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THE ORIGIN OF THE SHULCHAN-ARUCH

Die Entstehung des Shulchan-Aruch. Beitrag zur Festlegung der Halachah. Von Dr. CH. TSCHERNOWITZ. Bern: ACADEMISCHE BUCHHANDLUNG VON MAX DRECHSEL, 1915. pp. 79.

THE talmudic saying: תפשת מרובה לא תפשת מועט תפשת: 'If you attempt to grasp too much you may not be able to hold it, but if you grasp a little you *may* be able to hold it', may serve as a good advice to a certain class of authors, reminding them first, to define to themselves the scope of the subject which they set out to treat in their works, and then to remain within its circumscribed limits. If the author accurately defines his task and limits himself to one special subject or one particular problem he is more likely to have a firm grasp of his subject and to be able to bring out clearly whatever new theory he has to advance or whatever contribution he has to make to the solution of the problem with which his book deals. If, however, he does not so limit himself but drags into the discussion of his special theme questions of other subjects and vast problems only remotely connected with it, then, unless he be a great master, his grasp of all these various problems is likely to be weak. And if the compass of his book is small, his treatment of the various questions will lack in thoroughness. He may touch upon many remote questions and minor problems, discuss superficially some aspects of the main problem, hint at or refer to different theories, without bringing out clearly whatever theory of his own he has to offer.

The work before us is the best illustration of the truth of the saying: תפשת מרובה לא תפשת. The author did not grasp many of the problems which he touches upon in this small volume. His treatment of the main theme is inadequate. His theories are unfounded, his discussions are superficial, and many

of his statements are inaccurate and frequently contradict one another.

The work, as indicated by its title, purposes to deal chiefly with the genesis of the *Shulḥan Aruk*, but only a very small proportion of it is given to the treatment of this subject. Pages 1–22 deal with the methods of teaching and the definition of terms used in the talmudic literature, which have no bearing upon the genesis of the *Shulḥan Aruk*. Pages 22–4 contain a few general and superficial remarks about the development of the Halakah studies during the thousand years which intervened between the close of the talmudic period and the appearance of the *Shulḥan Aruk*. Pages 24–7 contain an account of Joseph Karo's life, his purpose and method in composing the *Shulḥan Aruk*, a comparison of the *Shulḥan Aruk* with the *Ṭur*, the faults and shortcomings of both these codes, in what they are alike and in what they are not alike. Pages 28–79 deal with the opposition to the *Shulḥan Aruk* and its final acceptance, the activities of its commentators, as well as with the works of other great rabbinical authorities of that period.

Thus, out of the 79 pages which the book contains, at the most, only six pages can be considered as, in a manner, dealing with the genesis of the *Shulḥan Aruk*.

This is a great fault of the book, but it is the least as compared with the other serious faults and grave mistakes to be found in it. I shall limit myself to pointing out only a few of the wild theories and unwarranted statements in which the book abounds.

The author tells us (pp. 11–12) that the early sources hardly draw any line between Halakah and Haggadah. The distinction between Halakah and Haggadah was made only by the Geonim after the completion of the Talmud. It would require more space than allowed to me for this review, to cite, in full, the numerous passages in the talmudic literature in which such a distinction is made. I can only refer to Levy's Dictionary and Bacher's *Terminologie*, s. v. הלכה and הגדה.

But our author must have forgotten his own statement on p. 5, that in order to be able to appreciate the Halakah one must go back to the Haggadah, which the *sources* always contradistinguish

from the Halakah. So the sources do distinguish between Halakah and Haggadah.

On pp. 12-14 our author advances the following unfounded and confused theory about the relation of Halakah to Minhag or custom :

The terms הלכה and מנהג 'custom', have always been identical, and the ancient teachers use the expressions 'practices', 'customs' for all that which we subsume under the term Halakah. But the authoritative power of the popular custom was regarded as the highest authority from which all valid decisions issue. The Halakah always relies for its support upon the popular custom. The Halakah is even subordinated to the מנהג as the higher source. The rule therefore was that in cases of conflict between the Halakah and the Minhag, the former must yield to the latter. Even the teachers of the Law, would, whenever the Halakah conflicted with a custom, recognize the latter as authoritative and valid. The halakic decision acquires binding power only after it becomes a popular custom. Accordingly, the Halakah is merely custom accepted by the teachers. In itself the Halakah possesses no binding power. It is merely theoretical teaching which must not necessarily be followed in practice.

Aside from the contradictions contained in these statements (for if הלכה and מנהג were always identical, one could not have been made subordinate to the other and they could never have come into conflict with one another, and there could not have been a rule that when conflicting with one another the Halakah must yield to the Minhag, and if there was such a rule, it could have been enacted only by the teachers of the Law, why then state that *even* the teachers of the Law acted upon this rule), the theory advanced is absolutely unfounded. It is almost inconceivable that one who is familiar with the talmudic literature should form such an opinion about the character and the authority of the Halakah. The talmudic passages which the author cites in support of his theory are either altogether misinterpreted or taken out of their context and given general application, other talmudical passages to the contrary notwithstanding.

