Wills,* Oxford, 1933, (abbreviated below as I L W), 29 (No. 2), 63 (No. 2).
4. Fyzee, *Outlines of Muhammadan Law* (2nd ed., Oxford, 1955), abbreviated below as 0 M L.
5. O M L, 186, citing a leading case decided by the Privy Council.
6. I L W, 82.

manner they decide, and sales, mortgages and gifts of property, even before the distribution of the estate, are legal and common.

The notional process of legal distribution may be compared with the doctrine of conversion in English equity, the physical distribution taking place much later than the apportionment in the eye of the law. To use a figure of speech — much liked by my students in the years gone by — the estate of the deceased may be likened to a round cake, which from a distance seems entire, but as each heir approaches the table, the cake is found to be carefully cut up and divided proportionately; and all that remains to be done is to hand over to the heir his particular piece.[7]

We now come to inheritance proper, according to the *fiqh,* and must deal with its main characteristics.

The *'ilmu' l-fara'id* (Islamic Law of Inheritance) has often been admired for its utility, complexity and formal perfection. The *Sirajiyyah,* a Hanafi authority, repeats a *hadith* of the Prophet: "Learn the laws of Inheritance, and teach them to the people, for they are one-half of useful knowledge:" Macnaghten has admired its justice,[8] Tyabji its completeness, and Sir William Jones its formal excellence, for, in his opinion, every possible question of inheritance can be answered rapidly and correctly by him who is proficient in the law.[9] As to its complexity, it is sufficient to fall back on one's own experience: I have yet to discover a young student who relishes the task of committing to memory — a modern, twentieth century memory, and not the memory of a Faydi or Ibn Hajar or of the scholars of antiquity — the rules necessary to pass the usual examination for the bachelor's degree in Muhammadan Law in an Indian University. But complexity must be distinguished from difficulty. The Islamic law of inheritance is complex; it demands mastery of certain first principles and a certain effort of memory. But it is not difficult, 99% of the cases that arise can be dealt with satisfactorily by a student in a matter of minutes, not hours or half-hours, and questions of real difficulty, where the jurists of antiquity have differed, are undoubtedly few and far between.

The Islamic law of Inheritance is based on two foundations: Pre-Islamic law and Koranic law. The Pre-Islamic law laid down the following rules, vestiges whereof can still be recognized in the Hanafi law:

(i) The nearest male agnate succeeded,

(ii) Females and cognates were generally excluded.

(iii) Descendants were preferred to ascendants, and ascendants to collaterals.

7. O M L, 318-19.
8. Ameer Ali, ii. 47.
9. O M L, 330.

(iv) Where agnates were equally distant, the estate was divided per capita.

The principles introduced by Islamic law were as follows:

(a) The husband or wife was made an heir.

(b) Females and cognates were made competent to inherit.

(c) Parents and ascendants were given the right to inherit even when male descendants existed.

(d) As a general rule, a female was given one-half of the share of the male.

The Pre-Islamic law and the Koranic reform introduced by the Prophet were welded together into a coherent system by the ingenuity and learning of the jurists and the practical decisions of the cadis. While the two systems were thus joined together, the scholar's eye can well discover the seam in the welding; or, to borrow a phrase from the system known as Equity in England, the two streams flow in one channel, but their waters do not mix, and occasionally the line of distinction is apparent to the discerning eye.

Taking a broad view, the Islamic scheme of Inheritance discloses three peculiarities: (i) the Koran grants specific shares to certain individuals, mostly women; (ii) the residue goes to agnatic relations, mostly men, and in their absence, to cognates, both men and women; and (iii) bequests are limited to one-third of the estate.

This is the general scheme of the Sunnite (Hanafi) law; we shall later distinguish it from the Shiite (Ithna Ashari) law as it is interpreted and followed in Indian courts. The Ithna Ashari system grew and developed much later, in a different milieu, and it contains elements which are foreign to Sunnite law in general. While the specific points of distinction are generally known, the real reasons, historical, economic and legal, remain for the present at least, one of the unsolved problems of our science.

The scheme of this paper is first, to deal with the general principles of Hanafi (Sunnite) law; then, to deal with the Ithna Ashari law, in broad outline; and, finally, to examine the Fatimid Law of Inheritance to be found in the *Da 'a' imu'l-Islam of Qadi Nu'man.*[10]

10. For Nu'man, see El., s.v., and Introduction to *Da'a'im,* I.

2. HANAFI LAW.

The Hanafi Jurists divide heirs into seven classes, three Principal and four Subsidiary, as follows:

A. The Three Principal Classes

i. Koranic Heirs;
ii. Agnatic Heirs;
iii. Uterine Heirs.

