YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**GEMARA BAVA KAMA 5771**

**Shiur #27: The Nature of "*Eish*" - "*Mamono*" or "*Chitzav*"**

***Bava Kama* 22a**

Introduction:

This week, we will analyze the fourth of the "*avot* *nezikin*" - *eish* (fire). The gemara in the sixth chapter discusses the laws of *eish* in great depth and detail, exploring the different situations in which one is culpable for damages caused by fire. Our sugya, though, grapples with the very nature of the obligation of payment for damages caused by *eish*.

"Rabbi Yochanan said: one's fire is considered like one's arrows. Reish Lakish said: one's fire is considered like one's property. Why did Reish Lakish disagree with Rabbi Yochanan? He said that an arrow moves because of one's force; this (fire) moves on its own [and can therefore not be likened to damage through arrows]. And why did Rabbi Yochanan not agree with Reish Lakish? He said that one's property is physical; this (fire) has no physical qualities..." (*Bava Kama* 22a).

In other words, the gemara questions whether damage incurred by fire should be viewed within the framework of "*nizkei* *mamon*," damages incurred by one's property (e.g. one's ox), or as a form of "*adam* *hamazik*," a person who damages, such as one shooting an arrow. Before addressing this question directly, we must first note the uniqueness of, and the subsequent problems related to, the obligation to pay for damages caused by fire.

Let us begin with the source for *eish*:

"If a fire shall go forth and find thorns, or a stack of grain or a standing crop or a field is consumed, the one who kindled the fire shall make restitution..."(Exodus 22:5).

A cursory reading of this verse already reveals the problematic nature of *eish*. On the one hand, the Torah describes the fire as "going forth" and "finding." *Chazal* aptly derive that one is obligated to pay even if the fire spreads on its own, as fire usually does. This suggests that the *mekhayev* (obligating factor) of *eish* is one's having allowed the fire to kindle and spread. On the other hand, the Torah obligates specifically "he who kindled the fire." This expression points to the damage as having directly resulted from the person's act. In this sense, *eish* bears resemblance to *adam* *hamazik*, in that even one who shoots an arrow or throws a stone is obligated to render restitution.

Beyond the ambiguous wording of the *pasuk*, we should note a general classification problem associated with *eish*. In the context of damages in halakha, we generally speak of two types of "*mechayevim*" of compensatory payment: 1) *nizkei* *mamon* - damage wrought by one's property (an animal); and 2) *adam* *hamazik* - damage caused by the individual himself. (*Adam* *hamazik* includes both "hands-on" damage, such as going up to a window and smashing it, and less direct damage, such as shooting an arrow.) *Eish* doesn't seem to fit into either category. On the one hand, can we really equate the relationship between a person and his fire to that between a person and his ox? On the other hand, can we really compare the act of shooting an arrow to starting a fire?

Returning to our gemara, it appears that the gemara is grappling with this very problem: how are we to categorize the obligation to pay for damages caused by fire? Rabbi Yochanan refused to view *eish* as "*mamon*o" - damage caused by one's property - because fire lacks "*mamasha*" - physical qualities. Yet, classifying *eish* as "*chitzav*" (arrows) seems equally as difficult, as fire spreads either independently or through external forces such as wind. Cases of *adam* *hamazik*, by contrast, are those when the individual directly brings about the damage. So, how are we to classify *eish*?

We should also note the intriguing question of Tosafot Rabbenu Peretz. Why does the gemara attempt to classify *eish* according to the preexisting categories of "*mamon*" and "*chitzav*"? Why can't we ignore these classifications and view *eish* as its own, self-sufficient *mechayev*?

In this shiur, we will attempt to understand the opinions of Reish Lakish and Rabbi Yochanan independent of one another, and then analyze the gemara's conclusion (23a).

Reish Lakish - *Isho* *Mishum* *Mamon*o:

According to the gemara, Reish Lakish categorizes *eish* as a form of *nizkei* *mamon* ("*mamon*o"). He rejects the opinion of Rabbi Yochanan in light of the fact that fire acts independently, without human effort. According to Reish Lakish, *eish* should NOT be viewed as a direct result of lighting. However, Reish Lakish's assertion that the obligation of *eish* is "*mishum* *mamon*o" remains somewhat obscure. How are we to understand the term "*mishum*": is one obligated to pay for damages caused by *eish* because *eish* is SIMILAR to *mamon*o, or because it ACTUALLY IS one's *mamon* (possession)? (In previous shiurim we have encountered a similar question regarding the Hebrew prefix "*ke*," whether it merely compares two halakhot or actually equates them.)

