

Roman and Jewish Law

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There is a curious parallel between the historical development of ancient Jewish Law and Roman Law. Both were first codified in the fifth century BCE (Twelve Tables and Ezra). Both have a sudden appearance of two opposing schools of legal thinking in the beginning of the first century CE: the house of Hillel & the house of Shammai in Judaea; the Sabinians & the Proculians in Rome. Later, toward the end of the second century CE, we have the publication of Gaius' *Institutes* (a seminal work) in Rome and the compilation of the *Mishnah* in Judaea. Shortly after, we have the text of a book written in Latin, comparing Roman and Jewish Law. Next, both Jewish and Roman law traditions split between East and West (Rome and Constantinople vs. Jerusalem and Babylon). Finally, in the sixth century, the Emperor Justinian commissioned a group of jurists under the leadership of Tribonian to make a definitive final codification of the laws (the *Corpus Iuris*); this was approximately the same time that the Talmudic final codification of Jewish Law was taking place. As a matter of fact, Justinian's *Institutes* (part of the *Corpus Iuris*) was probably an up-to-date version of Gaius' work (as the Talmud is an elaboration of the Mishnah). In this paper, I should like to point out the details of this phenomenon without too much speculation about possible influences.

- I. Twelve Tables & Ezra
- II. Proculians & Sabinians, the Houses of Hillel & Shammai
- III. Gaius & the *Mishnah*
- IV. *Collatio legum Mosaicarum et Romanarum*
- V. Split between East and West:
 - a) Theodosian Code, Barbarian Codes and the Jerusalem Talmud;
 - b) Justinian and the Babylonian Talmud

I.

The Roman tradition tells us that the Twelve Tables were a product of conflict of orders (plebeians vs. patricians). The plebeians wished to break the monopoly of the priestly class (patricians) on the law. A committee of ten men (*decemviri*) under Appius Claudius was finally established in the year 451 BCE to produce a law code. All the regular magistracies were suspended and the committee ruled and produced a code on ten tablets. This code was confirmed by the senate and the *comitia centuriata* (the early Roman equivalent of the House of Representatives). A second group of *decemviri* met in the year 450 BCE and produced an additional two tablets, making twelve tablets. The last two tablets were described by Cicero as "two tablets of unjust laws" ("*duae tabulae iniquarum legum,*" *de re publica* 2.37), which included a law forbidding intermarriage between the orders. This law was repealed in 445 BCE by one of two *Leges Canuleiae*. The Roman historian Livy refers to the Twelve Tables as the "source of all public and private law" ("*fons omnis publici privatique iuris,*" Livy 3.34). The whole Twelve Tables were first published in the consulship of L. Valerius and M. Horatius after the downfall of the *Decemviri*, 449 BCE (*Liv.* iii. 54, 57). Even in Cicero's youth (three and a half centuries later), these laws were learned by rote in school (*de legibus* 2.4.23).

Roughly contemporaneous with the creation of the Twelve Tables, in Judaea Ezra and

Nehemiah were instituting, or reinstating, the law code for the Jews returning from exile. The dating of the event depends on the identification of the king Artaxerxes mentioned frequently in these books; Artaxerxes I reigned from 465 to 424 BCE, Artaxerxes II reigned from 404 to 358 BCE. If, as many scholars believe, Ezra returned in the time of Artaxerxes I, the account of the reading of the Law (Nehemiah 8) and the confirming of the Law by the people (Nehemiah 10) occurred within the same decade as the confirming of the Twelve Tables. Moreover, as in the Twelve Tables, the issue of intermarriage is also a chief concern of those introducing or reintroducing the law code in Judaea (cf. Ezra 9:1-5, Neh. 10:30, Neh. 13:23-24).¹

II.

