

Introduction: Some ponderings on the use of the law in the writing of histories

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Professional jurists are often inquisitive about the subject matter of their calling and in the course of their careers may well develop fascinating insights into the law and those who interpret it. Their employers, however, be they governments, corporations, firms, or private clients, rarely show similar enthusiasm for such insights unless the hours spent pondering the social or historical significance of this or that legal view have a contemporary value that justifies the lawyer's fee.

Thankfully, other members of society are rewarded for mining the legal records of the past. For legal historians, the search often focuses on the changing legal ideas and how legal doctrine develops over time to meet the changing needs of societies. Yet because the law generally deals with concrete matters – again, because jurists are paid by people who are unlikely to remunerate those who simply while away their hours making up legal cases – it offers a reservoir of information that can be used, albeit with caution, in fields other than just the history of the law.

A partial reconstruction of the law of any given time and place is among the more obvious historical uses of legal documents but statutes, practical decisions, and even theoretical texts can be used to advance other forms of the historical endeavour. Legal works often reflect the values both of jurists and society-at-large, for while the law creates social values it is not immune to changes in these very values.

Often the search for either legal developments and/or the causes of such

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changes demands a study of the law over a long period of time, for the law tends to be a conservative discipline and jurists generally eschew radical change. As Guido Calabresi has noted, abrupt changes in the law can cause deep ruptures in society, ruptures that slower and more organic transitions would very likely avoid.¹

What is true regarding the legal mechanisms of states in which legislators enjoy the prerogative of being able to introduce and repeal laws is doubly true about religious communities that believe that their law stems from the Divine. While Christianity, Islam, and Judaism are each generally free to enact prohibitions or demand actions that do not directly confront scripture and that forward or protect proper religious observance, they cannot simply abrogate or even alter canonical statutes. For example, the biblical prohibition against interest-taking was an incredibly difficult matter for each of the three monotheistic religions yet none of them could simply reject the prohibition or declare it void, for to each it represented Divine will. Moreover, these religious societies essentially fused morality and law and often tried to ground Divine revelation in rational thought, only making changes in the law even more difficult. Nevertheless, the development of the commercial marketplace in the medieval period and its expansion in the modern age demanded the availability of intra-faith credit (taking interest from members of your own religion) and thus asserted enormous pressures on the law. As a result, jurists of each faith engaged in no small amount of legal casuistry over an extended period to try to find legal solutions to what was in essence a collective legal conundrum. Jewish and Christian legists ultimately found what they deemed to be suitable legal solutions; Muslim jurists continue to work on finding a resolution acceptable to all schools of Islamic legal thought.²

Economic developments in an expanding marketplace may have posed numerous questions for jurists but they were only some of the issues that pressured the law. Evolving social mores also raised numerous and often intricate legal problems. Religious law in the pre-modern age was almost all-encompassing and went far beyond matters of ritual and worship.

In the past as in the present, many people probably wished that they could change these laws but individuals can rarely effect any immediate change in the legal system and therefore they developed strategies to deal with legal regulations. For most, this simply meant acting within the framework of the law but there were those who attempted to manipulate or evade the law. Such strategies show that although individuals may revere the law there are instances in which even generally law-abiding people resist its formal demands.

In the spring of 1998, a group of historians who work with legal texts

from Christian, Islamic, and Jewish societies gathered at Ben-Gurion University of the Negev to discuss such social pressures on the law in the context of a workshop entitled 'The Family and Social Order'. In its attempts to identify, describe, and analyse the interplay between legal prescriptions and altering historical circumstances, the workshop approached legal texts from a perspective that would probably have been perceived as misguided, if not unrecognizable, to their authors. Doctrinal details were an integral part of the discussion and the participants engaged in cross-cultural comparisons but the workshop also touched upon the social historian's craft and the use of legal sources in the writing of history.

Each of the six essays in this volume grapples, explicitly or implicitly, with a number of questions regarding the use of legal sources from a historical perspective. Among them, what sorts of approaches can social historians devise in order to use legal texts to their best advantage? Can one draw a link between legal prescriptions and individual conduct and, if so, what does this mean for the study of both the dynamics of legal systems and the social and intellectual evolutions of these societies?

Four of the essays explore Islamic societies, ranging from the late Middle Ages (Mamluk Cairo and fifteenth-century North Africa) through the age of Islamic empires (sixteenth- and seventeenth-century Ottomans) and up to late-twentieth-century Algeria. The remaining two articles deal with Jewish communities; one concentrates on medieval North Africa while the second focuses on early modern Italy.

