

KOL DEPARISH AND KAVUA

Principles for Resolving Uncertainties of Origin

In the context of discussion regarding sacrifices that became intermingled with other animals, *Zevachim* 73a introduces the Torah principles of *kol deparish* and *kavua* which influence when the regular rule of *rov*, statistical majority, is implemented and when not.

- The principle of *kol deparish* (anything that separates) applies when an item has already left a mixed group and its status needs to be determined retrospectively. We focus on the object's origin rather than its current position and therefore the item's status is determined by the majority of the source from which it separated. For example, where a piece of meat is found in a general marketplace, if the *majority* of the butcher shops in that specific market sell kosher meat, the found piece of meat is presumed to be kosher.
- The principle of *kavua* dictates that something considered stationed in its place has an equal chance of being from the majority or the minority. It applies to a fixed group of items where the status of the entire group is known (e.g., a group of nine kosher animals and one non-kosher animal in a pen). When one item whose status is unknown is removed, it cannot be automatically assigned the majority status. For example, in the case of the ten animals, if one is removed without knowing which it was, the *kavua* principle would not permit one to simply assume it was kosher based on the 9/10 majority. The animal's status is a 50/50 doubt.

SOURCE OF LAW OF KAVUA

The law of *kavua* is a *gezeiras hakasuv* which *Kesubos* 15a explains is derived from *Devarim* 19:11 וְאָרַב לוֹ וְקָם עָלָיו, “and ambushes him and rises up against him”. These superfluous words serve to exclude from capital punishment one who throws a stone into a group of people consisting of Jews and Canaanites and he kills a Jew. The Gemara explains the case to be where there were nine Jews in the group and there is one Canaanite amongst them. Since most of the people in the group are Jews, the rule of majority would yield that the perpetrator be executed. The Torah teaches that we view each individual as having an equal chance of being hit and in cases of doubt the court must avoid imposing the death penalty. Tosafos (*Zevachim* 73b s.v. *ela*) explains that this is because the Canaanite is among a group assembled in a fixed place and clearly identifiable within that group and therefore cannot become nullified. He is viewed as half the group and the group is thus deemed to consist of half of Jews and half of Canaanites and the perpetrator is given the benefit of the doubt. If the Torah would view the Canaanite as a minority, there would be no reason to acquit the Jew. On the other hand, it would be unreasonable to assume that the Torah regards him as a majority, and we therefore say that the Torah views him as half the group (*Rashi, Sanhedrin* 79a). Thus, we see that when an uncertainty arises regarding something that is *kavua*, we treat it as having a probability of fifty-fifty. This rule has application in a dozen situations in *Shas* and we have previously discussed the principle of *kavua* in connection with the adoption of an abandoned baby (see *Daf Topics* 81 - <https://tinyurl.com/DAFTOPIC81>). Here, we shall examine three other scenarios where these principles came into play.

SHAATNEZ MIX-UP

Rav Yehudah Aryeh Dunner was presented with the following problem (*Kol HaTorah* 57, 2005). A *shaatnez* testing centre received twenty suits for examination and testing revealed that three suits contained *shaatnez*. These three were placed in a separate pile and tags were attached to each suit indicating that *shaatnez* required removal. When the staff arrived in the morning, they found that the cleaner had gathered all twenty suits together into one pile and moved them aside. The owner of one of the suits arrived to collect his garment and after he left, the staff discovered a loose tag lying on the floor. This tag must have fallen from one of the three suits requiring *shaatnez* removal, but they had no way of knowing from which suit it fell. Does the tester need to repeat his day's work and retest the suits and do they need to recall the suit which had been collected already?



SUITS ARE NOT NULLIFIED IN A MAJORITY

Shulchan Aruch (*Yoreh De'ah* 110:1) rules that intermingled items of the same type do not get nullified if they are significantly distinctive and then lists seven such items. A suit is not one of them and therefore the unidentified suit should be nullified amongst the other kosher suits. However, the Rema notes that some say that any item that is sold individually rather than in bulk (*davar sh'beminyan*) does not get nullified, and accordingly all the suits would be forbidden for those who follow the Rema. Except that perhaps the suit that was collected should be permitted without a retest on the basis of *kol deparish*. But is that not a case of *kavua*? Since the suit was picked up in the place where the doubt arose, that should be considered *kavua*, and then there is an equal chance of it having *shaatnez*.

