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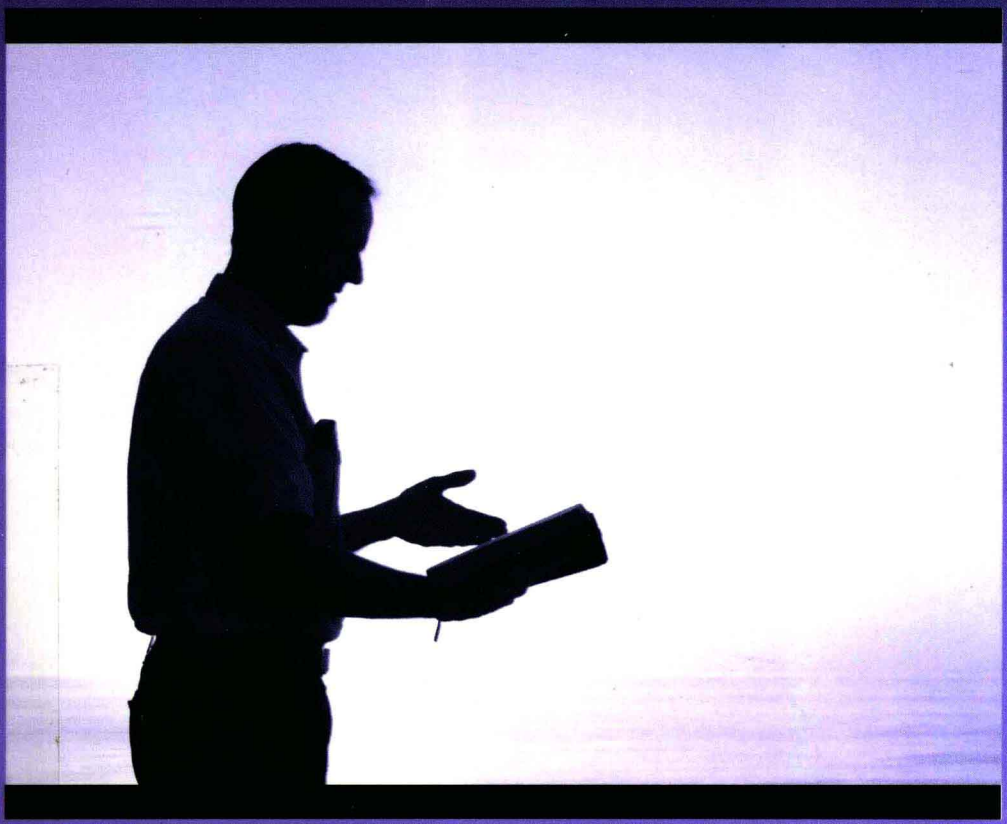
Judging in the Islamic, Jewish and Zoroastrian Legal Traditions

A Comparison of Theory and Practice



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A Comparison of Theory and Practice

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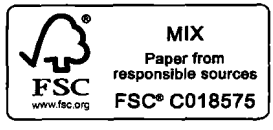

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Cultural Diversity and Law

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Around the world, most states are faced with difficult issues arising out of cultural diversity in their territories. Within the legal field, such issues span across matters of private law through to public and constitutional law. At international level too there is now considerable jurisprudence regarding ethnic, religious and cultural diversity. In addition, there are several layers of legal control – from communal and religious regulation to state and international regulation. This multiplicity of norm setting has been variously termed legal pluralism, inter-legality or inter-normativity and provides a fascinating lens for academic analysis that links up to cultural diversity in new and interesting ways. The umbrella of cultural diversity encompasses various population groups throughout the world ranging from national, ethnic, religious or indigenous groupings. This series particularly welcomes work that is of comparative interest, concerning various state jurisdictions as well as different population groups.

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Introduction

Subject and Aim

The subject of the present work is a comparative analysis of the Islamic, Jewish and Zoroastrian legal systems, highlighting the function of the judiciary, the social standing of the judges in their respective societies and their relations vis-à-vis jurisprudence. Since these legal systems are called 'religious' in legal literature, giving the impression that it is religion which is their most important feature, it is necessary to compare postulations of legal theory to legal practice in order to show the relationship between theory and practice.

