REVIEW ARTICLES:

Emanuel Rackman

Rabbi Emanuel Rackman is an Associate Editor of TRADITION. His most recent contribution to these pages was "The Dialectic of the Halakhah" in the Spring 1961 issue of this journal.

THE FUTURE OF JEWISH LAW

Israel has revived much. The tongue of the prophets has been resurrected there to become its official language. The study of the Bible was made universal. Even military experts profess their need of the Book of Books. Tourist guides refer to it in almost every comment. National contests involving demonstrations of its mastery attract thousands of spectators as baseball games do in the United States.

Rabbi Kook's prayer that the old shall be renewed is being fulfilled. But what of Jewish law? Will or can historic Jewish jurisprudence become the basis for the legal order of the autonomous Jewish republic of our day?

It may surprise many that this is not now the situation. However, except for family law and such cases as come before the rabbinical courts with the consent of all parties, the legal system of Israel is a composite of Ottoman, British, and French doctrines and rules. The Israeli parliament, the Knesset, has not radically altered the pattern. Partisans of the Halakhah (Jewish Law) have always urged the renaissance of the ancestral legal heritage. They had hoped that the revival of Jewish law would enhance the national revival even as the revival of Hebrew did. To their voices is now added the voice of Israel's Chief Justice—Professor Mosheh Silberg—in a small but stimulating volume entitled *Principia Talmudica* or *This Is the Way of Talmud.**

The volume merits careful analysis and evaluation. The view of a Chief Justice always carry weight. Moreover, the author teaches law at the Hebrew University in Jerusalem and thus influences hundreds of students who will one day become members of Israel's bench and bar. Because he is identified with no political party his recommendations do not reflect party claims or advantages and are, therefore, respected by Israel's intelligentsia. Unlike a colleague of his on the same bench, he has no personal frustration that blocks him emotionally *vis-a-vis* the Halakhah and his consideration of

* Jerusalem, Student Union of Hebrew University, 1961.

its viability in a modern state is objective and well balanced. Thus while one may differ with Professor Silberg on one point or another, his book dare not be ignored, for it will play an important role in the emergence of Israel's legal order. Indeed, many of its most significant sections have already been translated into English and published in the *Harvard Law Review*. That is why more than the usual book review is warranted and this essay purports to be a rejoinder in what hopefully may become a continuing dialogue among those who love Jewish law and crave its renaissance at the same time that they are realistic with regard to the present situation of that law and the milieu in which its revival is projected.

I

The heart of Professor Silberg's argument is that Jewish law has a character all its own. It is religio-centered, or, as the author of this essay has in his own writing described it, it is theocentric rather than power-centered. In Jewish law there is no separation of divine law from positive law. Occasionally, there may be a different legal rule applicable to matters sacred or ritualistic but the legal system is monistic. Doctrines, principles, rules, precedents—all are integral parts of the same Halakhah, and talmudic dialectic cites, challenges, and differentiates, recognizing no dichotomy between what is God's and what is Caesar's. Talmudic discourse has a basic unity—civil and religious law are one.

Since the source of the law is a bilateral covenant between God and Israel, and this covenant is so deeply entrenched as the root norm of the entire legal system, even God is a legal "person," bound by the very law He promulgated. His role in its very interpretation is prescribed by the rules explicitly or implicitly contained in the covenant. From this seed or beginning all that is unique about Jewish law flowers. And Professor Silberg writes feelingly, sensitively, and appreciatively of this uniqueness.

The author's approach is to be commended. He helps all students of the law to appreciate that the Halakhah is a very rich legal system. It can excite the intellect and quicken the ethic of any jurist. It has legal concepts analagous to those of the most advanced jurisprudence and its methodology as well as its concepts can be analyzed and communicated in terms familiar to all lawyers in the Western world. To many moderns all of this comes as a welcome surprise, inducing national or ethnic pride.

However, precisely because the book has so many virtues, its conclusion comes as a crushing disappointment. Silberg wants the revival of Jewish law but without its focus on God or religion. Judges and legislators are themselves to choose what rules of the Halakhah they shall retain and what they shall discard. God is dethroned—nay, removed as a covenantor, and man becomes the sole arbiter of justice.