Thus in support of his statement that the Mishnah contains numerous halakic rules, the origin of which can be traced only to popular customs, our author quotes the saying of R. Joḥanan in

p. Peah II, 6 (17 a): אם באת הלכה תחת ירך ואין אתה יודע מה : טיבה אל תפליגנה לדבר אחר שהרי כמה הלכות נאמרו למשה מסיני וכולהון משוקעות במשנה. But there is no mention at all in this saying of halakic decisions which have their origin in popular custom, and I am inclined to think that R. Johanan would resent the implication that what he designates as Halakot communicated to Moses from Sinai were merely popular customs.

As proof for his statement that the Halakah always leans on the popular custom as its support, our author quotes the saying of R. Joshua b. Levi (p. Peah VII, 6, 20 a): כל הלכה שהיא רופפת בבית דין ואין אתה יודע מה טיבה צא וראה מה הצבור נוהג ונהוג. But this saying expressly states that only when the Halakah is vascillating in regard to a certain question, i. e. when the Halakah has no definite decision about it, the established practice of the people in regard to that question should be followed. It certainly does not say that the Halakah in its definite rulings and decisions needs the support of the popular custom. The saying: כשם שקונסין בשם שקונסין (p. Pesahim IV, 3, 30 d) which our author further cites in support of his statement, proves just the contrary. For this saying presupposes the inferiority of the מנהג as compared with the Halakah. It plainly says that even the disregard of a mere custom is to be punished just as the disregard of a halakic rule. From the context, there, in the Yerushalmi we further learn that the rule itself, viz. that disregard of a custom is to be punished, cannot be sustained. The precedent cited there in support of this rule was a case of a violation of a rabbinic law and not of a mere custom.

As proof for his statement that the teachers would recognize the custom as valid notwithstanding its being in conflict with the Halakah, the author cites from p. Shekalim I, 46 a the phrase: לא הנהיג אבל להלכה לא, which he takes out of its context, misquotes, and misinterprets. The discussion there has no reference whatever to cases of conflict between Halakah and Minhag. It deals with the question whether the religious observances in connexion with Purim obtain also in the first month of Adar in a leap-year or not. R. Honah of Sepphoris says: ' In Sepphoris,

Rabbi Ḥaninah has introduced the custom to follow the opinion of R. Simon b. Gamaliel', mentioned in the Baraita there. To this saying of R. Ḥonah, is then added the remark : **לא אמר אלא הנהיג** : R. Honah only said that R. Ḥaninah had introduced it as a mere custom but not that the Halakah should be so'. The difference is very important, for if it was introduced merely as a custom, it may have been due to considerations for local or temporary conditions and need not be followed in other places. If, however, it had been declared as a Halakah it would have general validity and had to be followed in other communities also. Thus, the discussion there proves rather the superiority of the halakic decisions over mere custom, contrary to our author's statement. In the same manner our author misinterprets the passage in b. Tannit 26 b : **מאן דאמר הלכה כר' מאיר דרשינן לה** : מאן דאמר מנהג מידרש לא דרשינן אורוי מורינן בפירקא. The meaning of this saying is plainly this : According to the one who says, It is a Halakah, we declare it in the public discourse, so that all the people may know it and guide themselves by it. But according to the one who says, It is merely a Minhag, we should not declare it in the public discourse, for we are not so sure about it as to make it an authoritative rule binding upon the people. However, when consulted by an individual we should inform him that it is a proper custom. This again, contrary to our author's assumption, proves that the Halakah is by far superior to the Minhag and of more binding authority. From the same passage in Tannit our author could have learned to distinguish between a mere popular practice **נהגו העם** and a recognized religious custom **מנהג**. This would have helped him to take at their proper valuation the two phrases, **מנהג מבטל הלכה** and **מנהג מנהג** and **מנהג נקבעת עד שיהא מנהג** which apparently lend support to his theory about the authority of the Minhag.

Against the saying **מנהג מבטל הלכה** we could cite the talmudic question (R. H. 15 b) **במקום איסורא כי נהגו שבקינן להו?** And against the saying in the post-talmudic Tractate Soferim XIV, 18 **מנהג מנהג** **מנהג נקבעת עד שיהא מנהג** we might rightly use the talmudic argument **אטו במנקנא תליא מילתא?** Ḥullin 63 a. But the same

passage in the tractate Soferim refutes the interpretation given by our author to these two phrases by adding the following qualifying statement: *וזה שאמרו טנהג מבטל הלכה מנהג ותיקין אבל מנהג שאין* : *לו ראייה מן התורה אינו אלא כטועה בשקול הרעת*. This expressly tells us, that only such customs as had a good reason for being established and proofs from the Torah to support them, are to be considered as authoritative. In other words, the established Minhag receives recognition and authority only because we presume that it is based upon some halakic teaching of those former authorities who introduced it. (I have treated other aspects of the relation between the halakic teachings and established religious practice, as the product of the religious consciousness of the people, in an essay on Tradition and the Jewish Consciousness, to be published soon by the Central Conference of American Rabbis. The importance of the question of the authority of the Halakah, will, I hope, justify my having given so much space here to the refutation of this one theory of our author.)