We can find in the works of some authors of comparative law (e.g. Sola Cañizares, Adolf Schnitzer and René David)[1] the concept of religious legal system, although the definition of religion itself is rather complex and subject to various interpretations. To refer to just one obvious example, there is hardly any similarity between the Chinese concepts of religion (universalism, Taoism, yin-yang school etc.) and those of the revealed religions (the religions of the book). Moreover, there are so many schools and interpretations within Hinduism that one can hardly speak about any uniform 'ism'. If religious foundations taken for granted in legal literature are so diverse and complex, how much more the legal systems built on them would be. Thus, it is problematic to put such different legal systems under the aegis of one rather enigmatic category. With some exceptions, however, these considerations are not present in comparative legal literature since in the majority of cases it is the erudition and interest of the author and limited space which determine what comes under the aegis of religious legal systems. Hindu law and Islamic law are always discussed in comparative legal works because of their importance, influence and the great number of their followers. By contrast, Jewish and Canon law are discussed very briefly, if not omitted altogether; meanwhile Zoroastrian law is considered as not worth mentioning. Consequently, not only the definition of the term 'religious legal system' is missing, but also the exact enumeration of the individual legal systems covered by this category.

This issue was the topic of a conference in 2000, dedicated to the memory of David Daube, a scholar of reputation both as a Talmudist and as a Romanist. The participants, authorities in comparative law and experts in religious legal systems, were not able to reach a consensus on the meaning and definition of religious law.[2] The net result of the discussion was put by Jacques Vanderlinden: 'there are

1 These and other taxonomies are discussed in Varga 2005: 219–37.

2 For the discussion see Huxley 2002: 148–56.

as many comparative laws as there are comparative lawyers'.[3] Perhaps no more tangible results could be expected, for what are those characteristic features that link Canon law to Islamic, Jewish or, for that matter, Hindu law?

The present author agrees with Werner Menski, an authority on Hindu law, who claims that religious legal system as a concept is useless. He argues that this concept is an implementation of a Europe-centred worldview on law which considers the entire world from its own perspective, regardless of genuine legal thinking. According to this understanding, Menski argues, the term 'religious legal system' is composed of legal systems which are considered traditional, incapable of change, backward and irrational.[4] As such an approach is no longer acceptable; the term reflecting this understanding is also useless. This is the reason why this book has dropped the term religious legal system throughout, including from its title – which resulted, admittedly, in a somewhat artificial wording.

Despite all this, religion does have important functions in Islamic, Jewish and Zoroastrian law, both in legal theory and, in a more restricted sense, in substantive law. It is the aim of the present work to understand the real functions of religion in these legal systems, regardless of the dogmatic postulations of these religions. In order to do this one has to depart from ideals of the religious-legal texts and put social practice, everyday legal mechanisms and their social, political and economic background under scrutiny, finding the proper place of religion in the respective societies.

For this purpose the judiciary was made the focus of this enquiry since it is the judge who has the obligation to adjust to legal texts yet, at the same time, consider social realities being sometimes at variance with religious ethics and legal rules deriving from them. In addition, since the judge is also a theologian, a wise man of learning in various extra-judicial fields and a teacher of enormous social prestige, his social functions are more extensive, more articulate and colourful than in the continental or common law legal systems, where the function of the judge is limited to the solution of legal cases. As the religious elite tried to monopolize the administration of justice in order to assert the ethical principles represented by them, the office of the judge became a key issue for both the state and that elite.

At the same time, judges and legal scholars were also the driving force behind legal development, for they had the uneasy task of implementing legal rules deriving from religious postulations into an ever-changing social reality. Judges have been esteemed members of their society who eminently knew daily life and could see the danger of a rigid implementation of religious rules leading to social dysfunction. This consideration has led to various legal methods and techniques of argumentation that are far more characteristic of a legal system than the external history of law. The subtitle of this book (*A Comparison of Theory and Practice*) refers to this contradiction as an essential element of its content. Yet, at the same

3 Vanderlinden 2002: 166.

4 Menski 2002: 110–11.

time it is in accordance with the view of Alan Watson, who sees procedural law as one of the most important engines of legal development.[5]

Obviously, in pre-modern societies not only courts bore the burden of adjudicating disputes; there were other institutions and social mechanisms which were at play, too. As W. B. Hallaq demonstrated in relation to Muslim societies, procedures at a law court dealt with only a restricted number of cases, while others were discussed and solved by organs of micro-communities such as the extended family, the clan and the tribe, the neighbourhood and the guilds. Since the legal maxim 'amicable settlement is the best verdict' is deeply rooted in Muslim societies, arbitration and mediation were sometimes more important social mechanisms to solve a conflict than formal procedures at a law court.[6] Jewish law endorsed the same attitude towards social mechanisms other than formal litigation, and Sasanian society did not differ from Jewish and Muslim societies either. This attitude is, therefore, the broad social framework where formal litigation should be placed. This is why this is the subject of the present study and hence other mechanisms were dealt with only when necessary.

