

## ТЕОРИЯ И ИСТОРИЯ ПРАВА И ГОСУДАРСТВА

## ОБЩАЯ ТЕОРИЯ ПРАВА

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## JEWISH AND ISLAMIC LAW: A COMPARATIVE ANALYSIS

The present article is an attempt at examining the major distinctive features of Jewish and Islamic religious legal systems with special emphasis being placed on the peculiarities of sources of law and court procedures. The authors apply the method of comparative legal analysis in order to demonstrate the possible role of Jewish and Islamic law in the genesis of law. Refs 9.

*Keywords:* Jewish law, Islamic law, genesis of law, Halacha, Haggadah, Shari'ah, fiqh.

While Islamic law remains in effect in a number of countries, Jewish law has almost lost its topicality as a result of the emancipation of Jews. However it may be the comparative analysis of these two religious legal systems can still lead the researcher to some interesting conclusions regarding the essence of law. It is, of course, impossible to compare these systems exhaustively within the framework of a single article. We will thus confine ourselves to dwelling upon selected aspects of the issue at hand.

As far as the sources of law are concerned, the foundation of Jewish law lies in Torah (the term which is often translated as "law", but can just as accurately be translated as "instruction" or "teaching"), which is, so to say, the "constitution" of the Jewish people revealed directly by God. It is only the Pentateuch which is comprised by Torah in the narrow sense of the term.

In Christian tradition the Pentateuch corresponds to the first five books of the Old Testament, namely Genesis, Exodus, Leviticus, Numbers and Deuteronomy. "Torah" in the broad sense of the term denominates the whole Jewish Bible, i.e. all the books of Old Testament, Talmud and the post-Talmudic literature.

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Since Moses acted as an intermediary between God and Jewish people, the code of conduct formulated in Torah has become known as the Law of Moses, its basic foundations laid down in Exodus, 20–21, later amended and specified in other books. All the Toraic laws traditionally add up to 613 commandments, 248 of them prescriptive and 265 prohibitive.

The Ten Commandments set forth in Exodus, 20, and somewhat reformulated in Deuteronomy, 5, constitute the core of the legislation. These commandments are plain and clear: to worship God alone, to not take the name of God in vain, to remember the Sabbath day (Sunday in Christianity and Friday in Islam), to honor one's father and mother, to not murder, to not commit adultery, to not steal, to not bear false witness against one's neighbor and to not covet. The first two commandments enunciate the principle of monotheism, while the third and the fourth ones proclaim it obligatory for a human being to have regular rest for the first time in the history of mankind, with the remaining six dealing with the basic moral juridical maxima pertaining to human existence. The prohibitions and prescriptions left are relatively hard to classify because of their being scattered about the whole of the Books of Moses as well as due to the fact that they touch upon all the spheres of life, including but not limited to sanitary regulations, rules on cooking and performance of religious rites, moral religious, moral juridical and purely juridical norms — all of them united in the will of the One God.

The text of Torah is sacred to the extent not a single person has the right to amend it, still it is full of allegories and metaphors while at the same time it remains highly casuistic, which in turn makes it objectively in need of interpretation. The right of interpretation is traditionally vested in rabbinical courts, which act on the basis of the following provision found in Deuteronomy, 17:9-10: "And you shall come to the priests the Levites, and to judge that shall be in those days, and inquire; and they shall show you the sense of judgment... and you shall do according to the sentence". This provision is as well the rationale behind the establishment of the legal principle known as "according to the decision of the last ones", i.e. that the latest judgment on a particular matter overrules the previous one. It is Talmud that has essentially become the final product of this interpretation.

The basis of Islamic law is Quran, the Muslim divine book, which, like Torah, is sacred and immutable. According to the classical dictionary of Islam authored by T. P. Hughes, the word itself can be roughly translated as "the reading" [1, p.483]. The substance of Quran is made up of revelations Allah sent down upon prophet Muhammad, which the latter subsequently reiterated on his own. Quran is composed of 114 *surahs* (lit. "row", "series"), or chapters, with each *surah* comprising '*ayahs* (lit. "miracle", "sign"), or verses. It wasn't at once that Muhammad received the entire Quranic text, but it was revealed to him in parts — first in Mecca, then in Medina. The said text used to circulate in oral form for some time before its particular fragments were gradually written down (mostly using rhymed prose). It is thus quite natural that both Quran and Torah are abundant in obscure, vague spots, which is the main reason for the texts to be in need of thorough interpretation. That being said, as in Judaism, the very concept of final interpretation is alien to Islam, with the principle in effect being that the latest interpretation abrogates the earlier one: "We do not abrogate a verse or cause it to be forgotten except that We bring forth [one] better than it or similar to it. Do you know that Allah is over all things competent?" (Quran, 2:106).

