REVIEW ARTICLE:

Lawrence A. Kobrin

Ever since the establishment of the State of Israel in 1948, thoughtful Jews have been concerned about the un-Jewish nature and sources of the law prevailing in the Jewish State. Had not the Prophets promised that with the return of Israel to its homeland, Jewish law and justice would again return to its ancient eminence? Yet the problems are complex and intricate. They are here discussed as part of a review by Lawrence A. Kobrin, editorial assistant of TRADITION. Mr. Kobrin is a practicing attorney, an alumnus of the Day School movement, and a graduate of Columbia University Law School.

THE RETURN OF HALAKHAH TO ITS HOMELAND

The Draft Constitution of the State of Israel contained at least a tentative statement of goals and ideals for the new, young State. One of these referred most hopefully to a subject which has since caused some controversy: the use of traditional Jewish law, or Hallakhah, in the juridicial framework of the State. The Draft Constitution has remained only a "draft" and has never been adopted. The hope for a return to the use of practical Halakhah has not been filled to any great extent to date. Nevertheless, the dispute and debate over the possibilities inherent in Halakhah, not only its ritual or personal aspects, but its commercial and public aspects as well, has continued in one form or another down to the present.

Since the publication of Rabbi Emanuel Rackman's *Israel's Emerging Constitution* in 1955, however, the English reading public has been forced to resort to journalistic reports of developments in Israeli law, none of them wholly complete or satisfactory. Unfortunately, this has obscured the possibilities of the use of Halakhah in a modern judicial system, such as that represented by the State of Israel. Such a development has, for the most part, remained ignored and its potentialities overlooked.

The Return of Halakhah to Its Homeland

The author of *The Case for Jewish Civil Law in the Jewish State** is exceptionally well equipped to advocate, before the English reading public, the incorporation into Israeli law of those portions of the Halakhah which he terms "Jewish civil law." Rabbi Kahana brings to bear not only a thorough grounding in Jewish law but also a scholarly acquaintance with the principles and institutions of common law and civil law. A reading of his more scholarly work, *Three Great Systems of Jurisprudence* (London: Stevens & Sons, 1955), provides an excellent background for the present volume which is a more popular presentation — and a most welcome one.

The title of Rabbi Kahana's book is a succinct summary of his thesis. He urges the use by the State of Israel of "Jewish civil law" for the present and future jurisprudential and legislative needs of the State. "Jewish civil law" is used to refer to those areas of the Halakhah which could be termed "non-ritual," including *dinei mamonot* (commercial law), *dinei nezikin* (tort law), and their related areas. Rabbi Kahana includes, in addition to a general statement of his argument, several illustrations of the potential sufficiency of halakhic literature and sources to satisfy the demands made by the modern judicial system.

The author bases his argument on a summary outline of the history and sources of the Halakhah. In so doing, he pays particular attention to the *mishpat*, or civil law. Drawing on his vast knowledge of contemporary and recent legal history and philosophy, he argues that the underlying concepts of Jewish law are consistent with, or superior to, the "best" of modern jurisprudence. He argues further that some of the flaws which have crept into the system of jurisprudence upon which most Western communities rest have never been present in the Halakhah. Unfortunately, the brevity of his discussion in this vein tends to cast an *a priori* aura on his argument. Thus, for instance, he assumes without further demonstration or discussion that an eclectic system of law is necessarily inferior to one developed earlier in time and more integrated in nature.

The all too short final section of the book is devoted to some concrete examples of the utility and superiority of the Halakhah. Pointing specifically to such matters as the separate competence of different courts, enslavement for debt, the concept of leasehold interest, and procedural development, Rabbi Kahana aims to convince his reader of the general superiority of the Halakhah as well as of its contemporary utility.

