

# RABBI ELIEZER BERKOVITS'S HALAKIC VISION FOR THE MODERN AGE

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## ABSTRACT

How is Jewish law supposed to respond to the incredible changes that have taken place in modern times, most important of which are the expanded role of women in society and the creation of the State of Israel? For Eliezer Berkovits, these changes require a different approach to halakah than is currently seen, yet this approach should not be seen as any sort of “reform,” but rather a return to original halakic values that due to historical circumstances were not able to be brought to fruition until modern times. Sharply delineating his approach from traditionalist Orthodoxy on the one hand, and the Conservative view of halakah on the other, Berkovits offers a dynamic approach to halakah that seeks to return the halakic process to the precodification era.

Rabbi Eliezer Berkovits is a figure who provokes diverse reactions.<sup>1</sup> This is especially the case when it comes to his halakic writings. Some advocates see them as the way to a dynamic halakah. On the other hand, his approach has been strongly criticized by those who see it as little different than Conservative Judaism. Much like his teacher, R. Jehiel Jacob Weinberg, who never really found his place after World War II, so too Berkovits, because of his unique halakic vision, was destined to remain isolated from many of his Orthodox colleagues.

Eliezer Berkovits was born in 1908 in Nagyvarad, Hungary. He studied in his youth with Rabbi Akiva Glasner, from whom he later received semikhah.<sup>2</sup> Glasner's more famous father, R. Moses Samuel Glasner, known as the *Dor Revi'I*,<sup>3</sup> had a novel approach to halakah, and, in particular, the oral law. Presumably, some of the elder Glasner's ideas were carried forward by his son, although it is impossible to say if this influenced Berkovits, since he never mentions Glasner in his writings.

Berkovits then traveled to Frankfurt for both yeshiva and university study, following which he enrolled at the Berlin Rabbinical Seminary. This was not uncommon, and there were many students from Hungary and Eastern Europe who were interested in studying at the Seminary. However, in order to be admitted to the Seminary, one had to earn the equivalent of a

high school diploma. For some, this posed a problem because they had no secular education. Berkovits did not face this difficulty, and, at the same time that he was at the Seminary, he was also studying philosophy at the University of Berlin, culminating in a 1933 dissertation on “Hume und der Deismus.”

Central to Berkovits's intellectual development was the close relationship he had with his teacher at the Seminary, Rabbi Jehiel Jacob Weinberg. The late Rabbi Joseph Apfel, a classmate of Berkovits at the Seminary, commented to me that Weinberg's *shiur* often became a back and forth between Berkovits and Weinberg while the rest struggled to keep up. Writing to Weinberg, Berkovits showed how much he owed his teacher by noting that “virtually all of my Torah is from you.”<sup>14</sup> I think it is fair to say that Weinberg regarded Berkovits as the greatest talmudic scholar produced by the Seminary during his tenure.

There are two major areas Berkovits is known for. One is the realm of ideas, in particular his post-Holocaust theology. In this area, Berkovits has had international influence for which he is often quoted. The other field, which was more controversial and also not as successful, is that of halakah. Berkovits charted what many would regard as a new halakic course, although he saw himself as following in the path of the talmudic Sages. Both Weinberg and R. David Zvi Hoffmann, who had earlier served as rector of the Seminary, looked at halakah historically, yet when it came to practical halakic decision making they were careful not to historicize Jewish law. On the other hand, Berkovits, a philosopher of halakah, not a historian, was prepared to take the extra step and formulate new halakic approaches based on recent historical developments.

Berkovits's entire halakic philosophy can be seen as an attempt to make halakah relevant to Jewish society in modern times. He was convinced that all modern problems have halakic solutions. Since halakah must confront all new situations that arise, its responses will by definition also be new.

Until the late 1950s, when Berkovits came to Chicago, his views on matters of halakah were not widely known, although there is no doubt that they were already developed in his own mind. He was hired to teach Jewish philosophy at the Hebrew Theological College (HTC) in Chicago. He was not asked to teach Talmud and halakah, although he certainly would have liked to do so. The administration reserved these slots for the traditional Lithuanian talmudists, of whom there were always leading scholars at HTC.

Although Berkovits wasn't teaching Talmud and halakah, he still involved himself in these areas, and some of his ideas were quite radical for the time. He was speaking about changes in halakah to get halakah mov-

ing again instead of having it be frozen. This is the sort of language that for many raised the specter of Conservative Judaism. Berkovits was not yet publishing on these topics in a scholarly way—this would come in the 1970s—but he was writing in newspapers and giving interviews.

One of the senior rabbis in Chicago who read an article by Berkovits was troubled by what he said about the halakic process. The rabbi wrote to Weinberg, wondering if should sever his relationship with HTC on account of Berkovits's employment there. Unfortunately, in the surviving copy of Weinberg's reply the top line is cut off, so we can't identify the recipient, although I suspect that it was the noted Chicago rabbi Ephraim Epstein.

When I published Weinberg's reply, I called my essay "R. Jehiel Jacob Weinberg on the Limits of Halakic Development,"<sup>5</sup> because that was really the issue with which Berkovits and Weinberg were dealing. Weinberg informed his correspondent that he had been assured by Berkovits that the objectionable article was not recent, and that in the meantime he had written against non-Orthodox philosophies and that he was committed to the fight for traditional Judaism. In Weinberg's words, "I understood from his letter that he is embarrassed by this article and wants to forget it."

Weinberg also noted that he had raised the matter with Rabbis Oscar Fasman, Chaim Fasman, Leo Jung, and Samson R. Weiss, all of whom agreed that Berkovits was contributing greatly to Orthodoxy. Weiss particularly stressed Berkovits's great *yir'at shamayim*. Weinberg himself added that Berkovits is "a man of moral sincerity who hates hypocrisy and loves scholars."

He added that Berkovits is by nature an effervescent thinker, and he had been attracted to Isaiah Leibowitz's ideas on the need for halakic change.

