

CENTER FOR MODERN TORAH LEADERSHIP



HALAKHAH, TRANSPARENCY, AND JUSTICE: THOUGHTS ABOUT KOHANIM AND CONVERTS

By Rabbi Aryeh Klapper

Sunlight, like all disinfectants, kills healthful bacteria and pathogens alike. When the administration of law is fully exposed, mercy often becomes impossible. Such exposure is generally essential to contain the ever-present infectious disease of corruption. But we must acknowledge that it has costs.

Law by its nature is about the application of abstract rules to specific circumstances. The abstractions can be qualified, nuanced, and so forth, but in the end, what a law does is to treat cases with different characteristics as if they were exactly the same. (Sometimes a law allows authorities to use discretion. From the law's perspective, that means treating each case the same, namely as subject to discretion. But unbounded discretion is really the absence of law, even if it is enshrined in law.)

A key benefit of law is predictability. A clear law allows people to accurately anticipate how the legally constituted authorities will react to the actions they are considering. Laws that are ambiguous, or that leave room for discretion, are less predictable. They lead to injustice because people suffer consequences for their decisions that they could not have anticipated.

This is easy to see in areas such as contract law, where justice between the parties is often properly defined as giving them the outcome they expected. (Not always – some contracts are inherently unjust.) But the broader truth is that when we commit to a system of laws, we order our lives around it, and we have a right to expect it to be applied fairly and predictably.

Halakhah is a system of laws. So to some extent, people who live within halakhah are treated justly when they receive the rulings they expect, and unjustly when they don't.

What if people receive rulings that are more lenient than they expected?

In zero-sum financial cases, it's easy to see that this is unjust to the losing party. We don't say that one party received an excess of justice that balances out the other party's shortfall. That's one reason that the Torah explicitly forbids favoring the poor over the rich in a lawsuit, even if one's overall economic morality is strongly redistributionist.

What about ritual law? For example, let's imagine that a person reasonably expects (based on public expositions of legal precedent) to be told that her just-slaughtered chicken is

treif, or that the smudge on her bedikah cloth makes her niddah, or that use of a device is prohibited on Shabbat, and instead is told that the chicken is kosher, that she may consider herself tehorah, or that the device may be used. These decisions are rooted in a posek's understanding of how a strict ruling would negatively affect the questioner. Unexpected leniency therefore seems a clear win for the person receiving the ruling, and there seems no reason to worry about injustice.

That's likely true for the first such ruling. However, a person who is regularly surprised by lenient rulings, will gradually lose confidence in their own understanding of the law. They will perceive the law as inscrutable rather than as predictable. As a result, they will find it hard to order their lives around observing the law.

If lenient surprises happen regularly enough, the person's expectations will change. And unless we include a ban against sharing the rulings received – which would not be consistent with "sunlight" – other people's expectations will change as well. If those other people then do not receive the same lenient rulings, they will – correctly – regard this as injustice. This is true even if there are relevant differences between the people involved, so long as the legal significance of those differences is not transparent to the parties involved.

Why not just be transparent? A radical possibility is that laws can tolerate discretionary exceptions only so long as they don't interfere with the perception of predictability.

For example: some laws are intended to create social deterrents, and to that end they apply harsh punishments. Many cases will have mitigating circumstances that individually justify acquittals to avoid overpunishing. But if too many guilty people are acquitted, deterrence will wither.

The upshot is that the ability to rule mercifully often depends *davka* on mercy not being predictable, on it being perceived as going beyond the requirements of justice. Predictable mercy is actually a claim that the law is unjust.

These reflections arose as I considered writing about specific aspects of halakhah's treatment of romantic relationships between kohanim and converts. Specifically, I wondered whether certain paths for ruling leniently in such cases get blocked off as they become more known, and if yes, whether that constitutes an injustice.

Some basic background is necessary.

Vayikra 21:7 forbids kohanim from marrying a *zonah*. In some contexts in Tanakh, the term *zonah* clearly means prostitute; in other contexts, such as the descriptions of Rachav of Jericho and the mother of Yiftach, at least some commentators understand it differently. The position of the Sages is that here it refers only to a convert, a freed maidservant, and a Jewish woman who has had sex with a man whom she may not marry, such as a non-Jew.

