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## REVIEW ESSAY

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### ELIEZER BERKOVITS' *NOT IN HEAVEN*

One of the few truly creative and bold voices of contemporary Orthodoxy is without any doubt that of Eliezer Berkovits. In his many impressive works Berkovits has donned the respective mantles of philosopher, historian, Biblical scholar, religious polemicist and halakhist—all in order to champion his noble understanding of Jewish nationhood and Jewish faith. If one single, unifying sentiment can be found underlying Berkovits' entire literary corpus it is his very profound and often moving *Ahavat Yisrael*. This total love of and commitment to his people motivated Berkovits' polemic with Toynbee,<sup>1</sup> his theology of the Holocaust,<sup>2</sup> his angry polemic against Christianity's attitude to the Jews,<sup>3</sup> and his moving depiction of the behaviour of traditional Jewry in the darkest hours of the Nazi oppression.<sup>4</sup>

Berkovits' inspired nationalism and his deep concern for the welfare of the Jewish people have also considerably influenced the way in which he reads Halakhic texts. In his rather controversial study of the laws of Jewish marital and divorce contracts,<sup>5</sup> Berkovits' compassion for the abandoned Jewish woman and his concern for national unity and purity inspired his ingenious and learned halakhic proposals that would free countless *agunot* and prevent many tragic cases of *mamzerut*.

In this latest volume, which represents a philosophy of Halakha, Berkovits is apparently once again motivated by his *Ahavat Yisrael* and his Zionism. The net result is a highly provocative, bold and rather unorthodox presentation of the "Nature and Function of

\* *Not in Heaven: The Nature and Function of Halakha*, by Eliezer Berkovits (New York: Ktav Publishing House, 1983).

Halakha” which is sure to antagonize many of Berkovits’ Orthodox colleagues.

The central argument of the book is that halakha (which Berkovits defines as the flexible, unwritten law in contrast to the harsh, rigid written law) has as its primary goal “the humanization of the textual regulations”<sup>6</sup> of the written Torah. Berkovits quite correctly argues that the written law is entirely insufficient to guide and regulate the everyday life of individual Jews, and especially of the Jewish Nation. The application and most especially the adaptation of the law to life is the very *raison d’être* of the Oral Torah.

There is, Berkovits maintains, a constant “tension between written law and living conscience”<sup>7</sup> which can only be resolved through the sensitivity and humanity of the decisors of halakha in each generation. With the support of a wide and impressive array of Talmudic examples, Berkovits argues that halakha is governed by two fundamental, pervasive and often conflicting allegiances: faithfulness to the codified word of law on the one hand, and sensitivity and responsiveness to the ethical and humanly feasible on the other. “The way of halakha” is characterized by the strenuous efforts “to retain the meaning of the legal principle and yet to find solutions to the daily problems arising from the confrontation between the written word and the ethical needs of the concrete situation.”<sup>8</sup> Citing a variety of Talmudic precedents for changes and modifications of Biblical law in accordance with practical exigencies, Berkovits intimates that there is still today ample room for creative legislation which may in some circumstances overturn earlier halakha.

Having shown in the first section of this work that it is the “Nature and Function of Halakha” to reinterpret and adjudicate Jewish law in accordance with contemporary needs, Berkovits proceeds in section two to demonstrate that the Rabbis have in fact been granted sufficient power by the Torah to decide halakha boldly and creatively. The Talmudic cases with which Berkovits chooses to illustrate his point are well-known and his presentation of the material is strikingly similar to that of R. Zevi Hirsh Chajes in the latter’s *Torat Hanevi’im*, (Zolkiev, 1836). The Rabbis of the Talmud had, and used, the power to re-interpret, modify and even suspend earlier law when there was a clear and present social, moral or ethical reason to do so. The process of *Pisuk Hahalakha* is, Berkovits suggests, highly subjective. No two cases are exactly alike, and the decisor of Jewish law is empowered to deal imaginatively with the sources in order to arrive at a fair conclusion. The Torah is, as the title of the book suggests, “not in Heaven,” and the primary, exalted goal of Rabbinic legislation (the oral law) is to assure that the Torah remains a meaningful, relevant and above all humane system for governing Jewish national and personal life.