The ideas and hopes expressed by Rabbi Kahana are hardly new; in fact, they antedate the establishment of the State itself by many years. The late Chief Rabbi Herzog's monumental work on *The Main Institutions in Jewish Law* was a step in casting halakhic principles

**The Case for Jewish Civil Law in the Jewish State,* by Rabbi K. Kahana (London: Soncino Press, 1960).

into the format required by contemporary judicial systems. As noted, the Draft Constitution of the State of Israel — never adopted — included a paragraph to the effect that

> The law of the State shall be grounded on the basic principles of Hebrew law and these principles shall guide the courts when they must fill gaps in the statutory law.

At a later date, the Government's Justice Ministry joint project with Harvard Law School made extensive use of halakhic materials in the study of proposed or projected legislation.

Others have argued the same question in the intervening years in such places as the Knesset itself, special publications of the Jewish Agency, scholarly journals, and in an issue of TRADITION. To some degree, however, the arguments have lost something of their fervor and enthusiasm. Perhaps this is a result of the realization that the adoption of Halakhah is a long and tedious process and not an overnight affair or, more realistically, a diminished appreciation and understanding of the entire issue, even by the religious community.

It is for this reason that Rabbi Kahana's book is both timely and significant. But while he deals effectively — even within the confines of a relatively short book — with the "what" and "why," he gives no clue as to the resolution of the "how," that is, the manner in which the goal is to be achieved. In the delicate area of religious law, however, the "how" is a most significant element. Much of the opposition to further religious influence in the affairs of Israel centers about the methods by which such influence would make itself felt and translated into actual practice.

The exclusion of such a discussion is understandable, for the intricacies of technical legislative and judicial process are hardly popular subjects. Nonetheless, some "popular" appreciation of the legal process involved is necessary if we are ever to come to grips with the real questions of state practice.

The use of a set of rules or a portion of a legal system of one juridical entity by another is usually considered under the heading of "reception." Reception statutes are the legislative response to the vacuum left by every creation of a new legal-governmental entity. A new sovereign, until it has found opportunity to speak on every subject, gives no guidance to its courts and to its citizens engaged in commerce and affairs. In addition, a new government generally comes upon a scene where relationships have been created and affairs conducted for some time on the basis of certain accepted rules of the law. In such a situation, some sort of "reception" of the rules of law previously in effect in the area concerned, or of the laws of some known and recognized body, is essential to prevent judicial chaos. Thus, it was a reception of certain of the rules of law of the British Mandatory authority which was the first act of Israel's Provisional Government.

Some form of juridicial reception would presumably be the technique by which Halakhah might be introduced into the legal system of Israel, as Rabbi Kahana urges. Several routes are possible. These include the general reception statute, just mentioned, a general absorption, and the adherence to certain "principles" of the Halakah by the judical and legislative authorities.

Absorption is that type of activity represented by the joint Israeli Justice Ministry and Harvard Law School series of studies. There, juridical principles of general application in connection with proposed laws are analyzed. In the course of such analysis, traditional halakhic views are researched, the traditional views evaluated sympathetically alongside other possible legal procedures, and a recommendation is made based on all of the factors presented. Frequently, a specific device or legislative technique of the Halakhah may be adopted. Moreover, the general policy of the Halakhah may be promoted even though its actual techniques are thought to require modification.

In this connection, it is interesting to note that one of the features of Israeli legislation connected with the rules of property succession which has caused considerable comment and interest among non-Jewsh students, is the device of "maintenance." This procedure is designed to supplant the now inadequate common law protection of widows called dower. Under the new device, the surviving widow and orphans are given "maintenance" support from the assets of the estate, regardless of the will of the deceased. This procedure, considered quite a "step forward" by students in the field, is little more than a reapplication of the Mishnaic arrangement for the support of the widow from the assets of the estate (see *Ketubot* 11:1).

The second possibility, a general "reception statute," has already been utilized in the area of marriage and divorce and personal status within Israel. The Rabbinical Courts Act served as a general reception act to transplant, in questions of marriage, divorce, and personal status, the body of Halakhah on these subjects into the law of the State. Within certain bounds and under certain procedural rules, the judges of the Rabbinical Courts are to apply the Halakhah appropriate to the case before them.

