If the necessary measures for checking the malady be not strenuously adopted, in the near future a single head of cattle will not be found in the above area.

پیدا

پیدا کردن (paidâ kardan) : " To find," (e.g., work for anyone). (کاوه 1921, Apr. 10, p. 6).

پیراهن A " loose white vest."

پیراهن عثمان (pîrâhan-e 'Usmân) : " Thevest of 'Usmân.', Its metaphorical sense, " a call for strife and opposition," is explained by the following from Muir's *Caliphate*, p. 244 :

" A citizen of Madina, wrapping carefully the severed fingers of Naila in the blood-stained shirt of Othman, meet symbols of revenge, carried them off to Damascus, and laid them at Muavia's feet."

پیش بینی

پیش بینی شدن (pîsh-bînî shudan) : " To be foreseen." (ستارهٔ ایران) 1924, No. 9, p. 2, sub-col .4).

چنین پیش بینی میشود که پس ازگذشتن راپرت مزبور از نظر آقای رئیس الوزرا کمیونی مرکب از اشخاص بصیر و متخصص تشکیل

It is foreseen that after the above report has been received by the Premier a Commission will be formed of specialists.

پیش بینی کردن (pîsh-bînî kardan ; with accusative) : " To foresee." (اتحاد 1922, No. 219, p. 2, col. 1).

مانمی توانیم سکوت و سکوتی که عمارت بادگیر و بهارستان را فراگرفته است تصدیق نموده ودر مقابل نخاطرات و بد بختیهائی که پیش بینی می کنیم توضیحاتی نخواهیم

We cannot endorse the silence and quietude that have fallen upon Government quarters ; nor, in view of the dangers and misfortunes we foresee, can we refrain from certain expositions.

C. E. WILSON.

(*To be continued.*)

ISMA'ILI LAW AND ITS FOUNDER

I

EVERYTHING connected with Isma'ilism seems to be enveloped in a cloud of mystery and secrecy. The most ordinary doctrines are zealously guarded by the sectarians themselves ; even the books that are exoteric and quite harmless never reach the light of day, and are never studied except by the select few. It is not the purpose of this article to criticise or justify this attitude. Much can cogently be said on both sides, but one result is that the people at large remain grievously ignorant of the real nature and doctrine of Isma'ilism, and of its contribution to Islamic civilization.

In the case of jurisprudence this ignorance is shown by the fact, that even writers on Muhammadan Law generally suppose that Isma'ilism possesses no distinct legal system of its own ; and so great an authority as Ameer Ali laid it down that Ismâ'îlîs are governed by " the general principles of Muhammadan Law "—whatever that vague and nebulous statement may mean. He is not however to be blamed ; even Nizaris* perhaps the most important, influential and numerous branch of the Ismâ'îlîs, are generally ignorant of the existence of Ismâ'îlî Law—'the Pure Path ' (*al-madhhab at-tahir*)—to use the nomenclature of lawyers, on the analogy of the 'The Pure Imâms' (*a'immatu't-tahirin*).

The system of Ismâ'îlî jurisprudence, as it exists today and is to be found generally propounded in the works of Qâdî Nu'mân, was perfected in the reign of Al-Mu'izz li-dîni'llâh, the fourth Fâtimid Khalîfah and the fourteenth (or according to others, the thirteenth) Imâm of the Ismâ'îlîs (died A.H. 365/976 A.D.). The works of Qâdî Nu'mân being in Arabic, were preserved by the

* Also " Eastern Ismâ'îlîs ", represented in India by the community known as Khôjas.

Musta'lian[1] branch of Ismâ'îlîs[2] particularly in the Yemen, and now they are also to be met with in India. The Nizaris, for historical reasons, have not preserved this legal system, although it belongs as much to them as to the Musta'lians, because it originated in the times of Imâm Mu'izz, an Imam believed in by both branches. The Nizaris seem, however, to have generally adopted the jurisprudence of the country in which they settled; in Bukhâra and Samarqand, the Hanafî law; in Persia, the Ithna Asharî *Madhhab;* in India, the Hindu Dharam.

On an examination of the Ismâ'îlî legal system several peculiar characteristics appear which are to be carefully noted. Firstly, it is in reality a one man system; that is, except Qâdî Nu'mân, no jurist has attained the highest rank. In fact, if Ismâ'îlî tradition is to be believed,—and there is no reason why it should not be—it was not Qâdî Nu'mân alone who composed the standard books, but he wrote in close consultation with Imâm Mu'izz himself, and the two are like the Platonic twins, Socrates and Plato, the one completely submerged in the other; the work of Nu'mân being supposed to be a miracle of Imâm Mu'izz and the Imâm finding a mouthpiece in his great Qâdî and *hujjat*, Nu'man.

