

The Shi'ah School of Law

Edited by SYED MUMTAZ ALI

“There are three main groups among Muslims: Sunnis, Shi'ahs and the Abadites (nicknamed Kharijites), with several subdivisions. They have few differences in matters both of dogma and cult . . . In a cosmopolitan town, when one sees Muslims of different schools practising differently the same act, one asks wherefrom this divergence? Leaving aside the differences in dogma, which come from the deduction of the leading theologians of each school, **in the matter of cult let us know from the outset that nothing has been invented by anybody, but all comes from the Prophet himself or is deducted from the report of his saying or doing.**”¹

The two great sects among Muslims, the Sunnites and the Shi'ites date back to the Umayyads. “The difference between these two sects is based on a political question, whether the succession to the Prophet should take place by election or by inheritance among the close relatives of the Prophet? **This became a question of dogma to the Shi'ites**, and the schism split into ramifications of its own and occasioned civil wars. It is one such uprising which swept away the Umayyad dynasty, and made it yield its place in 750 [A.D.] to the Abasids, but the Shi'ites did not profit by the change. In our days there are probably ten percent Shi'ites among the Muslims of the world, the rest being almost all Sunnites, not to speak of the infinitesimally small sect of the Kharijites, which also came into existence at the same time.”²

“Islamic tradition reserves to the Caliph or the head of the Muslim State not only politics (including administration of justice), but also cult, i.e., the outward practice of the religion, such as the service of worship [salat], fasting and pilgrimage. All this falls under the purview of the Fiqh (Muslim law) developed by the different schools. In this realm, monopoly of power has been jealously imposed, although this concerns a rather less important part of our life. **Sectarian differences exist among Muslims since the death of the Prophet, as to who had the right to succeed to the Prophet in the exercise of the power regarding politics and cult. Let us leave the decision to God on the Day of Judgment, and let us occupy ourselves with our future and the defense against the enemies of God.** As to the inner life, which alone determines the salvation in the everlasting Hereafter, in this sphere there are no jealousies: **several persons could and did succeed the Prophet simultaneously.** If the Naqshbandiyah Order of mystics seeks its authority from

the Prophet through Abu Bakr, the Qadiriyyah and the Suhrawardiyyah orders for instance, do the same through 'Ali, and all this among the Sunnis to whom Abu Bakr alone was the immediate successor of the Prophet in the political field. **This spiritual Realm, which unites Sunnis and Shi'iahs, is not vapid abstraction: It has its own full-fledged administrative organization.** The existence of *Abdal* and *Autad* or spiritual governors and administrators, is known on the authority of the Prophet himself, as we read by as early an author as Ibn Sa'd. A monograph of Suyuti has collected all the traditions of the Prophet on the subject of *qutb*, *abdal* and *autad*.”³

The following entry for the most part consists of an excerpt under the heading of “Shi'ah” from the “Dictionary of Islam” © 1886, but this excerpt also gives a quotation from N.B.E. Ballie from his introduction to his digest of the Imamea Code (London 1869). This Dictionary was compiled by T.P. Hughes, who was an eminent Christian missionary in India during the late 1800s. We have tried not to tamper with its original idiom and vernacular even though on quite a few occasions it was difficult to control our desire to make alterations or to paraphrase some of the material for the sake of clarity and brevity. Nonetheless we feel this entry has much to offer Muslims in understanding the differences between the Sunni- Hanafi and the Shi'ah School of Law and to indicate how political developments in the history of Islam have brought the differences into an emotionally charged, sharp focus on certain aspects of such differences. Historically, this has resulted in strained relations between the followers of the two sects. Misguided, deep rooted emotions and excessive zeal of adversaries in defending themselves are no doubt the two obvious elements which, unfortunately, seem to defy attempts towards reconciliation and the much needed religious tolerance. It is our feeling that our kind of efforts to fill in the knowledge vacuum but also to re-establish sincere and effective communications. – Editor

Shi'ah Lit. “Followers.” The followers of 'Ali, first cousin of Muhammad and the husband of his daughter Fatima.

Basic Beliefs

The Shi'ahs maintain that 'Ali was the first legitimate *Imam* or *Khalifah*, or successor, to the Prophet, and

therefore reject Abu Bakr, 'Umar, and 'Usman, the first three Khalifahs of the Sunni Muslims, as usurpers. They are also called the *Imamiyahs*, because they believe the Muslim religion consists in the true knowledge of the Imam or rightful leaders of the faithful. Also, the *Isna'ashariyah*, or the *Twelveans*, as followers of the *twelve* Imams. The Sunni Muslims call them the *Rafizi*, or the forsakers of the truth. The Shi'ahs strenuously maintain that they are the 'orthodox' Muslims, and arrogate to themselves (as do also the Sunnis) the title of *al-Mu'minun*, or the 'True Believers.'