There is, of course, a difference between the initial reception statute of 1948 and that implied in the Rabbinical Courts Act. Only the latter is a "continuing" reception. In the case of the 1948 law, or the early laws of American colonies adopting English law, on which the 1948 law was modeled, only the body of law as it existed at the moment of the creation of the new state was to be thereafter considered. Thus, a decision of an English court in 1950 regarding a 1946 law which was in effect in Israel in 1948 could not have any binding effect on Israeli courts at any time after 1948. (This should be distinguished from the possible persuasive effect of such a decision in discussing an English statute or legal rule.)

In the case of a "continuing" re-

ception, however, the effect may be otherwise. The law to be applied —in this case, the Halakhah — is that which is current at the moment the decision is rendered by the Rabbinical Court. Presumably, a relevant *teshuvah* published just yesterday might be considered today by an Israeli Rabbinical Court.

To some degree, the "continuing" nature of such a reception procedure seems questionable to many in that they consider it "unclear" or "unsettled." Yet, such a continuing reception is not unique, nor should it be considered an "abdication" of judicial or legislative power. It is a frequent occurrence in many legal situations. In fact, the entire field of law known as "conflict of law" embodies what can be considered a "continuing" reception of non-local rules of law. Under accepted principles of law, a court in New York State may find itself required to apply the law of Saudi Arabia in ruling on a contract case brought before it. A divorce proceeding in the United States may require application of French, Swiss, or Mexican law. Or, settlement of affairs of a deceased property owner may require application of the laws of several separate nations and areas.

A third method by which the end sought by Rabbi Kahana can be achieved, at least in part, is adumbrated by the proviso of the Draft Constitution already mentioned. Under that proviso, the "principles" of Halakhah would be used to "guide the courts when they must fill gaps in the statutory law." This, too, is not a unique or unusual problem in jurisprudence.

No legislature or legislator, no matter how foresighted or how careful, can provide by statute for every possible case which may arise — and interstitial gaps are bound to arise in the enunciated rules of law. Judges must resort to some set of rules in order to apply existing law to the unprovided cases. A mature judicial system will contain such a set of procedural rules. Prior to that time, rules must be drawn from "outside" sources. To date, the sources to which Israeli judges have turned for such interpretative or policy guides have depended to some extent on the sources of their own training. Acceptance of Rabbi Kahana's program would turn them uniformly towards the Halakhah.

Rabbi Kahana's presentation falls short in that it does not explain just which of these methods, or combination of them, he would use. He offers only some description of the existing situation, although to say that "Israel has no legal system" (p. 111) seems a bit harsh and exaggerated. There is an outline of the goal — but no description of the means which are to be used to attain that goal. In short, we are left wondering "how." The lack of such a description makes it difficult to evaluate either its effectiveness or acceptibility in present-day Israel.

As a matter of fact, several obstacles are immediately apparent. An essential prerequisite for any of the known methods of accommodating a new legal system is the presence of legal personnel, both bench and bar, sufficiently trained in the principles and methods of

the legal system to be accepted. Not even the most optimistic view of the attitudes of the Israeli bench and bar towards halakhic principles can attribute to them qualification as professionals in Halakhah.

Equally unavailable, and no less important, are the varied and accepted legal materials in the format necessary for use in a modern juridprudential system. A work such as the *Encyclopedia Talmudit* is obviously a considerable step in the right direction, but the complexities of modern jurisprudential activity demand that principles under consideration be the subject of separate studies, treatises, extensively reported and printed cases, indices, digests, cross reference and re-index works, and summaries. Given a judiciary or bar not steeped in halakhic study, a far more massive output is required.