Now, if the role of God in the legal heritage was an important factor in the achievement of a blessed uniqueness, can one retain the blessing without His continuing participation? And if His role was

only a legal fiction and the good came rather from the monistic character of the law—the interdependence of divine and positive law (both of which in fact had their real source in man)—then can one hope to keep such a fiction alive in a secular state, hell-bent on relegating religion to the individual conscience instead of recognizing it as part of the legal order?

Jewish ethics describe obligations involving man's relationship with God and man's relationship with his fellow-man. In the folios of Talmud these relationships are integrated in almost every morsel of the dialectic. Eliminate the former and what is left that is different from positive law or that can produce the uniquenes which Professor Silberg reveres as the hallmark of Jewish law?!

II

To pose this question to Professor Silberg, however, is not to relieve the burden of those who champion the cause of the Halakhah for the modern state. Those who want to retain the traditional theocentricity must explain how they will legislate to make Jewish law visible today, since only a few will deny the need for legislation in the present. They must also explain how they will *amend* and *annul,* since amendment and annulment are as necessary as legislation. Legislation, amendment, and annulment, there always were. However, the guardians of the Halakhah enjoyed both the confidence and authority of Jews. In modern Israel they enjoy neither. Certainly the state is not prepared to recruit its judges and legislators from their ranks. Will they, therefore, withdraw into a closed community in which they enjoy the confidence and authority of a few and await the Messianic age, or will they help to revive and develop Jewish law even though secularists are its guardians? This they could do, if they chose. They could in their continuing encounter with God—the other party to the covenant—explore and articulate the insights of Jewish law for the present; they could provide the juridic insights and draft statutes even for secular judges and legislators. They could be creative even as Professor Silberg was in many chapters of his volume and perhaps they would cause their theocentric outlook to have an impact on the legal order—on both legislative enactment and judicial interpretation. Especially, in family law —where they do still have jurisdiction—they could demonstrate the viability of the Halakhah by the legislative power which the Halakhah vouchsafes unto them.

Perhaps an institute for Jewish law could be established comparable to the various committees that coined new Hebrew words in the last half-century in order that the Hebrew tongue may be reborn. The institute would comprise scholars of all orientations. The goal would be the continuance of Jewish law. Insofar as the development can be contained within the total frame of the Halakhah it should be encouraged so that there shall be no needless divisiveness in the Israeli Jewish community. If there is no alternative to Professor Silberg's proposal, then in vain does he sing the praises of a law which even for him can no longer be what

it once was, because its heart has ceased to beat,—its soul, its God, no longer throbs in the circle responsible for legal development. Man will have assumed complete control over it and it will no longer differ from other systems of positive law. The ancient Jewish sources will be of historical interest as will Roman sources, and Turkish sources. But the thread with the past—the denominator which gave uniqueness —God—will be no part of it.

III

However, even as a paean to Jewish law, Professor Silberg's book warrants critical evaluation. His exuberance is often greater than his argument. Let one assume with him that the time has come for Israeli jurists to draw upon Jewish precedents instead of British precedents for such lacunae as exist in the law. Is it the mere fact that they are *Jewish* precedents that makes them *ipso facto* preferable? In the very case (in the closing chapter) in which he and his colleagues urged the use of Jewish precedents he did not undertake to demonstrate their superiority over related rules of other legal systems. Even a fervent Jewish nationalist should regard the value of justice as a higher value than historical continuity. And in the final analysis this is the criterion that will win the hearts of those who must decide the future character of Israeli jurisprudence.

Thus in his chapter on Law and Equity, Professor Silberg classifies and summarizes the principles of Jewish equity jurisprudence. The classification and the summary are comprehensive. One is convinced that as equity always was a corrective of strict law in England, so Jewish law is blessed with the same remedial potential. Moreover, his claim that most concepts of British equity jurisprudence are to be found in Jewish law is also valid. But the uniqueness of the Jewish system of equity receives only a parenthetical reference. And there is virtually no argument that this uniqueness can make for a juster judicial system than was enjoyed by the Romans who also had equity law as well as strict law, or the British and Americans who share a rich legal heritage comprising the common law of the king's courts and the more flexible rules of the king's conscience which was exercised by his chancery.

