YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #03: The Root of Liability for *Bor* Damages (1)**

When describing the liability of a person who digs a pit, or *bor,* the Torah writes that the *ba'al ha-bor,* the *owner* of the *bor* is obligated to pay. This presentation implies that ownership over the *bor* is the source of liability and would make liability for *bor* damages consistent with the obligations of the owner of an animal to pay for the damages of the animal. Just as the Torah obligates the *ba'al* *ha*-*shor* or the owner of the ox to pay, the Torah obligates the owner of the *bor* to pay.

But can a person really own a *bor*? Firstly, a classic *bor* is located in *reshut ha-rabim,* which cannot be owned by a private person. Secondly, the *bor* is a hole in the ground, and not something tangible which can be owned. How can the Torah obligate a person for ownership of something which, according to halakhic guidelines, can't be legally owned?

One possible solution stems from a gemara in *Bava Kamma* (29b) which identifies *chametz* and a *bor* as two items which defy classic parameters of ownership. *Chametz* can’t be legally owned since it is *assur ba-hana'a* and items which provide no permissible utility cannot be owned. Yet despite the lack of classic ownership, the Torah obligates us to rid *chametz* lest we violate the prohibition of *bal yeira'eh*. Evidently even though chametz deviates from classic ownership patterns, the Torah endows an unnatural status of ownership which generates a prohibition of *bal yeira'eh*.

Similarly, the gemara claims, even though *Bor* doesn’t conform to typical items which are owned, as it is intangible and is located in a *reshut ha-rabim*. Yet the Torah establishes liability for the "owner" of the *bor*, effectively endowing a form of ownership to the digger even though the pit defies typical characteristics of owned items.

A different gemara (*Bava Kamma* 49b) suggests a completely different basis for the liability for damages caused by *bor*. The Torah introduces the laws of *bor* with the phrase "if a person uncovers a *bor* which had been covered by someone else or digs a new *bor* … " )Exodus 21:33). The gemara ponders why the Torah, having already established liability for uncovering a *bor*, still delineates that a person is liable for a newly dug bor. The gemara replies that this double language instructs that liability for a bor stems from "*iskei keriya u'peticha*" or the action of digging or opening up. This gemara claims that a *bor* isn’t owned by the digger and certainly isn’t owned by the person who removed the cover. Yet despite the absence of legal ownership, a person is obligated for the *act* of creating a *bor*- either through digging or through removing the cover. Even though there is no legal ownership upon the *bor*, the act of digging creates a public hazard which obligates the person for any damages which the public hazard causes. In fact, the gemara coins a phrase which captures this concept: the digger is considered a *ba'al* *hatakala*. Namely though the digger of the *bor* doesn’t own the item, he is the creator of the hazard or the *mazik*.

Namely, there are two different ways to understand the liability of bor: One possibility is that the person who digs the *bor* is awarded legal ownership by the Torah even though a pit doesn’t conform to the classic parameters of ownership. Alternatively, a person may be obligated since by digging the pit they created a *mazik*. Creating a public hazard is sufficient to create liability even upon an item which isn’t legally owned.

**A *Bor* in a Private Domain**

The classic *bor* described by the Torah is dug in the public domain. Would liability exist for a *bor* dug in a private *reshut*? Of course, if a person illegally walks into another persons land and falls into a pit, the homeowner is legally exempt since the trespasser had no rights to enter. What would happen though if the owner of the land not only dug a pit in his land but relinquished ownership over the land, effectively inviting people to walk through his property? This exact issue was debated by Rabbi Yishma’el and Rabbi Akiva, and it cuts to the heart of the greater *bor* conundrum.

Rabbi Yishma’el (at least according to the first reading of the gemara 49b-50a) claims that a person is **only** liable for a *bor* in *reshut ha-rabim* and not for a *bor* in *reshut ha-yachid*. Perhaps Rabbi Yishma'el claimed that the liability for a *bor* is due to creating a public hazard. A *bor* in *reshut ha-rabim* endangers the public and is considered a *mazik*. By contrast, a pit which was dug in private property may not be considered a hazard at the point of creation since at that time no one had the right to enter. The *bor* didn’t endanger anyone since no one was expected to enter. Even though subsequently ownership was relinquished and entry was permitted, there can be no obligation since a *mazik* was never created through digging.