The Spirit of division, which appeared among the followers of Muhammad, even before his death, broke out with greater violence after it; and the rapid strides of his successors to even imperial power, only afforded a wider sphere for ambition. The great and radical difference between the Shi'ahs and Sunnis, as we have already remarked, arises from the former maintaining the divine and indefeasible right of 'Ali to succeed the Khalifate on the death of the Prophet. 'Ali's claims, they assert, rested on his nearness of kindred to Muhammad, of whom he was a cousin, and on his having married Fatima, the only offspring of the Prophet which survived him. They also assert that he was expressly declared his successor by the Prophet himself, under direct guidance from God.

Shi'ahs Consider the Imamate or Khalifate to be a Divine Institution

The text quoted in defense of the divine institution of the Khalifate in the Prophet's own family, is the 118th verse of the Suratu l' Baqarah, or the Second Chapter of the Qur'an, which reads: –

“And when his Lord tried Abraham with words and he fulfilled them, He said, I am about to make of thee an IMAM to mankind; he said, ‘Of my offspring also?’ ‘My covenant,’ said God, ‘embraceth not evil doers.’”

According to the Shi'ahs, this passage shows that the Imamate, or Khalifat, is a divine institution, the possessor thereof must be of the seed of Abraham. This the Sunnis would also admit, as they hold that the true Khalifah can only be one of the Quraish tribe, but from the expression, “*My covenant embraceth not evil doers,*” the Shi'ah doctors establish the supernatural character of the Khalifate, and hold that the divinely appointed leader must himself be without spot or blemish or capacity to sin. The primeval creation of 'Ali is therefore a dogma of the Shi'ah faith.

The author of the *Hayatu 'l-Qulub* (Merrick's ed., p. 4) says: “the Prophet declared that the Most High had created him, and 'Ali and Fatima, and Hasan and Husain, before the creation of Adam, and when as yet there was neither heaven nor earth, nor darkness, nor light, nor sun, nor moon, nor paradise, nor hell.” [*Haqiqatul-Muhammadiyah*]

The Shi'ah account of the nomination of 'Ali by the Prophet Muhammad, pbuh, to be his successor.

The Shi'ah traditions also give very lengthy accounts of the nomination of 'Ali by the Prophet to be his successor. The following is the account given in the *Hayatu 'l-Qulub* (p. 334):

“When the ceremonies of the pilgrimage were completed, the Prophet, attended by 'Ali, and the Muslims, left Mecca for al-Medina. On reaching Ghadirkhum, the Prophet halted, although that place had never been known as a stopping-place for caravans because it had neither water nor pasturage. The reason for stopping at this place being a direct message from the Almighty. The Prophet had received divine message on the subject before, but He had not before expressly appointed the time of 'Ali's inauguration.”

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“As the day was very hot, the Prophet ordered them to take shelter under some thorn trees. Having ordered all the camel-saddles to be piled up for a pulpit, he commanded a herald to summon the people around him. Most of them had bound their cloaks on their feet as a protection from the excessive heat. When all the people were assembled, the Prophet ascended the pulpit made of camel-saddles, and, calling to him, the Commander of the Faithful ('Ali), placed him on his right hand. Muhammad then gave praise to God, and foretold his own death, saying that he had been called to the gate of God. He then said, ‘I leave among you the Book of God, to which, while you adhere, you will never go astray. I leave with you the members of my family who cannot be separate from the Book of God until both they and the Book join me at the fountain of al-Kausar.’ Then with a loud voice, he said, ‘Am I not dearer to you than your own lives?’ And all the people said, ‘Yes.’ He then took the hands of 'Ali and raised them up so high, that the white of his armpits appeared, and said, ‘Whosoever from his heart receives me as his master, then let him receive 'Ali. O Lord, befriend 'Ali. Be the enemy of all his enemies. Help all who help him, and forsake all who forsake him.’”

The writer also says: “Certain authorities, both

Shi'ah and Sunni, declare that when the Prophet died, the Muhajirs and Ansars, such as Abu Bakr, 'Umar, and 'Abdu r-Rahman ibn ul-'Auf, instead of visiting the family of the Prophet to comfort them at the time of his death, assembled at the abode of the Banu Saudah, and plotted to seize the Khalifate. Most of them did not perform the prayers at the Prophet's burial, although 'Ali sent to call them for the purpose. This plan was to make Abu Bakr Khalifah, and for this they had plotted in the Prophet's lifetime. The Ansars, however, wished to make Sa'd ibn ul-Abadah Khalifah, but they were over-ruled by the Muhajirs. A certain man brought the information that Abu Bakr was constituted Khalifah, when 'Ali was in the act of filling in the earth of the Prophet's grave, and said that the hypocrites had feared that if they waited until the funeral ceremony was over, they would not succeed in their design of depriving 'Ali of his rights. 'Ali laid his spade on the ground and recited the first verses of the 29th Surah of the Qur'an:

"Alif La Mim. Do men reckon that they will be left alone who say, 'We believe,' and not be tried? We did try those who were before them, and God will surely know those who are truthful, and he will surely know those who are liars."