A more impressive discussion of the same theme is to be found in Dr. K. Kagan's volume* on Roman, English, and Jewish law. Dr. Kagan proved the thesis that in the Roman and English systems there was a separation of equity law from strict or common law—the different judicial powers actually resided in different persons, while in Jewish law, law and equity were one. Equity was an integral part of the law. The same judges exercised both powers in their articulation and enforcement of the law. Professor Silberg makes casual references to this point but neither he nor Professor Kagan spell out the advantages of a unified approach. Perhaps they both assumed—and not improperly —that lawyers will recognize the advantages immediately. Neverthe-

* *Three Great Systems of Jurisprudence,* (London: Stevens & Sons) 1955.

less, lawyers also know that the unification can be, and is being, achieved in modern legal systems of legislation. In the final analysis, then, Jewish law can only be regarded as superior because it has the potential to yield such a unity: the duty of each and every judge to mete out justice in the fullest sense of the term by balancing the law's predictability as based on adherence to precedents with what is "good and righteous in the eyes of God." Every judge in the Jewish system is thus not a servant of the state. He is rather God's agent, serving Him, above all else. His accountability to God is the rationale for his broad judicial power. Theocentricity lies at the heart of this superior quality which Jewish law has. Yet can one discard that theocentricity and hope to retain the advantage?

IV

Professor Silberg's most original insight, and one of his most significant, is contained in the sixth chapter of the book. He maintains that unlike most other legal systems Jewish law is duty-oriented rather than right-oriented. The focus of attention is always on the obligation of the obligor rather than the claim of the claimant. Thus debts must be paid not so much because the lender has a right to the money he advanced to the borrower but rather because the borrower has a duty to fulfill a *Mitzvah*—a mandate of God or social ethics.

Perhaps one day historians will pass judgment on our generation and its mores and record that one important cause of our economic, political and social malaise is the denigration of duty and the enthronement of right and privilege. We glory in our bills of rights. We have rights against the state, seldom duties to it. Everyone knows of his right to social security and unemployment insurance; few are equally impassioned about the duty to vote or serve on juries. Employees know of their right to strike, their right to organize, their right to vacations; few are as alert with regard to their duty to give their employers an honest day's work. Even children know their rights against their parents; few are as keen about the measure of their obligation under the fifth commandment of the Decalogue.

It is, therefore, refreshing to ponder a legal system whose key word is obligation rather than privilege. Needless to say, right and duty are correlatives. Whenever anyone is under a duty, someone else has a right to the performance of the duty, and vice versa. However, the question is, where do we place the emphasis? In Jewish law, the emphasis is on the duty, and a social order that stresses duty rather than right will inevitably—by the very nature of duty—cause people to be less self-centered and more mindful of the "thou's" in society than of the "I."

Yet in authentic, historic Judaism this result was achieved because Jewish jurisprudence was God-centered. Indeed one can hardly visualize the result being achieved in any other way. To goad one to the affirmation of one's rights and privileges, the self is adequate. After all, it is in the interest of self to do so. However, to goad one to the per-

formance of duty there must be something that transcends the self. If obedience to duty is only the fulfillment of a mandate of the self, it cannot enjoy more status, and command more respect, than insistence on one's rights.

Whether Kant's position on the moral autonomy of the self can be reconciled with Judaism is the theme of a recent study by Professor Emil Fackenheim.* But Professor Fackenheim himself in earlier studies** demonstrated that the very aggrandizement of the self in a humanistic ethic—in which the self is the final arbiter of right and wrong —destroys humility and sense of creatureliness that are basic in Judaism's order for man. A commitment to duty can hardly thrive in any other setting. Either state, society, mankind — anything other than self—can provide the basis on which we posit obedience to duty as the higher good. Yet it was the unique characteristic of Jewish law that it did not deify state, society or mankind. States can be tyrannical; majorities of men can give sanction to Hitlerism. In Judaism what was right was "the will of God," as Carl Friedrich expressed it. One's duty to do the right transcended not only one's self-interest but also the mandates of multitudes with superior power. However, once duty is man-made, in a completely secularized jurisprudence, Jewish law will have forfeited its special genius and its claim to be resurrected since it can no longer yield what once made it a boon.