I praise him that he did not hide this in his heart but revealed what he was thinking. Yet he stumbled and spoke falsely. I am sure that his article arose at a time of spiritual crisis and out of spiritual longings, and I believe that he now regrets and is embarrassed by what came from his pen.

How then was Weinberg to explain Berkovits's unconventional approach to halakah?

I do not believe that Dr. Berkovits's intention was to uproot the Oral Law, God forbid, or to destroy the foundation of halakah, which is based on the Talmud and decisors. However, he was grabbed by the spirit of the screamers in Israel that there is a vital necessity to bring the halakah in line with the life of the State [of Israel] and the new conditions of life in Israel and the Diaspora.

Weinberg's lengthy letter is of great interest in its own right, quite apart from the Berkovits angle. Here is a short selection:

In truth, there are things concerning which it is possible and necessary to make adjustments. One example is non-Jewish milk in countries where the government supervises its purity and cleanliness. The *Hazon Ish* in his book showed reasons to permit it,<sup>6</sup> but there were zealous rabbis who protested this. [Another example is] shaving with an electric razor on *hol ha-moed*. Rabbenu Tam<sup>7</sup> and the *Noda bi-Yehudah* [R. Ezekiel Landau]<sup>8</sup> permitted [shaving], and the *Hatam Sofer* [R. Moses Sofer] absolutely forbade it.<sup>9</sup> But certainly there is a necessity to permit this matter which so many people are already doing, and which from the standpoint of halakah and clear logic needs to be permitted since it is the way of this generation to shave every day and there is no longer the fear "lest he enter the festival with a neglected appearance."<sup>10</sup> . . . I do not wish to justify the views expressed by Dr. Berkovits in his article. I only wanted to clarify the difficulty of the situation.

Weinberg acknowledges that the popular Orthodox assumption that there can't be any changes in halakic practice is incorrect. But where do you draw the line? When has one left Orthodoxy and moved into Conservative Judaism? Weinberg agrees with his correspondent that Berkovits went too far, but since, as he states, even Berkovits agreed with this judgment, he should be forgiven this lapse.<sup>11</sup>

Weinberg showed his support for Berkovits in two other ways. First, he included a responsum in his *Seridei Esh* that Berkovits wrote during his time in Berlin.<sup>12</sup> Weinberg's own responsum on the topic did not survive but Berkovits's did, so he was happy to print it. The inclusion of this responsum in a volume that appeared in 1965, after Berkovits had already become controversial on account of his halakic outlook, was a strong statement by Weinberg in support of his student.

The other way he showed his confidence in Berkovits related to an important halakic problem. Some time in 1964, Rabbi Leo Jung discussed with Weinberg various ways to solve the problem of the modern agunah, by which I mean a woman who is unable to remarry because her husband does not want to give her a divorce. Weinberg believed that he was too old to begin detailed investigations into this problem, but he suggested that Berkovits be given the task.<sup>13</sup>

Berkovits followed up on Weinberg's suggestion and wrote a well-researched book in which he suggested certain ways that the agunah prob-

lem could be solved halakically.<sup>14</sup> In his work, Berkovits concentrated on showing that certain forms of conditional marriage and even annulments of marriage lay within the powers of the rabbis. With such power, the rabbis would be able to prevent many cases of agunah. For example, with regard to conditional marriage Berkovits argues that the parties can agree before the wedding to make their union contingent on the husband granting a religious divorce should the need arise. Should the husband refuse to do so the marriage would thereby be invalidated and the woman would be able to remarry without a *get*.

Weinberg wrote an approbation to Berkovits's book in which he expressed his sympathy with Berkovits's approach and called upon leading halakists to examine Berkovits's arguments. Yet before the book's appearance, in the final months of Weinberg's life, R. Menachem M. Kasher, who had originally intended to publish Berkovits's work, began to voice disapproval of Berkovits's approach. This, combined with other trends in the Orthodox world, left Berkovits frustrated and angry.<sup>15</sup> In letters to Weinberg we get a glimpse of Berkovits's soul. Some of his comments are indeed harsh, and readers should examine the letters of Weinberg to Samuel Atlas<sup>16</sup> to see how much Weinberg shared Berkovits's frustration. Although teacher and pupil, there were in a sense also soul mates, and Berkovits felt confident in writing in such a fashion that only a student who understands his teacher's inner thoughts would be bold enough to do.<sup>17</sup>

On December 30, 1965, just a few weeks before Weinberg's death, Berkovits wrote to his teacher. After noting that Kasher opposed his views and treated him in a less than honorable way, Berkovits added:

For a long time I have known our “*gedolim*” and “*tzaddikim*.” In their opinion, they are exempt from being concerned with civility, fairness, and honesty, because their intentions are—of course—for the sake of Heaven. According to their approach, their holy purpose makes all means kosher. . . . You should know that there is an ever-increasing number of young Orthodox rabbis who have completely given up hope that there is what to expect from the *gedolei Torah* of this orphaned generation. Every day we see more clearly that we cannot abandon the future of Judaism and the people of Israel into their hands. God-willing and with God's help we will follow our path according to our conscience and our strength and they will be what they will be.