RETROSPECTIVE *KAVUA*

The Shach (based on Tosafos and the Ran) states that if there was no knowledge of the problem before the item was removed, then it is not considered removed from *kavua*. It would be regarded as separated from the majority and permitted. The whole concept of *kavua* is a novelty of the Torah, and we do not extend that novelty retrospectively beyond the time that the doubt first arose. Nevertheless, the Shach also cites the opinion of dissenting Rishonim such as the Ra'ah (*Bedek Habayis* 4:2) who argue that once the problem is discovered, it reveals that the prior situation was a separation from *kavua* and it should be forbidden retrospectively. The Shach concludes in favour of the latter opinion and accordingly even the collected suit would require retesting. However, Shulchan Aruch has a further ruling (*Yoreh De'ah* 110:5) that if one purchases meat from a slaughterhouse, and later they discover that there was non-kosher meat there, then anything purchased prior to the time of discovery is permitted because of *kol deparish*. Now, although we say, according to the stricter view of the Shach, that we apply *kavua* retrospectively, that is only in the classic case of the nine shops, where the non-kosher meat is identifiable, and therefore there is no majority *bitul*. The forbidden food remains in its place and the Torah law of *kavua* applies retrospectively. However, where one purchases from the slaughterhouse, where the *treifah* meat is not identifiable, then the Torah law of majority *bitul* applies, and we only forbid it rabbinically because it is a significant item. In such a case, we do not apply *kavua* retrospectively. Similarly, the suits were only forbidden because they were considered significant, so we can apply *kol deparish* and the collected suit would not need retesting. Another problem is that Shulchan Aruch (110:3) adds that even where the item is nullified by majority because of *kol deparish* it would still be forbidden because of rabbinical *gezeirah* lest this permit lead to him taking from *kavua* as well. However, the same answer is applicable. As this is a rabbinical prohibition, it only takes effect from time of discovery of the problem and does not act retrospectively.

MEAT SCANDAL

A very similar ruling was rendered in a 2013 case, where an undercover video captured the owner of a Los Angeles kosher meat market bringing unsealed boxes of chicken into the store, leading to the revocation of the store's kosher certification. The RCC ruling, issued on erev erev Pesach, went on to say that meat bought there before 3 p.m. Sunday "is permitted to be eaten and can be enjoyed on Yom Tov." This fascinating *psak* meant that any meat purchased at the store before that time, was perfectly kosher and anything bought thereafter, was regarded as non-kosher. This cut-off time can be understood in the light of the above distinction in the application of *kol deparish*. Any meat purchased in the store would be suspect, after it was known that some unsupervised meat had been brought into the store, but the majority of the meat was certainly kosher. Meat purchased was separated from the majority under *kol deparish*, but would still be forbidden rabbinically, as it could be confused with a *kavua* situation. However, rabbinical prohibitions do not apply retrospectively, and since the problem was determined by the Rabbanim to be an issue at 3 p.m., any earlier purchases were kosher.

SUSPECT *ORLAH*

The prohibition of *orlah* forbids the eating or any other benefit from the fruit of a newly planted fruit tree for the first three years. This prohibition applies both inside and outside of Eretz Yisrael, but with different levels of stringency. The law of *orlah* applies outside of Eretz Yisrael, a ruling considered a *halachah leMoshe miSinai*. However, a key difference in the diaspora is a leniency regarding cases of doubt. If there is a doubt about the *orlah* status of fruit, the stricter Torah rule applies, and the fruit is treated as forbidden. Outside Eretz Yisrael, in cases of doubt, this *halachah* dictates that the fruit is permitted. For example, if one buys fruit in a store and is not certain of its origin or the tree's age, it is generally permitted because we assume that since a majority of fruit on the market is not from the first three years, it does not have the *orlah* status. Inside Eretz Yisrael, even doubtful *orlah* in a store is forbidden, and therefore Rabbonim advise not to purchase fruit unless it is certified to be *orlah*-free with rabbinical supervision. The question is that since only a very small percentage of fruit is *orlah*, why do we consider it to be doubtful – any prohibited items should be nullified (in the case of *orlah*, 1:200).

DOUBT ARISES IN THE ORCHARD

The answer is that we have to look at the point where the doubt first arose. The person picking the fruit does not know that it is *orlah*, and if it was done under Jewish control, the fruit now has suspect *orlah* status. If no Jews were involved, then the *orlah* status is irrelevant to the picking, and when it is later sold, the purchaser can rely on *kol deparish* and the majority is assumed kosher. But if picked under Jewish control, the doubt arose in the orchard and the fruit already acquired its prohibited suspect *orlah* status. Many *poskim* hold that the orchard is regarded as *kavua*, which cannot rely on *bitul*, and when the fruit reaches the stores, it already has forbidden status. Even when it is exported abroad, this fruit retains its forbidden status and for that reason one cannot buy suspect fruit from Eretz Yisrael without *kashrus* supervision, even though doubtful *orlah* is permitted in the diaspora. The Rabbinat in Eretz Yisrael have created an extensive database of planting times of trees in all orchards and maintain control of all fruit entering warehouses before distribution to supermarkets and the IDF. *Rabbanut mashgichim* are instructed to remove any fruit as soon as it starts growing on *orlah* trees, so that these fruits cannot enter the market.