V

Yet even if the renaissance of Jewish law were to be accomplished, as Professor Silberg earnestly wishes it to be, he realizes how numerous are the halakhic views on almost every issue. One can find authorities for almost every conceivable alternative with respect to every question. The legal literature is vast and it comes from almost every part of the globe. According to Professor Silberg, it would be necessary for a democratically elected parliament to adopt codes, and select the rules it prefers. The parliament would not be bound by those canons for decision heretofore prevailing in the Halakhah. It would be the sense of justice of the legislators that would constitute the final authority. One cannot argue with Professor Silberg on this point. He is realistic. He knows Israel and he fully appreciates how impossible it will be to arrive at codification on any basis other than the sense of justice of the legislators. Some legislators might ask themselves, "What is the will of God in the instant situation?" The majority, however, are secular humanists. Yet, why should the latter, proceeding from their purely secular premises, not prefer to start *de novo*, and instead of choosing from among the precedents of Jewish law, make the legal systems of the entire world their hunting ground and choose from the infinite variety of rules available that

* "Kant and Judaism", *Commentary*, Dec. 1963, (pp. 160-7).

** See e.g., "Self-realization and the Search for God", *Judaism*, Vol. 1, No. 4, (1952), pp. 291-306).

rule which their sense of justice deems best? Indeed, there are Israelis who feel just this way about it. To counter this argument one appeals to Jewish nationalistic sentiments. However, it would be most unjust to permit such sentiments to block the adoption of the rule regarded as most just, even if its source is non-Jewish.

And here again, one must look to Judaism as a religion for the ultimate validity of any claim that Israel ought use the Halakhah for her basic jurisprudence. It is because God willed this law for His people that we adhere to it. Because He willed that we develop its insights and perfect its justice, we have never failed to study it. Jews have differed among themselves—the precedents and their differences are legion. But all authorities were motivated by the divine mandate—to heed His will. Eliminate theocentricity and all appeals for the revival of Jewish law must be without heart.

VI

Perhaps Professor Silberg's readiness to eliminate theocentricity is due to something more than a realistic awareness of the impossibility of winning acceptance for it in our day. Perhaps he is not really convinced that it is precisely theocentricity that is the most important cause for any special greatness that the Halakhah enjoys. True, the integration of divine and positive law in talmudic literature is achieved. But does the divine law give the positive law that which it would not otherwise have? Does Judaism as a religion make the ethics and the equity of Jewish civil and criminal law superior? This question is addressed particularly to the sixth and seventh chapters of his book.

For example, he develops at great length the contrast between Jewish law and Anglo-American common law with regard to the unenforceability of illegal promises. Anglo-American law usually leaves the parties where it finds them, and the courts will offer no relief whatever. Thus it might sometimes be that the wrongdoer will even enjoy the fruits of his illegal act because he is in possession of the fruit. Jewish law, on the other hand, will occasionally help the disadvantaged to retrieve a loss. The debtor who paid usury may be able to recover what was unlawfully exacted from him.

However, his generalizations are faulty. Even in the case of usury, not all types are recoverable by the debtor. Furthermore, in the case of overcharging by a vendor, Jewish law imputes a waiver or forfeiture when the overcharging is less than a sixth, even though the seller deliberately contrived to keep the overcharge within that limitation in order that he might profit by the forfeiture. And if *Chazakah* (the right of the defendant to hold on to what he has until the plaintiff demonstrates a superior right) is the principal rule in Anglo-American cases involving illegal contracts, it certainly plays no less central a role in Jewish law.

However, one of the greatest characteristics of the Halakhah is its emphasis on substantive justice rather than procedural regularity.