This question seems to be the subject of debate among the Rishonim.

Rashi explains that "there is a halakhic difference between them (Reish Lakish and Rabbi Yochanan) - for example, if one lights a fire with a coal which he doesn't own. Reish Lakish maintains that one is exempt, since it is not his property (*lav* *mamon*o *hu*)." Rashi here maintains that "*mishum* *mamon*o" must be taken literally. In other words, just as one is obligated to pay for damage caused by HIS ox, so must one pay for damage caused by HIS fire. The source of obligation is the same in both instances: one must compensate for any damage caused by his property.

Tosafot, however, cite several gemaras that seem to imply that "ownership" of the fire is NOT a necessary precondition for the obligation of *eish*. For example, the gemara (56a) says that one who places the other's haystack in front of a fire is obligated to pay for the destruction of the hay. Who started the fire seems to bear no relevance to the obligation. Tosafot therefore conclude that *eish* does not require "ownership" of the fire to be considered "*mishum* *mamon*o." Rather, it seems that one is obligated to pay for any damages caused by *eish* that he kindled, regardless of who OWNS the fire.

[As for Tosafot's question on Rashi's explanation of Reish Lakish, the Shita Mekubutzet cites the Gilyonot of Tosafot that offer a resolution. The Gilyonot suggest that, according to Rashi, the aforementioned case of the haystack refers not to the obligation of *eish*, but to *adam* *hamazik*. In other words, the perpetrator is liable for having directly damaged the haystack, and not because his fire caused the damage.]

How are we to understand Tosafot's approach? It would seem that two explanations may be offered, depending on how we understand a certain halakhic concept that we must now introduce.

Rabbi Soloveitchik zt"l often noted that the halakha requires payment not only for damages caused directly by one's property, but also for damages caused by a "*mazik*" (dangerous entity) that one has created. Consider, for example, the case of one who places another person's haystack before an animal not owned by the perpetrator himself, and the animal consumes the hay. Tosafot (*Bava Kama* 56b) classify the obligation incurred on the perpetrator under the category of *nizkei* *mamon*, not *adam* *hamazik* (see Rashba). Although he did not own the damaging agent, he nevertheless pays for the damages caused by this animal, which he had turned into a *mazik*.

What remains unclear, however, is the nature of one's relationship to this *mazik*. One could suggest that his relationship is one of *ba'alut* (ownership), i.e. the halakha considers a created *mazik* as one's property with regard to his responsibility for damages. Alternatively, we may redefine the entire institution of *nizkei* *mamon*. The responsibility for damage caused by one's property - even in a standard instance of *nizkei* *mamon* - does not evolve directly from the fact that his property caused the damage (see Rambam, *Nizkei* *Mamon* 1:1). Rather, his ownership of this animal requires that he guard the animal from causing any damage. In the case of damage, then, it is the owner's NEGLIGENCE which obligates him to pay (see Rashi 9b *d"h hikhsharti*).

According to this second approach, that *nizkei* *mamon* relates to one's negligence rather than the actual act of damage, we can better understand one's responsibility for the damages of a *mazik* he created. If one's mere ownership obligates him to watch over this *mazik*, and his negligence obligates him to pay, then certainly if one actually CREATES a *mazik* he must prevent it from causing damage. Naturally, then, he must pay for any damage resulting from his negligence.

Correspondingly, we may offer two explanations for Tosafot's approach to "*eish*o *mishum* *mamon*o." By kindling the fire, one creates a *mazik*. Thus, with regard to responsibility for subsequent damage, the halakha might consider this fire as his property, Thus rendering liability. Alternatively, his obligation may result from his failure to properly guard this *mazik* that he created, and he must therefore pay, despite the fact that he does not actually own the fire.

[These two different understandings of Tosafot become relevant in several cases. What if one failed to prevent some fire from spreading, but didn't actually own or even light the fire? Or, what if one ACQUIRED a fiery coal, but wasn't negligent in watching over it?]