Strictly speaking neither Torah nor Quran contain legal norms per se because the latter are "derived" by means of interpretation. Thus Talmud is substantially made up of

double-genre material known as *Haggadah* (heb. “story”) and *Halacha* (heb. “way”), with the former being the normative part and the latter pertaining to worldview issues. The way the Torah connoisseurs put it, there exists virtually no chasm between the two, moreover, they frequently intermingle with one another and supplement each other. Still the difference between the Haggadic and Halachic aspects of the issue at hand is evident in that *Halacha* serves as the basis for the enactment of obligations whereas *Haggadah* does not.

The scope of Halachic operations boils down to three systems of relations: relations between people, relations between man and himself and relations between man and God. It is therefore crucial to determine which of the abovementioned types of relations can acquire legal form.

According to the Short Jewish Encyclopedia the term “Jewish law” (heb. *mishpat ivri*) refers to certain areas of *Halacha* that “touch upon relations between man and other men as well as man and society as a whole and the interrelations between the state and its citizens” [2, p. 715]. It is M. Elon, the modern expert in the field of Judaic law, whose point with regard to the matter in question is perhaps the most grounded. In his voluminous treatise this scholar thoroughly emphasizes the differences between multiple aspects of *Halacha*, particularly its “religious” and “court” dimensions, as well as between the religious and ritual prohibitive norms (heb. *issur*) and juridical norms (heb. *mamon*, lit. “wealth”) [3, p. 141].

Legal cases pertaining to *mamon* matters have traditionally been tried differently from *issur* cases. The religious aspect of such cases has not always been taken into consideration during trials. For instance, although the one who bargains on Saturday undoubtedly violates the religious ban and is subject to punishment, the deals themselves are not considered void. Moreover, the principle regulating the issues of *mamon* (on a side note, similar to the one found in Islamic law) reads that “customs nullify the provisions of *Halacha*”, i.e. local customs are looked upon as superior to Halachic rules. Thus *mamon* is the most sensitive aspect of *Halacha* subject to constant influence on the part of different economic and social factors.

Islamic law, in turn, utilizes the notions of *Shari’ah* and *fiqh*, which are widely used as synonyms in the broad sense. From the point of view of the science of Islamic law it is, however, a grave mistake to employ these two terms synonymously. The way M. H. Kamali, a renowned researcher in the field of Islamic legal thought, puts it, the word *Shari’ah* translated into English literally means “a way to the watering-place or a path apparently to seek felicity and salvation” [4, p. 2], while *fiqh* amounts to “the right understanding [of an issue]”. In the words of N. J. Coulson, “since law can only be pre-ordained system of God’s commands or Shari’a, jurisprudence is the science of *fiqh*, or “understanding” and ascertaining that law” [5, p. 75]. It should be noted that there is no consensus among the Islamic legal scholars on the issue of proper correlation between these two terms, although it is widely accepted that it is the totality of prescriptive legal norms and the Islamic principles of conduct found in Quran and *sunnah* that makes up *Shari’ah*. Apparently within this context the term *fiqh* refers to the specifically prescriptive aspect of *Shari’ah*. According to this opinion, which is the most widespread among the Islamic legal scholars, *Shari’ah* is ultimately comprised of doctrinal theology (Islamic dogma), Islamic ethics, *ibadah* (religious legal norms that govern relations between man and Allah) and *mu’amalat* (legal norms that cover relations between human beings), the latter being the ones that can acquire specifically legal form (as is the case with Judaic law).