In these early sections of the volume, Berkovits says nothing that is fundamentally new or necessarily provocative. Both his formulations and the specific Talmudic quotations he uses to support his arguments are by now very well known to students and historians of halakha. Yet, beginning with the third section (“What is Halakha?”) the reader begins to sense that Berkovits intends far more here than a mere theoretical description of the dynamics of the Talmudic legal process. “Halakha” says Berkovits, “is the wisdom of the application of the written word of the Torah to the life and history of the Jewish people.”<sup>9</sup> And Berkovits, the ardent Zionist, believes that Jewish history has entered a new stage with the creation of a Jewish State. So long as the Jews were in exile, halakha was in exile with them. The primary symptom of the “exile of halakha” is according to Berkovits a fundamentalist adherence to the codes of Jewish Law. Codification is generally the product of social and political decline—a *galut* phenomenon. The redemption of halakha consists in freeing it from the shackles of the written word and allowing for the creative growth and interpretation of halakha in accordance with the spirit of the times.

The new reality of the State of Israel demands an understanding of what Halakha is about in its original, classical sense. The Torah She’be’al Peh has to be freed from its Galut-imposed shackles. What was done to it (i.e., codification—ALN) happened, as we have seen, against the directives of the Torah itself . . . Surely this . . . is a time to act for God to restore . . . the original character of the Torah She’be’al Peh.<sup>10</sup>

Too much concern with and too strict an allegiance to the written codes of medieval Jewish law have rendered halakha impotent to deal with the new realities of contemporary Jewish life, especially in the State of Israel. Contemporary halakhists must shed their conservatism and timidity and act boldly to harmonize the rule of law with the needs of the modern Jew and Israeli. Now that the Jewish exile is over, “the exile of halakha into literature”<sup>11</sup> must be ended. Codes were a necessary feature of *galut* halakha which Berkovits defines as defensive and protective. They are however foreign to the spirit of the new State of Israel.

Berkovits is harsh in his criticism of the timidity and conservatism of his colleagues in the Israeli Rabbinate, and characterizes their attitude to the sacred texts of Jewish law as “Karaitic.” The attitudes of contemporary Orthodox Rabbis has resulted in the estrangement of the Jewish people from traditional life. Only the rabbis can re-unite the Jewish people and the Jewish tradition:

To face the people and to understand the innate desire of the halakha to address itself to the life of the people may be the door-opener to free the halakhic scholar from his Karaitic alienation from reality.<sup>12</sup>

Practically, Berkovits calls for a relaxation of the requirements for valid testimony in Jewish law, greater flexibility in the matter of autopsies, the abolition of the laws of the Sabbatical year, the introduction of *takkanot* which will reduce the occurrence of tragic *agunah* cases, and finally a more liberal attitude on the part of the Orthodox Rabbinate to the marriages and conversions executed by non-Orthodox clergy. He desires these leniencies for the sake of Jewish life and Jewish national unity. Rabbis must be guided by ethical and national priorities in deciding halakha today and will sometimes be required to break radically with precedent. Halakha must begin once again to function in accordance with its true pre-exilic pristine nature. Its eternity is guaranteed only by its responsiveness to this generation and its sensitivity to “this new hour in the history of the Jewish people.”<sup>13</sup>

Berkovits is, as always, to be admired for the courage and obvious sincerity of his convictions. Yet it must be said that he has overstepped the boundary which separates traditional Judaism from other, heterodox versions of our faith. From the very beginning Berkovits’ treatment of the very complex and sensitive problem of reconciling allegiance to statute with the lofty requirements of equity is simplistic and one-sided. He overstates the power of practical and ethical considerations and misleadingly minimizes the awesome power accorded to precedent in Jewish law. He completely and intentionally ignores the basic halakhic proposition that earlier authorities automatically carry greater weight than those of later scholars, due to their proximity to the historic moment of Revelation at Sinai. He chooses not to deal with the basic assumption of all the medieval codifiers that creative legislation which had the power to overturn precedent and suspend Biblical law ended with the close of the Talmud (“*Ravina veRav Ashi sof hora’ah*”).