The Shi'ahs believe that at this time God made special revelations to Fatima, the Prophet's daughter, and 'Ali's wife. These revelations are said to have been possessed by the last of the Imams, al-Mahdi, and to be still in his possession.

It need scarcely be added that the Sunni writers deny every word of these traditions.

The strong hand of the Sunni Khalifah 'Umar kept the claims of 'Ali in abeyance; but when 'Umar died, the Khalifate was offered to 'Ali, on condition that he would govern according to the Qur'an, and the traditions as received by the Sunnis. The answer of 'Ali not being deemed satisfactory, the election devolved upon 'Usman. 'Usman was assassinated A.H. 35, and 'Ali was elected on his own terms, in spite of the opposition of Aisha, the favourite wife of the Prophet, who had become a great influence in Islam.

One of the first acts of 'Ali was to recall Mu'awiyah from Syria. Mu'awiyah refused, and then claimed the Khalifate for himself. His claims were supported by Aisha. 'Ali was eventually assassinated at Kufa, A.H. 40, and upon his death, his son Hasan was elected Khalifah, but he resigned it in favour of Mu'awiyah, on the condition that he should resume it on the death of the latter. Mu'awiyah consented to this

arrangement, although secretly determining that his own son Yazid should be his successor.

Upon the death of Mu'awiyah, A.H. 60, his son Yazid, "the Polluted," obtained the position of Imam or Khalifah, without the form of election, and with this event commenced the great Shi'ah schism, which has divided the forces of Islam until this day.

The Lineage of Shi'ah Khalifahs

The leading, or "orthodox" sect of the Shi'ahs, the *Imamiyahs*, received the following as the rightful Khalifahs:

1. 'Ali, the son-in-law of the Prophet.
2. Al-Hasan, the son of 'Ali.
3. Al-Husain, the second son of 'Ali.
4. 'Ali, surnamed Zinu ul-'Abidin, the son of al-Husain.
5. Muhammad al-Baqir, son of AINU ul-'Abidin.
6. Ja'far as-Sadiq, son of Muhammad al-Baqir.
7. Musa al-Kazim, son of Ja'far.
8. Ar-Raza, son of Musa.
9. Muhammad at-Taqi, son of ar-Raza.
10. 'Ali an-Naqi, son of Muhammad at-Taqi.
11. Al-Hasan al-'Askari, son of 'Ali an-Naqi.
12. Muhammad, son of al-Hasan al-Askari, or the

Imam al-Mahdi, who is supposed by the Shi'ahs to be still alive, though he was withdrawn for a time, and they say he will again appear in the last days as the *Mahdi*, or "Director," which the Prophet prophesied would appear before the Day of Judgment.

The Imamites trace the descent of this Imam Muhammad as direct from 'Ali, thus making him the twelfth lawful Imam, on which account they are called the *Isna-'ashariyah*, or the "Twelveans." They assert that this last Imam, whilst still a boy, being persecuted by the Abbasidean Khalifahs, disappeared down a well in the courtyard of a house at Hillah near Baghdad, and Ibn Khaldun says, so late as even in his day, devout Shi'ahs would assemble every evening after sunset at this well and entreat the absent Imam to appear again on earth.

Mujtahidun – Enlightened doctors of law

In the present day, during the absence of the Imam, the Shi'ahs appeal to the *Mujtahidun*, or "enlightened doctors of the law," whose opinion is final on all matters, both temporal and spiritual.

There have been two great schisms in the succession of the Imams, the first upon the death of 'Ali Zainu ul-'Abidin, when part of the sect adhered to his

son Zaid, the founder of the Zidiyah sect. And the second on the death of as-Sadiq, when his father nominated his second son, Musa al-Kazim, as his successor, instead of allowing the Khalifate to go in Isma'il's family; those who adhered to Isma'il's family being called *Isma'ilyah*. The great body of the Shi'ahs acknowledge Musa al-Kazim and his descendants as the true Imams.

The Isma'ilyah, like the Twelveans, make profession of a loyal attachment to the cause of 'Ali. Their schism was occasioned by a dispute regarding the succession to the Imamate on the death of Imam Ja'far Sadiq. Ja'far had four sons, the eldest of whom was Isma'il. One day, however, Isma'il was seen in the state of inebriation, and his father disinherited him, and appointed his son Musa. The greater number of the Shi'ahs accepted this decision, but a small number, who regarded the drunkenness of the Imam as an evidence that he accepted the *hidden* and not the legal precepts of Islam (!), remained attached to Isma'il. They say from the time of 'Ali to the death of Muhammad, the son of Isma'il, the Imams were visible, but from his death commenced the succession of concealed Imams. The fourth of these "concealed" Imams was a certain 'Abdullah, who lived about the third century after the Hijra.