Berkovits's strength of conviction is seen in other unpublished letters. Defending himself, he wrote to Kasher, who had urged that he not

publish his work because of its unconventional approach: "The question isn't if I am right or you are, but if an author who believes with all his heart that what he proposes is Torah, if he is permitted to publicize his work? In this, there is no doubt in my mind, and I can also rely on the approbation of Rabbi Weinberg."<sup>18</sup>

Writing again to Kasher, who in Berkovits's mind was not arguing halakically but upon a conception of *Da'as Torah*, Berkovits states:

"*Da'as Torah*" is the will of the rabbis when their will has no basis in halakah. I don't understand how *benei Torah* and *yivei shamayim* can declare that they themselves are *gedolim* and as such, their private opinions and conjectures without a source or basis in *Shas* and *poskim* are "*Da'as Torah*." Forgive me if I tell you what is in my heart and in the ever-increasing hearts of many of the Orthodox rabbis of the younger generation, "*Da'as Torah*" is not Torah at all. It is the religious politics of the older generation, that generation which is responsible for the spread of Reform and Conservatism in this continent is itself destroying our world.<sup>19</sup>

Berkovits insists that he respects these rabbis but he cannot close his eyes to the harm their actions, and inaction, are causing.<sup>20</sup>

In many of his private letters, Weinberg was harshly critical of the right-wing Orthodox. He thought that they had distorted traditional Judaism and were destroying any chance for it to have a mass appeal, especially in the Land of Israel.<sup>21</sup> Their strong opposition to university education showed that they were not yet ready to live in the modern world, and as such were destined to remain a ghetto Judaism. Berkovits shared this outlook and pointed to the proliferation of yeshivot that had no interest in secular studies. Where is the living Torah? he asks. How come yeshiva students do not become doctors, scientists, policemen, soldiers, and every other profession that is needed in the State of Israel?<sup>22</sup>

Here is another example of Berkovits's criticism of the right-wing Orthodox, from a letter he sent to Weinberg.<sup>23</sup> There are numerous parallels in Weinberg's writings, in terms both of content and style. Indeed, their criticisms are almost identical.

These fools (*tipshim*) are the destroyers of Judaism in this land, just as their colleagues are destroying it in Israel. The nation of Israel and the Torah of Israel need salvation from the plague of "*Tzaddikim*." Through us is fulfilled the verse *Therefore, I gave them statutes that were not good, and judgments whereby they could not live* [Ez. 20:25].

The day is coming when we will be forced to respond publicly to these “*Tzaddikim*” for God’s sake and for the sake of Judaism.

Do not fear; I have no part in disputes and no time for them. But the day will come and God willing we will follow our own path in a systematic way without relying on these Gedolei ha-Torah. This is indeed the requirement of the hour, to save and revive Judaism in the world.

In another letter to Weinberg,<sup>24</sup> Berkovits expanded on what he regarded as his mission:

Among the Orthodox in this land [the United States], the “*lomdim*” [old fashioned Talmudists] regard academic Jewish scholarship as insignificant, and the “*hakhamim*” [academic-type scholars] feel likewise about the *lomdim*. Precisely here we are obligated to bring these two into harmony, that of *Torat Yisrael* and *Hokhmat Yisrael*. We must work for an even more complete harmony than existed in Germany.

Again reflecting on the traditionalist rabbis in the United States, he writes:

I received threats and warnings in the name of men who are close to those who run Agudat ha-Rabbanim, not to dare publish my monograph [on conditional marriage]. . . . Due to our many sins we have declined to the lowest moral level of our lives—if these are rabbis. What is there to do?

Like all people I don’t enjoy the insults and abuse heaped on me by people without conscience. Nevertheless, as is the level of descent, so is the obligation to work for the recovery and redemption from it.<sup>25</sup>

Let us now turn to Berkovits’s vision of halakah, which was controversial. It is his post-Holocaust theology which has been the subject of so much attention, but my sense is that Berkovits’s real project, the one closest to his heart, was halakah in modern times. In his lifetime he saw Orthodoxy move to the right, which meant that his ideas were even less acceptable to the Orthodox. In response to this move to the right, he moved left. We see the same phenomenon with R. Emanuel Rackman, who was a mainstream Orthodox figure during most of his life, but by the end, as with Berkovits, was on the fringes of organized Orthodoxy.

Berkovits’s halakic theory is found in his books *Not in Heaven*,<sup>26</sup> the larger Hebrew version, *Ha-Halakhah, Kohah ve-Tafkidah*,<sup>27</sup> *Jewish Women in*

*Time and Torah*,<sup>28</sup> and in some articles he wrote on halakic matters. His most radical ideas were already there in his early years in Chicago, as we can see from Weinberg's letter referred to already. In his younger years, Berkovits apologized for some of his radical comments as he tried to remain mainstream. In his later years, however, he was unapologetic about his views. Still, in the preface to *Not in Heaven* he is careful to state that although his learning comes from his father's house, the yeshivot he studied in, and from Weinberg, in this book "I was determined to be guided exclusively by the traditional halakhic material as I found it." I read this to be saying that what you will find in this book is original to Berkovits, and don't blame others, in particular his father and Weinberg, if you think it is too radical.

A point that runs through all of Berkovits's writings on halakah is the connection between Jewish law and the system of values that stands at its base. There is no legal positivism here. Halakah is to be understood, and implemented, by taking into account its ethical substratum. It is not just that the halakah is to be explained as having ethical values, but these values are of decisive import in how halakah is implemented. In fact, halakah is dependent for its validity on it being an ethical system.

Without such an understanding one ends up distorting what for Berkovits are basic Jewish values. If one only sees the trees and not the forest, if one is halakocentric, halakah becomes a fetish, able to be explained only by its own internal rules. To Berkovits, this is a great distortion of what Jewish law is all about. He illustrated this by telling of his visit to a women's seminary in Israel. Berkovits describes telling the class about how in a death camp a mother and child were separated, with the child to be sent to the gas chambers. The mother chose to give up her chance to live in order that her child not go by herself to her death. Berkovits explained to the class that the mother, by refusing to part with her child, reached the highest fulfillment of what it means to be a mother. "This *kiddush ha-shem* is also the highest level of *kiddush ha-hayyim*."

Berkovits recalls that among the young women, many of whom would themselves be mothers in a few years, there was no reaction, no sense of the emotional moment. He tells us that after the lecture he asked the teacher how to explain such a lack of feeling by the students when faced with the self-sacrifice and love of this mother. The teacher replied that the students were busy thinking whether or not what the mother did was in accord with halakah.