Secondly, as regards the style and form of the works, they are more akin to the earlier Hadîth literature than the later law works. No authority is cited except the first six Imâms; the vast majority of traditions being on the authority of Imam Ja'far as-Sâdiq, who is the fountain-head of Ismâ'îlî jurisprudence. The traditions cited are the decisions of the Imâms themselves, therefore erroneous opinions are not discussed or refuted, except in rare cases as, for instance, Mut'a (temporary marriage) which is, according to Ismâ'îlî Law, altogether unlawful and equivalent to *zina* (fornication). Thus the legal books of the Ismailis differ considerably from later works of Hanafî or Ithnâ 'Asharî Law.

Thirdly and lastly, the Ismâ'îlîs make no distinction between the *first principles* of law and the *application* of the law. In Sunnite or Shî'ite jurisprudence generally the Sharî'at laws are divided into two distinct divisions. The first division is called the *Roots* (or foundations) of the law (*Usul*). This deals with Qur'ânic interpretation, the

(1) Also called the Western Ismâ'îlîs.

(2) Represented by the Bohoras in India.

criticism of traditions, distinguishing the genuine ones from those which are not genuine, etc. The second division deals with the *application* of these principles and arriving at the specific rules of Sharî'at which every Muslim must obey. This division is called the *Branches* of the law (*Furu'*), popularly and erroneously also called *Furu'at*. The Ismâ'îlîs assert that as the Founder of their system is Imâm Mu'izz himself, who through the instrumentality of his Qâdî laid down the law clearly, following in the footsteps of his illustrious ancestor, Imâm Ja'far as-Sâdiq, no such discussion need arise at all. The decision of the Imâm is before you, your duty is simply to follow it, if you wish to remain a follower of the Pure Path of the Pure Imâms.

As a brief account of the life of Nu'mân follows, it is needless to go into the subject here, but perhaps the story of the composition of *Da'a'imu'l-Islam* (the Pillars of Islâm)[1], the masterpiece of Nu'mân, and the text-book and Code of laws throughout the Fâtimid Empire, may not be uninteresting. It is related that once a large number of *Da'is* were gathered at the court of Imâm Mu'izz. The chief topic of conversation was the variations in religious practices and laws, and how erroneous opinions had crept into the Pure Path, the true Sharî'at. This was strongly deprecated and the Imâm laid down the principle that the people should always follow in the footsteps of the previous generations. Then he cited the famous Hadîth of the Prophet إذا ظهرت البدع فى امتى فليظهر العالم علمه وإلا فعليه لعنة الله

"When innovations appear in my community, let the learned man make manifest his learning or else the curse of God be upon him." Then, turning to Nu'mân, he said: "You are the person, O Nu'mân, who is indicated (by the Prophet) in this saying," implying that it was Nu'mân's duty to set the matter right. He thereupon commanded Nu'mân to write the *Da'a'imu'l-Islam*, and while Nu'mân composed Imâm Mu'izz corrected and revised it, chapter by chapter, verse by verse. Thus ultimately a book came to be composed, brief but authoritative, and it served as the official code throughout the Fâtimid Empire, and to this day serves as the first and most important text-book of law among the Musta'lian Ismâ'îlîs[2]. It must however be repeated again that the importance of the *Da'a'im* lies in

(1) See Ivanow, *Guide to Ismaili Literature*, No. 64; and Fyzee, *Ismaili Law of Wills*, pp. 1-8.

(2) See "Qâdî an-Nu'mân," *JRAS* for Jan. 1934, p. 20-42.

the fact that, having been composed before the split between the Nizârîs and Musta'lians, it is the common heritage, together with all the works of Nu'mân, of both sections of the Ismâ'îlîs.

