

BOOK REVIEWS

***The Theory of Marriage in Jewish Law*, by RABBI K. KAHANA
(Leiden: E J. Brill, 1966).**

Reviewed by Meyer Kramer

After reading the first chapter of *The Theory of Marriage in Jewish Law*, entitled "Comparative Approach," in which Rabbi K. Kahana contrasts the English common law and attitudes towards marriage with the more progressive Jewish views, this reviewer was not prepared mentally for the *Chiddushei Torah* in the traditional vein which comprise the remaining three-quarters of this volume. Ostensibly, the book was written to set the record straight for those writers on Jewish law who "have been led to believe that the institution of marriage was similar to that of the acquisition of property . . . and that the husband acquires through marriage, the ownership of a wife in the same way as a man acquires the ownerday (*sic*) of property" (p. 26). Rabbi Kahana supplies ample proof that while the Talmud uses the word *kinyan*, acquisition, in referring to the contract of marriage, and although the same terms

and rules at times come into play in connection with marriage and slavery, there are some very basic differences between the transfer of property and the creation of a marriage and that a wife does not become the possession of a man the way property does. Using the Talmud and ancient and recent commentaries he elucidates that in Jewish law, marriage is not an acquisition, nor a contract, nor even a sacrament, but a status, a *davar she'be'erva*. "The husband's 'Ba'aluth' (Ownership) does not exist over the person of the woman but over her 'Ishuth' (Wifehood). This has been created and is implicit in her status of 'Married woman,' a status in which she is denied to anyone else and allowed only to him" (p. 90).

Unfortunately, granting the validity of Rabbi Kahana's observations and differentiations, his approach is not very likely to convince those unidentified writers to whom he addresses himself of the errors of their conclusions. If, as

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this reviewer suspects, these are men who espouse an evolutionary theory of social institutions, they see in the employment of common rules for marriage and divorce and for the procurement and liberation of slaves, and in the utilization of a property term like *kinyan*, acquisition, for marriage, proof that the "acquisition" of a wife in marriage once was very much akin to the purchase of a slave or a chattel. (See *The Spirit of Jewish Law*, by George Horowitz, 140, p. 253, N. Y. 1953.) However erroneous their hypothesis, it cannot be rebutted by showing that in the 19th, the 12th or even the 2nd century of the Common Era, the Rabbis subscribed to a "status" conception of marriage.

Furthermore, the entire discussion suffers from the usual weakness of *pilpul* — that account is taken only of facts which fit the answer, and those that do not are simply disregarded. One instance of this methodology should suffice:

In Tractate Gittin, p. 82, the Rabbanan say that if a husband hands a *get*, a bill of divorcement, to his wife with the statement "You are now free to marry anyone except X," the divorce is invalid. On its face, this result would indicate that should the husband die immediately afterwards, the Biblical injunction forbidding a Cohen to marry a divorcee should not apply. The Talmud states otherwise. Since the verse in Leviticus 21:7 reads: "A woman divorced from her husband they shall not take," the words "from her husband" are redundant and signify that a woman whose husband divorced her from himself

alone and prohibited her to the rest of the world may not marry a Cohen. Since an element of divorce has appeared, though the *get* is invalid, the wife is considered divorced as far as the priesthood is concerned.

The Palestinian Talmud, according to Rabbi Kahana, disagrees and permits the widow whose husband had freed her to remarry all but X, to wed a Cohen. An identical opinion is espoused by Rabban Hananel, and Maimonides considers this to be the Biblical view. Rabbi Kahana justifies the Palestinian Talmud on the basis that marriage is a status which is either completely present or completely absent. One is either married or divorced, a *davar she'be'ervah* or not. This is a reasonable interpretation and comports with the theory of marriage that Rabbi Kahana espouses. The only trouble is that the Babylonian Talmud reaches a different conclusion as to the law. What is its theory of marriage? Rabbi Kahana passes over that problem. Those who are aware of the way *chiddushim* are developed and *shiurim* in Yeshivot given will not be surprised at his silence. But a reader who is not familiar with this approach will hesitate and wonder whether a theory which is justified by one authority and apparently contradicted by another has been established beyond doubt.

Actually, while there always exists a tremendous conceptual temptation to develop a single, unified explanation for a multitude of data, the scholastic preference for the law of parsimony does not necessarily correspond to social real-

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ity. Marriage involves so many facets that one theory may well prove inadequate to account for all its ramifications. Since marriage leads to some basic economic rights and duties, why shouldn't that fact be indicated in the way the relationship is established? At the same time, if marriage serves to set apart two people for a specific, holy purpose, why not relate it to *Hekdesh*, mortmain? A realistic view of what wedlock entails could accept without qualm as reflections of economic significance the language of *kinyan* and the similarity of some of the marriage rules to those governing the purchase of the chief source of extra-familial labor in Rabbinic times, slaves.

