**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #08: Unilateral Seizure of Disputed Funds**

The baseline of all monetary disputes is the principle of *ha-motzi mei-chaveiro alav ha-ra’aya*, which awards disputed items to the current possessor in the absence of any evidence to the contrary. The *gemara* in *Bava* *Kama* (46b) is so convinced of this principle that after attempting to derive it from a *pasuk*, it asserts that the rule is intuitive and does not require a specific verse. There are very few principles in the halakhic system that enjoy this status and which are derived from the systemic logic of the overall halakhic code.

What would happen if a dispute yields a *ha-motzi mei-chaveiro alav ha-ra’aya* conclusion and the plaintiff who lost the case unilaterally grabs the disputed item? This case of *tefisa* is discussed by the *gemara* in *Bava Metzia* (6) in the context of a *kohen* who asserts that a newly born animal is a firstborn and therefore belongs to him. The owner denies this claim and asserts his ownership. In the absence of testimony about the identity of the animal, the original owner retains ownership based on *ha-motzi mei-chaveiro alav ha-ra’aya*. Subsequently the *gemara* explores the situation of "*takfo kohen*," in which the plaintiff/*kohen* seizes the animal. The *gemara* presents two possible solutions, but it is widely assumed that the conclusive ruling disallows this seizure and that *takfo* *kohen* *motzi'in mi-yado* – if the plaintiff *kohen* seizes the animal - we remove it from his possession and award it to the defendant. Interestingly, in the 17th century, R. Shabtai Cohen (himself a *kohen*) penned a legendary work about the rules of seizure/*tefisa*, and by logical extension the dynamics of possession.

There are several interesting exceptions, situations in which unilateral seizure succeeds. As in every halakhic context, these exceptions prove the rule or principle. One exception centers upon a scenario cited in the *gemara* (*Ketuvot* 17b) in which a husband and wife undergoing divorce dispute the woman’s original status at the time of their marriage. The husband claims that she was not a *betula* and her current *ketuva* should be collected accordingly (only 100 *zuz*). The woman claims that she was a *betula* at the time of their marriage and she deserves a greater *ketuva* (220 *zuz*). In the absence of any concrete testimony, the principle of *ha-motzi mei-chaveiro alav ha-ra’aya* favors the husband, and he only surrenders 100 *zuz*. The *gemara* is concerned that the woman will unilaterally seize the disputed funds and therefore implements an apparatus to prevent this. The *Rishonim* question why this is necessary given that *tefisa* ordinarily fails.

The Ramban (*Ketuvot* 17b) introduces a novel solution to this quandary. While *tefisa* fails in typical deadlocked disputes, halakhic deadlocks that promise future resolution allow unilateral *tefisa*. Cases that are “*avida ligluyei*,*”* which will one day yield new evidence, allow *tefisa*. Only dead-end disputes in which no new evidence is expected disallow *tefisa*. Regarding the dispute about the woman's status at the point of the marriage, we can expect future testimony to emerge, and consequently *tefisa* is allowed.

One way to understand the Ramban’s position is practical. Typically, *Beit Din* must intervene to reverse a unilateral and illegal seizure. However, in “fluid” cases in which future testimony may rule definitively for one litigant, *Beit Din* will not intervene. As the case in question is still in flux, it is pointless to intervene to reverse a seizure; it is possible that *Beit Din* will reverse a seizure only to have the case resolved in favor of the "seizer," compelling them to award him the item in any case. *Beit Din* therefore remains passive in the face of the seizure, awaiting a definitive outcome. Indeed, part of the Ramban's articulation of his approach supports this explanation.

A different understanding of the Ramban is more structural. Perhaps the expectation of new evidence affects how we classify the dispute and the suitability of seizure. This approach demands an analysis of how *ha-motzi mei-chaveiro alav ha-ra’aya* operates and why seizure fails. Classically, *ha-motzi mei-chaveiro alav ha-ra’aya* consists of two components, which quite possibly co-exist and lend the principle its ubiquity and legal force. First, possession provides a "low-level" proof of ownership. In the absence of hard evidence, we assume that a possessor actually manufactured or purchased the item. Most people are not suspected of theft; we can therefore presume that the possessor is indeed the owner. If hard evidence presents itself, we will not rely on this assumption, but in a vacuum of evidence, this assumption is compelling. Alternatively and additionally, *ha-motzi mei-chaveiro alav ha-ra’aya* may also set a baseline status quo which is not altered unless compelling evidence presents itself. We do not assume that the possessor is the owner; rather, we maintain the status quo of possession until and unless evidence presents itself. Thus, *ha-motzi mei-chaveiro alav ha-ra’aya* may contain an ASSUMPTION about ownership as well as a mandate to preserve a STATUS QUO.