B. The Four Subsidiary Classes

iv. Successor by Contract;
v. The Acknowledge Kinsman;
vi. The Sole Legatee;
vii. The State, by Escheat.

The property goes in the first instance to Koranic Heirs, Class i. If there is a residue, or if there are no Koranic Heirs in existence, it goes to Class ii. Agnatic Heirs. Finally, in the absence of Class i or ii, the property is distributed among Class iii, Uterine Heirs. The three principal classes together comprise all the blood relations of the deceased whether they are agnates or cognates, and one relation by marriage, namely, the surviving spouse. The subsidiary heirs take only by way of exception, and in special circumstances. A few general principles emerge:

(a) No distinction is made between immovable and movable property. The concept of *mal* (property) is simple; it comprises all forms of property, and includes both corpus *('ayn)* and usufruct *(manafi').*

(b) Islamic Law does not recognize birthright; nor has a *spes successionis* any value. No person can claim to be the heir of another unless that person actually dies. If there are successive deaths, then the exact point of time of the death of the person through whom the heir claims is the deciding factor.

(c) Generally the principle of 'representation' is not recognized. Taking a simple case, *A* dies leaving a son *B.* and a predeceased son's son, *C.* The rule is that the nearer excludes the more remote and there being no representation, *C* is entirely excluded by *B,* and *B* is the sole heir both according to the Sunnite and the Shiite law.

There are some exceptions to the rule, and some are created by special laws of Muslim states and by custom. We need not discuss them in this elementary treatment of first principles.

(d) Males and females have equal and absolute rights to deal with property although the actual share of the female is generally one-half

that of the male. For example, the daughter and the widow, in inheriting property, suffer from no such disabilities as are recognized in certain cases in English or Indian law.

We shall now deal very briefly with the three classes of Heirs according to the Hanafi law. The Koran deals fully with inheritance: and the expression *farida* means 'an obligatory share' laid down in the Koran, and the *ashäbu'l-farä'id,* or *dhawü'l-furüd* means 'owners of the obligatory shares,' whence, the law of Inheritance is known as '*ilmu' l-farä'id.* In text-books written by English Lawyers, beginning with Sir William Jones who wrote in 1792, we are accustomed to call this class of heirs as "sharers" from the word *sahm* denoting a 'share.' But this term is unsatisfactory and the better designation is Koranic Heir, by which we shall call the *ashäbu'l-farä'id.*

Class i, *ashäbu'l-farä'id,* consists of 12 relations, mostly women. They are: 1) Husband, 2) Wife, 3) Father, 4) True Grandfather, 5) Mother, 6) True Grandmother, 7) Daughter, 8) Son's daughter, 9) Full sister, 10) Consanguine sister, 11) Uterine brother, 12) Uterine sister. It will be seen that the bulk of the property in the majority of cases goes to the tribal heir, who is an agnate and a male, thus belonging to the second class. For instance, a man dies leaving a widow and a son, the widow is a Koranic heir and she receives 1/8 of the estate, while the son — a Tribal heir — takes the rest, namely, 7/8 of the property. Thus it is clear that Koranic reform gave a share to an important female, but the residue goes to the heir recognized by ancient tribal custom, the son.

Class ii, the Agnatic Heirs, are the '*asabät,* a term which may well be rendered as "near male agnates." English authors use the term Residuaries, but the present writer has given reasons to show that it is a misleading term, and creates confusion. We shall therefore designate them as the Agnatic Heirs.

The essential thing to remember is that the Agnatic Heirs were the principal heirs before Islam, they continue to remain in Sunnite law the principal heirs, provided always that the claims of the near relations mentioned in the Koran, the Koranic heirs, are satisfied. The son, the father, the brother, the paternal uncle and the nephew are all in this important class. They take what is left over after satisfying the claim of the Koranic heirs, but in actual practice the residue constitutes the bulk of the property in a large proportion of actual cases.

We have seen the case of the widow and the son; let us take a few simple examples. Let us say a man dies, leaving a widow and a brother. The widow will take $\frac{1}{4}$, as a Koranic heir, leaving $\frac{3}{4}$ to the brother. Substitute paternal uncle or nephew in the example, and the result will be the same. In this case we have given a larger share to the widow, and therefore, greater security as the agnatic heir is not a son.