The contentions of the Shi'ahs regarding the succession have become endless, and of the proverbial seventy-three sects of Islam, not fewer than thirty-two are assigned to the Shi'ahs, and according to the *Sharhu 'l-Muwaqif*, there are as many as seventy-three sects of the Shi'ahs alone.

According to the *Sharhu 'l-Muwaqif*, the three principal sects of the Shi'ahs are (1) *Ghulat*, or Zealots, the title generally given to those who, through their excessive zeal for the Imams, have raised them above the degree of human beings. (2) *Zaidiyah*, those who separated after the appointment of Muhammad Baqir to the Khalifate, and followed Zaid. (3) *Imamiyah*, or those who acknowledge Ja'far Sadiq as the rightful Imam, to the exclusion of Isma'il, and which appears to be what may be called the *orthodox* sect of the Shi'ahs. Out of these three great divisions have grown innumerable sects, which it would be tedious to define. All Shi'ah religionists are more or less infected with mysticism.

Many of the Shi'ahs have carried their veneration for 'Ali so far as to raise him to the position of a divine person, and most of the sects make their Imams partakers of the divine nature. These view have their foundation in the traditions already quoted, which assert the pre-existence of Muhammad and 'Ali, and they have undoubtedly been fostered by the gnostic tendencies of all forms of Persian belief, especially Sufism.

Since the accession of Isma'il, the first of the Sufi dynasty, A.D. 1499, the Shi'ah faith has been the national religion of Persia⁴ [Iran]. Nadir Shah, when at the summit of his power, attempted to convert the Persians to the Sunni form of Islam, in order to assist his ambitious designs, but the attempt failed, and the attachment of the Persians to the Shi'ah faith has remained as decided as ever.

Sir Lewis Pelly remarks: "Though the personal history of Ali and his sons was the exciting cause of the Shi'ah schism, its predisposing cause lies far deeper in the impassible ethnological gulf which separates the Aryan and Semitic races. Owing to their strongly centralized form of government, the empire of the Sassanides succumbed at once before the onslaught of the Saracens; still, Persia was never really converted to Islam, and when Muhammad, the son of Ali, the son of Abdullah, the son of Abbas, the uncle of Prophet Muhammad, proclaimed the Imamate as inherent of divine right, in the descendants of the Caliph Ali, the vanquished Persians rose as one man against their Arab conquerors. The sons of Abbas had all espoused the cause of their cousin Ali against Moawiyah, and when Yazid succeeded to the Caliphate, Abdullah refused to acknowledge him, and retired to Mecca. It was he who tried to dissuade Husain from going to Kufa. His son was Ali, who by order of the Caliph Walid, was flogged and paraded through the streets of Damascus, mounted on a camel, with his face to its tail, and it was to avenge this insult on his father that Muhammad resolved to overthrow the dynasty of the Ommiades.

"The Persians, in their hatred of the Arabs, had from the first accepted the rights of the sons of Ali and Fatimah to the Imamate; and Muhammad cunningly represented to them that the Imamate had been transmitted to him by Abu Hashim, the son of Mohammad, another son of the Caliph Ali, whose mother was daughter of the tribe of Hanifah. This was a gross fraud on the descendants of Fatimah, but the Persians cared not so long as they threw off the Arab yoke." (*Miracle Play*, Intro., p. xvi.; W.H. Allen & Co. 1879)

The Muhammadans of the province of Oudh in British India are for the most part Shi'ahs, and there are a few in the region of Tirah, on the frontier of India. With the exception of the province of Oudh, the Muhammadans of India are for the most part Sunnis of the Hanafi sect, but practices peculiar to the Shi'ahs have long prevailed in certain localities. In most part of India, where the parties are Shi'ahs, the law of this school of jurisprudence is always administered, especially with regard to marriage and inheritance.

Five books of Traditions

It is not correct, as stated by Sale (Introduction to the Koran) and others, that the Shi'ahs reject the Sunnah, or Traditions; for although the Shi'ahs do not receive the "six correct books of the Sunnis," they acknowledge five collections of their own namely: (1) Al-Kafi (2) Manlayastahzirahu 'l-Faqih (3) Tahzib (4) Istibsar (5) Nahju 'l-Balaghah. The works written on the traditions are very numerous.

The Rev. James L. Merrick (Boston 1850) has translated into English portions of the *Hayatu 'l-Qulub*, the most popular book of traditions amongst the Shi'ahs. It was originally compiled by Muhammad Baqir, son of Muhammad Taki, whose last work was the well-known *Haqqu 'l-Yaqin* A.H. 1027 (1627 A.D.).

The Shi'ah school of jurisprudence is of an earlier date than that of the Sunnis, for Abu Hanifah, the father of the Sunni Code of Muslim law, received his first instructions in jurisprudence from Ja'far as-Sadiq, the sixth Imam of the Shi'ahs; but this learned doctor afterwards separated from his teacher and established a code of law of his own.

The major differences between the Shi'ahs and Sunnis

The differences between the Shi'ahs the Sunnis are very numerous, but the following are the principal points:

(1) The discussion as to the office of Imam, already alluded to.