This is why equity and strict law were never isolated from each other in separate courts or separate systems. This is also why very few talmudic folios deal with forms of action, pleadings, judgments or executions. And since it is procedure or adjective law that usually deters judges from dealing with a cause as a *gestalt* and hampers the generally just adjudication of an entire controversy, Jewish judges were the better able to get to the essence of the parties' rights and duties and do what justice required. Yet, to delegate such broad power to the judges one must be certain of their integrity and commitment to justice. Unlike the guardians in Plato's *Republic* they are not to rely upon mystical illumination alone. They are bound by precedents and rules. Veer they must between the recorded heritage of their forbears and their own overpowering sense of justice. Judges were expected to be both saints and scholars. Their awareness of God and their continuing encounter with Him in the judicial process was the glory of Jewish law. But their training was more than the training of scholars. It was a religious calling involving the fulfillment of a role delegated by Him. All of this must, of necessity, vanish when judges are men whose sole guide is the concept of justice prevalent in their society with no link with the Infinite and His will with respect to the issue or cause at hand. The values implicit in social studies become the ultimate.

One knows that Professor Silberg personally does not share this view. Why then should he not be impolitic — if to be impolitic is necessary — and argue without equivocation for that theocentricity without which the flower that we do have must wither and become only a relic of a glorious past!

VII

To continue the dialogue between Professor Silberg and those who are in agreement with him, this reviewer must also discuss several specific items as well as the general thesis.

1. Professor Silberg argues that Jewish law in many instances fixes rigid standards. Perhaps as he suggests, Jewish law was meant principally to be a guide for the layman who must be told precisely at what point the lawful becomes unlawful. However, other legal systems are equally rigid at times, while in some situations broader and more flexible criteria are available to the judge for his decision.

According to American law, for example, a mortgage is in default the day after payment is due, no matter what excuse the mortgagor can offer for his failure to pay. This is also true of the period of grace allowed for the remitting of premiums on insurance policies. Similarly, the day for reaching one's majority is fixed. Biological, emotional, and intellectual maturity at an earlier or later date is immaterial.

Yet standards of care in bailments are very variable—according to the views of judges and jurors. And this is also true of Jewish law. Local customs and mores always affect the terms of contracts in all systems of law,

Jewish law not excluded. Therefore, one wonders whether Professor Silberg is not generalizing too much from too few particulars when he posits uniqueness in Jewish law in connection with the rigidity of its standards.

2. Yet, nowhere is the Halakhah's rigidity more apparent than in connection with its rule of proximate cause in tort. Consequently the Halakhah modified its own original position, and its strict rules with regard to *Gerama* became more viable with the more liberal rules of *Garmi*. To fathom the distinction still baffles analysts of Halakhah, but whatever the distinction, the resultant liberalization of the rules is apparent.

But there the rigid standard was for judges — not laymen. Thus there was a rigidity which Professor Silberg cannot explain by reference to the Halakhah's orientation toward laymen. Similarly there was rigidity in connection with the impeachment of witnesses which was exclusively a phase of the judicial process and again not lay-oriented.

3. In Chapter 2 of his book he also argues that the talmudic dialectic frequently results in what is virtually a re-writing of the rules contained in the Mishnah and sometimes the result is even the opposite of that which is the obvious meaning of the text under discussion. This may be true but his illustration is not a happy one. It would appear that several of the paragraphs of the first chapter of the Mishnah known as Bava Kamma (on the second of which Professor Silberg bases his discussion) were only mnemonics for fuller versions in the *Tosefta*. This is especially true of the paragraph following the one cited by Professor Silberg. Therefore, it would appear that the second Mishnah which he cites may represent only subject-headings incorporating by reference the full texts of the relevant paragraphs in the *Tosefta* and not a contradiction of them as Professor Silberg suggests.