Class i, *Ashabu'l-fara'id* is given precedence owing to the profound respect paid to the Koran; the Word of God comes first. Really the rule may be reversed and stated in terms of the ordinary practice and the reality of the circumstances as follows:—

Keep the bulk of the property for the Agnatic Heirs — the *Asabat,* the persons who from time immemorial were recognized as heirs by tribal law — and give the specified shares to the persons mentioned by name in the Koran, the *ashabu'l-fara'id* (or the *dhawu'l-furud).*

An examination of the law of inheritance shows how wise this principle was. Without making too great a change to begin with, the whole system of devolution of property was gradually changed and the condition of women was slowly but unmistakably ameliorated. The law of inheritance as it touches the rights of females is an example of the great practical wisdom of the Prophet, a wisdom which chose the razor's edge rather than a bludgeon. But during the succeeding centuries, the force of custom and the practical necessity to preserve property in the male line was so great that in almost all the Muslim countries Muslim women have lost part of the heritage guaranteed to them by the Koranic law.

Class iii. The *Sirajiyyah* says — "a distant kinsman *(dhu rahm)* is every relation who is neither a Koranic Heir *(dhuu fard)* nor an Agnatic Heir (*'Asaba*)." The expression *dhawu'l-arham,* (sing, *dhu rahm)* means "kindred" and *rahm* in the context must not be confused with "womb." This is a common Arabic usage, for instance, *silatu r-rahm* is that bond of affection and regard which exists, or should exist, between blood relations, and further illustrations need not be given.

Now who are the blood relations who are neither Koranic nor Agnatic Heirs? Obviously

A) Female Agnates; and

B) Cognates, male and female.

The Koran mentions a certain number of relations and allocates a share (*sahm*) to each of them — this constitutes the first class Koranic Heirs *(dhawu'l-farai'd).* The tribal law gave importance to the principle of agnacy; so all the male agnates were recognized as heirs of the second class and they constitute the Agnatic Heirs (*'as abat*). The remaining blood relations were first, female agnates, and secondly, cognates, male and female. These two groups constitute the *dhawu'l-arham* of Hanafi law, the Uterine Heirs.

A careful examination of Class ii and Class iii will show that between them they exhaust all possibilities of blood relationship to the deceased, Class i, consisting of the surviving spouse and a few selected blood relations, mostly females, who needed immediate protection and security.

Among the important members of the Uterine Heirs may be mentioned daughter's son, and in Sunnite law, he is relegated to the third class. But Imam Husayn was The Lady Fatima's son, and we must bear this in mind when we consider the treatment meted out to such cases in Shiite inheritance.

We have now completed a bird's-eye view of Hanafi inheritance; the Maliki, Shai'i and Hanbali schools of law differ but slightly from it and offer differing solutions on a variety of minor points. These three systems are practically unknown in India and, as there is no modern text-book which deals authoritatively and exhaustively with all the four systems, it is unnecessary to discuss them here. [11]

3. ITHNA ASHARI (SHIITE) LAW OF INHERITANCE.

Once the principles of the Hanafi law are mastered there should be no difficulty in comprehending the scheme of the Ithna Ashari law. It lays down that two causes give rise to a claim for inheritance —

A) *nasab* (blood relationship), and

B) *sabab* (special cause).

A) *nasab* is subdivided into two groups:

i) *dhu ford* (Koranic Heir), and

ii) *dhu qarabat* (blood relations, agnate or cognate).

B) *sabab* is likewise subdivided into two groups:

i) *zawjiyyat* (the status of a spouse), and

ii) *wala'* (special legal relationship).

wala' is of three kinds:

1) of *'itq* (right of emancipation),

2) of *damin al-jarira* (right of obligation for delicts committed by the deceased),

3) of *imamat* (right by virtue of the leadership of the community as a matter of faith).

Sections (1) and (2) of wala are obsolete in India; (3) is replaced by the law of escheat.[12]

The most important class of heirs derive their rights under the principle of nasab, and blood relations are divided into three classes as follows. It will be observed that the classification is symmetrical and logical, each of the three classes being divided into two sections.

11. For brief bibliography, see O M L, 378,

12. O M L, 379.

Class I, Section (i) — Parents.

Section (ii) — Children and lineal descendants, how low soever.

Class II, Section (i) — Grandparents, how high soever,

Section (ii) — Brothers, and sisters and their descendants.

Class III, Section (i) — Paternal and

Section (ii) — Maternal uncles and aunts of the deceased, and of his parents and grandparents, how high soever and their descendants, how low soever.