The Ismâ'îlî system of jurisprudence, being a thousand years old, developed in the fourth century of the Hijrah (tenth century A.D.), is one of the earliest in Islâm, and it is to be hoped that it will be studied with the care and attention it deserves. The close study of law involves also the study of history, sociology, religion and ethics; as Professor Allen observes; " Law streams from the soul of a people like national poetry, it is holy as the national religion, it grows and spreads like language; religious, ethical and poetical elements all contribute to its vital force."*

II

The Qâdî Abû Hanîfah an-Nu'mân b. Abî 'Abdi'llâh Muhammad b. Mansûr b. Ahmad b. Hayyûn at-Tamîmî al-Ismâ'îlî al-Maghribî was the greatest of Ismâ'îlî jurists and a protagonist of the early Fâtimids in Egypt. Nu'mân appears to have sprung from a Mâlikî stock in Qairawân, adopting the Ismâ'îlî faith early in life. The exact date of his birth is not known, but it is probable that he was born in the last decades of the third century of the Hijrah. His connection with the Fâtimids began with his entering the service of Mahdî (the first Fâtimid Khalîfah), and serving him for the last nine years of his life (A.H. 313-322). Thereafter he continued to serve Qâ'im (the second Fâtimid Khalîfah) for the whole of his life. During this time Nu'mân was concerned chiefly with the study of history, philosophy and jurisprudence, and the composition of his numerous works. Just prior to Qâ'im's death, which occurred in 335-946, he was appointed a *Qadi*. His rank increased during the time of Mansûr (third Fâtimid Khalîfah) and he reached his zenith in the time of the fourth Fâtimid Khalîfah, Mu'izz (died 365-976), whom he predeceased by two years. Officially, he does not seem to have been appointed " *Qadi'l-qudat*," a designation given for the first time to Nu'mân's elder son 'Alî; but during the reign of Mu'izz', Nu'mân acquired great power and was in effect the highest judicial functionary of the realm, one of the most important figures in the hierarchy of the Da'wat.

Law in the Making, 54.

Qâdî an-Nu'mân was a man of great talent, learning and accomplishments: diligent as a scholar, prolific as an author, upright as a judge. Not many external facts of his life are known. Possibly he was a recluse immersed in juristic and philosophical studies, and engaged in the composition of his numerous works. He was the founder, and is rightly regarded as the greatest exponent, of Ismâ'îlî jurisprudence. According to the Ismâ'îlî tradition he wrote nothing without consulting the Imâms who were his contemporaries; and his greatest work, the *Da'a'imu'l-Islam* (The Pillars of Religion) is regarded as almost the joint work of Imâm Mu'izz and Qâdî an-Nu'mân, and therefore as of the highest authority. It was the official *corpus juris* after the time of Mu'izz throughout the Fâtimid Empire. In addition to being a jurist, some of his works on other subjects are also considered to be standard works by the Ismâ'îlî doctors and are still eagerly studied; for example: *Asasu't-Ta'wil* and *Ta'wilu'd-Da'a'im* (*ta'wil*), *Sharhu'l-Akhbar* and *Iftitahu'd-Da'wat* (*akhbar*), and *Al-Majalis wa'l-Musayarat* (*wa'z*).

Nu'mân was the founder of a distinguished family of *qadis*, and both his sons, 'Alî and Muhammad, attained the rank of chief cadi (*qadi'l-qudat*).

Qâdî an-Nu'mân died at Old Cairo (Misr) on Friday the 29th of Jumâdâ ii, 363-27 March, 974.

Nu'mân was a prolific and versatile author, and the names of forty-four of his works have survived. Of these twenty-two are totally lost; and eighteen are wholly, and four partially, preserved by the Western Ismâ'îlîs of India. Instead of giving a complete list of his works, which can be found elsewhere, I am only mentioning the most important of them, while classifying them according to subjects:

A. FIQH, 14 works (*Kitabu'l-Idah*, *Da'a'imu'l-Islam*, *Mukhtasaru'l-Athar*); B. MUNAZARA, 5 works C. TA'WIL, (Allegorical interpretation of religion), 3 works *Asasu't-Ta'wil*, *Ta'wilu'd-Da'a'im*); D. HAQA'IQ), (Esoteric Philosophy), 4 works; E. 'AQA'ID (Dogmatics), 6 works (*al-Qasidatu'l-Mukhtarah*); F. AKHBAR and SIRAH, 3 works (*Sharhu'l-Akhbar*); G. TA'RIKH, 2 works (*Iftitahu'd-Da'wat*); H. WA''Z, 3 works (*Al-Majalis wa'l-Musayarat*); I. MISCELLANEOUS, 4 [illegible]

[SOURCES AND BIBLIOGRAPHY. The most important sources for the study of the life and works of Nu'mân are (1) Ibn Khallikân, *Biographical Dictionary*, Trans, De Slane, iii. 565 et seq., (2) Ibn Hajar, *Raf'u'l-Isr*, G.M.S., Vol. XIX, 586-87 and (3) Sayyidnâ'Imâdu'd-dîn Idrîs b. Hasan, *'Uyunu'l-Akhbar*, vol. VI, folios 33-41, and the latter half of vol. V. A full account of Qâdî an-Nu'mân appears in *JRAS* 1934, January No., pp. 1-32. Shorter accounts may also be found in Fyzee, *Ismaili Law of Wills* (Oxf. Univ. Press, 1933) 9-14 ; and Ivanow, *Guide to Ismaili Literature* (Royal Asiatic Society, London, 1933) 37-40.].

