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Challenges in the Study of Ancient Legal Influence

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Challenges in the Study of Ancient Legal Influence*

Introduction

As the author states: »the fruit of scholarship in comparative studies of Jewish and Islamic law, from its beginnings until today, is quite meager, restricted in scope, and unsystematic.«¹ The situation is unfortunate, for these two great legal traditions lived side by side in relative harmony for many centuries, and the possibilities for mutual influence were considerable. An appreciation of the interactions which took place between them is, therefore, important for a thorough understanding of each system, as well as being of considerable significance in terms of world legal history.

The immediate reasons for the lack of scholarship are not hard to find. There are few enough people interested in legal history as it is; even fewer are linguistically qualified to conduct original research in Hebrew, Aramaic and Arabic. Indeed, the dispersal of the ancient Middle Eastern Jewish communities in reaction to the creation of the state of Israel has led to a diminution in the pool of potential scholars. Another problem, found in many scantily researched areas, is that of the vicious circle of absence. Most people hesitate to venture into a field of study in which basic research is lacking, for the dangers of mistakes are greater, and, vitally from the point of view of a doctoral student or academic whose career prospects depend on producing published pieces within a limited time-scale, the amount of work as a proportion of the amount produced is several orders of magnitude higher. So those contemplating research in the area, after considering the situation, usually choose to do something else which produces results more quickly

and with less effort. The result is that the absence self-perpetuates. Gideon Libson's monograph is therefore particularly welcome and valuable.

The Content

The main text (which is quite short, 182 pages plus the preface) consists of a preface, seven chapters and a conclusion. It is supplemented by 143 pages of notes which, since they are in a smaller font, presumably rival the main text in sheer number of words, a useful bibliography and an index.

The work is mainly concerned with influence and custom in Jewish and Islamic law during the 7th to 11th centuries AD, the Geonic Period, when the gaons (or geons), legal scholars based in Jewish law academies in Babylonia, were in a position of authority as regards Jewish law and were consulted, via written requests for their rulings, by far-flung communities of the Jewish diaspora. The system led to an extensive literature.

Chapter 1 (»History of Comparative Research in Jewish and Islamic Law«) contains a full evaluation of scholarly work on the relationship between the two legal systems, together with much material on the question of outside influence on Islamic law generally. It goes on to consider the methodological problems inherent in the study of influence between the legal systems.

Chapter 2 (»Custom in the Geonic Period«) deals firstly with the various words translatable as »custom« and those used to describe it, as well as with the various types of custom seen in Jewish law during the Geonic Period and its relationship to law. The author then analyses major influences on custom.

* GIDEON LIBSON, *Jewish and Islamic Law. A Comparative Study of Custom during the Geonic Period* (Islamic Legal Studies Program, Harvard Law School), Cambridge, MA: Harvard University Press 2003, xi, 367 p., ISBN 0-674-01106-6

I 175.

Chapter 3 («Custom in Islamic Law»), much shorter than the preceding chapter, is constituted by an examination of custom in Islamic law, and contains a short consideration of the differences in attitude to custom as a source of law as between the two systems.

Chapter 4 («Jewish-Muslim Contacts during the Geonic Period») looks at the various aspects of proximity between the two communities: the predominance of Islamic law and Islamic courts; the sheer fact of living together on a daily basis; the influence of the Arabic language and Arabic legal literature; and the need to take account of the commercial environment.

Chapter 5 («Islamic Law as a Background for Geonic Custom») deals with various mechanisms, introduced into Jewish law via custom, which seem to derive from, or at the least to have been strongly influenced by, Islamic law. The chapter then examines the implications for Jewish law of recourse by Jews to Islamic courts.

Chapter 6 («Execution Procedure with regard to Impoverished Debtors: The Oath of Destitution ›I Have No Means‹ (*yamin al-'adam*)») and Chapter 7 («Determination of Incremental Amount of a lost *Kettubah* Based on ›Estimated *Mohar*») are detailed studies of particular examples. In Chapter 6 the author traces the changes to the Jewish Oath of Destitution under the influence of Islamic law, in Chapter 7 he conducts a similar exercise as regards the document recording the financial obligations of a husband towards his wife (the *kettubah*).