Berkovits's response to this explanation is classic Berkovits:

I was shocked by his words, and more so by the hardened hearts of the students. *Ribono shel olam*, is this halakah?! What type of halakah are they teaching in this institution. Is there a greater insult to the ethical value of the halakah than the words of this "religious" educator?<sup>29</sup>

We see very clearly in this story the problems with a self-sufficient halakah that is only able to be explained internally: One can be halakically proper, but ethically blind. It is stories like this that gave rise to the jibe about those who are in awe of the *Shulhan Arukh*, rather than of God.<sup>30</sup>

For Berkovits, it is not a question of morality or ethics being in conflict with halakah and halakah having to bend. Halakah itself has to be suffused with these elements or else the halakah is defective. Make no mistake about it, Berkovits assumes that halakah as practiced can have moral failings, and rather than be rejected it is to be updated. I won't use the word "reform" because Berkovits would not see this as a reform, but as a necessary means of keeping the halakah relevant.

Berkovits is not unique in his recognition that standards of morality influence halakah. In other words, these standards need not derive from the halakah, and can act as a check and influence on halakah. You can find this approach in R. Moses Samuel Glasner and also in R. Abraham Isaac Kook, especially in his newly published writings. Both of these thinkers, as well as Berkovits, do not see this morality as arising from the zeitgeist. Here is where one finds the great divergence between Conservative halakists and Berkovits, despite what appear to be outward similarities. For the Conservative thinkers, their halakic stances are pushed by moral sentiments arising from non-Torah sources, something they are entirely open about.<sup>31</sup>

Berkovits sees morality as inherent in the Torah, what we can call Torah values. This is seen in all sorts of rabbinic statements that he quotes, which show the Sages' concerns in this area. There are times, however, where these overarching Torah values are in tension with the accepted halakah. In such cases, it is precisely the Torah values that cause one to reevaluate the halakah. In this reevaluation, one is simply following in the path of the Sages who were active participants in creating the halakah. What Berkovits is describing is a Jewish law that is moving and active, not one that is frozen. To illustrate this, he cites many instances of halakic innovations that originated in the Sages' common sense and caring.

For example, Exodus 21:29 states: "But if the ox was wont to gore with its horn in times past, and its owner had been warned, and he has not kept

it in, but it has killed a man or a woman, the ox shall be stoned, and its owner also shall be put to death.” According to the Talmud, the last clause of the verse, prescribing the death penalty for the owner, is not to be taken literally but means monetary payment.<sup>32</sup> Berkovits comments:

It is quite obvious that independently of all adduced “collaborating” [corroborating?] biblical material, the halakhic conscience could not accept the idea that a man, though not altogether free of guilt (since he had been warned about the wildness of his animal), should be put to death for the goring of his ox.<sup>33</sup>

According to Berkovits, the halakic conscience is not being influenced here by general ethical values. Rather, the Sages’ understanding of Torah law derives from values that are inherent in the Torah itself.

Here is another relevant passage where Berkovits describes what motivated Hillel in instituting the *Prosbul*.

Where did Hillel find the authority for his innovation? Where was it written in the Torah? It was, of course, not found in any text, in any code. He found it within himself. There was a clash between equally valid laws, principles and concerns of the Torah. He had to find a resolution to the conflict. There was no text, no *Torah Shebikhetav* to tell him which course to follow. He could find the solution to the problem within his own understanding of the comprehensive ethos of Judaism as he was able to gather it in his own heart and in his own conscience from the totality of the Torah teaching and the Torah-way of Life.<sup>34</sup>

In speaking of how the great sensitivity of the Sages led them to interpret the law in an ethical fashion, Berkovits refers to *lex talionis* and the Sages’ “reinterpretation of the plain literal meaning of the biblical text.”<sup>35</sup> The key word is “reinterpretation.” According to Berkovits, the Sages read “eye for an eye” figuratively because of their ethical sense. This is a very radical position for an Orthodox thinker because it assumes that the rabbinic understanding is not inherent in the verse. This is not a problem for Berkovits, as the ethical sense shown by the Sages in this reinterpretation is itself derived from the Torah. It is derived from the Torah but is manifested in the Sages’ consciences.<sup>36</sup>

Where did the Sages derive the right to “reinterpret”? Berkovits explains:

When, in a given situation, a specific law is in conflict with another law, principle or concern of the Torah, the specific law may

be limited in its application, reinterpreted, adapted, suspended or changed in this one situation but not abolished, by the overruling concern of the total Torah.<sup>37</sup>

Berkovits brings many examples of halakot that came into being because of *Kevod ha-Beriot* and *Darkhei Shalom*. He speaks of how in certain cases the Sages compelled men to give their wives divorces even if in biblical law there is no source for this. The Sages also ruled that the testimony of one witness stating that a *get* was written properly is enough to ensure the validity of the document. After discussing these examples, Berkovits concludes: “All of the above rulings are somehow based on textual interpretation. But quite clearly, it is the halakhic conscience that *creates* the interpretation.”<sup>38</sup>

This brings us to the great difficulty Berkovits sees with codification. If halakah is meant to be looked at anew in every generation, with required “updates” carried out, then codification is a real problem. He even refers to it as a “spiritual calamity of the first magnitude” and an “unavoidable violation of the essence of *halakhah*.”<sup>39</sup> In another place he speaks of “the Karaite inclination” of Torah scholars vis-à-vis codified halakah.<sup>40</sup> What this means is that just as the Karaites are commonly thought to have treated the Written Law as unalterable and not subject to creative interpretation, rabbis today treat the codified law in the same way.