(2) The Shi'ahs have a profound veneration for the Khalifah 'Ali, and some of their sects regard him as an incarnation of divinity, whilst they all assert that next to the Prophet, 'Ali is the most perfect and excellent of men.

(3) They still possess *Mujtahids*, or "enlightened doctors," whose opinion is final in matters of Muslim law and doctrine. The Mujtahid is the highest degree amongst Muhammadan doctors. The Sunnis say, in the present divided condition of Islam it is impossible to appoint them, but the Shi'ahs still elect them in Persia, and the appointment is confirmed by the king.

(4) They observe the ceremonies of the Muharram in commemoration of al-Hasan and al-Husain, whilst the Sunnis only observe the tenth day of the Muharram, or the *Ashura*, being, they say, the day on which God created Adam.

(5) They include the *Majusi*, or fire worshipers, amongst the *Ahlu 'l-Kitab*, or people who have received an inspired record from God, whilst the Sunnis only acknowledge the Jews, Christians, and Muslims as such.

(6) They admit the principle of religious compromise called *Taqiyah* (lit. 'Guarding oneself'). A

pious fraud, whereby the Shi'ah Muhammadan believes he is justified in either smoothing down, or denying, the peculiarities of his religious belief in order to save himself from persecution.

(7) There are also various minor differences in the liturgical ceremonies of the Shi'ahs, which will be found in the account of the liturgical prayers.

The differences in the law

The differences between the civil law of the Shi'ahs and Sunni have been carefully noted in Mr. N.B.E. Baillie's Introduction to his *Digest of the Imameea Code* (London, 1869):

(a) "With regard to the sexes, any connection between them, which is not sanctioned by some relation founded upon contract or upon slavery, [[click here](#) for Appendix A which sets out the Islamic policy on slavery] is denounced by both the sects as *zina* or fornication. But, according to the Hanafiyahs, the contract must be for the lives of the parties, and it is only to a relation founded on a contract for life that they give the name of *nikah*, or marriage. According to the Shi'ahs, the contract may be either temporary, or for life. To a relation established in any of these ways, they give the name of *nikah*, or marriage, which is thus, according to them, or three kinds, permanent, temporary, and servile. It is only their permanent marriage that admits of any comparison with the marriage of the Hanafiyahs. And here there is, in the first place, some difference in the words by which the contract is effected. According to the Hanafiyahs, the words may be *sarih* (express) or *kinayah* (ambiguous). According to the Shi'ahs, they must always be express; and to the two express terms of the other sect (*nikah* and *tazwij*) they add a third *mu'tah*, which is rejected by the others as insufficient. Further, while the Hanafiyahs regard the presence of witnesses as essential to a valid contract of marriage, the Shi'ahs do not deem it to be in anywise necessary. The causes of prohibition correspond, to some extent, in both schools; but there is this difference between them, that the Hanafiyah includes a difference of *dar*, or nationality, among the causes of prohibition, and excludes *li'an*, or imprecation, from among them; while the Shi'ah excludes the former and includes the latter. There is, also, some difference between them as to the conditions and restrictions under which fosterage becomes a ground of prohibition. And with regard to infidelity, though both schools entirely prohibit any sexual intercourse between a Muslimah or Musalman woman and a man who is not of her own religion, the Hanafi allows of such intercourse, under the sanction of marriage between a Muslim and any woman

who is a *kitabiyah*, that is, who belongs to any sect that is supposed to have a revealed religion, while the Shi'ah restricts such connection to *mut'ah* or temporary and servile marriages. Among Kitabiyah, both schools include Christians and Jews, but the Hanafi rejects Majusis, or fire-worshippers, who included among them by the Shi'ahs. The Shi'ahs do not appear to make any distinction between valid and invalid marriages, all that are forbidden being apparently void according to them. But the distinction is of little importance to the parties themselves, as under neither of the schools does an unlawful marriage confer any inheritable quality upon the parties; and the rights of the children born of such marriages are determined by another consideration, which will be referred to in the proper place hereafter.

[paragraphs (b) and (c) containing outdated material have been omitted here]