ASAF A. A. FYZEE.

MUGHAL RELATIONS WITH PERSIA

FROM BABUR TO AURANGZEB

III

TOWARDS the end of Jahângîr's reign we have seen that relations with Persia were not maintained, although the Shâh seemed anxious to renew them. After the loss of Qandahâr, Jahângîr had a just resentment against an old friend who had not only deprived him of a rich province, but had instigated against him the rulers of the Deccan and possibly Shâhjahân. The Shâh, however, kept on sending ambassadors, but no-one was sent in return from India. When 'Abbâs heard of the death of Parwîz, he appointed Taktâ Beg for the mission of condolence, but before he could leave there arrived the news of Jahângîr's death and of Shâhjahân's rapid success against his rivals.

Behri Beg was now appointed on the usual mission of condolence and congratulation. But before he reached the Indian Court, Shâh 'Abbâs died at Mâzandarân on the 9th January 1629, and was succeeded by his grandson Sâm Mirzâ, son of the unfortunate Safî Mirzâ, who now took the title of Safî I.

Although Shâhjahân was aware of the Shâh's death, he appointed Mu'taqid Khân to receive Behri Beg, and to introduce him into the royal presence. On 5th July 1629.[2] Shâhjahân bestowed a robe of honour and Rs. 20,000[3] on the ambassador, who produced the late Shâh's letter.[4] He was dismissed on the 13th Rabî'I 1039 (1629 A.D.) with a further reward, an elephant, a robe of honour and a jewelled dagger.

(1) *'Alam arai 'Abbasi* ff. 416 (Add 166684).
(2) Qazvini ff. 176b. —77.
(3) *Padshahnama* (Lah.) I, p. 261.
'Amal-i-Salih, p. 333.
(4) *Majmu'u'l-Marasilat* f. 229.

ASPECTS OF FATIMID LAW

The recent work of Prof. Bernard Lewis (London), *The Assassins* (1), highlights the early history of an interesting branch of heretics in Islam—the *malā'īn-e malāḥida* of Niẓām al-Mulk. A summary of what is known about them will be found in my paper "The Ismā'īlīs" in the *Religion of the Middle East* (2). The Ismā'īlīs are divided into two well marked groups, the Eastern (Nizārians) and the Western (Musta-'lians). By the vicissitudes of history, the Eastern Ismā'īlīs do not follow any individual system of *fiqh* anywhere in the world; but the Western branch, generally called the Fatimids, have the distinction of preserving their own school *(madhhab)* of jurisprudence. In India the Fatimids are represented by the Bohoras and are divided into two communities, the Dā'ūdīs and the Sulaymānīs, both governed by the same school of law. The two sections are strict followers of their own rituals in faith and consider the following seven works as the foremost authorities in the field of sacred law, *fiqh* or *sharī'a.* These are:

i) *Da'ā'im al-Islām (The Pillars of Islam).* Two volumes, ed. A. A. A. Fyzee, Maaref Press, Cairo. Vol. I, 1951; reprinted, 1963 and 1969. Vol. II, 1961; reprinted, 1967. The references are to the first edition. Abbreviated, DM).

ii) *Kitāb al-Iqliṣār.* Two volumes, ed. Moḥammad Waḥīd Mirzā. Institut Français de Damas, 1957.

iii) *Kitāb al-Yanbū'* (Inanow, *Ismaili Literature* (Tehran,

(1) Weidenfeld and Nicolson, London, 1967.
(2) Ed. A. J. Arberry, vol. II (Cambridge, 1969), 318.

1963), 67.) Vol. I is lost; only vol. II, preserved. Manuscript.

iv) *Mukhtaṣar al-Āthār* (Ivanow, *op. cit.*, 65. Two vols. Manuscript.

v) *Ikhtilāf Uṣūli'l-Madhāhib* (Ivanow, *op. cit.*, 73). Manuscript. An edition is under preparation by Dr S. T. Lokhandwala, Senior Fellow, Indian Institute of Advanced Study, Simla, India.