It is interesting to note that there may be a third approach to this opinion of Reish Lakish. The Shita Mikubetzet, in the name of Talmidei HaR"I, writes, "We should distinguish between a case where fire spread by itself, in which case he is obligated to pay because he didn't watch over the fire, and in such a situation the fire MUST belong to him, and a situation where he actually lit the fire, in which case the fire may or may not actually belong to him..."

This explanation seems to accept, to some extent, both approaches mentioned above. It recognizes an obligation to pay stemming from one's ownership over an object, as well as an obligation resulting from his having CREATED the *mazik*. In a case where the fire spread on its own, the obligation relates to negligence; when the perpetrator lit the fire himself, his obligation relates to his having created a *mazik*.

Rabbi Yochanan - *Isho* *Mishum* *Chitzav*

Rabbi Yochanan disagrees with Reish Lakish and maintains that we are to view *eish* as "*chitzav*" - a form of *adam* *hamazik*. As we discussed in the context of Reish Lakish's view, the term "*mishum*" requires clarification. Should we actually consider *eish* as a form of *chitzav*, or does Rabbi Yochanan merely categorize *eish* under "*chitzav*," without equating the two?

We should begin by recalling Reish Lakish's basis for his disagreement with Rabbi Yochanan: "...an arrow moves because of one's force, this (fire) moves on its own..." How does Rabbi Yochanan counter this charge? He might maintain that *eish* merely bears resemblance to *chitzav*, but cannot be considered identical to *chitzav*. Therefore, this difference with regard to the fire's independent mobility poses no challenge for Rabbi Yochanan, since he never equated *eish* and *adam* *hamazik*. Alternatively, it may be that the Torah views the spreading of fire, even a fire which is spread by a common wind, as being a form of "his force," i.e. an extension of the individual's act. This might be indicated by the *pasuk*'s reference to the perpetrator, as noted earlier - "the one who lights the fire." The Torah seems to attribute the fire's destruction to the active involvement of the one who kindled the flame.

This issue of how to understand Rabbi Yochanan's opinion seems to be the subject of a debate among the Rishonim. They question whether *isho* *mishum* *chitzav* may be applied to OTHER areas of halakha, such as *shechita*, murder, and Shabbat. Their discussions in these contexts reveal their general attitude towards Rabbi Yochanan's comparison of *eish* to arrows.

For example, the gemara in Chullin (31a) discusses different types of valid and invalid *shechita*. It comments that whereas, as the Mishna rules, dropping a knife onto the animal's neck does not constitute a valid *shechita* (even if the knife had successfully severed all that is required), if one throws a knife and it slaughters an animal, the *shechita* IS valid. Tosafot (Sanhedrin 77a) question the invalidity of the *shechita* by the dropped knife in light of Rabbi Yochanan's opinion in our sugya. If *eish* is to be viewed as "*chitzav*," then even a dropped knife, which is considered a *toladah* (sub-category) of *eish*, should be able to accomplish a valid *shechita*!

This question leads Tosafot to conclude that the Mishna MUST follow the view of Reish Lakish. Rabbi Yochanan would, in fact, rule that in such a case the *shechita* is valid. Clearly, Tosafot equate *eish* with *chitzav* within Rabbi Yochanan's opinion. They maintain that the Torah really views fire as a form of "*kocho*," human force, and thus the action is attributed to the individual.

Others, however, disagree with Tosafot. Rav Chaim Soloveitchik, in *Hilkhot Shekhenim*, contends that even if the equation between *eish* and *chitzav* is to be maintained, *shechita* requires "*koach gavra*," DIRECT human force, and that would still be lacking in the case of the dropped knife. Other Achronim disagree with Tosafot completely, insisting that Rabbi Yochanan would never suggest that a *toladah* of *eish* could achieve a valid *shechita*. According to these Achronim, the comparison between *eish* and *chitzav* is partial, and relevant only in the context of *nezikin*.