Excellent Research and Valuable Insights

There are many positive things to say. The amount of research done, much of it from primary sources in the original languages, is prodigious, and the author's knowledge is extremely

impressive. The detective work necessary to piece together the evidence, and the logic and methodology used in reaching the conclusions, particularly in the specialist studies of Chapters 6 and 7, are exemplary and convincing. The author's treatment of context, its influence on legal development generally and its influence on the interaction between the two systems, an area of comparative legal studies often neglected or dealt with in too shallow a manner, is excellent. There are many insights of great value, both as regards the particular systems studied and generally. One instance of the latter is the way in which Jewish law was tailored to fit Islamic commercial law and practice in order to create an »international« regime.² Others concern the ways in which the Islamic general and legal environment influenced Jewish legal thinking and law in such areas as the form of Jewish legal scholarly activity, court procedure, and substantive rules, phenomena which have, no doubt, many historical and modern parallels.

Importantly in a field where so many books are priced for libraries, the book is affordable for scholars and students.

Structural and Other Problems

The main problem is that the author has not decided what the work should be about. Therefore the work contains the embryos of two books which should have been separate, one on the influence of Islamic law on Jewish law in the Geonic period (the major part), the other on custom in the two legal systems during that time. The resultant confusion is apparent throughout. It can even be seen in the title, which declares that custom is the main theme, when it is in fact only one of two topics, and the minor one at that.³

2 40. The word »international« is used anachronistically, given the absence of modern nation states at the time, indeed an extra point of interest is the fact that, as far as we can see, there was no state involvement in the process.

3 We can leave aside as a generally accepted if irritating practice the fact that the first part is misleading, because the book does not provide, as one might conclude

from that first part, a general comparison of Jewish and Islamic law.

Unfortunately, the correct structures of the two books are incompatible. A study of the first topic should have contained a more broadly based theoretical discussion of influence, looking at custom as the way in which influence took place, rather than as a major topic in its own right. A study of the second topic should have been based on a theoretical framework of custom in law generally, together with a longer, and materially different, comparative analysis, with much of the text on influence in a subsidiary role. Dealing with the two topics together results in neither subject being dealt with properly, and considerable confusion on the part of the reader. In the author's defence, it should be said that the deficiencies in the major work on influence are considerably less than those associated with the work on custom.

Additional difficulties derive from the author's apparent lack of familiarity with comparative law technique, terminology and literature.

Take, for example, the comparison of custom. This should have been done using a theoretical framework based on the formulation of principles sufficiently general to cover the two systems, enabling a structured comparison to take place. The result of the failure to follow this procedure is what we see here, the sequential analysis of the law in each system within its own conceptual framework, leading to a less than satisfactory and far from comprehensive comparison, without the deeper understanding of the theory of custom which would have resulted from that structure.⁴

Another example can be found in the misleading title of Section 3 of Chapter 1. Despite being called »Methodological Problems in Comparative Research«, the section concerns influence, not comparison.⁵ Further instances include the lack of any reference in this section to general

comparative law scholarship on influence between legal systems, the lack of any mention of legal pluralism,⁶ and the almost total absence of citations concerning legal transplants.⁷

Additional problems, possibly related to the lack of focus, concern the clarity of the text. Knowledge of many important matters is assumed, including such vital information as the reasons for the characterisation of the period studied as »geonic«, the procedures followed in the geonic system, and the literature which it generated; on the stylistic front, the writing is clear but unnecessarily wordy, with a significant amount of repetition.

Overall Assessment

This is a »curate's egg« of a book, good in parts. It is not, it must be said, a great success as a unit. The negative aspects lead to a feeling of considerable frustration, especially since so much excellent work has been done, and the author is clearly a remarkable scholar who could have provided many more valuable insights if the work had been better focused and structured.

This comment must be tempered, though, by a realisation of the formidable nature of the difficulties associated with a study of this sort, an investigation of complex social events which occurred hundreds of years ago. In this situation, it is as well to remember that only he who is without sin should throw the first (destructive) stone, therefore the comments herein are offered by way of (hopefully constructive) comment. And, on the positive side, the good parts are excellent. The author has made many significant contributions to our knowledge in various areas of considerable importance and interest. His knowledge of the material is second to none,

⁴ The Conclusion contains a claim (at 182) that a »theoretical framework characterizing [the use of custom] in both Jewish and Islamic law« has been constructed. This reviewer disagrees, having failed to find any such framework. It is true that some general discussions occur, but they are incomplete and dispersed throughout the text: see, for example, Section 7.5 of Chapter Two

»Conclusion« at 45 (even this is situation-specific) and Section 8.6 of Chapter Two »Borrowed Custom and Responsive Custom« at 58, particularly at 61. Extra evidence can be found in the index, which contains no sub-entry for any general word such as »theory«, no entry for »custom« and only one for »customs«.