Naturally, it has to be clarified why the study covers Islamic, Jewish and Zoroastrian law while omitting others. Historical, cultural and phenomenological considerations figure equally among the factors supporting the comparison of these legal systems. Common linguistic, ethnic and social background (of the Jews and Arabs), a multitude of cultural interactions throughout a long history (of all three systems) and a legal system based on similar theoretical considerations (also of all three systems) are objective factors making comparisons possible and meaningful. Thus, the focus is on the Middle East. Therefore, the Hindu legal system is mentioned only occasionally. Although it does share some common features with Islamic, Jewish and Zoroastrian law, essential similarities, however, can be found only in relation to Zoroastrian law supported by an early common history and cultural background. But this could be the subject of further research.

As far as the time frame of the study is concerned, it does not go back beyond late Antiquity and only rarely stretches beyond the thirteenth century, omitting the Ottoman period altogether. The sixth and the seventh centuries are among the most interesting and most decisive periods in the history of law, although this is not emphasized in comparative legal literature. The sixth century was the time of Emperor Justinian and of the codification of Roman law during his reign. During the reign of his contemporary and rival, King Khusraw of Persia, the Iranian state witnessed a cultural flourishing not experienced in the previous centuries. It was the time when the Awesta, the holy book of Zoroastrianism, was codified after several centuries (millennia?) of oral tradition. It was also the century when the codification of the Babylonian Talmūd, which became the most important document of the Jews after the Torāh, was completed in Mesopotamia under Persian political and administrative control. Thus, within a couple of decades three

5 Watson 1999: 91.

6 Hallaq 2009: 160–64.

cultures of hoary past – the Roman, the Jewish and the Persian – codified their own legal heritage, which makes the period rather remarkable in itself.

The seventh century is of no less significance: legal codification was continued both in Persia and among the Jews. The law book *Mādigān ī Hazār Dādestān* (MHD+A),[7] compiled probably in the first decades of the seventh century, is a collection of judgments and legal rulings of scholars, and thus a source of utmost importance for students of Zoroastrian law. Meanwhile the Jewish Academies continued to work on their masterpiece, the Babylonian Talmūd, on which Persian influence could be discerned in the level of legal terms. The second part of the century witnessed the emergence of Islamic law, which fundamentally transformed the (legal) history of the Mediterranean and of the Middle East. Thus in 100 years one can witness the codification of Roman and Jewish law, the heyday of Zoroastrian law and the birth of Islamic law.

The significance of the next two centuries is different between the legal cultures under discussion. During that period Jewish legal scholars primarily restricted themselves to commenting on Talmudic wisdom, and no major work similar to the Talmūd was produced. The works of some outstanding authors (such as Saʿadya Gaʾōn) refined the inherited tradition in many respects. Zoroastrianism, no longer the official religion of Persia, was losing ground during that period, yet the ninth and tenth centuries witnessed the birth of important religious and legal works (the so-called *riwāyas*) which adjusted the legal tradition to the changing historical context. As far as Islamic law is concerned, the first centuries were of utmost importance, during which generations of legal scholars established both the theoretical framework and the rules of a new legal system.

To avoid this work being more complex than it already is, focus is restricted to Sunnī legal tradition. Shiʿī law, admittedly, is distinct from the Sunnī legal understanding, but only concerning questions which are irrelevant for the purpose of the present study. Important aspects such as the *uṣūlī-akhbarī* disputes, the emergence of the various titles of the legal scholars and their relation to each other (*Ayat Allāh, Hujjat al-Islām* etc) and the concept of *welāyat-e faqīh* are the results of the modern period and bear no imprint on the legal understanding of the pre-modern period.[8]

This book is about comparative law. Therefore, it leans on the results of previous researches by outstanding experts on Islamic and Jewish law. Concerning Zoroastrian law, however, it does contain original research material since Zoroastrian law is a less frequently studied field and belongs to the particular field of research of the present author. But comparative law might be misleading because it is not positive law which is compared here but rather the social and

7 The text was edited and translated into German as well as English by Macuch 1981; 1993 and Perikhanian–Garsoian 1997.

8 For shiʿī legal theory see Löschner 1971; modern trends are analysed in Mallat 1993.

cultural environment of the legal systems in which they operate. Therefore, comparative legal culture seems to be a better designation.

Principles and Methods

To accomplish the aim outlined above meant facing innumerable difficulties, hence it is necessary to define the principles and methods of research.