4. The Talmud does use extreme and sometimes seemingly farfetched illustrations to vivify and verify its analysis of a rule as Professor Silberg suggests. However, one of its glories is that the legal analysis in terms of such applications often permits the emergence of a moral value or ethical insight. One such illustration is to be found in *Kiddushin* (7a). The Talmud poses this hypothetical question: "What if a man, using the correct form in every other respect should nonetheless say that he weds only half of a woman?" If the law of sales is applicable, one can acquire half ownership of a thing. If, however, the law of consecrated things applies, then if one consecrates half of an object, the whole of it becomes holy and is subject to all the relevant prohibitions. And which rule shall be employed in the case of the betrothal of part of a woman? The initial impulse of any modern would be to say that in the interest of womanly dignity one should avoid the concept of sale wherever possible and resort to the other more refined analogy of consecration. Our sages, however, ruled otherwise — and precisely out of respect for the

ethical value of consent. Their decision was that the rules of sale would apply. Precisely because they respected the rights of women, they said that when the woman has consented to only partial betrothal, one dare not—without her express will—impute any more than that to her. Her consent must be real, not constructive. Therefore, having consented to only half marriage, we cannot automatically regard her as wholly wedded. However, since there can be no partial sale of a thing which cannot be shared by partners, and we know that two men cannot share the same woman, there can therefore be no partial betrothal at all and the whole act of the husband is null. Thus by the mundane-sounding law of sale, rather than the lofty-sounding law of consecrated things, a further safeguard was built around the woman's unequivocal consent.

Thus the use of palpably farfetched illustrations may also be for didactic purposes rather than only for clarification of the legal concept or its practical application.

5. The Halakhah countenances its own subversion — argues Professor Silberg. His third chapter is a fascinating account of the instances available. However, all of them involve the subversion of one halakhic norm to a superior halakhic norm. One may subvert the law of heave-offerings in order to feed the hungry in a famine. And one may subvert the law of the second tithe since, as the Talmud itself suggests, there is neither gain nor loss to anyone by the subversion. In the final analysis it is the owner of the produce who retains everything. However, by granting him some leniency in the observance of the law he may be encouraged to observe its more important aspects and take the proceeds of the redeemed tithe to Jerusalem. As this writer elsewhere* describes it, this was the Torah's earliest promotion of tourism and pilgrimages to the holy city.

6. Alas, Hillel's subversion of the law which cancelled debts in the Sabbatical year continues to be misunderstood. Hillel's ordaining of *Pruzbul* was not to subvert the law. The Sanhedrin had the power to suspend the law altogether by the exercise of their prerogative of *Hefker Beit-Din Hefker.* They could do this even if the law was biblical and not only rabbinic. However, they wanted to avoid the suspension of the biblical law in the hope that one day Jews would once again observe it. They hoped that creditors would one day be more generous. Therefore, they created a form which kept alive the memory of the biblical rule. This was the function of the *Pruzbul,* not subversion but commemoration.

7. Professor Silberg recognizes that God too is subject to the Halakhah, and especially His assets in the sanctuary—consecrated things. Yet from many rules of tort and contract they are excepted. The rationale of the exceptions he does not consider. This is a serious omission. If there is no rationale,

* *R.C.A. Sermon Manual,* (New York: R.C.A. Press) 1961, pp. 172-5.

and the exceptions are dogmatic as based on biblical verses or traditions, then secular humanists will not respect a system of law which uses reason and experience to validate legal rules applicable to humans and dogmatism *vis-a-vis* consecrated things. If, however, there is a rationale to the exceptions, it should be set forth in a book which starts with a panegyric on the universal application of the rules to God and man.

VIII

All lovers of Jewish law are in Professor Silberg's debt. He has at least written—with heart and mind — a stimulating volume. Perhaps more lovers of Halakhah will emulate him and write for the greater glory of Torah and Israel. Perhaps too a special journal will yet emerge for the articulation and development of halakhic norms for the enrichment and edification of world thought. Such a journal was already projected by an editor of TRADITION a few years ago. Rabbi Joseph B. Soloveitchik also proposed that a series of such studies be undertaken jointly by the Rabbinical Council of America and Yeshiva University. The time may be ripe for the venture. Professors of Hebrew University and Yeshiva University should join hands across the sea and in Hebrew and English — with halakhic and universally accepted juridic terms— make the world take note of a legal heritage which is perhaps its greatest.