Let us now address the issue of the peculiarities of legal procedure within the frameworks of Jewish and Islamic law. The Judaic norms pertaining to court procedure had been formulated long before the revelation of Ten Commandments. It is interesting to note that it wasn't God himself who was responsible for the establishment of said procedures, but Jethro, Moses' father-in-law, who in Exodus, 18: 17–23, was quoted as saying the following after he took a close look at the difficulties Moses had been facing trying to solve the disputes between his people: "What you are doing is not good. You and these people who come to you will only wear yourselves out. The work is too heavy for you; you cannot handle it alone. Listen now to me and I will give you some advice, and may God be with you. You must be the people's representative before God and bring their disputes to Him. Teach them His decrees and instructions, and show them the way they are to live and how they are to behave. But select capable men from all the people—men who fear God, trustworthy men who hate dishonest gain — and appoint them as officials over thousands, hundreds, fifties and tens. Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves. That will make your load lighter, because they will share it with you. If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied". Eventually Moses acted on Jethro's advice, later reminiscing about the accident: "And I charged your judges at that time, "Hear the disputes between your people and judge fairly, whether the case is between two Israelites or between an Israelite and a foreigner residing among you. Do not show partiality in judging; hear both small and great alike. Do not be afraid of anyone, for judgment belongs to God. Bring me any case too hard for you, and I will hear it" (Deuteronomy, 1: 16–17).

In Islamic tradition, it is prophet Muhammad himself who is credited with having been the first Muslim judge by virtue of having served as the head of the community. The prophet used to try cases personally on the basis of Quran, 4:105-106: "Indeed, We have revealed to you, [O Muhammad], the Book of truth so you may judge between the people by that which Allah has shown you. And do not be for the deceitful an advocate. And seek forgiveness of Allah. Indeed, Allah is ever Forgiving and Merciful". However, having soon realized, like Moses before him, his inability to try cases single-handedly, he resorted to allotting his judicial authority to his deputies, which in the long run led to the merging of the executive and judicial powers. This state of affairs continued well into the times of the first Righteous Caliphs and their successors who, although they eventually managed to retain their status as the supreme legal authority, nevertheless had to gradually transmit their trial-solving functions to special judges (*qadi*, pl. *qudat*) appointed by the Caliphs and their deputies. According to A. an-Na'im, "the early Abbasid Caliphs sought to create or enhance their legitimacy by founding their claim to rule on shared lineage with the prophet, thereby implying that they were qualified to reenact his model. They attempted to uphold the unity of religious and political leadership through their appointments of Islamic scholars as judges (*qadis*) and through patronage of religious sciences and institutions, as well as in their role as military defenders of the Islamic empire" [6, p. 62]. Obviously this development couldn't but affect the status of an Islamic judge.

Extremely high requirements have been set by both Judaism and Islam for those willing to assume the position of a judge. Besides having to be wise, the judges of the Judaic rabbinical courts had to prove their expertise in arbitration by means of acquiring *smihah* — a certificate confirming its owner's knowledge of all the legal aspects of *Halacha*.

*Smihah* had usually been transmitted between the men of wisdom in a string mode. In addition, the judges of the Jewish rabbinical courts had to have good grasp of secular sciences, including medicine, mathematics, astronomy etc. Precluded from serving as judges were senile people, eunuchs and the childless for the reason that they could act mercilessly against the defendants; the Jewish king was also not allowed to become a judge because of the uncontested character of his opinions. Finally, the Jewish judge (the rabbi), who was traditionally elected by the entire community, had to be morally infallible, modest and disinterested.

As the Islamic doctrine puts it, it is necessary for the judge applicant to be a Muslim man of the full legal age known for irreproachable lifestyle, high intelligence, relevant education and practical experience — all the prerequisites for acquiring *ijtihad*, i.e. the right to pass independent judgments based on one's personal understanding of Quran and *sunnah*. In his seminal work on classical Islamic jurisprudence, *An Introduction to Islamic law*, Wael B. Hallaq argues that "Islamic law is overwhelmingly the result of *ijtihad*, a domain of interpretation that rests on probability. Every accomplished jurist could exercise *ijtihad*, and no one knew, except for God, which *mujtahid* (the jurist conducting *ijtihad*) was correct" [7, p.27]. The applicant is to be proficient in Arabic and have a good ear, as well as to be generally good-looking. The appointment is invalid unless all the abovementioned requirements are met.