The present work was written expressly for a scholarly purpose hence its approach is markedly secular. Stressing the secular approach is important because one may study a religious system also as a believer, and then, naturally, the result will not be the same. Jewish, Islamic and Zoroastrian law is being practised, taught and applied even today, primarily by Rabbis, scholars and priestly individuals. Their approach, however, is obviously different from that of secular lawyers. To clarify the matter, Jewish law offers a good example: *halakah* and *mishpat Ivri* are not identical concepts (though one may translate both as 'Jewish law'), as the first reflects the Talmudist approach, insisting on tradition, whereas the second is that of the modern lawyer. The main difference between the two is that the modern lawyer is not satisfied with the analytical method, which is practically the only means of the Talmudist, but approaches the issue historically and applies the method of legal comparison, too.[9]

It is impossible to describe these legal systems with the terminology of Western legal systems, whether civil or common law. As the founder of the *ʿādat* legal school, Cornelis van Vollenhoven correctly emphasized, one has to view Oriental law in an Oriental manner. This principle, marking a breakaway from the ethnocentric approach, is an outstanding intellectual foundation of his school which it insists upon to this day.[10] Sadly enough, it also means that the reader has to find their way in the ocean of Middle Persian, Aramaic, Hebrew and Arabic legal terms, which would, at first sight, make the task more difficult than easy.

There is, hopefully, no sign of 'parallelomania' (Jacob Neusner) in the work since it does not want to show similarities at all costs. Moreover, since similarities in themselves prove no 'legal transplants' (Alan Watson), this study does not want to complicate matters with historic speculations about 'who borrowed what from whom' because such transplants, in the majority of cases, cannot be proven for certain. Omitting such speculations one can discover a series of structural similarities in the legal systems studied here, the results of which will, hopefully, stimulate more research in this field of comparative law.

It is important to note that the present study is the result of multidisciplinary research and, therefore, has no method of its own, but rather applies methods of philology, history, sociology, religious and legal history. In other words, while it

9 Shilo 1982: 97.

10 Fikentscher 1980: 99.

touches on the area of several, not interrelated disciplines, it does not belong to the main trend of research of any of them.

This complexity explains why this research has hardly any antecedents. As far as the author is aware Jewish, Islamic and Zoroastrian law has never been compared in a single work, either conceptually or in details of substantive law. Naturally, a comparison of certain aspects of Islam and the Jewish religion is available but Zoroastrianism has been exempt from these studies. Zoroastrianism is either compared to the Jewish religion (primarily in the field of dualism, cosmology and soteriology) or its influence on Islam has been studied. It is Jacob Neusner who has devoted several works to the comparison of Jewish and Zoroastrian religious texts and to their analysis, unveiling the social position of the Jews in Sasanian Persia.[11]

To carry out more research in this important field the Irano-Judaica programme was launched in the 1990s, embodied in a series of conferences. It puts emphasis on the interactions between Iranian and Jewish cultures, comparative legal history not missing from its agenda, primarily due to the works of Maria Macuch and Yaakov Elman. Legal terms of Persian origin found in the Babylonian Talmūd not only testify to Persian legal influence on Jews, but also prove at the same time that members of the Jewish Academies knew the language and rules of Zoroastrian Persian law, and sometimes made use of them in their works.[12]

A systematic comparison of the Zoroastrian and Islamic legal systems is only a desideratum at the moment. Legal institutions of similar nature where the adaptation of an earlier Persian model is most probable, such as charitable foundations (*waqf*) and the *mut'a* marriage, were studied and compared already during the 1980s,[13] while a comparison of the legal theory of these legal systems has been done only recently.[14]

Attempts have been made to compare Jewish and Islamic law already at the beginning of the 20th century; the first work worth mentioning among the early writings is that of Robert Roberts.[15] Among the results of the more recent literature the paper of Judith Wegner is worth mentioning. She argues for a kind of Talmudic synthesis in the sources of Islamic law and assumes a Jewish legal background in the legal theory of Islam.[16] The book by Jacob Neusner and Tamara Sonn is rather a textual and not a historical comparison, and their work primarily tries to explore

11 The situation of Jews and Christians in Sasanian Persia and their relationship to Zoroastrianism is analysed in detail by Neusner 1990. A comparison of the major Jewish and Zoroastrian religious texts is in Neusner 1993. The situation of Jews in Sasanian Persia is discussed at length in Neusner 1965, 1966, 1968, 1969, 1970 and in a shorter version by the same author (Neusner 1984).

