

YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

TALMUDIC METHODOLOGY
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SHIUR #20: SAFEK SEFEIKA - PART 1

Halakha provides several tools to assist in the resolution of empirical uncertainties. Ideally, any halakhic information should be provided by witnesses who possess firsthand knowledge about an item, person or event. However, given the impracticability of this demand, halakha empowers us to follow several norms in establishing past events. Probabilities (rov), last known states (chazaka), assumed behavioral patterns (anan sahad), and proximity (karov), are all employed – in different contexts – to help determine halakha. In the absence of any of these factors, we are obligated to treat a safek de-oraita (uncertainty regarding Torah law) more severely than a Rabbinic one – "safek de-oraita le-chumra," whereas "safek de-rabanan le-kula."

One interesting option involves a situation of safek sefeika - where there are two overlapping issues affecting one halakhic ruling – meaning, where we can establish issur only by assuming two joint or simultaneous questionable realities. Consider, for example, a case where a safek issur (an item which might be neveila) falls into a vat of kosher food and becomes 'lost' within the vat. If a person were to eat from this vat, he would be violating an issur only if we assume BOTH 1) that the original piece was indeed forbidden food, AND 2) that the piece which he eats is the original one which fell into the vat. Halakha allows for situations like this – termed safek sefeika – to be treated leniently, and the food is permissible. Likewise, if a husband finds his new bride to be a non-betula on their wedding night, we would allow her to continue living with him even though she might have been disloyal after the betrothal (in which case she becomes forbidden to him). In this case, in order to establish a prohibition, we would have to assume BOTH 1) that her sexual contact occurred after her engagement, and not before, AND 2) that such contact was willful (rather than involuntary, which does not forbid her to her husband). Since we can arrive at issur only by making this double assumption, halakha permits her to remain with her husband.

The Rashba, in one of his teshuvot, offers an interesting rationale for this halakha of safek sefeika. He equates safek sefeika with rov (probability), claiming that, essentially, we can view safek sefeika as a logical rov. We might claim that most women who engage in premarital sexual activity do so in a manner which does not forbid them from continuing with their husbands (even though the act itself is forbidden). This view would suggest that from a purely statistical standpoint every safek sefeika yields a statistical "probability." A different way of viewing safek sefeika as rov might be to assess logical possibilities rather than statistical probabilities. Anytime we face two sefeikot, there exist four scenarios. Taking the case of the possibly disloyal woman, the following four cases are possible: a) she had voluntary contact prior to engagement b) she had coerced contact prior to engagement c) she had coerced contact subsequent to engagement d) she had voluntary contact subsequent to engagement. Inasmuch as in alleged scenarios a) through c) she is permitted to her husband, we allow her to remain with her husband, since most suggested scenarios support this ruling. In any event, either articulation would firmly associate safek sefeika with rov.

By contrast, several sources suggest an independent interpretation of safek sefeika. Perhaps the most well known and indicative is a Tosefot in Ketuvot (9b), which lodges an astounding claim regarding safek sefeika. Generally, we rule "ha-motzi mei-chavero alav ha-re'aya" – the person extracting the money from its current possessor is charged with the burden of supplying evidence. In the absence of evidence – even if the defendant has supplied no evidence to his claim - we rule in his favor and retain the money in its current possession. Even halakhic tools which are often effective in resolving uncertainties (migu, rov, chazaka) are insufficient in extracting money in the absence of hard evidence. Tosefot (s.v. I bai), however, allows a woman accused of infidelity to collect her ketuba because her issur is purely a product of safek sefeika – she might have been coerced, and even if she willfully engaged in sexual contact, it might have occurred prior to the engagement. Even though she hasn't furnished concrete evidence to either scenario, and even though she seeks to extract money from the husband – she is allowed to collect. Undoubtedly, Tosefot did not view safek sefeika in the same light as the Rashba. Had safek sefeika been a derivative of rov, it could not warrant the reparation of money. Generally, we rule "ein holekhin be-mammon achar ha-rov" - we do not utilize rov as an instrument for extracting money. The Rav zt"l explained that Tosefot would view safek

sefeika as an absence of a halakhically recognized safek. Even though part of our halakhic conduct demands worrying about potential issur, if an issur can only apply by taking two assumptions simultaneously (a. she had sexual contact after the engagement AND b. it was willful), we are excused from worrying. In halakhic terminology, safek sefeika is not even considered a safek. In the aforementioned situation of a woman collecting her ketuba, since the only way we can conclude the cancellation of her ketuba is by adopting two simultaneous assumptions, we do not even consider the safek as 'pressing' or halakhically significant, and we allow her to collect her ketuba.

A similar sentiment may be drawn from a gemara in Ketubot (13a), which cites a machloket between Raban Gamliel and Rabbi Yehoshua about resolving a 'crisis' regarding halakhic pedigree. Upon witnessing a woman engaging in suspect activity with a person of questionable halakhic status, can we apply standard halakhic tools to assume his validity and thus maintain her status as suitable to marry a Kohen? Raban Gamliel is liberal in applying these vehicles and maintaining her validity, whereas Rabbi Yehoshua rules that ma'aleh asu be-yuchsin - in affairs relating to personal marital status, the Chakhamim adopted stringent measures and did not allow for leniency. Only in the presence of hard evidence attesting to the pedigree of the man can we maintain this woman's status. There is only one exception where Rabbi Yehoshua agrees that a woman in doubt may be ratified as suitable to marry a Kohen - a woman to whom the gemara refers as "almanat issa"(14a). According to most Rishonim, this refers to a woman who belongs to a family which contained in its ancestry a safek pasul - a woman who may have been unsuitable to marry a Kohen. Since the present woman who wishes to marry a Kohen is only a safek sefeika – perhaps she doesn't descend directly from this questionable family member, and even if she does, perhaps that original woman wasn't even pasul - she can be validated to marry a Kohen. Even Rabbi Yehoshua, who rejects most halakhic instruments in clarifying an uncertainty of yuchsin (halakhic pedigree), admits that a woman will maintain her status in the situation of safek sefeika. This, too, indicates that safek sefeika is not a TOOL to resolve a safek. For if it were, Rabbi Yehoshua should presumably reject this tool for use in yuchsin as he rejects other tools. Evidently, safek sefeika is not even considered a safek, and therefore, in a case of almanat issa, when we have only a safek sefeika, the woman can maintain her currently held status of validity.