Codification was unavoidable in the post-Temple era, the problems of which are described by Maimonides in the introduction to the *Mishneh Torah*. While this allowed the law to be secured, it also stifled halakic creativity. With the return of Jews to the Land of Israel, Berkovits believes that the time is right to move away from the binding authority of codes. Had the ancient Jewish national existence continued to develop normally, Berkovits claims that the period of the *tannaim* would not have ended and people would still be turning to the judges of their own day. In such circumstances, there would have been no need to compose the Mishnah. In other words, there would have been no final codification, and Jewish law would have remain fluid. This is exactly what Berkovits wants to resurrect, a halakah that functions like the *Torah she-Ba'al Peh* of ancient days, a halakah that is dynamic and creative.

Precisely because halakah must be dynamic and respond to current situations, Berkovits stresses how problematic the position of women in halakah is. His solution to this problem is to argue for a conception of Torah law that distinguishes between the “Torah tolerated” and the “Torah taught.” Since the Torah was given in an era when the full value of women

was not yet recognized, certain aspects of ancient society unfortunately had to be tolerated by the Torah. The Torah could not change a society overnight. All it could do was offer certain limited changes, which showed the direction the Torah desired people to move in. Yet one must not confuse these compromises with the exalted values actually *taught* by the Torah.<sup>41</sup>

Berkovits cites Maimonides's explanation of sacrifices as a source for this approach.<sup>42</sup> Just as Maimonides sees sacrifices as something the Torah was forced to compromise with, since this was the form of worship the people were attached to, so too there were other aspects of life current at the time of the giving of the Torah that had to be incorporated into God's revelation. Berkovits adopts this approach to explain the Torah's laws of slavery. Since slavery was part of the ancient world, and realistically could not be legislated out of existence at that time (i.e., the children of Israel would never have accepted such a command), the Torah had to accept the institution while attempting to grant the slave more rights than he had in other cultures.

Berkovits's approach is not surprising when dealing with slavery. However, this is not the case when he applies this insight to the position of women. By doing so, Berkovits undermines the apologetics of so many who had argued precisely that women were *not* discriminated against in Torah law, but that there was a system of separate but equal.

Berkovits rejects such apologetics and is forthright that the position of women in Torah law is no longer acceptable for people in the modern world. This ties in with his notion that if the Torah was given in a different generation, then it would not have included some of the disabilities against women. Berkovits opens his 1992 book, *Jewish Law in Time and Torah*, with these provocative words: "It is not our intention in this work to plead the cause of Jewish women against the numerous Jewish laws that today are rightly considered unfair or even unjust." Note that he refers to laws that "today" are considered unfair and unjust. This is connected with a major theme of his, that Jewish law doesn't stand still and what was once tolerable, or even appropriate, need no longer be so.

In placing Jewish law regarding women in a historical context, Berkovits is not only speaking of Torah law, but rabbinic law as well. What other Orthodox figure could say the following about rabbinic marriage laws?: "Nothing gives clearer expression to the servile responsibility of women than the original laws of marriage and divorce."<sup>43</sup> It is important to remember that such judgments could only be made in modern times, when the

position of women has markedly improved from that of many years ago. Berkovits is not making an absolute judgment about halakah per se. Rather, he is telling us that halakah must be understood in a historical framework. In earlier times, women were subservient to men. As that is no longer the case, and that is a good thing, halakah must reflect this reality. It must move from “Torah tolerated” to “Torah taught.”<sup>44</sup>

Berkovits also has no problem stating that the midrash assumes that women have less intelligence than men,<sup>45</sup> and he lists some of the negative judgments about women found in rabbinic literature.<sup>46</sup> Again, this is not the sort of thing you expect see in books by Orthodox writers, which are usually apologetic in nature and designed to prove that every contemporary positive view of women was also shared by the Sages.

Berkovits discusses the ancient Greek view of women and points to similarities between it and what appears in rabbinic literature. This enables him to conclude that those negative evaluations of women that are expressed by some of the Sages are not to be regarded as “authentically Jewish,”<sup>47</sup> but are a reflection of the time that the Sages were living in. Ancient society was such that women were treated as second-class citizens and regarded as having less intelligence, and such outlooks influenced the Sages.

The problem with what Berkovits is trying to accomplish is that he is adopting two mutually exclusive approaches. On the one hand, he argues that legislation that discriminates against women should be viewed as “Torah tolerated,” that is, something that the Torah or the Sages were unable to change because of the values of earlier eras. On the other hand, he also acknowledges that at least some of the Sages held negative views of women. If the latter is the case, then legislation detrimental towards women has nothing to do with being “Torah tolerated,” but reflects a different world-view on the part of the Sages.

Although Berkovits acknowledges that one can find demeaning views of women in rabbinic literature, he also claims that the Sages’ attempted to alleviate some of the halakic problems faced by women. As he puts it, “It is quite obvious that the rabbis were fully aware of the legally disadvantaged status of the woman. They were disturbed by it and endeavored to correct the situation by innovative rulings and Takanot.”<sup>48</sup>

To illustrate how this trend continued in the post-talmudic era, Berkovits cites R. Asher ben Jehiel,<sup>49</sup> who explained R. Gershom’s ordinance against polygamy as a way of equalizing the status of men and women in marriage. For Berkovits, the path for us is obvious, in that we must continue what the Talmud

started and the medieval authorities continued, namely, to work within the halakic system in order to remove the halakic disabilities placed upon women.

Berkovits was attacked for advocating a form of halakah that was more Conservative than Orthodox.<sup>50</sup> Yet his firm belief was that he was simply continuing the approach to halakah of the Sages and of the medieval authorities. While it is true that moderns can no longer come up with *derashot* on verses of the Bible as did the Sages, according to Berkovits this does not mean that there is no fluidity left to Jewish law.

Furthermore, as has already been mentioned and bears repeating, there is also a real distinction to be made between Berkovits's approach and that which is found among Conservative halakists. The latter believe in updating halakah due to changing values in wider society. Law changes precisely because values change. For Berkovits, on the other hand, the halakah changes but the values remain the same. There are biblical values that in prior eras were not able to be realized, but can be actualized in our day. For Berkovits, this is in no way a reform, but rather a return to original intent, to the original values of the Bible.