12 See Macuch 1999, 2002, 2003; Elman 2003; Jany 2009.

13 Macuch 1994; Macuch 1985.

14 Jany 2005, 2008.

15 Roberts 1925.

16 Wegner 1982.

the similarities between the two legal systems in general.[17] Gideon Libson in his most recent study compares the influence of social practice in both Jewish and Islamic law and convincingly argues for similarities and interactions.[18]

In the majority of cases these studies primarily compare individual legal institutions in an analytical way, argue for a general interrelationship or possible historical connections, but do not approach the topic from the perspective of sociology and anthropology. An exception is the work of Irene Schneider, who studied the Muslim judges of the classical period in her pioneering book in a sociological approach.[19] A criticism of the Weberian model is given in another work of Schneider, but it again concentrates only on Islamic law, omitting a comparative perspective completely.[20] A valuable contribution to the field of legal anthropology is the work of Lawrence Rosen, who concentrates on the Moroccan judicial practice with the help of his field work; the comparative approach, however, was not on his agenda.[21]

What follows does not discuss the topics in chronological order but according to their significance. This is why it is not Jewish law (as historically the oldest one) which would be the starting point in a case when the problem under scrutiny is of marginal importance in this legal system. In such cases the study will discuss first that legal system which offers the best opportunity to unveil the problem in its entirety and only then will attention turn to the other two systems.

In contrast to the methods of modern sociology, where questionnaires, field work and statistics are of great importance for the researcher, here the only possible way is to study the sources. It is therefore necessary to clarify the approach to the sources, the 'golden mean' being the best solution here, too. A naïve and uncritical following of sources is just as harmful as a hypercritical approach which regards every statement of the sources with suspicion. As sources reflect the imprint of the circumstances of their genesis it would be unwise not to acknowledge this fact. Moreover, some sources are expressly religious texts whose aim is not to explore reality but to record the 'theory' and, as such, to cover up reality at times. Thus, it is not easy sometimes to explore social reality and to separate it from the religious-legal ideal beyond it. For example, works on Islamic legal theory in general and the *adab al-qāḍī* literature in particular are about the ideal of a legal scholar and a judge, a picture which could be far from social realities at times – which demands caution. By contrast, *fatwā* collections, the ongoing legal disputes in the Talmūd and the legal cases presented in the Persian law book, are closer to contemporary legal practice and have nothing to do with the ideal of a legal scholar. As a result, these are more reliable sources for a historic understanding than works on theories.

17 Neusner-Sonn 1999.
18 Libson 2003.
19 Schneider 1990.
20 Schneider 1993.
21 Rosen 1989.

Notes on Transcription

Symbols: ā, ē, ī, ō, ū indicate long vowels; to transliterate Middle Persian names and words MacKenzie's method is used with some minor modifications.[22] Concerning words which have found their way into English vocabulary (such as 'Islam') this study avoids applying rigid rules of transcription and transliteration (which would result in 'Islām') to make the work easier to read.

Table I.1 Transliteration of Arabic names and terms

Script	Transliteration	Pronunciation	Script	Transliteration	Pronunciation
ء	ʾ	Glottal stop	ض	ḍ	Emphatic d
ا	ā	Long a or glottal stop, depending on context	ط	ṭ	Emphatic t
ب	b	b	ظ	ẓ	Emphatic z
ت	t	t	ع	c	Voiced pharyngeal fricative
ث	th	th in 'thin'	غ	gh	French r
ج	j	j in 'joke'	ف	f	f
ح	ḥ	h (voiceless pharyngeal fricative)	ق	q	Voiceless uvular stop
خ	kh	German ch	ك	k	k
د	d	d	ل	l	l
ذ	dh	th in 'then'	م	m	m
ر	r	r	ن	n	n
ز	z	z	و	w; ū	w; ū like oo in 'school'
س	s	s	ه	h	h
ش	sh	sh	ى	y; ī	y in 'yes'; ī like ee in 'deer'
ص	ṣ	Emphatic s			

22 MacKenzie 1971.

Table I.2 Transliteration of Hebrew and Aramaic names and terms

Script	Transliteration	Pronunciation	Script	Transliteration	Pronunciation
א	ʾ	a or glottal stop, depending on context	מ	m	m
ב	b	b or v	נ	n	n
ג	g	g or gh	ס	s	s
ד	d	d or dh	ע	ʿ	Voiced pharyngeal fricative
ה	h	h, o, a, e	פ	p	p, f
ו	w	w, o, u	צ	ṣ	Emphatic s
ז	z	z	ק	q	Voiceless uvular stop
ח	ḥ	German ch	ר	r	r
ט	ṭ	Emphatic t	ש	ś	s
י	y, ī	y, i, e	ש	sh	sh
כ	k	k or kh	ת	t	t or th
ל	l	l			