I suggest that the practical legal applications of abstractions are necessarily bound by culture – they cannot be true across all cultures. Making law is the process of reducing discretion, and almost always requires us to behave less-than-ideally in some circumstances for the sake of ensuring that we behave ideally in many others. But it makes a real difference when and where and by whom the details are determined, even if each determiner would do so properly for their own context.

One of the most important tasks of a halakhic leader is to decide which halakhot are best formalized, so that the reality of your own community becomes (or at least you make the claim it ought to become) the governing framework of Klal Yisroel, and which are best left abstract, so that other communities can legitimately practice differently without denying your authority. I, for example, would like signing the halakhic prenup to become a halakhic norm, and not allow communities with different conceptions of the proper distribution of power in marriage to resist it, although this is an ambitious goal when even Modern Orthodoxy has not yet reached the point of universal signing. But I think in many other areas, ranging from kibbud av vaeim to contraception, we may be best off maintaining abstraction for now, for two reasons:

1) Sometimes we may not yet have enough factual information, or enough perspective to realize whether our culture is fairly standard or a real outlier.

2) It is often – not always, but often – easier to hold a community together when its fights are about abstractions rather than law.

However, it is important to realize that maintaining abstraction does not necessarily mean that all options are permitted – more often, it maintains the practical halakhic status quo, and this of course can be a heavy price to pay.

As both last week's dvar Torah and my latest contribution to Text and Texture ("Chukim, Mishpatim, and Womanhood") raised large issues about halakhic process that legitimately, and to my mind happily, provoked requests for clarification, I will take this week's slot to begin trying to do so. This effort will be preliminary and brief, however, owing to time constraints – I look forward to revisiting the issues more comprehensively.

When is it best to specify the law in detail, and when best to leave it general and abstract? An easy answer is that details are necessary in inverse proportion to trust. The metaphor I use for this is "BeRachel bitkha haketanah" – as understood by Rashi, Yaakov spells out daughter, and younger, to Lavan so there would be no loopholes in the contract. But the underlying message of that story is that Lavan tricks Yaakov anyway. No amount of detail can prevent misbehavior in the absence of integrity.

Furthermore, if an excess of detail indicates distrust, what are we to make of this week's parshiyot, let alone of Sefer Vayikra? Rabbi Saul Berman cites the Hertz Chumash as seeing the details of Vayikra as rooted somewhat differently in lack of trust – it was necessary to publicize the Manual for Priestly Service so that priests would be accountable to the public, rather than leaving the people vulnerable to a priesthood that could threaten to do sacrifices wrongly but imperceptibly, and therefore fail to atone for their owners. On this theory, the detailed instructions for making the Mishkan are G-d's way of making Himself accountable for being present to B'nei Yisroel. Perhaps more sharply, they remove from the Jews any explanation for Divine absence other than their own misdeeds.

Law is the opposite of discretion – one makes laws only because one fears that otherwise people will misbehave. Sometimes this is because there is no right or wrong, as in which side of the street to drive on, or what color light means go – so law is necessary to create a right thing to do. In other cases, however, law is designed to prevent people from doing the wrong thing, not because they are evil – that requires enforcement, not just law – but because their judgment is poor.

My friend, and predecessor at Harvard Hillel, Rabbi Harry Sinoff, had two forms of psak halakhah for the minyan – one he said orally, and was intended to cover only the extant situation , and the other he wrote, and was intended to serve as precedent for future situations. Setting a precedent was a deliberate choice to remove discretion from later Boards and rabbis, for fear that they would make the wrong decision in a similar case[1].

It seems self-evident that the values and purposes of halakhah, to be ideally achieved, require halakhah to be interpreted differently in different times, places, and circumstances. The laws of "placing a stumbling block in front of the blind", for example, require knowledge of how people in a specific culture relate to specific temptations and provocations; the laws. Gestures that in some cultures express proper respect to parents will in others be seen as satiric, and punishments that seem appropriate in some cultures are abusive in others.

Nonetheless, the history of Halakhah seems largely one of growth toward greater detail. This is partially simply a reflection of the need for scholarship to have an outlet, but also reflects the reality that since details are often framed as precedent, Halakhah, as opposed to Nature, has an anti-entropic tendency. All of us can list laws where the prior commitment to details makes Halakhah's relationship to current reality tenuous, as in the

[1] Although sometimes, if one assumes that successors will share the same values and judgment, removing their discretion just shields them from political pressure.

permission to wear designer high-tech sneakers on Yom Kippur so long as they are not made of leather.

My contention is the following: If one has a tenuous majority on an important issue, setting precedent in as much detail as possible is the proper strategy. That way the shifting ideological winds will not undo your core commitments. Think of Beit Shammai, on the one day they outnumbered Beit Hillel, passing 18 decrees creating barriers between Jews and Gentiles; while Beit Hillel apparently disagreed with all 18, and were restored to the majority almost immediately, most of those decrees are still binding practice.

However, minorities are rarely well-advised to concretize their positions into psak – that will likely provoke counterpsakim, which by the normal canons of Halakhah, as reflecting a majority position, will have more authority. The proper strategy for a minority is to keep the formally determined Halakhah back on a level of abstraction that commands consensus, and then depict one's practice as simply a legitimate expression of that consensus.

Undoing detailed precedent, and reverting to abstraction, is much harder to do. We can, however, see clear instances of it where Halakhah meets changes in scientific knowledge; the standard move is to claim that the detailed instructions of precedent were merely good advice as to how to fulfill the law, rather than legal statements in their own right. But even this is not easy, as witness the extent to which R. Moshe Feinstein's early refusal to ban smoking endures.

I want to emphasize that the decision as to whether to issue a detailed rule, as opposed to an abstraction, is one that is properly the subject of scholarly discretion, and that scholars of integrity can take conflicting positions with regard to a particular issue even when they agree entirely on how to read the evidence of the textual tradition.

Shabbat Shalom!

Aryeh Klapper
www.torahleadership.org