The author of the above five—the basic texts of Fatimid law—is Sayyidnā Qāḍī'l-Quḍāt Abū Ḥanīfa al-Nu'mān b. Muḥammad b. Manṣūr b. Aḥmad b. Ḥayyūn al-Tamīmī al-Maghribī (died, 974), the foremost jurist of the Fatimids, whose works constitute a monumental heritage of medieval Islamic law (1).

vi) *Kitāb al-Ḥawāshī* (Ivanow, *op. cit.*, 299, 300). Strictly anonymous; but generally attributed to Sayyidī Amīnjī b. Jalāl (died, 1602). Two volumes. Manuscript.

vii) *Masā'il Amīnjī b. Jalāl* (Ivanow, *op. cit.*, 299). Manuscript. Two vols.

The last two works are by a sixteenth century Indian author and give us an insight into the problems that arose in India and the way the *dā'īs* solved them.

It would be very desirable to edit all the legal works of Nu'mān in order to assess the juristic and historical value of these ancient texts; but, as only two (nos. i and ii) have so far been edited, and as manuscripts of the others are not easy to obtain, a brief summary of some of the practical aspects of the law has been given by me in the *Compendium of Fatimid Law*, and the doctrine of *kitmān* (secrecy) dealt with in an article recently (2).

Out of the four Sunnite schools, the Ḥanafī is the *madhhab* of the majority in India, and full information is available. The

(1) Asaf A. A. Fyzee, "Qāḍī an-Nu 'mān: the Fatimid Jurist", *JRAS*, 1934, 1-32; additional information will be found in my *Compendium of Fatimid Law*, Indian Institute of Advanced Study, Simla, India, 1969, Introduction, pp. xix-xxxii. This work is abbreviated as *Fat. Law*. See Also *Ency. of Islām*, III, 953.

(2) *Op. cit.*, pp. 1, and 210 ff. How strictly the doctrine of secrecy is followed is shown by me in "The Study of the Literature of the Fatimid *Da'wa*" in *Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb* (Brill, Leiden, 1965), 232-49.

Shāfi'īs are to be found in the south of India; and a few cases have been reported. Nevertheless, the Shāfi'ī school is little known in India. As for the Mālikīs and Ḥanbalīs, their law is utterly unknown, as no Muslims in India adhere to this school.

Of the Shiite schools, only the Ithnā 'Asharī school is fairly well known; and there are many *ulema* and collections of manuscripts in the country. The Bohoras follow the Fatimid school, and their system is little known. Thus for practical purposes, I have confined myself to some of problems of the Fatimid school, and compared them with the Ḥanafī or the Ithnā 'Asharī *madhhab*. Unfortunately our present knowledge of the details of the law and its history is so small that a full explanation of the differences between the schools has not been attempted. Hence, the following points are dealt with:

A. Marriage. (1) Guardianship in Marriage *(wilāyat al-ijbār)*;
(2) Temporary Marriage *(nikāḥ al-mut'a)*;
(3) Marriage during *'idda*;
B. Divorce. (4) Triple *ṭalāq*/*ṭalāq* during menstruation;
(5) Gifts on *ṭalāq (mut'at al-ṭalāq)*;
C. Gifts. (6) Possession *(taqbīḍ)*;
(7) Life-grants *('umrā, suknā, ruqbā)*;
D. *Waqf*. (8) Income of Family *waqf*;
E. Wills. (9) Bequests to heirs *(waṣiyyat li-wārith)*;
F. Inheritance. (10) Female Heirs.

A. MARRIAGE. (1) GUARDIANSHIP IN MARRIAGE

The fundamental principle in marriage is that there can be no marriage without one guardian and two witnesses *(lā nikāḥa illā bi-waliyyin wa shāhidayn)* (1); a marriage without a guardian and two witnesses is void, whatever the age of the woman (§ 53). If the girl is a minor, her consent is not necessary; but if she is a major, her consent is vital to the validity of the

(1) *Fat. Law* §§ 52 ff. The references to the paragraphs that follow are to the same book.

union, from which it follows that where there is no consent, there is no marriage. If the woman is a major, *in certain circumstances*, she can appoint her own guardian; but, in any event, a guardian is a *sine qua non*. Failing all persons designated by the law as guardians, the cadi himself can act as a guardian (§ 64).

The right of *wilāyat al-ijbār* (which, in this context, signifies the power of the guardian to marry and without which the marriage is a nullity) is different in the case of Mālikīs, Shafi'īs and the Fatimids on the one hand, and the Ḥanafīs and Ithnā 'Asharīs, on the other. In the former, without a guardian, there can be no marriage; but, *aliter* among the latter, where if there is no guardian, and the woman is a major, she herself can marry *without a guardian*, provided there are two witnesses. The question is of great practical importance and so we shall take an illustration.