In 'Parents and their minor children: familial politics in the Middle Maghrib in the eighth/fourteenth century', David Powers hones in on the highly charged issue of inheritance.³ As Powers points out, 'inter-generational transmission' can lead to nasty 'intra-familial strife' and therefore the laws of inheritance are the subject of incessant manipulations, ingenious legal stratagems, and, at times, outright rejection. To understand the interests that effect the interpretation and application of the law, Powers turns to the *fatwā* literature, an Islamic legal genre in which lay individuals ask widely respected experts for legal counsel. These questions and answers have been the subject of numerous studies of Islamic societies precisely because they both expose the concerns and dilemmas of Muslim believers and reveal how jurists adapt doctrine to social circumstances. Working with an example from fourteenth-century North Africa, Powers tells the story of the son of a well-known and well-to-do family who, together with his mother, conspired to disinherit his sister. In her effort to salvage her share in her father's estate the sister turned to the court.

In the course of the case we learn that numerous legal questions that directly affect individual conduct have sprouted from a kernel of clear-cut

prescriptions regarding inheritance that have gone through minuscule – at most – changes over the years. It is precisely the possibilities for multi-valenced interpretations that set the stage for such controversies for they allow both individuals and jurists to arrive at different and often conflicting forms of conduct and legal solutions. Specific outcomes were determined by the knowledge and skills of litigants and judges, the biases and notions of justice of the judge, as well as social circumstances and local values. This case exposes some of the interpretations and manipulations, as well as counter-interpretations and counter-manipulations, that inheritance law allows. Powers also observes that ‘Muslim women had well-defined legal rights’, that some of them ‘were prepared to go to court to demand their rights’, and that certain jurists supported their rights.

The pliability of the law and in particular the way that it has been adapted to personal interests lies at the heart of Yossef Rapoport’s study, “Divorce and the elite household in late medieval Cairo”. Islamic law enables the husband to initiate and conclude a divorce by stating to his wife ‘You are divorced’ three times, whereas the wife must resort to the courts if she wants to dissolve the marriage.⁴ Moreover, in contrast to the husband who does not need the approval of officials and is not obliged to present a reasonable cause for his actions, the wife must appeal to the qāḍī and convince him that she has a justifiable cause to initiate the divorce. However, the law does protect the wife economically and therefore the act of divorce often entails the transfer of a relatively large sum of money from husband to wife.

Rapoport, who takes these and other legal strictures as a given, asks what sort of manoeuvres men and women made within the confines of the law and what were the social patterns that developed in late medieval Cairene society. The sources that enable Rapoport to examine the conduct of the Cairenes is a biographical dictionary that contains a large section about women. The entries reveal that an astoundingly high percentage of ‘Cairene elite women’ were divorced. But what is probably more meaningful is Rapoport’s observation that the ‘divorces were initiated by wives or their families as often as by husbands’. Husbands were deterred from uttering unilateral divorces by a combination of financial obligations and social pressures. Thus, by turning to a non-legal source that deals with Mamluk society, Rapoport was able to demonstrate that the relations of power between husbands and wives in that time and place were a far cry from the scheme of power that the law seems to recommend. Although legal doctrine did not change, social practice was far removed from the power relations assumed by legal texts, illustrating the vast space for manoeuvre within Islamic legal doctrine.

Whereas individuals could promote their interests through interpretation of the law, the rulers in many Islamic societies had the right to advance their, or the community's, interests through legislation on the basis of the principle of *siyāsa shar'iyya* ('governance in accordance with the *sharī'a*').⁵ Pointing to this idea, Dror Ze'evi, in his essay 'Changes in legal-sexual discourses: sex crimes in the Ottoman empire', explores how the rulers of the Ottoman empire moulded and altered the law so as to adapt it to their needs and values. Starting from the well-known premise that the body of Islamic legal doctrine (*sharī'a*, or in its Ottoman terminology, *shariat*) was 'never fully codified' and that its lacunae in the area of criminal codes were probably larger than its explicit prescriptions, Ze'evi notes that alongside the *sharī'a* the Ottomans articulated a body of texts called *kanūnname* that closed many of these gaps. Focusing on the sensitive topic of sexual transgressions, he argues that the *kanūn* did not compete with nor did it challenge the underlying premises of the *sharī'a* but rather based itself on them. The *kanūn* did, however, espouse a more detailed set of punishments than the *sharī'a* and tampered with principles of legal procedure. These adjustments, argues Ze'evi, grew out of the legislator's perceived need to enhance social control by devising a quicker and more efficient system of justice that was capable of effectively punishing offenders. On the other hand, the new code lightened the punishments for certain sexual offences, expressing a more liberal view than that of the *sharī'a* in such matters. By creating a new corpus of legal texts, the advocates of change in Ze'evi's study – the ruling class – narrowed the gap between evolving social values and legal doctrine.