Indeed, overemphasis on the "status," the *davar she'be'ervah*, aspect of marriage, may prove to be a backward step at a time when circumstances require that the Jewish law of marriage be as flexible as possible. The guideposts of Halakhah give the Rabbinat and the community considerably less control over matters of *ervah* than they do, say, over *davar she'be mamon*, fiscal details. The principle that he who weds does so

on condition that the Rabbis approve, (*Kol hamekadesh a'data derabannan mekadesh*) emphasizing the interest of the community in the marriage relationship, is the touchstone for whatever change Jewish law may be required to undergo in the future, and while it can be justified even under a "status" theory of marriage, its underlying assumptions and possible applications do carry overtones which challenge the explanation of marriage as an inflexible "status" of the *arayot* category.

All in all, "The Theory of Marriage in Jewish Law" is a most interesting venture in the presentation of detailed halakhic materials in English. One may wonder whether a book "written essentially for those who have some understanding of the Talmud's method of discussion and the manner in which its conclusions are reached" (the Preface), and which relies in such great measure upon the *acharonim*, would not have read better in Hebrew. However, it stands as a worthy addition to the effort of British Jewry to make the halakhic classics available to the world in English.

Storm the Gates of Jericho, by ABRAHAM L. FEINBERG (New York: Marzani & Munsell, 1954).

Reviewed by Hayim Donin

Storm the Gates of Jericho is the story of an obviously strong and forceful personality who has injected himself into the controversies of our era.

Dr. Feinberg is a rare master of

words and phrases. His prose is poetic. It is easy to see why, in an age when oratorical skill was the primary asset of a rabbi, he early in life landed one of the top Reform pulpits in New York. Yet since his book was intended for popular consumption, one ques-

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tions the author's tendency to use recondite words.

In his foreword Dr. Feinberg says that he "tried to ferret out and obliterate every trace of pulpit posture or pronouncements," but he did not try hard enough.

The real disappointment, however, has less to do with language or rambling format than with the picture of the fighting public figure that emerged.

Except for the chapter where Dr. Feinberg justifies his struggle to introduce some additional ritual into Holy Blossom Temple of Toronto by haranguing against all ritual that smacks of Orthodox piety, there is little in the writing that would indicate a religious spirit any different from that of any political or theoretical liberal of his day. One wonders whether the Prophets were as much the guiding light to his thinking as they were an effective tool to be used to advance the causes that moved him. By his own words: "To attract attention, I picked quarrels with people in the news. . . . On every occasion, I hurled the Hebrew prophets at the rich, the arrogant, the oppressive" (p. 202-3). "I was an angry young man" (p. 204), and ". . . my star had designated me a crusader for social righteousness!"

He quickly learned the art of getting publicity. "I would . . . phrase and re-phrase a spontaneous, impassioned press release on the Saturday sermon for the Sunday Times. . ." He mimeographed his controversial sermons in advance so that they could be easily available to the press. When he returned to the Rabbinate in 1935

after a five-year stint as a romantic tenor on radio and Broadway, he took a pulpit of which he said, "though its financial reward was 'peanuts,' the location was strategic, in mid-Manhattan, with immediate access to the public." He found "my work cut out for me" when his attention was drawn "to a rumor of counter-revolutionary rumblings in republican Spain and the cloak-and-dagger peregrinations of a Colonel Franco!" (p. 237).

There is constant allusion to all the great poets and philosophers from Plato to Santayana, who "had been [his] sustenance at the Seminary" (p. 197), and provided sources of inspiration and light.

It was Dean Inge, a Congregationalist minister, "whose profound and perceptive intellectual integrity . . . lifted my Seminary years above paradigms and pilpulism . . ." Was it then a Christian-inspired prejudice or only a Reform prejudice that Feinberg projects back into history when he explains the rise of Christianity by saying that ". . . some of the Jewish populace fretted under the rule of Torah. They sought a humanized faith that would inflame the heart and release the intellect."

It is a complex picture that emerges. The son of immigrant parents, Feinberg was the product of an Orthodox home and a small town, Christian environment. His Saturday job, his description of the juicy ham that led to the permanent downfall of his kashrut, his reverence for the figure of Jesus, are not the sort of youthful training and preparation one expects should render one fit for Jewish

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religious leadership.

If it is difficult to find much Jewish religious commitment, despite continued reference to the prophets, there is abundant evidence of deep feeling for Jews as a people which led him into the Reform rabbinate. As with many other American Jews, his Jewishness incorporates the vivid memories of taste and smell, of cooking and holiday warmth. A strong affection for the cultural background of his forbears is evident.