It hardly needs to be said that for Berkovits, halakah has to be alive and respond to the situation at present. Thus, the fact that there is now a State of Israel means that halakah has to be decided in the state differently than in the Diaspora, where Jews are a minority. There now has to be a national halakah. The problem is, as he titles chapter 4 of *Not in Heaven*, what we have today is a "Halakhah in Exile." In other words, even though Jews have returned to the Land of Israel, this has not changed how Jewish law is decided. "It is still the halakhah of the *Shtetl*, not that of the State. As yet we have not become worthy of *Torat Eretz Yisrael*."<sup>51</sup>

For Berkovits, in order for Jewish law to function the way it should, it can no longer be defensive, building fences around the community. It must now deal with matters it never had to confront in the exile, issues such as social justice, economic problems, and everything else a modern state brings. Yet how is Jewish law supposed to function in such a state?

Because of the lack of opportunity for halakhic application to real-life situations of national existence, the art and wisdom of such application dried up. Because of Halakha's exile into literature and codification, new authority barriers were erected that seem insurmountable. The old principle of the acceptance of personal responsibility for halakhic decisions, which demanded that the *Dayan* rule according to what his eyes see, has received a new meaning that reads: according to what he sees in *shtetl* authoritative text.<sup>52</sup>

One example of how Berkovits thinks the existence of the State of Israel must impact Jewish law is seen in the question of the permissibility of autopsies on Jewish cadavers. While this might have been a halakic problem in the Diaspora, in the State of Israel, where Jews are responsible for ensuring an adequate standard of medicine, there is no question in his mind that any halakic objections to the performance of autopsies must be pushed aside by the needs of medical advancement and training.<sup>53</sup>

The Sabbatical year is another challenge that Orthodoxy has had to confront. It is obviously a big problem for Orthodox farmers, and the solution of the Chief Rabbinate is to sell the land, thus enabling agricultural production to continue without interruption. Berkovits rejects this solution.<sup>54</sup> In his mind, this approach is only suitable for individual fields, but not when the state itself is involved, as it must be since it owns almost all of the farmland. He sees it as absurd that the land of the entire country could be sold to a non-Jew, and he claims that there must be a different solution. He also rejects the haredi viewpoint, according to which the land should not be touched and the farmers should be supported by charity or government assistance.

After showing the inadequacy of both of these “solutions,” Berkovits speaks about the need for a new approach. This is similar to how Isaiah Leibowitz also spoke about the need for a new approach, since Jewish law as defined in the *Shulhan Arukh* is designed for a situation where Jews are a minority, not when there is a Jewish state and Jews are thus responsible for all vital services.<sup>55</sup>

Berkovits does not clearly explain what the new approach would be, and perhaps he is afraid of appearing too radical. Yet I think that anyone who examines what he says has to conclude that he means that *Shemitah* will no longer be practiced in modern times. What he has in mind is that the contemporary rabbinic authorities should act as the Sages of old did, and suspend the Sabbatical laws for the sake of the greater good.<sup>56</sup> Such a perspective is quite radical, although not unprecedented,<sup>57</sup> because the standard Orthodox approach is that contemporary rabbis do *not* have the authority to act in such a fashion. As we have seen, one of the great criticisms that Berkovits has of modern halakah in the State of Israel is that it acts in a *galut* fashion, bound to a *galut* mentality. The alternative Berkovits is offering is to return to the dynamism of a precodification halakah, when the Sages could do what the times required

By returning halakah to the stage of Oral Law, opinions cited in the Talmud that are rejected by the codifiers can now be applied to help solve

current halakic problems. In many cases, it won't even be necessary to resurrect these opinions, since, as Berkovits argues, the halakah as it currently stands allows for revisions because of the changed circumstances of a Jewish state. The real problem is thus not the halakah itself, but the halakic authorities. As Berkovits puts it, on the very last page of *Not in Heaven*, today's halakists

do not search for the Word that was intended for this hour, for this generation. If they have the authority, they impose the Word meant for yesterday and thus miss hearing the Word that the eternal validity of the Torah was planning for today, for this generation, for this new hour in the history of the Jewish people.

The contemporary halakists also do not know how to properly balance competing values. Berkovits writes as follows, in explaining how the Sages could offer an innovation in the laws of *kiddushin* against what seems to be Torah law:

The reason seems to be that the laws of *kiddushin* do not represent the entire Torah. Apart from the right of the husband over divorce, there is another commandment, even more comprehensive and compelling. "Thou shalt love thy neighbor as thyself." It could not be disregarded. There was a conflict between the two laws of the Torah. A solution had to be found and it was found. Its promulgation required a great deal of courage and a deep sense of rabbinical responsibility.<sup>58</sup>

From Berkovits's perspective, it is precisely this courage and deep sense of responsibility that is lacking among contemporary halakists.

## CONCLUSION

In his lifetime, Eliezer Berkovits was thought by many in the Orthodox world to have pushed the envelope too much in the direction of Conservative Judaism. His understanding of how the halakic process should function did not find many adherents. In the years subsequent to his death, his views have fallen even more out of fashion. Yet the questions he asks remain as powerful now as when he first raised them.

Is Jewish law simply a matter of submitting to divine and rabbinic dictate, or is there a *telos*, which we can call Torah values? If, as Berkovits argues, the latter is the case, then most of Orthodoxy has it all backwards. One does not adjust one's values based on what the halakah teaches. Rather, it is halakah that must be adjusted so that it is in line with our most important

values, which are themselves Torah values. These values remain the same, but since the world changes the way these values are concretized through halakah must also change. For Berkovits, this is not a reform of halakah but rather its most profound fulfillment.