Under Augustus (27 BCE-14 CE), we are told there were two famous interpreters of the law, Marcus Antistius Labeo and Caius Ateius Capito, who became the founding fathers of the two later competing schools (*sectae* or *scholae*) of Roman Law, the Proculians and the Sabinians. These schools lasted at least until the time of the Emperor Hadrian (117-138 CE). The name of the school that Labeo founded, the Proculians, came from his follower Proculus; the name for the school of Capito, the Sabinians, came from Massurius Sabinus, his follower. However, the Sabinian school was also called the Cassiani (Pliny, *Epistle* 7.24 and Pomponius *Enchiridion*) after Gaius Cassius Longinus. The Roman historian Tacitus tells us (3.75) that “Labeo was a man of sturdy independence and consequently of wider fame, Capito’s obsequiousness was more acceptable to those in power.” There has been much written about the differences between the two schools.² Gaius, about whom we shall speak, records several instances of the conflict of these schools.³

What is of especial interest to us is the names of the schools. Proculians were clearly named after Proculus, but *procul* is the Latin for “far or far off.” The name of one sect of Jewish law, the Pharisees (*perushim*) means “the separatists” – another strange coincidence. There is, more seriously, a possible point of contact between Jewish and Roman law. Gaius Cassius Longinus, after whom the Cassiani were named, was not only a jurist, but also a governor of Asia (40-41 CE) and of Syria (47-49 CE), who appears in Josephus’ account of the procurator Fadus (*Antiquities* 20.1ff). When Fadus gave orders that the priests’ vestments be returned to Roman custody, Cassius Longinus came to Jerusalem to personally supervise the potentially explosive situation; his family already had much contact with Judaea (his great grandfather – or granduncle, the one who participated in the assassination of Julius Caesar, had already played an important role in the history of Judaea).⁴

The obvious parallels to this development of Roman Law is either the Pharisees and Sadducees (which antedates the Roman division) or more likely the distinction between the House of Hillel and the House of Shammai on the Jewish side (which was also a first century CE phenomenon).

III.

The Sabinian school probably petered out in the reign of Hadrian (117-38) but this was the time of the flourishing of the important legal figure who was just called by his first name Gaius. This was also the period in which Akiba was active (*Tosefta Zavim* 1:5 refers to

Akiva as a *mesader halachoth*, an organizer of the laws); it was also the time of the birth of Jehudah Ha-Nasi (Kid. 72b, born at the time of the death of Akiva in the Hadrianic persecutions). Contemporary with the beginning steps of the codification of the *Mishnah*, in Rome there appeared this important figure who wrote a commentary on the *Twelve Tables* and many other books; most of them were lost, but we knew of Gaius' work from the frequent quotations in Justinian's *Corpus Juris*. In 1816 in Verona, Italy a palimpsest was found with the text of Gaius' *Institutes* – apparently an elementary textbook intended for lawyers. Here we have a systematic presentation of contemporary Roman Law.⁵ Gaius' opinions were so important that he was listed as the earliest of the five most authoritative jurists (Gaius, Papinian, Paulus, Ulpian, and Modestinus) in the *Law of Citations* of Theodosius II (426 CE). Jehudah Ha-Nasi's final compilation of the *Mishnah* (the culmination of the process which began with R. Akiva) took place in the generation after Gaius' *floruit*.

IV.

A strange book, written entirely in Latin, appeared in Rome in the fourth century CE; it was called *The Law of God Which the Lord Taught to Moses* (*Lex dei quam praecepit dominus ad Moysen*) but we now refer to as *The Comparison of Mosaic and Roman Laws* (*Collatio legum Mosaicarum et Romanarum*). It compares criminal, tort (delictual) and inheritance law with their Roman equivalents. Passages from the Pentateuch are juxtaposed to Roman legal texts apparently intending to show that the Jews anticipated all the Roman laws. The authorship of the book is contested (Christian or Jewish?). The best edition of this text (including facsimile, translation and commentary) is by M. Hyamson, Oxford, 1913. This book is the sole example that we have of a volume where the Jewish and Roman Law literally and actually are put side by side for comparison.

V.

The later legal history of both Judaea and Rome shared the same destiny: Judaea had now two centers of legal development, Judaea (already called the Roman province, Palestine) and Babylonia; Rome, after the rule of Constantine (306-337 CE), also had two centers of legal development, Rome and Byzantium. In both cases, East and West had separate developments, but each side of the two geographical divisions shared common traditions: In the West – in Palestine, the final codification is the Jerusalem Talmud, and in Rome we have the Theodosian Code (438 CE) and two “barbarian” codes, the *Lex Romana Visigothorum* and the *Breviary of Alaric* (506 CE); In the East – in Constantinople (Byzantium), we have Justinian's *Corpus Juris*, in Babylonia, we have the Babylonian Talmud.