“(d) But there are some important differences between the repudiation of the two sects. Thus, while the Hanafiyahs recognize two forms, the Sunni and Bida'i, or regular and irregular, as being equally efficacious, subdivide the regular into two other forms, one of which they designate as *ahsan*, or best, and other as *hasan*, or good, the Shi'ahs, reject these distinctions altogether, recognizing only one form of the Sunni, or regular. So also as to the expressions by which repudiation may be constituted; while the Hanafiyahs distinguish between what they call *sarih*, or express words, which are inflections of the word *talaq*, and various expressions which they term *kinayah*, or ambiguous, the Shi'ahs admit the former only. Further, the Hanafiyahs do not require intention when express words are used; so that, though a man is actually compelled to use them, the repudiation is valid according to them. Nor do they require the presence of witnesses as necessary in any case to the validity of repudiation; while, according to the Shi'ahs, both intention and the presence of two witnesses in all cases are essential. Both sects agree that repudiation may be either *ba'in* (absolute or *raja'i* (revocable), and that a repudiation given three times cannot be revoked, nor a woman so repudiated be again married by her husband until she has been intermediately married to another man, and the marriage with him has been consummated. But according to the Hanafiyahs, repudiation may be made irrevocable by an aggravation of the terms, or the addition of a description, and three repudiations may be given in immediate succession, or even *unico contextu*, in one expression; while, according to the Shi'ahs, on the other hand, the irrevocability of a repudiation is dependant on the state in which the woman may be at the time that it is given, and three repudiations, to have their full effect, must have two

intervening revocations. To the *ba'in* and *raja'i*, repudiations of both sects, the Shi'ahs add one peculiar to themselves, to which they give the name of the *talaq-u'l-'iddah*, or repudiation of the 'iddah, and which has the effect of rendering the repudiated woman forever unlawful to her husband, so that it is impossible for them ever to marry with each other again. The power of revocation continues until the expiration of the 'iddah, or probationary period for ascertaining whether a woman is pregnant or not. After it has expired, the repudiation becomes absolute, according to both schools. So long as it is revocable, the parties are still in a manner husband and wife; and if either of them should happen to die, the other has a right of inheritance in the deceased's estate.

“(e) With regard to parentage, maternity is established, according to the Hanafiyahs, by birth alone, without any regard to the connection of the parents being lawful or now. According to the Shi'ahs, it must in all cases be lawful; for a *waladu 'z-zina*, or illegitimate child, has no descent, even from its mother, nor are there any mutual rights of inheritance between them. For the establishment of paternity, there must have been, at the time of the child's conception, according to both sects, a legal connection between its parents or a semblance of either. According to the Hanafiyahs, an invalid marriage is sufficient for that purpose, or even, according to the head of the school, one that is positively unlawful; but, according to the Shi'ahs, the marriage must in all cases be lawful, except when there is error on the part of both or either of the parents. With regard to children begotten under a semblance of right, the Hanafiyahs require some basis for the semblance in the relation of the parties to each other; while according to the Shi'ahs, *bona fide* belief on the part of the man that the woman is his wife seems to be all that is required; while no relation short of a legal marriage, without such belief either on the part of the man or the woman, would apparently be sufficient.

“(f) On the subject of testimony, both schools require that it shall be direct to the point in issue; and they also seem to be agreed that when two or more witnesses concur asserting a fact in the same terms, the judge is bound by their testimony, and must give his judgment in conformity with it. They agree in requiring that a witness should in general have full knowledge, by the cognizance of his own senses, of the fact to which he is bearing testimony; but both allow him, in certain exceptional cases, to testify on information received from others, or when he is convinced of the fact by inference from circumstances with which it is connected.

“(g) *Nasab*, or descent, is included by both sects among the exceptional facts to which a witness is allowed to testify when they are generally notorious, or

when he is credibly informed of them by others. But according to the Hanafiyahs, it is enough if the information be received from two just men, or one just man and two just women; while the Shi'ahs require that it should have been received from a considerable number of persons in succession, without any suspicion of their having got up the story in concert. The Hanafiyahs class marriage among the exceptional facts, together with *Nasab*; but, according to the Shi'ahs, it more properly follows the general rule, which requires that the witness should have the direct evidence of his own senses to the fact to which he is giving his testimony. They seem, however, to admit an exception in its favour; for they reasoned that as we adjudge Khadijah to have been the mother of Fatima, the daughter of the Prophet, though we know it only by general notoriety and tradition, which is but continued hearsay, so also we may equally decide her to have been the Prophet's wife, for which we have the same evidence, though we were not present at the contract of marriage nor even heard the Prophet acknowledge it. Both sects are agreed that a witness may lawfully infer and testify that a thing is the property of a particular person when he has seen it in his possession; and so according to the Hanafiyahs, 'When a person has seen a man and woman dwelling in the same house, and behaving familiarly with each other in the manner of married persons, it is lawful for him to testify that she is his wife, in the same way as when he has seen a specific thing in the hands of another.' The Shi'ahs do not apply this principle of inference to the case of marriage, and there is no ground for saying that, according to them, marriage will be presumed in a case of proved continual cohabitation.

“(h) There is a difference between the two schools as to the person who is entitled to claim a right of *shuf'ah*, or pre-emption. According to the Hanafiyahs, the right may be claimed, firstly, by a partner in the thing itself; secondly, by a partner in its rights of water and way; and thirdly, by a neighbour. According to the Shi'ahs, the right belongs only to the first of these, with some slight exception in favour of the second. The claim of the third they reject altogether. In gift, the principal difference between the schools is, that a gift of an undivided share of a thing, which is rejected by the Hanafiyah, is quite lawful according to the Shi'ahs.