Bettina Dennerlein's 'Claiming legitimacy: disputes about marriage, paternity and divorce in Algerian courts', combines the perspectives that appear in the first three articles of this volume. Like Ze'evi, Dennerlein dissects the body of laws and finds that it is composed of several layers: traditional, colonial, and reforms introduced by the Algerian Supreme Court. Based on this analysis of the law's elements and structure, she shifts to the perspective that was put forth both by Powers and Rapoport, that is, asking how did individuals utilize the law and manoeuvre within the confines set by it? Drawing on 300 court decisions, most of which were issued by the Algerian Supreme Court, she examines the legal strategies that were used by litigants in these courts in cases of contested marriages, paternity, and divorce. The cases suggest that litigants moved among the different layers of the law mentioned above according to their needs, a strategy that judges were aware of.

Dennerlein's shift in perspective, from legal texts and institutions to 'strategies of concrete actors', leads her to an important historiographic observation' that 'whereas women once appeared to be powerless victims

in a male-dominated society, they are now depicted as actively or even selfishly reproducing (neo-)patriarchy in order to promote their own interests'. By moving beyond doctrine to the sphere of social practice, Dennerlein is able to bring into relief a different scheme of power relations between men and women.

The use of a code of laws for uncovering various groups in a society is demonstrated in Miriam Frenkel's 'Adolescence in Jewish medieval society in the Islamic world'. Frenkel attempts to determine whether the notion of a transition period between childhood and adulthood existed in these Jewish communities by examining the writings of a number of outstanding Jewish jurists of the age to see if they recognized different developmental stages of personal status on a child's way to full legal majority. The authors of these legal tracts could hardly have imagined that anyone would use their works to this purpose but, again, legal works offer numerous possibilities for historical interpretation and Frenkel concludes that these authors indeed acknowledged a category of youth that we now label as adolescence. She reinforces her findings on the basis of both moral literature and poetry written by Jews in contemporary Islamic societies. Finally, she looks beyond the purely literary discussions to the social and economic foundations of these communities and finds that there too society recognized a period of transition in the lives of its youths and used this time to attempt to integrate youngsters economically into the group. While communities often enjoyed success on the job-training front, they endured setbacks in their attempts to socialize such young people, failures that remind the modern reader that the teenage years were ever turbulent.

Medieval and early modern Jews always lived under two legal systems: Jewish law and the law of the host community. In his article 'Law and love: the Jewish family in early modern Italy', Howard Adelman demonstrates how Jews, and in particular Jewish women, used this duality of circumstance to advance their own personal interests even in matters of the heart. Faced with a legal problem, some Jews appealed to the system that they believed would prove most advantageous to their position, essentially abandoning Jewish tradition in certain areas. Even in matters that remained solely within the Jewish community, Adelman argues that litigants used the law to meet their needs by crafting their versions of events to forward their own positions. As for those who violated the law to satisfy their passions, they faced legal sanctions if caught but, as Adelman shows, even punishments meted out by rabbinic authorities were determined to no small degree by consideration of the ramifications of such punishments on family life and/or the community, factors that were ostensibly beyond the pale of the law.

There are certainly many other possible approaches to the use of legal texts in the writing of history than those offered here. Yet these papers show that while the sensitivities and knowledge necessary to understand each legal text in its historical context differ from one culture to the next the questions that historians ask of these texts are often very similar. The juxtaposition of these essays in one volume reminds us that certain cross-cultural historical and legal phenomena differ in detail but that in many ways they are common to cultures that are founded on what adherents believe to be Divine revelation.

ENDNOTES

- 1 Guido Calabresi, *A common law for the age of statutes* (Cambridge, Mass., 1982), 3.
- 2 Discussions of the problem of interest-taking include John Noonan, Jr., *The scholastic analysis of usury* (Cambridge, Mass., 1957), Haym Soloveitchik, *Halakah, kalkalah ve-dimui azmi* (Jerusalem, 1985), and Nabil Saleh, *Unlawful gain and legitimate profit in Islamic law* (Cambridge, 1986).
- 3 For an overview on Islamic views regarding inheritance see H. Gibb *et al.*, *The encyclopedia of Islam*, 2nd edn (Leiden, 1960), s.v. 'Mīrāth,' by J. Schacht and A. Layish.
- 4 On the laws of divorce in Islamic law see Gibb, *The encyclopedia of Islam*, s.v. 'Talāk', by J. Schacht and A. Layish.
- 5 On *siyāsa sharīyya* see Gibb, *The encyclopedia of Islam*, s.v. 'Siyāsa', by I. R. Netton and F. E. Vogel.

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