As alluded to above, this dual basis for the principle may account for its widespread application. Certain situations may render the assumption inoperable, but the maintenance of the status quo will still favor the defendant/possessor. Alternatively, certain scenarios may argue for the suspension and reversal of the status quo, but the assumption of possession will still award the defendant.

The classic situation of *tefisa* may be an example in which only ONE of the *ha-motzi mei-chaveiro alav ha-ra’aya* components favors the original defendant. Even after the unilateral seizure, we continue to ASSUME that the item belonged to the original possessor, as we know how it reached the possession of the seizer, the current possessor, and there are no ownership assumptions that favor him. However, the doctrine preserving a status quo may favor the seizer, since HE now enjoys the status quo of physical possession. Put differently, *tefisa* transforms the status quo, but does not change any implicit assumptions. The original assumption about the original defendant/possessor’s ownership is the reason for failed *tefisa*.

Conceivably, however, *tefisa* could succeed in a situation in which our assumptions are irrelevant. Since *tefisa* alters the status quo in favor of the seizer, the seizure will succeed if the environment disqualifies the assumption that typically favors the original defendant even after seizure. Perhaps a dispute in which there is anticipation of future evidence is such a situation. The assumption that possession=ownership is only admissible in dead-end situations; in the absence of ANY evidence, we are forced to accept low level assumptions. However, if evidence is presented, OR EVEN IF EVIDENCE IS ANTICIPATED, the low level assumption favoring the defendant is useless. At this stage, no assumptions about anyone's ownership are considered and the other component pertains – the status quo favors the current possessor/seizer, and his *tefisa* is thus successful. The exception is not based on practical considerations, but categorical ones. *Tefisa* is ALWAYS partially effective in altering the status quo. However, the assumption of ownership USUALLY still favors the original defendant. A liquid dispute in which future testimony is expected renders assumptions irrelevant and seizure successful. Indeed, subsequent language of the Ramban makes it appear that the effectiveness of *tefisa* in "fluid" disputes is not practical, as earlier suggested, but categorical.

This second approach to understanding *tefisa*'s effectiveness in fluid disputes may reflect a statement of the Ramban in a different context. He highlights a different instance in which *tefisa* is effective. If the dispute involves "*trei u-trei*," a deadlock based on two witnesses supporting each disputant, *tefisa* is effective. This appears odd, since *trei u-trei* disputes are resolved by applying *ha-motzi mei-chaveiro alav ha-ra’aya*; *tefisa* should not be effective.

Perhaps a case of *trie u-trei* is comparable to a *safek aveida* *ligluyei* in allowing unilateral *tefisa*. In typical cases, *tefisa* is ineffective, even though it alters the status quo since the seizer now possesses the item, because the assumed ownership of the original possessor remains unchanged and overcomes the hold of the seizer, invalidating *tefisa*. However, if the dispute is such that the assumed ownership is irrelevant, *tefisa* will be effective, as the status quo will determine the award and, post-*tefisa*, the status quo favors the seizer. As stated above, one instance in which assumptions are irrelevant is a fluid *safek*; since we expect superior evidence, we pay no heed to assumed evidence. *Trei u-trei* is the exact inverse of *avida ligluyei* but structurally identical. Since *eidim* have supported both disputants and have deadlocked, we cannot admit any more evidence. All assumptions about ownership are rendered irrelevant since ACTUAL testimony was offered and stalled by the *trei u-trei* deadlock. Since assumptions are no longer acceptable, the award is determined by the status quo, which currently favors the seizer. A case that is in flux as well as one which has been frozen because of contradictory testimony of *trei u-trei* are each situations in which assumptions about ownership are not relevant and the status quo determines the award. In each instance *tefisa* will be successful as the “seizer” now enjoys the status quo while assumptions of ownership are irrelevant.