A. The Emperor Theodosius II appointed a commission to codify the laws. Jolowicz⁶ tells us (p. 483ff):

The work was . . . published on 15 February 438, with effect as from 1 January 439. Already before its completion it received the approval of Valentinian III [the tentative candidate for the position of Emperor of Rome] and on 25 December 25 438 a copy . . . was laid before the Roman Senate, which received it with acclamations . . . The Codex Theodosianus

has not been preserved in its entirety. In the East it was superseded by Justinian's legislation, but it continued to be used in the West, and there are a number of Western manuscripts containing parts of it . . . especially [in] the *Lex Romana Visigothorum* . . .

This code, which was originally composed of sixteen books, each of which were further subdivided into many titles, and it was adapted into the later codifications made by the rulers of the invading Vandal tribes for the population of Rome after the West had fallen (476 CE). At approximately the same time in Palestine, the Patriarchate was dying. The last *nasi*, R. Gamliel was demoted by an edict of the year 415 BCE. The Theodosian Code "directs the Sanhedrins of the two Palestines to hand over to the imperial treasury the moneys that had been collected for the *nasi* with official permission."⁷ This was the end of the Patriarchate and it is commonly believed that the Jerusalem Talmud was compiled at about that time (probably in Tiberias rather than in Jerusalem) in order to preserve their traditions. Nostalgia for the Patriarchate and fear of losing the tradition probably motivated the compilation of the Jerusalem Talmud, as nostalgia for the lost Empire and the need for continuity motivated the transmission of the Theodosian Code.

B. Finally, the ultimate monument of Roman Law, the *Corpus Iuris* was commissioned by the Emperor Justinian (527-565) in Constantinople. Almost a century after the Theodosian Code, Justinian appointed a committee including, among others, the law professor Tribonianus (who, incidentally, may have had connections with the famous Roman law school in *Berytus-Lebanon*⁸) to create the most authoritative work on the subject. This was completed for the most part by 534 CE and became not only the chief code for the later Eastern Roman (Byzantine) Empire, but also the most influential law text in the Western world throughout the Middle Ages and beyond.

According to the account of Sherira Gaon⁹ ("Epistle" tenth Century CE), Rav Ashi or Rav Yose and his pupil Ravina possibly around 501 CE started the process which resulted in the final codification of Jewish law in the Babylonian Talmud; the *Savoraim* completed it during the rest of that century and the next century in the schools of Sura and Pumpedita. However that may be, the redaction of the Babylonian Talmud was probably already underway about the time of Justinian's compilation, even though it was probably completed later. Both were comprehensive and definitive collections of traditional legal opinions which were considered to be binding for their respective communities.

This has been a concise description of a series of coincidences but one must point out, if only briefly, certain differences. Roman Law has a large body of written texts in its tradition; the Jewish sources are mostly transmitted orally. Roman law codification is mainly of civil law; Jewish Law has more concern for religious as well as civil law. Roman law develops mostly from legislation and edicts, Jewish Law develops more like constitutional law, through interpretation of a text. The ultimate authority for law in Rome is mainly the legislative bodies in the Republic (*comitia*, Senate) and the elected magistrates, whereas later in the Empire it is the Emperor; the ultimate authority of law in Jewish sources is the Torah and the Divinity.

- ¹ The main sources for the account of the formation of the 12 Tables are Livy (3.33ff), Dionysus of Halicarnassus (10.52ff) and Pomponius (as quoted in Justinian's Digest 1.2.2.4).
- ² see further, Schultz, F., *History of Roman Legal Science*, 1946.
- ³ see Bauman, Richard *Lawyers and Politics in the Early Roman Empire*, Munich:C.H. Beck, 1989.
- ⁴ See Josephus' *Antiquities* 14:119-22, 270ff.
- ⁵ text, translation and commentary by F. Zulueta, 2 volumes, Oxford 1953.
- ⁶ *Historical Introduction to Roman Law*, Cambridge, 1952.
- ⁷ S. Safrai, in *History of the Jewish People* edited by Ben-Sasson, Harvard, 1976 p. 355.
- ⁸ See Honore, Tony, *Tribonian*, Cornell Univ. Press, 1978, pp. 43ff.
- ⁹ *Iggeret Sherira Gaon*, edited B. M. Lewin, 1921.