Feinberg's youthful experiences with anti-Semitism left their permanent mark. He became a bold and courageous, though sometimes also pugnacious, fighter against this dread disease. His sentimental adulation of the little *shtetl* whence his parents came is somewhat maudlin, yet perfectly sincere and moving in the light of the European holocaust. His chapter on the holocaust is, in fact, one of the most moving in the book.

His affectionate tribute to his mother who was a major force in his life is in sharp contrast to the hostility he harbored against his father in his earlier years. "A tragic little man with broken dreams," he calls him. This resentment was identified with, and transferred to, the Orthodox ritual piety and scrupulous observances of his father. And though in later years, his hostile feelings towards his father waned and he was moved to understanding, those against Orthodoxy continued unabated. He lashes out against the Orthodox Jews of Toronto with typical recourse to all the distortion, calumnies, and generalizations which if used by a

Gentile would mark him an anti-Semite and subject him to a firing line commandeered by Feinberg himself. Even the "accustomed bigotry of Christian fundamentalists" is less disturbing to him than the "Orthodox intolerance." Yet he sees no inconsistency when he condescendingly pontificates that "only a fragmentary segment of Jews hermetically sealed on an intellectual island in outer space would seriously claim Sinaitic revelation for the proscription of butter with meat" (p. 277). His reverence for Christian doctrines (even where he disagrees with them) and for those who hold them seems to be far greater than his respect for the creeds and practices to which his Orthodox brethren are committed. He harps at the bitter distortions of Judaism and its legalism reflected in Christian teaching, yet he does not refrain from equally carping comments about the traditions of Judaism in contemporary times.

On page 294, Feinberg writes: "I asked myself if Christian trust and love *had* to be indoctrinated by calumnies against Judaism . . ." Should he not also ask himself if Reform faith has to be advanced by calumnies against Orthodoxy? Although it is the Orthodox who are always accused of intolerance, the throwing of barbs has never been unilateral.

But even in the area of social justice, which is Feinberg's *métier*, is there a tinge of regret that "resolutions on social justice, fiery debate on labor rights, the ancient thunder of Hebrew prophecy unleashed by valiant voices . . . to which my nerves tingled as a fled-

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gling at rabbinical conventions" have given way to workshops on education, theology, Israel, counseling, etc. Not that rabbis from all the groups have renounced idealism. He acknowledges their having joined freedom rides, pushed for civil rights, joined ban-the-bomb demonstrations. "Yet the lightning is gone," he bemoans. But that is his opinion. The issues may have changed yet "fiery debate" is still forthcoming on issues like civil rights and Vietnam.

What I found however to be particularly disturbing was the admission that "the wonder and reverential awe he (Jesus) aroused in me years ago . . . are not extinguished" (p. 88). "He speaks to my heart as one who dared to love life with great tenderness . . . I call him brother . . . because I want to share his courage and compassion. The church has transcendentalized and monopolized him long enough" (p. 95). While he is aware that between the faiths "the differences are deep and unbridgeable" (p. 175) he seems to seek a way of redoing Christian doctrine so as to reduce the differences altogether. And even though the concept of the Chosen People and their mission was perhaps the principal doctrine retained by classical Reform Judaism to bolster its theology, Feinberg writes "I would surrender the self-cossetting image of Israel the Chosen People in the hope that Christendom might abjure the sanguinary symbolism of

the Cross. Since the singular role of Christianity in the Divine scheme has flowered from that of Judaism, their joint abdication could be guaranteed by Jewish initiative" (p. 184).

But are principles of faith proper subjects for bargaining? And if they are talked about as capable of being surrendered over the bargaining table, then they have already been surrendered, and there is no sense in the other party conceding anything.

When Feinberg writes that he does not officiate at an intermarriage without a prior conversion, *or at least a written pledge to rear and educate the children as members of the Jewish community*, and even that is dispensed with under "exigent and exceptional circumstances," he is saying in effect that he does preside over the marriage of a Jew to a non-Jew, though he may not do so often or as a matter of routine.

In discussing ritual, Feinberg makes a "modest" claim: "Is my voice, then, the voice of God? It is the voice of the Jewish people. Always and intuitively, my interest in a ceremony was aroused by the degree in which it incorporated tribal feeling, the folk sentiment . . . its intimacy with the underground reservoirs of Jewish experience . . ." (p. 277-8). On the basis of his own statements, there is serious question as to whether he is justified in making even that claim.

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Chayei Yisrael Hachadashim, by ELIYAHU SHEMUEL HARTOM
(Tel Aviv, Yavneh, 1966).