The Tosafot cited above also maintain that if one's fire takes another person's life, the one who kindled the flame is guilty of murder. In truth, this extension of Rabbi Yochanan's opinion is already implied by the gemara (*Bava Kama* 22b). The gemara there incorporates into its discussion of Rabbi Yochanan the principle of "*kim lei bideraba minei*." This rule exempts one from a low-level punishment when the crime was committed concurrently with a more serious crime. In such a situation, the court administers only the more severe penalty. The gemara suggests that if the fire both killed a slave and caused monetary damage, the one who lit the fire is exempt from paying for the financial loss. Based on this gemara, Tosafot conclude that one who lights a fire that takes the life of another is liable for the death penalty. Consistent with their overall approach, Tosafot equate *eish* with *chitzav*.

Regarding this issue, as well, we find a lack of unanimity. Rabbi Yitzchak Zev Soloveitchik (*Chidushei HaGriz*, *Hilkhot Rotzei'ach*) argues that the gemara's application of "*kim lei*..." to our context does not indicate an absolute equation between *eish* and *chitzav*. Accordingly, the comparison between *eish* and *chitzav* cannot be extended beyond the realm of *nezikin*.

Finally, we must mention the famous question of the Nemukei Yosef. He asks (*Bava Kama* 10a in the Rif): "How do we permit the lighting of fire close to sunset on the Sabbath eve, that it will continue to burn throughout the Sabbath, for (according to Rabbi Yochanan) it is as if he himself lit the fire on Shabbat!" While the Nemukei Yosef obviously concludes that one IS permitted to light a fire close to the onset of Shabbat (as God-fearing Jews have been doing for centuries), his question clearly assumes that the damage caused by one's fire is to be equated with the damage caused by one's own hands.

The Conclusion of the Gemara:

The gemara concludes (23a) that Rabbi Yochanan agrees that the obligation to pay for damages caused by *eish* is ALSO because of *mamon*o. The only difference between Reish Lakish and Rabbi Yochanan is manifest in a case when one lights a fire that causes another physical injury. Generally, one who physically injures another incurs four payments beyond the direct compensation (*nezek*, *tzaar*, *ripuy* and *shevet*). Rabbi Yochanan and Reish Lakish argue whether or not these payments are required when fire injures a person.

How are we to understand the conclusion of the gemara? Methodologically, we must also address the issue of the relationship between *chitzav* and *mamon*o according to Rabbi Yochanan. Do these two elements, *chitzav* and *mamon*o, remain separate obligating factors that merely coincide, or do they integrate into a single, albeit complex, *mechayev*? Additionally, if they do merge and form a single *mechayev*, what is the precise nature of that *mechayev*?

Rashi (*d"h vekhi*) seems to imply that these two elements do remain as separate factors.

Others, however, understand that Rabbi Yochanan believes in one, complex *mechayev*. For example, the Shita Mikubetzet cites Rabbenu Yeshayah, who understood that according to the conclusion of the gemara, the primary element is *chitzav*. However, the perpetrator must actually own the *chitzav* in order to be obligated to pay. *Chitzav* is the *mechayev*; *mamon*o is merely a necessary prerequisite for the obligation.

The Rambam (Nizke Mamon 14:15), in contrast to the opinion of Rabbenu Yeshiyah, writes, "A fire that spreads and injures a person, he who lit the fire is obligated to pay for his *nezek*, *shevet*, *ripuy*, and *tzaar* as if he injured him with his own hands, because EVEN THOUGH FIRE IS TO BE CONSIDERED AS HIS *MAMON*, IT IS AS IF HE INJURED HIM WITH HIS HANDS..." In other words, although the obligation of *eish* is one of *mamon*, it is similar enough to *chitzav* to require the four additional payments for the physical damage incurred.

The Shita Mikubetzet, in the name of Talmidei HaR"I, offers another approach. He explains that neither *mamon* nor *chitzav* alone would be sufficient to obligate one to pay for damages caused by *eish*. Even if the fire spreads to another field, in which case, the gemara tells us, the individual is obligated only because of *mamon*o, it is only because the fire began as BOTH *mamon*o and *chitzav* that there can be an obligation at all!

If so, we may suggest that the Talmide HaR"I may offer a new answer to the Tosafot Rabbenu Peretz's question cited above - why the gemara searches for preexisting categories in which to classify *eish*. Perhaps the gemara worked under that assumption only initially. The gemara concludes, however, that according to Rabbi Yochanan, *eish* is NEITHER *chitzav* nor *mamon*o. Rather, *eish* is a new, independent halakha, which combines the elements of both *mamon*o and *chitzav*.