Rabbi Akiva disagrees, and extends the liability for *bor* even to a pit which was dug in a private property (assuming of course, that subsequently the public was allowed to enter).

One way to explain Rabbi Akiva's position is that he associated liability for a *bor* with legal ownership. Though *bor* defies the classic characteristics of ownership, the Torah creates virtual ownership. If the Torah can endow virtual ownership and liability for a pit in a *reshut ha-rabim* it can certainly endow ownership for a pit dug in private property. Namely, Rabbi Akiva argues with Rabbi Yishma'el about the fundamental *mechayav* or root obligation of a bor. Rabbi Yishma'el believed that the *mechayav* is the creation of a *mazik* and therefore he limited liability only to a *bor* which imperils the public at the point of creation. A *bor* dug in a private domain doesn’t yet endanger the public and isn’t considered a *mazik*. In contrast, Rabbi Akiva believed that the root *mechayav* of *bor* is ownership and extended liability even to a *bor* in *reshut ha-yachid*.

Alternatively, Rabbi Akiva may have fundamentally agreed with Rabbi Yishma'el that the *mechayav* of *bor* is the creation of the *mazik*. However, he claimed that digging a *bor* in a private area and subsequently inviting people to walk through is considered one extended process of creating a *mazik*. The public hazard doesn’t have to exist at the point of digging. By digging and then inviting people to walk through the vicinity of my *bor*, I have created a public hazard.

**Relinquishing Ownership of the *Bor***

Did Rabbi Akiva base *bor* liability upon ownership, or does he base the liability upon a creating a *mazik* but asserts that digging a *bor* and inviting people near the bor is tantamount to creating a *mazik*?

This internal question within Rabbi Akiva's logic may be at the heart of a debate between Rashi and Tosafot. What if a person dug a pit in their private *reshut*, and subsequently relinquished ownership both upon their land AND upon the *bor*. Rashi (*Bava Kamma* 27b *s.v. d'afkarinhu*) claims that the person is still liable. Tosafot (*s.v. hani mili*) disagree and claim that by relinquishing ownership upon the pit the person is no longer liable.

Perhaps Tosafot and Rashi disagree about Rabbi Akiva's internal logic. Tosafot believed that Rabbi Akiva extended liability a *bor* in a private property because he viewed ownership as the root of *bor* liability. The Torah awards ownership for a *bor* in *reshut ha-rabim* and therefore the digger is liable. In a *reshut* *ha-yachid* a person naturally owns a *bor* and is liable. If however the digger/owner explicitly renounces ownership of a *bor* in his private property, they are no longer considered the owner of the *bor* and aren’t liable.

Rashi, however claimed that Rabbi Akiva obligates the *bor* digger for creating a hazard- even if the *bor* was initially dug in a private property. Relinquishing ownership upon a *bor* doesn’t reduce the public hazard which was created and the digger remains liable.

**A *Bor* Which Only Endangers One Person**

A second *machloket* between Rashi and Tosafot may also reflect their differing understandings of Rabbi Akiva. The mishna in *Bava Kamma* (49b) speaks cryptically of a *bor* which is dug "in a private domain and opened up into a private domain.” Tosafot decode the case as a reference to a pit which was dug in the diggers private domain but whose entry was located in a different person's private property. The person who dug the *bor* in his own property is liable for damages caused to his neighbor in whose property the opening of the *bor* is located. Rashi disagrees with this reading and reinterprets the mishna to refer to a completely different scenario.

Perhaps Rashi was opposed to any liability for a *bor* which effectively only imperils one person. By digging a *bor* in my private property whose opening is in my neighbors property I have created a hazard which only endangers my neighbor. As he hasn’t invited the public to walk through his land, only he is imperiled. A *bor* which imperils one person or family isn’t considered a *mazik* and doesn’t create liability. By contrast, Tosafot may have viewed Rabbi Akiva's position as based on ownership. I own the *bor* and therefore am liable when my neighbor is damaged by falling into the *bor* which I own.

(Edited by Zachary Beer)