For the *qadi* to be officially appointed it is required that the order of the Caliph or his deputy be read out before the witnessing audience. The fact of the appointment is brought to the notice of the population inhabiting the areas under *qadi's* jurisdiction, which are specified in the order. The *qadi* usually remains in office for an indefinite term, but it is at the discretion of the Caliph to fire him at any time.

It is only in case that the appointed applicant submits a candidature deemed more worthy of filling the position that he retains the right to decline his appointment. Self-nominations are usually not accepted. The *qadi* is not supposed to receive any salary, but he's allowed to file expenditure refund claims with the state (but not with the parties to the dispute). It is noteworthy to mention that, in the words of R. Jackson, "traditionally, and somewhat idealistically, sharia courts had a single *qadi* (judge), making no provision for courts with a plurality of judges, nor for any system of appeal. There is no jury system, the single *qadi* being the judge of both the facts as presented and of the law as written" [8, p. 126].

Since the goal of justice is to deliver just rulings it is inevitable that the court be bound by reasonable procedure. In Jewish law, the procedural requirements have been concisely set forth in Leviticus, 19:15: "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly". Crucial practical requirements pertaining to court procedure stem from the abovementioned verse, with the most significant being the necessity to ensure equal rights of the parties (first and foremost to enable them to prove their points on equal terms). If it happens that the judge starts questioning his own impartiality he is obliged to recuse himself.

The requirements of the Islamic court procedure appear to be more or less the same as those found in Jewish law. It is the obligation of the *qadi* and the court staff to be polite and respectful of the claimants. The *qadi* is prohibited from accepting whatever presents he may be offered even on occasions unrelated to the case currently put before him. It is also forbidden for the judge to plead the case provided that his personal interest or the

interests of his relatives are involved. Upon the beginning of trial the *qadi* must make sure that he is capable of rightly examining the essence of the issue and that his general state of health or his possible irritability will not interfere with his performance. It is the duty of the judge to secure the equality of the disputing parties by means of either providing them with equal opportunities to prove their point or by showing them equal attitude.

Overall, the similarities between the Jewish law and the Islamic law are undisputed, which is evident from the very fact that both these legal systems use monotheistic religions as their bases. If it was possible to carry on the presented comparative analysis, quite a number of other common features could be shown, especially in matters dealing with property rights and contractual law.

In conclusion, this author would like to address the “everlasting” issue of correlation between the notions of state and law. It appears that the ongoing disputes between the proponents of the theory of natural law, the “etatist positivists” and “sociological positivists” are senseless and unfounded as every single one of these approaches has a right to exist because of being valid to a certain extent. In addition, the demand for law is objectively ever present. In the words of Karl Marx, the legislator resembles the naturalist in that he doesn’t essentially invent the law, but only confines himself to defining it, and that’s exactly how the legislator’s subjectivity often manifests itself [9, p. 140]. In the European positivist tradition, it is always the state that “formulates” the law, but if it had always been the case, we would have had to strip the Jewish law and the Islamic law of any legal status — contrary to common sense and the actual state of affairs. It is a well-known fact that not only had the Jews lost their national state and their territories, but they haven’t been able to reassert their hold on their lands up until the formation of the Israeli state. Still the Jewish law had been developing quite successfully for all that time without having to resort to state-run lawmaking thanks to the activity of the rabbinical courts. On the other hand, although the independent Muslim states have long been established, it is still Allah who remains the sole legislator in Islam. Although there is no doubt that nowadays the principle at hand is almost not observed by the majority of Muslim states, it should be kept in mind that the Islamic law in its classical form equals the law of the legalist judges. It thus seems, bearing in mind the status of the rabbinic court judge, that the Jewish law is a little bit more ingenious than the Islamic law. Because of being a justice and a priest at the same time, the rabbinic court judge becomes capable of applying his prosecutorial discretion on a much wider scale by simply interlacing the methods of reasoning — something that would be beyond the scope of the “appointed” *qadi*’s authority. Nevertheless, the contribution of the Islamic judge to the development of law remains irrefutably immense.

All in all, the Islamic law and, particularly, the Jewish law display one of the possible ways of genesis of law.

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