## NOTES

1. Although I have added a number of footnotes, the essay preserves the oral form in which it was delivered. Shortly before completing this essay, a wonderful article by Avinoam Rosenack appeared, “Rabbi Eliezer Berkovits: Halakhah and Modern Orthodoxy,” *Ukrainian Orientalistics* (2011): 73-111. Only after my essay was completed did I see Meir Roth, “Eliezer Berkovits ke-Teoretikan shel ha-Halakhah” (dissertation, Bar-Ilan University, 2011).

2. This information is found in Berkovits’s unpublished letter to his granddaughter.

3. See Yaakov Elman, “Rabbi Moses Samuel Glasner: The Oral Torah.” *Tradition* 25 (Spring 1991): 63-69.

4. Letter to Weinberg, May 21, 1948.

5. *Edah Journal* 2, no. 2 (2002).

6. *Hazon Ish, Yoreh Deah*, 41:3,4.

7. See *Tur, Orah Hayyim*, no. 531.

8. *Noda bi-Yehudah, Orah Hayyim*, first series, no. 13.

9. *She’ot u-Teshuvot Hatam Sofer, Orah Hayyim*, no. 154.

10. See BT *Moed Katan* 14a. This is the reason given for prohibiting cutting one’s hair during *hol ha-moed*, lest the haircut be deferred to then and the individual enter the festival ungroomed. The implication is that those who shave every day, and thus groom themselves before the holiday, are also permitted to shave during *hol ha-moed*. See J. David Bleich, *Contemporary Halakhic Problems* (New York, 1977), 1:48-53.

11. See also Weinberg’s 1965 letter published in *Ha-Ma’ayan* 34 (Tevet 5754), 20, in which he defends Berkovits against an attack, adding, “I am certain that he [the attacker] does not reach his [Berkovits’s] ankles in Torah.”

12. *Seridei Esh* (Jerusalem, 2003), vol. 3, no. 35. Berkovits describes the episode in *Not in Heaven*, 104-105. In Berkovits’s letter to R. Leo Jung, undated, he reports that Weinberg discussed the matter with R. Hayyim Ozer Grodzkinski in Vilna. On returning to Berlin, Weinberg told Berkovits, “The Gaon R. Hayyim Ozer is not impressed with your *lamdanut*, but he agrees with your decision, as do I.” (Leo Jung papers, Eliezer Berkovits file [Box 6, folder 12], Yeshiva University Archives. All references to the Jung papers come from this file.)

13. See my *Between the Yeshiva World and Modern Orthodoxy* (London, 1999), 190-91.

14. *Tenai be-Nisuin u-ve-Get* (Jerusalem, 1967). Berkovits looked to Weinberg to support his arguments, and in a letter to him dated 29 Sivan (no year), he wrote:

I believe that there is indeed a solution in accord with the principles of halakah. I am not insolent enough to say this based on my work, and God forbid for me to audaciously rule before *mori ve-rabbi*. I believe with perfect faith that there is a solution because I believe [!]. Because I believe in the God of Israel and His Torah I also believe in the firm and eternal strength of the halakah to solve the problems that afflict the life of the people of Israel.

In my opinion you alone in our generation can show the way and lead the nation *el ha-menuhah al pi ha-nahalah* [cf. Deut. 12:9]. There is none like you in Torah and wisdom, none like you when it comes to ruling in practical halakah, and none like you who understands the spirit of the nation and feels its pain.

15. Rosenack, "Rabbi Eliezer Berkovits," 94, quotes R. Joseph B. Soloveitchik's famous 1975 lecture opposing annulment of marriages and assumes that this was directed against Berkovits's book. Yet this is incorrect, and Soloveitchik never publicly expressed any view about Berkovits's proposals. Soloveitchik's remarks were actually directed against R. Emanuel Rackman, who had also proposed annulling marriages as a way to solve the agunah problem.

16. See my "Scholars and Friends: Rabbi Jehiel Jacob Weinberg and Professor Samuel Atlas," *Torah u-Madda Journal* 7 (1997): 105-21.

17. I thank Dr. Avraham Berkovits for providing me with copies of some of his father's letters to Weinberg.

18. Letter to Kasher, Feb. 13, 1966. I deal with Weinberg's supposed retraction of his support for Berkovits's book in *Between the Yeshiva World and Modern Orthodoxy*, 191n83. As mentioned there, Berkovits believed that the letter of retraction by Weinberg published by Kasher was a forgery. In his letter to R. Leo Jung, May 11, 1982, Berkovits writes:

I am certain that he [Weinberg] never wrote the words with Rabbi Kasher cited in his name in *Noam*. On the contrary, show us the letter of *mori ve-rabbi zatzal*. A year ago I wrote to him [Kasher] by registered mail and asked him for a copy or transcription of Rabbi Weinberg's letter. Until today I have not yet received a reply from him. I am certain that the words said and written in his name are not authentic. Due to our many sins we have reached the point where even men who fear Heaven, etc., find permission to do all sorts of things when they think that their intentions are for the sake of Heaven. The Merciful One will forgive iniquity etc. [from *Tahanun*]." (Leo Jung papers)

See also my Seforim Blog post, May 17, 2012. <http://www.seforim.blogspot.com>.

19. Letter to Kasher, Jan. 1, 1966. In his letter to Kasher, Feb. 2, 1966, Berkovits adds that his comments about *Da'as Torah* were not made with reference to the rabbinic greats of the prior generation. "I am like dust of the earth beneath their feet. . . . I had in mind the concept as used at all times and in every matter by rabbis in America from the older generation."

20. Letter to Kasher, Feb. 2, 1966; Letter to Weinberg, undated.

21. See my *Between the Yeshiva World and Modern Orthodoxy*, 176.

22. See Berkovits, “A Contemporary Rabbinical School for Orthodox Jewry,” *Tradition* 12 (Fall 1971): 6; *Not in Heaven*, 93, 117; *Mashber ha-Yahadut bi-Medinat ha-Yehudim* (Jerusalem, 1987), 55; *Essential Essays on Judaism*, ed. David Hazony (Jerusalem, 2002), 211-12; and Berkovits’s unpublished essay on secular studies.