Class I excludes Class II; likewise Class II excludes Class III. But the heirs of the two sections in each class take together, and do not exclude each other. A few simple illustrations will show the difference between Hanafi law and its Ithna Ashari counterpart.

1) *Daughter's son, Full brother.*

By Hanafi law the daughter's son being a Uterine Heir is excluded, the full brother as an Agnatic Heir taking the whole estate. But in the Ithna Ashari law, the daughter's son being an heir of the first class succeeds in preference to the brother who belongs to the second class.

This case reminds us forcibly of the love and affection existing between the Prophet and his grandsons, Hasan and Husayn by Fatima, his favourite daughter, and wife of 'Ali b. Abi Talib, the fourth Caliph of the Sunnites, the first Imam of the Ithna Asharis, and the *wasi par excellence* of the Ismailis. It seems reasonable to conclude that the Ithna Ashari jurists, and those who accorded to the Prophet's family a special position have interpreted the law in such a manner as to give very special consideration to the rights of the *ahlu'l-bayt,* People of the Household, that is, the nearest kith and kin of the Prophet. The Shiite literature abounds in precepts inculcating love and devotion to them, technically called *walaya,* and obedience to their commands.[13]

2) *Brother's daughter, Full paternal uncle.*

By Hanafi law the full paternal uncle, being an Agnatic Heir, will take the whole property to the exclusion of the brother's daughter who is a Uterine Heir.

13. An illustration familiar to students of Fatimid literature is the *wasiyya* of Ali, see I L W, especially 9; and Fyzee, *Shiite Creed,* (Oxford, 1942), 96, note 6, deals fully with the dogmatic aspects. Donaldson, *Shiite Religion,* (London, 1933), and Hollister, *The Shi'as of India,* (London, 1953), are full of this doctrine. There is a magniloquent *hadith* in Donaldson, 347.

In Ithna Ashari law, the brother's daughter being an heir of the second class will succeed in preference to the full paternal uncle who belongs to the third class.

It is unnecessary to multiply instances, which abound in the text-books, of the different results arrived at on applying the two distinct systems of inheritance.

We may now state the shares of the principal heirs, designated Koranic Heirs according to both systems without the modifications and refinements introduced by the legists of the different schools.

1) Husband, 1/4 (1/2, if no children).

2) Wife, 1/8 (or 1/4, if no children).

3) Father, 1/6 (if no children, becomes member of another class of heir).

4) Mother, 1/6 (or 1/3, if no children).

5) Daughter, 1/2 (2/3 jointly, if there are two or more daughters, and there is no son).

6) Uterine brother or sister, 1/6 (1/3, if no parent or child).

7) .....

8) Full sister, 1/2 (2/3 jointly, if there are two or more sisters).

9) Consanguine sister, 1/2 (2/3 jointly, where there are two or more such sisters).

This, in barest outline, represents the broad scheme of inheritance, both among Hanafi and Ithna Asharis in simple cases. It must not be supposed however that it represents accurately or exhaustively all the possibilities of inheritance. Particularly in the case of mother, daughter, sister and father, many complications are introduced by the authorities of all the schools, details whereof are beyond the scope of this paper. Of special importance, are principles of exclusion, complete or partial.

An important question arises — If the law of inheritance in the Hanafi and Ithna Ashari schools is based upon the Koran and if the Koran is fairly exhaustive in its precepts regarding inheritance, why such a vital difference between the two interpretations ? To this question — one of the really unsolved problems of the modern science of Islamic law — no complete or scientific answer has been given so far. A few illustrations show preference for the claims of the Prophet's kith and kin; but more important and unrealized are probably the social, cultural and economic consequences of the law being developed in Persia, and not in Arabia. The tie of agnacy, so strong in the sub-continent of Arabia, was not such a binding force in Iraq or Persia or other outlying places. And, recognition of the principle of heredity, and even primogeniture,

emphasized in the doctrine of Imamat, greater attention was presumably paid to Uterine near relatives in the Shiite systems of inheritance, generally. However, the main points of difference between the two systems have been clearly stated by Tyabji and we can summarize them.

1. *Principles of Agnacy (ta'sib).*

An examination of Hanafi law shows that the Hanafi interpretation kept intact, so far as possible, the ancient tribal structure of society. In fact, it is known that during Umayyad times, there was a distinct phase in which revivalism of the past had succeeded in Arab society. The substratum of pre-Islamic custom in the law could not be destroyed, and the asabat (Agnatic Heirs) remained in Hanafi law the most important heirs.