On pp. 31-2 the author advances the following theory about the different attitudes towards religious laws and practices held by the Spanish and German authorities respectively :

In regard to the observance of the dietary laws, we find the German rabbis to be lenient and the Spanish rabbis to be more strict. This difference is due to the different political and social conditions under which the Jews of the two countries lived. In Spain the relations between Jews and non-Jews were friendly. The Rabbis, fearing that the Jews might become assimilated, were, therefore, anxious to erect a barrier between the Jewish and non-Jewish population. This they believed could be best achieved by insisting upon a rigid observance of the dietary laws. In Germany, on the other hand, the separation between Jews and non-Jews was wide enough and, accordingly, there was no need of such special measures to prevent assimilation. This difference between the Spanish and German Jews in regard to the ritual laws is already noticeable in the fact that the German Jews were more zealously careful in the observance of their religion and its observances than the Spanish Jews.

Here again the author is confused and contradicts himself. But aside from this, the very phenomena which our author sets

out to explain by his social-political observations refute his theory. For, as a matter of fact, the tendency to be strict in the interpretation and application of the dietary laws prevailed among the German rabbis, while the Spanish rabbis were comparatively lenient in this regard.

The author has a special fondness for sweeping generalizations to which very many of his numerous false and contradictory statements are to be attributed. I shall mention only a few. According to our author the patriarchate in Palestine ceased at the same time when the Babylonian Talmud was completed, in the year 520 C.E. (p. 22). As a matter of fact, the patriarchate ceased about the year 426, after the death of the last patriarch Gamaliel VI.

On p. 23 our author makes the sweeping statement that the Spanish scholars were the only ones who pursued grammatical and exegetical studies. This is a statement which is hardly worthy of refutation.

Another such sweeping generalization is his statement on the same page, that the German authorities occupied themselves almost exclusively with the codification of the Halakah while the Spanish scholars busied themselves with the explanation and expansion of the talmudic logic and with a theoretical study of the Torah.

On p. 25 he makes Alfasi, Maimonides, and Asheri, respectively, the representatives of three main tendencies in Judaism, viz. the Babylonian, Spanish, and German.

On p. 26 (ll. 1-3) he states that the Shulḥan Aruk is like the Ṭur only in its 'Disposition'. Otherwise it is essentially different from the Ṭur. But on the same page, ll. 24-7, he contradicts himself by making the following statement: 'It (the Shulḥan Aruk) is, as already stated, merely an extract from the Ṭur. Accordingly, it is, as regards contents and arrangement, in no wise different from the Ṭur.'

On p. 28 he stated that the 'Sephardic scholars have nowhere stated expressly their position or attitude toward the Shulḥan Aruk'. But, on the same page and on p. 29 he quotes a few

Sephardic authorities who expressed themselves unfavourably about the Shulḥan Aruk.

The author occasionally uses the titles of the two works בית יוסף and שולחן ערוך, interchangeably. He speaks of the Shulḥan Aruk when he means the Bet Joseph and *vice versa*. This indiscriminate use of the titles of the two works, probably aided by the printer's devil, has produced a rather comical confusion in the dates which the author gives to the completion and publication of the two works. Thus, on p. 24, we are told that Karo began with the preparation for his work בית יוסף in the year 1552 (obviously printer's mistake for 1522). It took him twenty years to collect his material and twelve years more to compose the work, which he finished in Safed in the year 1554. On p. 25 we are told, further, that after Karo had completed his work בית יוסף he decided to write the Shulḥan Aruk. Then, on p. 26, it is stated that the first and second part of the Shulḥan Aruk appeared in Venice in the year 1550, while the third and fourth part appeared in Labbionette (should be Sabbioneta) in the years 1553 and 1559. According to these dates the first and second part of the Shulḥan Aruk were published at least four years before Karo had decided to write the same. This confusion is due to the mistake which the author made in assigning to the Shulḥan Aruk the dates 1550, &c., the years of the publication of the Bet Joseph.

The printer will probably share in the responsibility for a large proportion of the minor mistakes, such as mis-spelled words, faulty references, and inaccurate quotations which are found on almost every page of the book.

Many of the awkward expressions and vague and meaningless phrases which abound in the book may be due to the difficulty which the author seems to have in expressing himself in German.

JACOB Z. LAUTERBACH.

Hebrew Union College.