There is a third obstacle, namely, the attitude of a large sector of the Israeli public towards anything to do with religion, religious law, or functionaries. Against such a background, it is most unlikely that either a reception statute — of any type — or a basic policy declaration looking to Halakhah as a source of "principles" would be acceptable to the whole of the Israeli public, not to speak of a large portion of its bench and bar. (One must not overlook the constructive contribution of certain members of the Israeli judiciary who do look to Halakhah where the occasion allows. Their effort in this area is necessarily a limited one and is ultimately submerged in the general non-halakhic trend of jurisprudence. Even so, a more widespread professional and public awareness of those efforts which have been made might have a salutary effect on the respect for Halakhah in general, quite apart from the question of Israeli adoption.)

In this light, the method by which halakhic procedures might be used in a modern framework of jurisprudence, as given by Rabbi Kahana, is too brief for either the lay reader or the specialist. Far more elaborate public discussion of both the general question of policy and the specific matter of methodology is needed, and should not be delayed. It is true that political realities may make the case for Jewish civil law one of *tafasta merubah lo tafasta* — overambitiousness leading to failure. This should not close the subject, however, since several avenues of preliminary education of the public for the use and acceptance of Halakhah, in the "civil" sense, remain open.

The type of scholarly activity that has been conducted on a limited basis should be expanded and continued. There is the need for the publication of this research. This publicity must be aimed at the Israeli and non-Israeli Jewish public in an effort to acquaint them with the desirability — and, even more, the utility — of this frame of reference. Such publicity will eventually result in greater understanding and acceptance of the principles of Jewish law, a "by-product" that may be as important as the "product" itself.

Publication will serve as a means of publicity, but it will also do more. It will enable Halakaha to stand in readiness for those judicial and legislative authorities ready to study or to use it. It will serve as an answer to the criticism, often made even within the religious "camp" itself, that Jewish religious authorities have done nothing to meet the challenge of the legal needs of the modern state.

Widespread preparation, publication, and publicity may lead the reinstitution of resort to a *din Torah* — a judicial halakhic decision on a non-ritual matter — in the business life and organization and relations within the Jewish community, outside of Israel as well. The values of Halakhah are pertinent wherever Jews are, and wherever a free and organized Jewish communal life exists. Modern legal systems in the Western world encourage the use of extra-judicial arbitration for the settlement of disputes, and a *din Torah* can, through the arbitration statutes, be given the enforceability of a decree of the highest court of the land. Not every Jewish businessman would be willing to incorporate a *din Torah* provision into his business relations or contracts; those who did would get some greater part of the feeling of Torah as a way of life. Such increased presence of Torah in the lives of more people could lead to an increased awareness of the values that Torah has to offer in all spheres of life.

Such a world-wide program may be even less realistic than that which Rabbi Kahana confines to Israel. But the effort must start somewhere, and present day political exigencies and social considerations may make it impossible for that place to be only the State of Israel. The first response to Rabbi Kahana's "case" for Jewish civil law may be a request for further "pleading" of that "case" in non-Israeli free Jewish communities and in non-governmental institutions within Israel.

Such efforts, too, may remedy the unfortunate aspect of Rabbi Kahana's book which, driven by its own conciseness and brevity to *a priori* and unconvincing positions, often serves to raise more problems than it solves. Merely to state that the halakhic "enactment" (*takkanah*) provides for legal development does not solve the question of the radical demands made on the Halakhah by modern society. Similarly, the imposition of enslavement for debt or capital punishment for minor property offenses can scarcely serve as an indictment of any of the legal systems of the Western world. Finally, while the jubilee year may approximate a lease arrangement, it does not per se indicate that the Halakhah is already capable of coping with such modern refinements as net leases, subordinate interests, trusteeships, or property syndication investments.

Perhaps these are some of the matters which Rabbi Kahana has promised us for the future by indicating that his present work is only the introduction to a fuller treatment. The public, both lay and specialist, eagerly awaits this larger

work which will more convincingly advance the cause of the acceptance of the Halakhah in the State of Israel — a sort of return of the native son to its homeland.