Berkovits’ analysis of the dynamics of the halakhic process is especially disappointing from a philosophical perspective. One might have expected this prominent Orthodox philosopher to deal, at least tangentially, with the major and unresolved philosophical problems raised by his discussion of “Halakha as the Priority of the Ethical.” Berkovits however contents himself with citing a few examples where the “Halakhic conscience . . . creates the interpretation”<sup>14</sup> of Scripture, and where Biblical Law is intentionally distorted or contradicted in order to arrive at a morally acceptable decision. Berkovits has great admiration for the Rabbis of the Talmud “who certainly believed that the law of the Torah was divine and yet criticized it in the name of God, as it were.”<sup>15</sup> But is not revealed law the very source of Judaism’s concept of morality? Do the Rabbis not ultimately base all of their ethical teachings upon the dictates of Scripture? If so, how do we explain, and resolve, a conflict between the rule of law and our sub-

jective sense of righteousness? Berkovits never grapples with this fundamental problem on a theoretical level, but practically indicates that priority is given to human reason and ethical sensibilities in order to reinterpret or overrule halakhic precedent. The net result is a gross oversimplification of a very difficult and sensitive issue.

Equally simplistic and misleading is Berkovits' theory of the exile of Halakha, and his brief history of codification. To be sure, social disintegration, political misfortunes and the resultant decline of learning are some of the classic motivations for the codification of Jewish law. Indeed, the lamentation over the general situation of social and spiritual decline forms a *leitmotif* in the introductions to the classical halakhic codes of medieval Judaism. Yet external factors are probably far less important in the creation of legal codes than the internal dynamics of legal growth. As any legal system ages, precedent accumulates, the common law grows and there is a practical necessity for concise summaries of major issues of law lest the legal literature become too bulky and chaotic for practical reference. Codification is, above all else, the product of the internal need to summarize and systematize the law. It is occasionally, but not necessarily, a symptom of political decline. Faithfulness to Code-law has since early Talmudic times been most pronounced in Halakha. There was, to be sure, ample opportunity to dispute particular decisions of any given codifier, basing oneself on precedent, and that flexibility continues in contemporary halakhic decision-making. Still, unambiguous and uncontested decisions codified by Asheri, Tur, Rambam and Karo are the rule of law. To characterize strict adherence to the codified rule of law as "Karaitic" is both mischievous and offensive.

Berkovits preaches an unusual form of religious Zionism. He believes that the Torah must be embraced in democratic fashion by the will of the people of Israel, and rejects any attempts to impose adherence to halakha upon a secular majority in Israel by political means. He contends, with very little evidence, that the Torah was always meant to be observed in a democratic state, and was never to be enforced by might, power or fear. All this is highly problematic. But far more difficult is Berkovits' strong conviction that with the creation of a secular Jewish state, halakha has suddenly been redeemed, and must rise to this new and great moment of Jewish history by shedding the shackles of medieval Rabbinic "karaism" and once again assuming the legislative boldness of the ancient Rabbis.

There can be little doubt that the creation of the State of Israel has given rise to a long list of new, challenging halakhic problems. But so has the advent of the technological era, and the new circumstances of Jewish life in America. All this means is that the Rabbis must find halakhically acceptable answers to new problems. It in no

way justifies outright rejection of law which has been sanctified by codification and generations of observance. This writer, for one, remains unconvinced by Berkovits that the existence of a Jewish State must effect fundamental changes in the due process of halakhic legislation.