The Ithna Asharis, and as we shall see presently, the Fatimid jurists, destroyed this principle completely. "As for the *'asabat*, dust in their jaws," is the dictum of Imam Ja'far as-Sadiq (the Veracious), sixth in the line from Ali. In view of the Prophet's relationship with Ali first cousin and husband of his daughter Fatima, and the circumstances which led to the non-recognition of the claims of Hasan and Husayn at the hands of the community *(jama'a)*, the Shiites generally interpreted the Holy Writ as placing persons related through women on a footing of equality with those related through men. Cognacy or agnacy did not make a great difference to them, and the classification of I) Koranic Heirs, II) Agnatic Heirs, III) Uterine Heirs, gave way to a simple principle by which two fundamental principles of classification were recognized:

A) *dhu fard*, Koranic Heirs and B) *dhu qarabat*, blood relations.

2. *Classification of Heirs.*

The classification of heirs was based on these two principles and heirs were divided into three homogeneous classes, Class I, Class II, Class III. The first class consists of parents and children; the second, grandparents, and brothers' and sisters' children and their descendants; the third class comprises paternal and maternal uncles and aunts and their descendants.

3. *Interpretation of Koranic Rules.*

'The Shias do not leave the old rules of law as they were, but replace them by a set of rules consisting of a fusion of the customary law and the Islamic reforms, and thus, amongst Shias, the classification of heirs becomes important only when we have to deal with the question of the quantum of shares they take, and not for the purpose of considering which persons are entitled to succeed. The clue seems to be that the

Hanafis take the Koranic alterations of the Pre-Islamic customs literally, and the Shias take them as illustrations of underlying principles. The former let the substratum of the customary law stand unaltered except to the extent to which it is definitely altered by express provisions of the Koran. The Shias take each instance mentioned in the Koran as speaking not only for itself but as indicating the widest possible principles.'[14]

This is a brief and lucid statement of the principles of Shiite law.

4. *Stirpital Succession.*

The verse that a male shall have twice as much as a female is interpreted by the Shiites as changing the entire scheme of distribution. The Shiite theory of Imamate is based upon the principle that excellence is due to heredity and a noble pedigree. Circumstances like the tragedy of Kerbela tended to deepen the feeling and thus we see the theory of Law that the daughter's children stand in the right of the sister; and this principle was systematically applied in every case.[15]

5. *Female Inheritance.*

The Koranic provision that the daughter is entitled to succeed with the son is interpreted by the Shiites as applicable to all heirs female. The Shiite jurists take the provisions of the Koran as not restricted to individual instances of the daughter or the sister, but as establishing a new principle for the benefit of females for, as Tyabji rightly points out, probably the most important legal reform introduced by Islam refers to the rights of women.[16]

The same author shows that the Koranic verse about the relative proximity of parents and children has received different interpretations, but the results have been far-reaching. A text of the Koran is taken, not as a particular dictate, but as a principle, capable of almost limitless expansion. An illustration is the succession of uncles and aunts, and collaterals in general.

And Tyabji finally concludes his acute analysis by discussing the principles relating to return and the rights of the mother — questions of relatively lesser importance than those more fully referred to above.[17]

14. F. B. Tyabji, *Principles of Muhammadan Law*, 3rd ed., (Bombay, 1940), 928.

15. O M L, 402.

16. Tyabji, 3rd ed., 926.

17. *Ibid*., 403. For an elementary treatment of the Shiite (Ithna Ashari) law of inheritance, see O M L, Chap. xiii, 379-403.

4. *FATIMID* LAW.

The cadi Nu'man b. Muhammad is the jurist and law giver of the Fatimids;[18] it is on his *Da'a imu'l-Islam*, vol. II, that this portion of my study is principally based. The first volume was edited and published in Cairo in 1951; the edition of the second volume has been delayed for reasons beyond the control of the editor, but he hopes that it will see the light of day in 1959.[19] Nu'man's major works are the *Iddh* (lost), *Iqtisar* (published by Institut Francais de Damas and edited by Dr. Muhammad Wahid Mirza, Professor and Head of the Department of Arabic and Islamic culture, Lucknow University), *Mukhtasaru'l-Athar*; *Yanbu* (only Part II extant); and *Tahara*. He has also written several historical and polemical works. The relation between these works has not yet been definitely established but it seems tolerably clear (a) that the *Idah* was the original source, now lost; (b) that the *Da'a'im* came next, to define and consolidate the law; and (c) that the *Mukhtasaru'l-Athar*, for judges; the *Iqtisar*, for students, and the *Tahara* and *Yaribu'* were later productions by other hands. A detailed discussion of this problem would be of great interest, but it is proposed to postpone it to a more convenient occasion.