“(i) In appropriation and alms, there do not seem to be any differences of importance between the two schools. And in wills, the leading difference seems to be that while according to the Hanafiyahs, a bequest in favour of an heir is positively illegal, it is quite unobjectionable according to the Shi'ahs.

“(j) In respect of inheritance, there are many and

important differences between the two sects, but they admit of being reduced to a few leading principles, which I now proceed to notice, following the order in which the different branches of the subject are treated of in this volume. The impediments to inheritance are found in number according to the Hanafiyahs, viz. slavery, homicide, difference of religion, and difference of *dar*, or country. Of these the Shi'ahs recognize the first; the second also with some modification, that is, they require that the homicide be intentional, in other words, murder, while with the Hanafiyahs it operates equally as an impediment to inheritance, though accidental. For difference of religion, the Shi'ahs substitute infidelity, and difference of country they reject entirely. Exclusion from the whole inheritance, according to the Hanafiyahs, is founded upon and regulated by two principles. The one is that a person who is related to the deceased through another has no interest in the succession during the life of that other, with the exception of half-brothers and sisters by the mother, who are not excluded by her. The other principle is that the nearer relative excludes the more remote. The former of these principles is not expressly mentioned by the Shi'ahs, but it is included without the exception in the second, which is adopted by them, and extended, so as to postpone a more remote residuary to a nearer sharer – an effect which is not given to it by the Hanafiyahs.

“With regard to partial exclusion or the diminution of a share, there is also some difference between the sects. According to the Hanafiyahs, a child, or the child of a son, how low soever, reduces the shares of a husband, a wife, and a mother, from the highest to the lowest appointed for them; while, according to the Shi'ahs, the reduction is effected by any child, whether male or female, in any state of descent from the deceased. Further, when the deceased has left a husband or wife, and both parents, the share of the mother is reduced, according to the Hanafiyahs, from a third of the whole estate to a third of the remainder in order that the male may have double the share of the female; but, according to the Shi'ahs, there is no reduction of the mother's third in these circumstances, though, when the deceased has left a husband, the share of the father can only be a sixth. The shares and the person for whom they are appointed being expressly mentioned in the Qur'an, there is no difference in respect of them between the two schools. But they differ materially as to the relatives who are not sharers. They are divided by the Hanafiyahs into residuaries and distant kindred. The residuaries in their own right they define as every male in whose line of relation to the deceased no female enters; 'and the distant kindred,' as 'all relatives who are neither sharers nor

residuaries.' The residuaries not only take any surplus that may remain after the sharers have been satisfied, but also the whole estate when there is no sharer, to the entire exclusion of the distant kindred, though these may in fact be much nearer in blood to the deceased. This preference of the residuary is rejected with peculiar abhorrence by the Shi'ahs, who found their objection to it, certainly with some appearance of reason, on two passages of the Qur'an cited below. Instead of the triple division of the Hanafiyahs, they mix up the rights of all the relatives together, and then separate them into three classes. According to their proximity to the deceased, each of which in its order is preferred to that which follows; so that while there is a single individual, even a female, of a prior class, there is no room for the succession of any of the others.

"Within the classes operation is given to the doctrine of the return by the Shi'ahs, nearly in the same way as by the Hanafiyahs; that is, if there is a surplus over the shares, it reverts to the sharers, with the exception of the husband or wife, and is proportionately divided among them. According to the Hanafiyahs, this surplus is always intercepted by the residuary, and it is only when there is no residuary that there is with them any room for the doctrine of the return. When the shares exceed the whole estate, the deficiency is distributed by the Hanafiyahs over all the shares by raising the extractors of the cases – a process which is termed the *'aul*, or increase. This is also rejected by the Shi'ahs, who make the deficiency to fall exclusively upon those among them whose relationship to the deceased is on the father's side. With regard to the computation of shares, there does not appear to be any difference between the schools." *A Digest of Moohummudan Law. Imamea Code.* N.B.E. Baillie, London (1869).

Appendix A

Excerpted from "Human Rights in Islam" by 'Allamah Abu Al-'A'la Mawdudi. Chapter 3, subsection 5 – Al Tawhid Journal, vol. IV. No. 3 Rajab-Ramadan 1407.

5. Individual's Right to Freedom

Islam has clearly and categorically forbidden the primitive practice of capturing a free man, to make him a slave or to sell him into slavery. On this point the clear and unequivocal words of the Prophet are as follows: "There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. Of these three,

one is he who enslaves a free man, then sells him and eats this money" (al-Bukhari and Ibn Majjah). The words of this Tradition of the Prophet are also general, they have not been qualified or made applicable to a particular nation, race, country or followers of a particular religion. The Europeans take great pride in claiming that they abolished slavery from the world, though they had the decency to do so only in the middle of the last century. Before this, these Western powers had been raiding Africa on a very large scale, capturing their free men, putting them in bondage and transporting them to their new colonies. The treatment which they have meted out to these unfortunate people has been worse than the treatment given to animals. The books written by the Western people themselves bear testimony to this fact.