If the girl is a minor aged 5, all schools agree that a *walī* is necessary. If however the girl is major, that is above 15 years in India, there are differences among the schools. One Khadīja, a lady of twenty, unmarried and virgin, wishes to marry Ibrāhīm, aged 25. Khadīja has lost her father; and her elder brother who is the legal guardian, does not agree to the match. Khadīja, being a person governed by the Fatimid school of law, can, in no circumstances, contract a valid marriage, unless she adopts another school of law which permits such unions. The same is the position in Shāfi'ī law, and presumably, also among the Mālikīs. But if Khadīja were a Ḥanafī, she has the legal capacity to marry. In the Bombay case, *Muhammad Ibrahim* v. *Gulam Ahmed*, a Shāfi'ī girl was faced with a similar predicament. So she changed over to the Ḥanafī school and married without a guardian, according to her own inclinations; and this can be done by a Bohora lady as well (1).

(1) *Muhammad Ibrahim* v. *Gulam Ahmed* (1864) Bombay High Court Reports, O. C. J., 236; Ameer Ali, ii (5 th ed., 1929), 239; Tyabji (4th Ed., 1968) §§ 58 ff.; Fyzee, *Outlines* (3rd ed., 1964), 200-1; and "Marriage of Minors" (1936), 38 Bombay Law Reporter, *Journal*, 41.

A. (2) TEMPORARY MARRIAGE *(mut'a, ṣīghè)*

The *Da'ā'im* and all other Fatimid authorities are unanimous that a marriage for a stipulated period of time, is void and sinful. 'Alī said: "There can be no marriage without a *walī* and two witnesses; or for one *dirham* or two *dirhams*, or for one day or two days. This is debauchery *(sifāḥ)* and such conditions are not valid in *nikāḥ*" (1).

It is therefore clear that this sharply distinguishes the Fatimid from the Ithnā 'Asharī rule, by which such marriages are valid in certain conditions. The incidents of the *mut'a* marriage are well known in India and Persia, and need not detain us here (2). *Mut'a* is not recognized among the Ḥanafīs.

A. (3) MARRIAGE DURING *'IDDA*

The rule of law is stated by Tyabji: In Ḥanafī law a marriage with a woman undergoing *'idda* is irregular *(fāsid)*, but not void *(bāṭil)*; but in Ithnā 'Asharī law it is totally void (3).

The Fatimid jurists agree with the Ithnā 'Asharī view and a few rules of Fatimid law may shortly be stated.

(i) If a man has four wives, he cannot marry a fifth until *(a)* his marriage with one of them is dissolved, and *(b)* her *'idda* is completed.

(ii) Sayyidnā Ja'far b. Manṣūr al-Yaman laid down that if a person does marry a fifth wife during the *'idda* of one of the other four wives, *all the five women* are forbidden to him ! (4)

(iii) And finally, even the hand of a woman observing *'idda* should not be sought *(lā yanbaghī)* in marriage (5).

These rules follow from the principle that the marriage subsists during the period of the *'idda* in an inchoate form: and thus, marriage is *ḥarām* during the *'idda* (*Fatimid Law* § 300, ii);

(1) *Fat. Law* §§ 95 ff.
(2) Tyabji §§ 34 ff.; Fyzee, *Outlines*, 8, 112-15.
(3) Tyabji § 82; Fyzee, *Outlines*, 104.
(4) *Fat. Law* § 116; *Da'ā'im*, ii § 886. (The references are to the first edition).
(5) *Fat. Law* § 275; *Da'ā'im*, ii § 744.

maintenance is due from the husband (*ibid.*, §§ 257, 276); and where a woman is divorced in the *sunna* form, each party inherits from the other, if the other spouse dies during the period (*ibid.*, §§ 259, ii; 449, i).

B. DIVORCE. (4) TRIPLE *ṬALĀQ*/*ṬALĀQ* DURING MENSTRUATION

Ṭalāq in Fatimid law, as in all the other schools, is a detestable procedure. 'Alī said: "*Ṭalāq* is abominable and I detest it" (1).

Where three declarations of *ṭalāq* are made simultaneously and at one sitting, the procedure is by itself sinful and reprehensible, and

i) it never takes effects as an immediate and irrevocable divorce;

ii) where such triple declaration is made in a period of purity *(ṭuhr)*, 3 pronouncements, or 6 pronouncements, or 1000 pronouncements, have the effect of *one legal ṭalāq;* but

iii) even a single *ṭalāq*, when it is given during the period of menstruation, is totally void (2).