The Book of Inheritance *Kitabu'l-Fard'id* is to be found in the last part of the second volume. According to my edition, it is Book XV, and consists of nine fasls comprising 84 articles.

1. Inheritance of children and descendants;
2. Parents and children;
3. Spouses;
4. Brothers and sisters with grandparents;
5. *dhawii'l-arhdm*;
6. *'awl*;
7. Exclusion from Inheritance;
8. Miscellaneous problems;
9. Decrease in the shares of Inheritance and miscellaneous problems.

Without going into unnecessary detail, we shall now state briefly, with examples, the chief rules laid down by Cadi Nu'man.

18. See *Qadi an-Nu'man: The Fatimid Jurist and Author,* 1934, JRAS, 1-32; *Da'a'imu'l-Islam*, I, Ed. Fyzee, Introduction (Cairo, 1370/1951); W. Ivanow, *Guide to Ismaili Literature,* (London, 1933), 37.

19. It is being printed and published by the Maaref Press, Cairo.

I. *CHILDREN AND DESCENDANTS.*

1. When a man dies leaving a single child or children, male and/or female, no other person is entitled to inherit and the children take in accordance with the rule that the male takes the double share. For instance, if there are two sons and a daughter, the estate will be divided into five equal portions, the sons will each take two shares and the daughter, one share. This is a common principle of Islamic law.

If there is a single daughter as the sole surviving heir, she will take 1/2 as the Koranic share and *1/2 bi'r-rahm*, on the ground of consanguinity, thus taking the whole property. This decision was clearly inspired by the well-known case of the Prophet's daughter Fatima, and demonstrates the affinity between Ithna Ashari and Fatimid principles.

2. *Daughter, Son's Daughter.*

The inheritance will go solely to the daughter, the son's daughter being excluded. This is on the principle that the nearer excludes the more remote. Similarly a son's son or full sister would also be excluded.

3. *Two Daughters.*

They would first get the Koranic 2/3 between them, therefore the share would be 1/3 each. The remaining one-third would return proportionately *bi'r-rahm*, and the final distribution would be 1/2 each.

4. *Two Daughters, One Son.*

The existence of the son brings into force the principle of the double share to the male. The estate will be divided into four equal portions; the daughters will get a quarter each; the son will get the residual one-half as in Sunnite law. "And the son's son stands in the shoes of the son" (*Da'a'im*, II).

5. *Son's Daughters.*

Imam Ja'far lays down that the daughters of a son, where there is no son or daughter, are in the same position as a daughter.

6. *Daughter, Son's Daughter and Son's Son.*

The daughter takes the whole of the property. In Hanafi law, the distribution would be daughter, 1/2; the remaining 1/2 would be divided into three portions, the son's son taking two portions and the son's daughter, one; thus 1/2 x 2/3 = 1/3 and 1/2 x 1/3 = 1/6, respectively. The final distribution would be d = 1/2, ss = 1/3; sd = 1/6 (O M L, 360).

7. *Father, Son's Son.*

The father takes 1/6, and the residue 5/6 goes to the son's son. Similarly the son's son how low soever (*tasafalu*) takes, where no nearer heir exists.

8. *Son's Daughter, Daughter's Son.*

The son's daughter = 2/3; and the daughter's son — 1/3 on the principle that the former represents the son, and the latter the daughter, irrespective of the sex of the heir.

In Hanafi law, the son's daughter as Koranic heir would get 1/2 as Koranic Heir, and the daughter's son would get the other moiety, as Uterine Heir.

II. *PARENTS AND CHILDREN.*

This represents Class I, Section 2, in Ithna Ashari Law.

1. *Father, mother.*
   Mother takes 1/3 and the residue 2/3 goes to the father.
2. *Father, mother, son.*
   Father = 1/6; mother = 1/6; son = 2/3.
3. *Father, mother, son, daughter.*
   Father = 1/6; mother = 1/6 = 3/9
   son = 2/3 of 2/3 = 4/9
   daughter = 1/3 of 2/3 = 2/9

4. *Mother, daughter.*

This is an interesting case of what would be called "return" or *radd*, as understood in Hanafi law. The mother is allotted 1/6, as there is a daughter; and the daughter is allotted the Koranic 1/2. Thus, reducing them to a common denominator, we have 1/6 plus 3/6, and 2/6 remains undistributed. In this case the Fatimid jurist Nu'man simply reduces the denominator to 4 and allocates 1/4 plus 3/4, keeping the original proportion of the shares *(cf.* Hanafi Law, O M L, 356 which is similar), and for the same reason, father 1/4 and daughter 3/4. This solution is different from the one given in Hanafi law, where the daughter gets 1/2, and the father inherits in two *separate* and distinct capacities. First he gets 1/6 as Koranic Heir, and the remaining 1/3 he gets as Agnatic heir, thus daughter and father = 1/2 plus 1/2 (O M L, 348).