Finally, Berkovits commits a serious error of judgment when he blames the Orthodox Rabbinate for the very serious divisions within contemporary Jewry. Berkovits maintains that it is Orthodox intolerance of alternative interpretations of halakha which threaten Jewish national unity. "It is our conviction" he writes, "that Halakha has to be stretched to its limits in order to further Jewish unity and to better mutual understanding."<sup>16</sup> Berkovits believes that there is a possible golden mean of halakhic interpretation that will satisfy the ideological needs of all three major Jewish denominations. He therefore calls upon the Rabbis to liberalize their attitudes to Conservative and Reform marriages and conversions. There are here two ironies which illustrate the extent to which Berkovits is sadly misguided by his idealism: (1) The decision of R. Moshe Feinstein not to recognize the halakhic validity of Conservative and Reform marriage ceremonies has, more than any other single piece of halakhic legislation, freed countless Jewish children from the stigma of *mamzerut*, a problem with which Berkovits has grappled both here and in his earlier works. Very often a Psak may appear to be rooted in intolerance, but is in fact motivated by the highest ethical and humane considerations. Berkovits, in calling upon the Orthodox Rabbinate to recognize the validity of the religious ceremonies of other denominations, would—ironically enough—stigmatize thousands of Jewish children as *mamzerim*. (2) This book, with its call for Jewish unity, was published the same year that the American Reform Rabbinate decided to recognize paternal lineage as a sufficient source of Jewish identity. Would Berkovits have Orthodoxy compromise itself on this issue too, all for the sake of Jewish unity?

Berkovits' concern for the unity and integrity of Israel is undoubtedly well-intended. But his polemic against his Orthodox colleagues is misdirected. For the source of the crisis of Jewish unity and identity is not those rabbis who have remained faithful to Jewish law and tradition, but rather those who have chosen, for the sake of convenience, to break with it. Orthodoxy cannot afford to compromise its principles in order to accommodate unprincipled rabbis and Jewish leaders.

In his introduction to this volume, Berkovits makes an interesting "personal confession." He states that while in all his earlier halakhic studies he interpreted the sources in accordance with the traditions of his father's house and the teachings of his revered teacher Rabbi

Yehiel Ya'akov Weinberg, z"l, "in this work I was determined to be guided exclusively by the traditional halakhic material as I have found it and as I have learned to understand it over the years."<sup>17</sup> Clearly Berkovits sensed the heterodoxy of his own work and wrote this so as not to besmirch the memory of his father and his Rebbe. As for Berkovits himself, this thin volume will almost certainly earn him the admiration of many in the Conservative and Reform Rabbinate whose intention, he insists, "may be no less L'shem Shamayim, for the sake of heaven, than that of Orthodox Jews."<sup>18</sup> But the Orthodox Rabbinate will, in all likelihood, be angered by Berkovits' rather one-sided polemic with it. Towards the end of the book, Berkovits argues that being an Orthodox rabbi does not "automatically bestow upon one the precious treasure of Yirat Shamayim,"<sup>19</sup> a treasure he attributes to some Conservative and Reform rabbis. This may be true. Nonetheless, having read his provocative book, the Orthodox reader may well wonder whether the Rabbinic dictum "*kol haposel, bemumo posel*"<sup>20</sup> does not apply in the case of Rabbi Berkovits. But, of course, unlike halakha, such determinations are indeed in heaven.

#### NOTES

1. Eliezer Berkovits, *Judaism: Fossil or Ferment?* New York, 1962.
2. *Idem*, *Faith After the Holocaust*, New York, 1973.
3. *Op. cit.*
4. *Idem*, *With God in Hell: Judaism in the Ghettos and Death Camps*, New York, 1979.
5. *Idem*, *Tenai Benissu'in Uveget*, Jerusalem, 1967.
6. *Idem*, *Not In Heaven: The Nature and Function of Halakha*, N.Y., 1983, p. 21.
7. *Ibid.*, p. 32.
8. *Ibid.*, p. 32.
9. *Ibid.*, p. 71.
10. *Ibid.*, p. 93.
11. *Ibid.*, p. 88.
12. *Ibid.*, p. 94.
13. *Ibid.*, p. 106.
14. *Ibid.*, p. 22.
15. *Ibid.*, p. 29.
16. *Ibid.*, p. 107.
17. *Ibid.*, p. 2.
18. *Ibid.*, p. 107.
19. *Ibid.*, p. 107.
20. *Kiddushin*, 70a.