Thus of the four modes of *ṭalāq* mentioned by Tyabji, *aḥsan*, *ḥasan*, 3 declarations *at one time*, and *bā'in* (one, written, irrevocable declaration), only the first, the *ṭalāq al-sunna*, is recognized as valid by the Fatimid jurists, and all the others, being among the *ṭalāq al-bid'a* are declared *bāṭil* (void) (3).

B. (5) GIFT ON *ṬALĀQ (mut'at al-ṭalāq)*

The word *mut'a* is used in two distinct senses in the law of marriage and divorce. It literally means "present" or "gratification", e.g. *mut'at al-ṭalāq*, the gift which is compulsory on the husband upon *ṭalāq*, or *mut'at al-ḥajj*, the fee to be paid to the man who performs the pilgrimage on behalf of another.

Secondly, it is the abbreviated form of *nikāḥ al-mut'a*, that

(1) *Da'ā'im*, ii § 979.
(2) *Fat. Law* §§ 204, 206 (i) (iv).
(3) *Ibid.*, xxxvi (III); §§ 198 ff.; Tyabji §§ 141 ff.; Fyzee, *Outlines*, 142 ff.

is marriage for a fee or profit. This is considered lawful only in the Ithnā 'Asharī school.

Now the gift on divorce is not known in India, although its obligatory nature is laid down by Cadi Nu'mān.

He argues that the Koran clearly lays down that a man should make a gift to his divorced wife according to his means and recognized custom *(ma'rūf)*, Koran 2,236. Such a gift is a well recognized *sunna.* Imām Ja'far al-Ṣādiq held it be *farīḍa* (obligatory) and always decreed its payment. The gift should be a generous donation, to be made even to a slave-girl. Such gifts may consist of a slave, a slave-girl, clothes, wheat, dates, money or a beast of burden. The rule is of wide application and modern forms of property, such as stocks and shares, etc. are obviously within the spirit of the dictum. Imām Ḥusayn b. 'Alī once gave away 20,000 dirhams to a divorcée and a wine-skin of honey; but the woman said wistfully:

> "(Lo! What) a meagre gift
> From a parting beloved!"
> *(matā'un qalīlun min ḥabībin mufāriqin).*

The gift should be made either before or after the divorce (1).

Although no case for demanding such a gift seems to have been reported, it is submitted that the gift on divorce is compulsory on the Bohoras in India and Pakistan.

C. GIFTS. (6) DELIVERY OF POSSESSION *(TAQBĪḌ)*

Muhammadan law, as received in India and Pakistan, Ḥanafī as well as Ithnā 'Asharī, lays down that there are three essentials of a valid gift *(hiba):* (i) declaration of gift by the donor *(ījāb);* acceptance by the donee *(qabūl);* and (iii) delivery of possession *(taqbīḍ)* (2). As to the nature of possession necessary *(qabḍa)*, a number of complicated rules have been laid down by the courts, according to the character of the property gifted. It is obvious that in the conditions of modern

(1) *Fat. Law* §§ 286-91.
(2) *Outlines*, 209.

life, the nature of property itself has become diversified, and there are many valuable things which are not susceptible of actual, physical possession (called, *khāṣṣ*); and such valuables as shares in a company, insurance policies, equities of redemption, rights in tenacies and the like are not susceptible of physical possession. When they are given by way of gift, symbolic or *constructive possession* is all that the law demands. Thus the law in the sub-continent is full of refinements and details which were unknown in the pristine law of Islam (1).

The Fatimid rules however are simpler. The test is acceptance by the donee, not delivery of possession. "And (it is related) from Imām Jaf'ar b. Muḥammad al-Ṣādiq that he said:

The gift is valid when it is accepted (by the donee), whether possession is delivered *(qubiḍat)* or not, and whether it is divided *(quṣimat)* by metes and bounds or not » (2).

The same is the rule for *mushā'* (undivided property), and no actual possession of the property is necessary for validating the gift (3).

C. GIFTS. LIFE GRANTS

The Ḥanafī law of life-grants is somewhat complicated. Originally a life-grant was treated as a gift with a condition. The gift was declared to be valid, and the condition void, thus completely going against the intention of the donor. But recently, after the strenuous pleading of Tyabji which was accepted by the Privy Council, both the Ḥanafī and the Ithnā 'Asharī cases have been decided conformably with the wishes of the donor (4).

The Fatimid law is simpler and the *Kitāb al-Yanbū'* defines three kinds of such grants and declares them to be lawful:

(1) *'Umrā:* Where a man gives to another the beneficial rights in a house for a lifetime, after which the property reverts to the owner or his heirs.