5. *Father, mother, brothers.*

Father = 1/6, mother = 1/6, brothers = 2/3.

This happens only if there are more brothers than one, if there is only one brother, the distribution is father 1/3, mother 1/3, brother 1/3.

III. *SPOUSES.*

The Koranic share of the husband and wife are fixed by Holy Writ and there can be no change in them. Thus the husband receives 1/2 if there are no children, and 1/4 where there are; and the wife receives a half of the husband's share, that is 1/4 if there are no children and 1/8 if there are. In Fatimid as in Shiite law generally, the shares of the husband and the wife are immutable, and no circumstances are allowed to modify them. For instance:

1. *Wife, mother, father.*

The wife gets 1/4; mother, 1/3; father, the residue. Therefore Wife = 3/12; mother = 4/12; father = 5/12.

IV. *COLLATERALS AND GRANDPARENTS.*

We now come to the more complicated cases of inheritance involving collaterals, both near and remote.

1. *Full sister and full brother.*

The simplest case is that of brother and sister. Full sister gets 1/2 and the remaining property is divided among remote heirs. Two full sisters get 2/3. If there are brothers and sisters, then the whole property will be distributed so that the brothers obtain twice the share of the sister.

2. *Uterine sister, uterine brother.*

This is one of those rare cases where male and female inherit equal shares; if there is one uterine brother or uterine sister, he or she gets 1/6 of the estate; but if there are two or more sisters, or brother and sister, or two or more brothers, they divide the 1/3 *equally* between them.

Full, consanguine and uterine brothers and sisters are entirely excluded by the father, mother, son and daughter. They inherit only in the absence of parents and children.

3. Where full, consanguine and uterine brothers and sisters co-exist, the consanguine brothers and sisters are excluded, but the uterine brothers and uterine sisters inherit with the full brother and full sister, taking 1/6 if there be only one of them, or sharing 1/3 equally, if there are more of them.

For example:

2 Full brothers,

1 Full sister,

2 Consanguine brothers,

1 Uterine brother,

1 Uterine sister.

The consanguine brothers will be excluded by the full brothers. The uterine brother and sister will take their Koranic share, 1/3 and divide it equally between them. The residue 2/3 will be divided into five shares, the brothers taking two shares and the sister one share. The distribution will therefore be:

Uterine brothers, 1/6 } = 5/15
Uterine sisters, 1/6 }

2 Full brothers, 2/3 x 2/5 = 4/15 plus 4/15 = 8/15

2 Full sisters, 2/3 x 1/5 = 2/15 = 2/15

Paternal Grandparents.

The grandfather is deemed equal to a brother, in general. Therefore a paternal grandfather and brother take equally. Similarly, the grandfather and the brother's son also take equal shares.

Grandfather, Grandmother.

The paternal grandfather is excluded by the father; and the paternal grandmother by the mother. If they both co-exist, the paternal grandfather takes 2/3 and the paternal grandmother, 1/3.

Mother, Grandfather, Grandmother.

Mother = 1/3; the remaining two-thirds are divided so that the grandfather gets double the share of the grandmother, thus grandfather 2/3 x 2/3 = 4/9; and grandmother 2/3 x 1/3 = 2/9. Whence, finally —

Mother = 3/9,

Grandfather = 4/9,

Grandmother = 2/9.

The final section is dhawi l'arham, asabat and qarabat. This is a singular chapter and puts together a number of unrelated cases. It is probable that during the Fatimid times in Egypt, the notion of the family and of the tribe was still a binding force, and had not disintegrated to the extent that it did later in other countries.

A brief list of priorities will demonstrate this:—

a) Son, preferred to son's son.

b) Son's son, preferred to brother's son.

c) Full brother's son, preferred to consanguine brother's son.

d) Father's full brother, preferred to father's consanguine brother.

e) Father's *full* brother's son, preferred to father's *consanguine* brother's son.