Some rishonim seem to understand the prohibition against kohanim marrying converts as based simply on their having once been non-Jewish. This principle may be constructed as Biblical or as Rabbinic. Others understand the prohibition as based on a presumption that converts had sex with non-Jews at some time prior to converting. This assumption may be constructed as rebuttable or as irrebuttable. Yet a third position understands the prohibition as grounded in Yechezkel 42:22, which they understand as obligating kohanim to marry only women who are **בתולת מזרע בית ישראל** = *virgins of the seed of the House of Israel*. As ordinary kohanim may marry non-virgins, this verse requires extensive interpretation.

How should poskim react when a kohen and a convert seek to marry?

One approach is to discourage them as strongly as possible. In the YU world, this is often accompanied by anecdotes about such marriages failing, and/or about happy marriages that ensued after such relationships broke up. These anecdotes comport with my limited experiences, and have what seems to me a reasonable psychological rationale; for people who care deeply about halakhah and/or their status as kohanim, the relationship carries a burden of guilt or spiritual anxiety that can be dispelled only by an unequivocal halakhic endorsement, whereas here the endgame is generally a grudging halakhic permission.

A second approach is to search strenuously for grounds for permission. One makes no promises in advance, but at the same time makes at most pro forma attempts to persuade the couple to break up.

Given the rationale I offered above for the first approach, the second approach is most useful for couples who are not deciding whether to marry, but rather only whether to marry in an Orthodox halakhic ceremony. However, I'm not sure whether this outcome comports with justice. Is it fair that people with greater prior commitment are less likely to receive a lenient ruling allowing them to marry, even if this can be justified from a utilitarian perspective?

Several other factors play halakhic roles that seem to me legitimate and yet in tension with justice.

One is that poskim are made uncomfortable, and may suffer reputationally, if they are perceived as being too prone to leniency. But their first leniency inevitably attracts questions

from people who see their cases as similar, and if they are, the process will inevitably become more streamlined over time. Poskim may pull back or refuse to take questions if they perceive this happening. But is it justice for the availability of a legal outcome to depend on one's place in the queue? What if poskim decide that they'll only address cases brought to them by close students?

The last question raises the broader question of access to halakhic resources. My work on cases of *iggum* has taught me how vital it can be to have an advocate within the halakhic system doing the necessary halakhic research and pushing for action. People whose local rabbi takes approach #1 may never have their cases presented seriously to poskim who take approach #2, even if that approach would work well for them.

In the United States, issues of kehunah and conversion for many years were greatly affected by two leniencies of Rav Moshe Feinstein. The first was that attestations of kehunah are reliable only via an unbroken chain of Shomrei Shabbat. The second was that in some situations one could rely on the position of Rabbi Shimon bar Yochai, who allowed kohanim to marry women who converted before the age of three.

The first leniency was broadly known and relied on; the second often required access to a student of Rav Mosheh. The second position often came up in an era when adopted children were not told of their status. It comes up now in cases of surrogacy.

Another "modern" case involves women who grow up in non-Orthodox communities and discover late in the dating process that their mother's conversion is halakhically challengeable, and convert themselves as adults.

One ground for permitting the marriage in such cases is an extension of Rabbi Shimon bar Yochai's rationale. One understanding of Rabbi Shimon is that there can be no presumption of sex-with-a-man-one-could-not-marry with regard to a woman younger than three years old. Perhaps that presumption is also vacated for women who plausibly identified as Jewish before turning three, even if their identification was mistaken. This extension draws support from Ritva to Ketubot 11a. Ritva posits that infant females captured in the war against the Midianites were raised Jewish and converted as adults, and yet were eligible to marry kohanim. (See also RaSHaSH ad loc.)

By reading this essay to its end, you joined the favored few who know of this Ritva and its possible halakhic implication. Would sharing his position widely increase the likelihood that couples in this situation will find poskim willing to be lenient? Or is it best to keep the source and argument under wraps, and use it privately if an appropriate case comes to you or me?

Shabbat shalom!

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