23. Letter to Weinberg, June 8, 1959.

24. Letter to Weinberg, Feb. 1, 1959.

25. Letter to Leo Jung, undated (Leo Jung papers).

26. (New York, 1983)

27. (Jerusalem, 1981)

28. (Hoboken, 1990)

29. *Mashber ha-Yahadut*, 89-90. Avinoam Rosenack called this to my attention a number of years ago.

30. See *Emet ve-Emunah* (Jerusalem, 1972), 97 (no. 675 in most editions); *Siah Sarfei Kodesh* (Lodz, 1931), 5:44. See also Chaim Tchernowitz, *Pirkei Hayyim* (New York, 1954), 10 (second numbering).

31. See David Hazony’s introduction to Berkovits, *Essential Essays on Judaism*, xvi-xvii.

32. *Sanhedrin* 15b.

33. *Not in Heaven*, 21.

34. *Crisis and Faith*, 87.

35. *Not in Heaven*, 21.

36. See *Crisis and Faith*, 90.

37. *Crisis and Faith*, 91.

38. *Not In Heaven*, 22.

39. *Crisis and Faith*, 95. Berkovits is not the first to oppose codification. For the viewpoints of R. Hayyim ben Betzalel, the Maharal, and others, see Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia, 1994), 3:1375.

40. *Not in Heaven*, 92.

41. *Jewish Women in Time and Torah*, 1-2, 33.

42. *Guide of the Perplexed* 3:32; Berkovits, *Jewish Women*, 29.

43. *Jewish Women*, 7.

44. For a rejection of Berkovits’s model of “Torah tolerated” versus “Torah taught,” see David Hartman, *The God Who Hates Lies* (Woodstock, 2011), 84. Hartman argues that Berkovits is oblivious to the fact that rather than being Torah tolerated, gender inequality was historically embraced by the Sages “as an ideal unto itself” (87). As I will point out, Berkovits is not clear on when to apply the concept of “Torah tolerated” and when to regard the Sages as being influenced by non-Jewish societal norms.

45. *Jewish Women*, 11.

46. See *Jewish Women*, 3-29.

47. *Jewish Women*, 25.

48. *Not in Heaven*, 45.

49. *Teshuvot ha-Rosh* 42:1.

50. Allan L. Nadler, "Eliezer Berkovits's *Not in Heaven*," *Tradition* 21 (Fall 1984): 91-97; Chaim E. Twerski, "The Limiting Factors of Halacha—The Other Side of the Coin," *Academic Journal of Hebrew Theological College* 1 (2001): 80-106; no. 2 (2003): 101-11. Writing as an academic, not as a religious critic, Rosenack, "Rabbi Eliezer Berkovits," 87, raises the following questions without offering any answers: "In what sense can we say that Berkovits's historical critique—which touches on the Written Torah in his [!] historical context—draws on sources within the halakhah itself? . . . What distinguishes Berkovits's halakhic process from the modes of analysis, grounded in historical criticism, that are reflected in the Conservative responsa literature?"

51. *Not in Heaven*, 91.

52. *Ibid.* In Berkovits's letter to R. Leo Jung, April, 15, 1970, he writes:

Of late, I have been thinking of the bad situation that while there are innumerable problems on the horizon of our existence, here as well as in Eretz Yisrael, nothing is being done to do planned halachic research into them. There is not a single place in the world where vital halachic research in contemporary issues is being undertaken. It is a situation inconceivable in any civilized society.

It may not be a bad idea to assemble, be it even a small group of *talmidei hakhamim*, who know how to do scholarly work and have accepted the *Torah im Derekh Eretz* ideology, who would undertake certain halachic projects, would meet with some regularity for mutual discussion, and would publish the results of their work. The accumulative effect of such an association might be considerable. (Leo Jung papers)

53. "Berur Halakhah be-Din Nituhei Metim," *Sinai* 69 (1971): 45-66, *Mashber ha-Yahadut*, 51-52. Weinberg also argued in support of autopsies in Israel, but the question he was asked concerned autopsies when trying to determine the cause of death. He did not deal with dissection of bodies as part of the standard training in medical school. Yet he would seem to permit this as well, for he focuses on the necessity of Israel having a medical school, and he was well aware that dissections of bodies are an important element of medical training. See *Kitvei ha-Gaon Rabbi Yehiel Yaakov Weinberg*, ed. Shapiro (Scranton, 1998), vol. 1, no. 22

54. *Mashber ha-Yahadut*, 50-51, *Not in Heaven*, 95.

55. See Leibowitz, *Torah u-Mitzvot bi-Zeman ha-Zeh* (Tel Aviv, 1954); *Judaism, Human Values, and the Jewish State* ed. and trans. Eliezer Goldman et al. (Cambridge, MA., 1992), ch. 15.

56. See *Not in Heaven*, 98, where after mentioning how the Sabbatical laws were suspended during the Roman occupation of Palestine, Berkovits writes:

It is, of course, a generally valid halakhic principle that (with only three exceptions) there is no law in the Torah that is obligatory where its observance may result in danger to someone's life. In other words, in such cases the non-observance of a biblical command is not a violation but, on the contrary, the observance of another supervening law that protects life. Surely, this is the principle by which the problem of *Sh'mitta* observance in a modern Jewish state should be approached.

57. Berkovits did not know that there were some great scholars, including R. Joseph Engel, R. Alexander Moses Lapidot, and R. Mordechai Eliasburg, who thought that the Sabbatical laws could simply be ignored without any “sale” of the land to non-Jews. This opinion was expressed in the early years of Jewish settlement in the Land of Israel when the economic circumstances were much worse than when Berkovits wrote about the issue. See Eitam Henkin, “Uvdot u-Mitosim be-Folmos ha-Shemitah,” *Alonei Mamrei* 121 (2008): 52-53.

58. *Jewish Women*, 49.