⁵ It is natural, therefore, that no references to comparative law

methodology can be found in the notes to this section.

⁶ The words »legal pluralism« are used (at 35, note 116), but seem to denote legal fragmentation. There is no reference to the usually cited texts, e.g. M. B. HOOKER, *Legal Pluralism*, Oxford 1975.

⁷ Alan Watson's *Legal Transplants* is referred to once, in note 66 to Chapter One.

his detective work (e. g. his methodology on legal influence) worthy of Hercule Poirot.

Overall, despite its faults, the work constitutes a valuable resource for scholarship and

deserves a place in any library with a significant section on legal history.

Nicholas H. D. Foster

Fremde als Sehnsuchtsprojekt*

Die deutsche Kolonialzeit – ist das überhaupt ein Thema jenseits akademischer Spezialinteressen? Ein schönes Text- und Bildbuch, herausgegeben von den Literaturwissenschaftlern Alexander Honold (Basel) und Klaus Scherpe (Berlin), sagt vehement und überzeugend ja. In vierundfünfzig Einzelbeiträgen von zwanzig Autorinnen und Autoren geht es mit »Deutschland um die Welt« auf eine Erkundungsreise, die von der Eröffnung des Suezkanals 1869 (Simons) bis zum Tod des Schriftstellers Max Dauthendey auf Java 1918 (Hilt) reicht. Dazwischen finden sich, chronologisch angeordnet, vielfältige Themen aus den Bereichen des deutschen Orientalismus und der Kolonialgeschichte, die von der Infrastrukturentwicklung (Bagdadbahn, Telegraf, Schifffahrt), über die wissenschaftliche und populäre Präsentation des Fremden (Ethnologie, Völkerschauen, Gewerbeausstellungen) bis hin zur Medialisierung (Fotografie, Karikatur) und zur künstlerischen Verarbeitung von Fremdheit, etwa in den Bildern von Emil Nolde und Max Pechstein, aufgefächert werden. Vereinzelt geht es auch um Kolonialpolitik im Reich und vor Ort, wenn etwa Carl Peters Traum von einem »großdeutschen Ostafrika« (Scherpe) oder »Der erste Schultag in Fumban/Kamerun« (Werkmeister) im Mittelpunkt stehen. Deutsche als Ärzte und Erzieher, Wissenschaftler und Mi-

litärs, Kolonialpolitiker und Künstler, Baumeister und Ausstellungsmacher verknüpften je eigene Projektionen und Wunschbilder mit der Fremde, die stets zwischen Abwehr und Verlangen changierten.

So schicken sich die Autorinnen und Autoren auch nicht an, noch einmal mit ideologiekritischem Gestus und akademischem Geschütz den alltäglichen und strukturellen Rassismus im Kaiserreich zu enthüllen, sondern tragen mit offensichtlicher Freude an der Arbeit ein buntes »Mosaik« der »Fremde als Sehnsuchtsprojekt« (10) zusammen. Im Vorwort heißt es, es gelte »zwischen literarischer Imagologie und ethnologischem oder geographischem Fachwissen einen dritten Weg einzuschlagen, mithin weder bloße Fremd->Bilder« (mentale oder imaginative Projektionen) zu untersuchen noch auf dem gegenläufigen Faktizitätspostulat zu beharren (nach welchem es darum ginge, herauszufinden, wie die Fremden wirklich sind)« (11). Der Band ordnet sich somit in eine Reihe anderer Veröffentlichungen ein, die in den letzten Jahren das Thema Kolonialismus als Gegenstand der Literatur- und Kulturgeschichte (neu) entdeckt haben. Eher historisch orientiert ist zum Beispiel der von Birthe Kundrus bei Campus herausgegebene Band *Phantasiereiche. Zur Kulturgeschichte des deutschen Kolonialismus* (2003).

* ALEXANDER HONOLD, KLAUS R. SCHERPE (Hg.), *Mit Deutschland um die Welt. Eine Kulturgeschichte des Fremden in der Kolonialzeit*, Stuttgart, Weimar: Metzler 2004, XII, 524 S., 149 Abb., ISBN 3-476-02045-2