Paternal and Maternal Aunts.

When they are not excluded by nearer relations, they inherit in the proportion of two shares to the paternal and one share to the maternal aunt.

The principle of 'awl (increase)

The principle of *'awl* is well-known in Hanafi law (O M L 355) (Hanafi), 387 (Ithna Ashari). It means that when the shares of the Koranic heirs amount to more than unity, the denominator is increased and made equal to the numerator. Thus husband = 1/2; 2 full sisters = 2/3. Now 1/2 plus 2/3 = 3/6 plus 4/6, that is, 7/6, and therefore the Hanafi lawyers resolve the anomaly by making the shares, husband 3/7 plus two full sisters 4/7.

The principle is not accepted by the Ithna Asharis, and apparently rejected also by the Fatimids. The illustration given in the *Da'a'im* is as follows:—

Husband 1/2 = 3/6,

Agnatic brother, 1/3 = 2/6,

Consanguine sister, 1/2, but reduced to 1/6.

This is not a very satisfactory illustration of the way in which a consanguine sister loses a part of her share to the Koranic Heirs, but apparently, as in Ithna Ashari law, the claims of the sisters, full and consanguine, are deferred to those of other Koranic Heirs. The section is itself too incomplete to give a full analysis.

Exclusion from Inheritance on Special Grounds.

A few miscellaneous illustrations are given by Nu'man in this section. For instance:

a) An illegitimate child obtains inheritance from the mother's, but not from the father's, side (the Hanafi rule is contrary to the Ithna Ashari,

where such a child is *nullus filius* and inherits from neither parent, O M L, 335),

b) A Muslim inherits a *kafir,* but an infidel cannot share in the inheritance of a believer (*ibid.*, 334).

c) The property of an apostate (*murtadd*) is distributed according to Muslim law (*loc. cit.*).

d) A man who kills another, intentionally or unintentionally, cannot inherit from him (agreeing with Hanafi, but differing from Ithna Ashari law, *ibid.*, 334-35).

e) If two persons die in a shipwreck or a common calamity, and there is no proof as to which of them died first, each inherits from the other (the same is the rule of Hanafi law, *ibid.*, 377).

Difficulties and Doubts.

1. When a man dies leaving without anyone except his widow, Ali gave her the whole of the property; and similarly, the property would go to the widower (this is also the rule in Indian Law, discussed in *ibid.*, 357, 365, 383).

2. A man of the tribe of Khuza'a died, and as there was no surviving heir, his property was given by the Prophet to the tribe.

3. Where a man dies leaving several sons, the sword, the buckler, the ring and the Koran would go to the eldest son; if the eldest had died, then to the eldest surviving son.

The apparent reason for this is that the Prophet appointed Ali, as his *wasi*, and each successive Imam appointed his eldest son as his heir, in a special sense, to the Imamate. And for this purpose the special paraphernalia of office went to *one* and could not be shared by other sons (the same is the Ithna Ashari rule, *ibid.*, 385; *contra* Hanafi law).

4. Women do not inherit landed property (*'aqar*) but the price of the property is to be distributed upon sale (*naqd*). Land is supposed to be a *waqf* for men who go out for *jihad* and fight against the enemy (Ithna Asharis agree only in respect of a childless widow, and their excluder is not so wide, *ibid.*, 373; the rule is inapplicable in Hanafi law).

The rule is stated too briefly for a full discussion. The word *naqd* here apparently means sale of land and distribution of proceeds. What is not clear however is: if land is not sold, then to whom does it go? If women are not entitled to land, can the sons virtually usurp it?

Pending a final analysis, it may generally be stated that the general scheme of inheritance among the Fatimids is that of the Ithna Ashari Shiite law, with a few minor concessions to Sunnite sentiment; and secondly, that the brief statement on the position of women and landed property is too incomplete for a clear statement of the law. It is possible that the other compendia, like *Mukhtasaru'l-Athar*, *Yanbu*, *Majmu'u'l-fiqh* and *Ikhbar* may have something to say on the point, but I regret I have not been able to analyse them with the care the problem deserves.

The law briefly stated above is of considerable practical importance, as it is applicable to the Bohoras, both Da'udi and Sulaymani, a wealthy trading community established in Western India, as well as in East Africa and Ceylon. Unfortunately there is no thorough account or history of this interesting Musta lian Sect — almost a guild, in some parts of the world — but Dr. S. T. Lokha Dwalla has written in an earlier number of *Studia*, *Islamica* a very welcome article.[20]

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