Reviewed by Louis Bernstein

The problem of co-existence in Israel between religious and non-religious sectors of the population has been the focus of much attention by Israel's outstanding minds. The gap between the observant and non-observant seems to be widening rather than narrowing as the young state matures. The differences between the groups color every aspect of Israeli life, seriously affecting governmental stability and even the economic life of the country.

There are extremists in both camps who feel that a total divorce between the two parties is the only viable solution for the serious problem. The more responsible elements, however, realize that such a step would have the gravest consequences for the state as well as for the Jewish people universally. They seek a *modus vivendi* which would permit both groups to live together by accentuating the common bonds that link Jews together, in sharp contrast to those who stress the divisive factors.

Professor Eliyahu Shemuel Hartom, of blessed memory, was squarely in the second camp. He was a great and devout scholar but almost completely unknown to his contemporaries in the world of Yeshivot. He lived in Italy and Israel until his death in 1965 at the age of 88. In his later years he divided his time between the Rab-

binical Seminary in Italy and Jerusalem. Professor Hartom, who emanated from the spiritual school of Shadal, wrote this book in Italian more than fifteen years ago and then translated it into Hebrew. For some unexplained reason its publication was delayed until the beginning of this year, but the issues raised are as timely now as they were during the State's infancy.

The author has excellent qualifications for tackling the delicate subject. Unlike many Orthodox rabbis in Israel who still regard the State of Israel with suspicion or cannot come to terms with its existence, Rabbi Hartom is totally committed to the State as the *atchalta degeulah* (beginning of the Redemption).

He is equally committed to the thesis that neither the Jewish State nor the Jewish people can exist without Torah. His interpretation of Torah in a broad sense might raise more than a critical eyebrow in some traditional circles. For Professor Hartom, Torah is not confined to the Oral Law and the *Shulchan Arukh*. It is the purpose of the Oral Law to expand upon and to apply principles enunciated in the Written Law. These processes of expansion and application are as legitimate today as in the days of the *Shulchan Arukh* and Jewish Law must be dynamic rather than static.

Hartom asserts that the Torah sets goals for Jews and directs man towards them. The details of the

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laws are relevant to the time they were written. "The direction and goal are eternal but the details of the laws are but examples for us from which we must learn how to walk in the path of the Torah in accordance with temporary conditions."

Hartom was apparently sensitive to being accused of having Reform tendencies. So he cites one concrete example which should clarify that what he is suggesting is exactly the opposite of Reform Judaism. He insists that the Sabbath must be observed according to Halakhah, all traffic should be barred on Sabbath in the Jewish State, but a code must be developed which would permit all policemen, religious and non-religious, to utilize vehicles in carrying out their duties. Hartom seeks to emphasize the unique aspects of Judaism and its laws both of which Reform Judaism has always sought to eliminate.

Rabbi Hartom maintains that Orthodox Jewry must assume the initiative to bridge the gap between the religious and secular sectors in Israel by presenting a system of law suitable for the modern State. This does not necessarily mean that all secular resistance to religion would evaporate. It would, however, eliminate the basic assertion that Jewish law is static and inapplicable in a modern state. The onus for the chasm would then be placed squarely on the shoulders of the secular community, particularly those concerned with the unity and destiny of the Jewish people and the State of Israel.

The author is a realist. He realizes the many obstacles in the

path of his goal. Rabbi Hartom pleads eloquently and simply for a legislative body to cope with the halakhic issues and to submit decisions. He was most certainly aware of the vast debates surrounding the issue of a Sanhedrin but simply avoids them by asserting that the State of Israel might betray its historic destiny and the cause of Torah suffer a most costly defeat if the status quo continues to paralyze religious legislation.

The book is short (146 small pages excluding a bibliography) but is beautifully written in a simple Hebrew. The author's belief in his thesis overwhelms the reader on almost every page. The ideas are systematically presented. It is also a unique book because although it is written by an Orthodox Rabbi advancing the idea of a Torah state in Israel, there is practically no reference to the Talmud or Midrash. It is, however, built on a thorough and critical knowledge of the Bible. In its own way, the book is an appeal for use of the Written Law as the foundation of future Halakhah, although Hartom is careful to insist that the entire tradition of Oral Law must be considered.

"Chayei Yisrael Hachadashim" is a vitally needed and timely contribution. It is in effect a plea for Orthodoxy to meet the challenge of the twentieth century. It is a reflection of the concept of two Judaismisms, religious and non-religious. It is an affirmation of faith in the oneness of our people, the divine nature of the State of Israel, and the vitality of Torah. It deserves the serious consideration of Ortho-

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dox thinkers for it dares to say
what many are still afraid to think.

REVIEWERS IN THIS ISSUE

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