(1) Tyabji §§ 394 ff.; *Outlines* § 43.
(2) *Fat. Law* § 302; *Da'ā'im*, ii § 1216.
(3) *Fat. Law* § 304.
(4) For a full treatment see *Outlines* § 46.

(2) *Suknā:* Where the owner of the house gives to another the right to live in a house for a certain period, after which the property reverts to the owner or his heirs.

(3) *Ruqbā:* Where the owner of the house gives the right to live in the house or enjoy the fruits thereof to two persons (one of whom can be himself), so that when one of them dies, the house or land goes to the survivor for his lifetime, after which it reverts to the owner or his heirs.

All such transactions are declared to be valid. Thus, in Fatimid, as distinguished from the Ḥanafī, law a great variety of life-grants are permissible in landed property; and, by parity of reasoning, the same rules would apply in the case of other forms of property as well (1).

D. *WAQF.* (8) INCOME OF FAMILLY *WAQF*

The Ḥanafī rule is that in a family *waqf (waqf 'alā'l-awlād)* the general presumption is that the income is distributed *per stirpes*, male and female sharing equally. This is sharply to be distinguished from the distribution of inheritance, where as a rule the male takes double the share of the female.

Amīnjī b. Jalāl states the law as follows in the *Ḥawāshī*, Vol. II:

"(In a family *waqf*) ... if the settlor *(wāqif)* gives a single share each, alike to male and female ... the distribution shall take place accordingly; but if he does not make any specific provision, the share of the male shall be double the share of the female" (2).

Thus the ordinary rule among the Fatimids is the same as that of the law of inheritance, but if a specific provision to the contrary is made that male and female shall share equally, such a condition is valid and enforceable.

It is significant that Nu'mān, the earliest authority, does not lay down the rule in this manner; hence it is permissible to assume that this was a later rule, formulated in India some two centuries ago and not earlier.

(1) *Fat. Law* § 307.
(2) *Ibid.* § 338; *Ḥawāshī*, ii, folio 162*a*; for a fuller treatment of the law in India, see *Outlines*, 303.

E. WILLS. (9) BEQUESTS TO HEIRS

It is a well known rule among the Ḥanafiyya, as distinguished from the Ithnā 'Ashariyya, that "There shall be no bequest to the heir" *(la waṣiyyata li-warithin)*.

The Fatimid authorities agreeing with the Ḥanafīs say that as God has already fixed the share of each heir in the Koran, man cannot by will change such a distribution of property by giving him a legacy in addition to his portion of inheritance. This rule is well known in India and it is unnecessary to discuss it in detail (1).

F. INHERITAHCE. (10) FEMALE HEIRS

(Rule against inheriting landed property explained away by Cadi Nu'mān)

The Imāms Muḥammad al-Bāqir and Ja'far al-Ṣādiq jointly declare that women were *not* entitled to inherit immovable property *in specie*, but were only entitled to their proper share of inheritance according to the Koranic rules, account being taken of the price of land forming part of the heritable estate. Thus women would get their proper share, not in the shape of land, but in the other forms of property known at that time.

Nu'mān says in the *Da'ā'im* that this is *not* a general rule, but restricted (a) to land which had been dedicated as *waqf* for the benefit of men who had undertaken *jihād* in defence of the state, or (b) to land dedicated as *waqf* for the benefit of one group of persons (namely men) to the exclusion of the other group (women).

The above argument appears to be somewhat specious and intended to hide the real state of affairs. In Africa the customary law did not favour the holding of land by women; hence the dictum, very clearly expressed, of the two Imāms. Now as this would contravene a Koranic command, Nu'mān possibly

(1) Tyabji § 669 *(b)*; *Outlines* § 76; *Fat. Law.* § 373.

formulates this dubious explanation. His own view however is firmly expressed as follows:

"Where landed property is owned by the deceased person and is heritable, the female heirs have a share in it, in accordance with the rule laid down in the Koran." That is, two shares to the male, and one share to the female heir (1).

It will thus be seen that the Fatimid law in the above cases agrees with the other schools in the manner following:

With Ḥanafīs—two cases, A(2), E(9);
—Ithnā 'Asharīs—three cases, A(3), A(4), C(7);
—Shāfi'īs—one case, A(1);
—Mālikīs—one case, C(6);
—Customary Law (?), E(10);
—*Sui Generis*, two cases, B(5), D(8).

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(1) *Fat. Law* § 458, and Introduction xxxvii f.