The Position of Slavery in Islam:

Briefly I would like to tell you about the position and nature of slavery in Islam. Islam tried to solve the problem of the slaves that were in Arabia by encouraging the people in different ways to set their slaves free. The Muslims were ordered that in expiation of some of their sins they should set their slaves free. Freeing a slave by one's own free will was declared to be an act of great merit, so much so that it was said that every limb of the man who manumits a slave will be protected from hell-fire in lieu of the limb of the slave freed by him. The result of this policy was that by the time the period of the Rightly-Guided Caliphs was reached, all the old slaves of Arabia were liberated. The Prophet alone liberated as many as 63 slaves. The number of slaves freed by 'Aishah was 67, 'Abbas liberated 70, 'Abd Allah ibn 'Umar liberated one thousand, and 'Abd al-Rahman purchased thirty thousand and set them free. Similarly other Companions of the Prophet liberated a large number of slaves, the details of which are given in the Traditions and books of history of that period.

Thus the problem of the slaves of Arabia was solved in a short period of thirty or forty years. After this the only form of slavery which was left in Islamic society was the prisoners of war, who were captured on the battlefield. These prisoners of war were retained by the Muslim Government until their government agreed to receive them back in exchange for Muslim soldiers captured by them, or arranged the payment of ransom on their behalf. If the soldiers they captured were not exchanged with Muslim prisoners of war, or their people did not pay their ransom money to purchase their liberty, then the Muslim Government used to distribute them among the soldiers of the army which had captured them. This was a more

humane and proper way of disposing of them than retaining them like cattle in concentration camps and taking forced labour from them and, if their women folk were also captured, setting them aside for prostitution. In place of such a cruel and outrageous way of disposing of the prisoners of war, Islam preferred to spread them in the population and thus brought them in contact with individual human beings. Over and above, their guardians were ordered to treat them well. The result of this humane policy was that most of the men who were captured on foreign battlefields and brought to the Muslim countries as slaves embraced Islam and their descendants produced great scholars, imams, jurists, commentators, statesmen and generals of the army. So much so that later on they became the rulers of the Muslim world. The solution of this problem which has been proposed in the present age is that after the cessation of hostilities the prisoners of war of the combatant countries should be exchanged. Whereas Muslims have been practising it from the very beginning and whenever the adversary accepted the exchange of prisoners of war from both sides, it was implemented without the least hesitation or delay. In modern warfare we also find that if one government is completely routed leaving her in no position of bargaining for the prisoners of war and the winning party gets its prisoners easily, then experience has shown that the prisoners of war of the vanquished army are kept in conditions which are much worse than the conditions of slaves. Can anyone tell us what has been the fate of the thousands of prisoners of war captured by Russia from the defeated armies of Germany and Japan in the Second World War? No one has given their account so far. No one knows how many thousands of them are still alive and how many thousands of them have perished due to the hardship of the Russian concentration and labour camps. The forced labour which has been taken from them is much worse than the service one can exact from slaves. Even perhaps in the times of ancient Pharaohs of Egypt such harsh labour might not have been exacted from the slaves in building the pyramids of Egypt, as has been exacted from the prisoners of war in Russia in developing Siberia and other backward areas of Russia, or working in coal and other mines in below zero temperatures, ill-clad, ill-fed and brutally treated by their supervisors.

The Slave Trade of Western Nations:

After the occupation of America and the West Indies, for three hundred and fifty years, traffic in slave trade continued. The African coasts where the black-skinned captured Africans were brought from the interior of Africa

and put on the ships sailing out from those ports, came to be known as the Slave Coast. During only one century (from 1680 to 1786) the total number of free people who were captured and enslaved only for British Colonies amounts, according to the estimate of British authors, to 20 million human beings. Over the period of only one year (1790) we are told that 75,000 human beings were captured and sent for slave labour in the Colonies. The ships which were used for transporting the slaves were small and dirty. These unfortunate Africans were thrust into the holds of these ships like cattle right up to the top and many of them were chained to the wooden shelves on which they could hardly move because these were only eighteen inches apart, kept one on top of the other. They were not provided with suitable food, and if they fell ill or were injured, no attempt was made to provide them with medical treatment. The Western writers themselves state that at least 20% of the total number of people who were captured for slavery and forced labour perished during their transportation from the African coast to America. It has also been estimated that the total number of people who were captured for slavery by the various European nations during the heyday of the slave trade comes to at least one hundred million. This is the record of the people who denounce Muslims day and night for recognizing the institution of slavery. It is as if a criminal is holding his finger of blame towards an innocent man.

Endnotes:

1. Introduction to Islam, by Dr. M. Hamidullah, paragraph 563a.
2. *Ibid* paragraph 499.
3. *Ibid* paragraph 208a
4. In 1935, Persia was renamed 'Iran'