

PARASHAT MISHPATIM

The Laws of Damages - A "Declaration of Human Rights"

By Rav Elchanan Samet

TWO AGENTS OF DAMAGE

After opening with the laws of Israelite indentured servants, Parashat Mishpatim moves on to the laws of damages, or torts (21:12-22:5). The 31 verses regarding damages are divided into two halves of more or less equal length:

A) (21:12-27) - Sixteen verses dealing with a PERSON who causes damage either intentionally or unintentionally.

B) (21:28-22:5) - Fifteen verses dealing mainly with damages caused by one's PROPERTY or as an indirect result of his actions.

(The remainder of chapter 22, concerning the laws of "shomrim" [guardians], constitutes an independent unit, even though it also deals with a type of damage.)

This distinction between the two halves of the parasha is confirmed by the traditional division of the parashiot as they appear in a Sefer Torah: each individual type of damage comprises a separate "closed parasha," and we find a break in the form of an "open parasha" only between 21:27 and 21:28, which represents the dividing line between the two halves.

HOW IS THE SECOND HALF ORGANIZED?

An examination of the second half of this parasha of damages gives rise to several difficulties. Let us first list the subjects treated:

- a) an ox goring a person (21:28-32);
- b) an animal falling into a pit (21:33-34);
- c) an ox goring an ox (21:35-36);
- d) a thief stealing an animal (21:27-22:3);
- e) an animal damaging a field (22:4);
- f) fire burning a field (22:5).

The most glaring problem is unit (d): amidst all the laws of damage caused by one's property (e.g. his ox or his pit), we find laws relating to a thief. This would seem to represent a return to the laws of the first half of the parasha, dealing with a PERSON who damages.

Secondly, the order of damages listed in this half is perplexing: it starts with an ox goring a person, moves on to a pit, and then comes back to an ox goring another ox. Why are the two types of goring not dealt with together, and why does the issue of the pit divide them?

Furthermore, it would seem appropriate that damages caused by someone allowing his animal to eat from the someone else's field should be juxtaposed to the damages caused by an ox that gores, since both represent damage caused by an animal; but in fact, the laws of the burglar separate them.

Similarly, it would seem logical that the laws concerning the pit should be juxtaposed with the parasha of the fire, since in both cases damage is caused through a person's careless actions. But a number of other issues are discussed in between these two.

Is there some logical order underlying the laws of damages? Ibn Ezra (P.A. 21:2) says,

"I shall state the general rule before starting to explain [this parasha]: each law or commandment stands on its own. If we manage to find a reason why one law or commandment is juxtaposed with another, then we shall connect them as far as we are able. And if we cannot, then we shall assume that the lack [of connection] is due to our own lack of understanding."

Indeed, the Ibn Ezra does try to explain the placement of various laws of damages, but he fails to answer most of our questions.

The Ramban (21:2) explains the order of the laws in the first half of the parasha of damages in terms of their connection with the Ten Commandments, and concludes that "all the issues are placed intentionally and correctly." But he ignores the question of the order of the second half, and thus leaves our questions without a response.

THE ORGANIZING PRINCIPLE

Our question about the organization of the parasha of damages is based on the assumption that the order should follow the categories of the agents which CAUSE damage. Such a categorization is appropriate from a legal perspective, since one's level of responsibility for the damage determines whether and how much restitution he must pay.

Our questions, however, disappear when we realize that the Torah orders this section based on the categories of those who are DAMAGED, not those who CAUSE

damage. Although the first half of the parasha of damages does deal in its entirety with a person who causes damage, it is important to emphasize that it deals only with damage inflicted upon a person. This half deals with four types of damage to a person: a) a blow leading to death; b) a blow causing a person to be bedridden; c) a woman's miscarriage; and d) causing a blemish on a person's body. (In conjunction with the laws concerning someone who kills, verses 15-17 address several offenses which are as serious as murder and are punishable by death.)

The second half of the parasha of damages (starting from 21:28) continues with the laws of damage caused to a person, commencing (like the first half) with the most serious possible damage - killing him. Now, however, it is an ox that kills, not a person. Because of the great difference between a person killing another person and an ox killing a person, this section does not appear above with the laws of murder and manslaughter.

Unit (a) distinguishes between two types of ox (one without any previous record of violence and one which is known to be prone to such behavior) and between two types of victim (a free man and a slave). In all cases, the ox is stoned; the difference lies in the amount of damages to be paid. The word "ox" (shor) appears in this unit (21:28-32) seven times.

Units (b)-(f) then address lesser victims of damage: one's animal and one's field. Unit (b) deals with a pit dug by someone in the public domain, "into which an OX or a DONKEY falls." Based on this verse, we learn a midrash halakha (Bava Kama 28b), "'Ox' - not a person; 'donkey' - not vessels." Apparently, this deduction is made based on the location of the law regarding the pit within the parasha, which is arranged specifically in order of the VICTIMS. The law of the pit is part of the laws of damages caused to ANIMALS. Damages caused to a person were dealt with previously, while damage to vessels is dealt with hereafter.

Unit (c) also deals with damage caused to animals - an ox goring another ox. Here too a distinction is made between an otherwise innocent ox and an ox known to be dangerous. There is a connection between this unit and that of the pit: they conclude with the same law, formulated in similar language: "He shall pay... and the dead

animal shall be his." The word "ox" appears in these two units together a total of seven times, but only three times with reference to the ox that causes the damage, while the other four times the word refers to the ox that is injured or to its replacement.

Why, then, does the Torah place the laws pertaining to the pit before those pertaining to the ox that gores another ox? Perhaps in order to emphasize that the order in which the cases are categorized is based on the victim rather than the damager. Juxtaposing an ox that gores a man with an ox that gores another ox (as we might have thought logical) would highlight the common cause of damage and would blur the great difference between the victims.

It is also possible that the reason lies in the fact that a pit is a more common source of damage to animals, since all types of animals are similarly injured by it - "ox or donkey." Fewer incidents of damage are caused by a goring ox, which generally gores only other oxen - "If a person's ox should gore the ox of his neighbor..."

Unit (d), unexpectedly bringing us back to "a person who damages," still deals with damage caused to animals - this time in the form of the theft of an ox or a sheep. The Torah distinguishes between serious damage caused to the animal - slaughter or sale, where the value to be repaid is four or five times that of the animal - and the relatively light, reversible damage of mere theft, where the fine is only double the value. (This unit also deals with the case of a thief who is unable to repay, and incidentally also with the case of a burglar who comes in stealth.)

It is now clear why this unit, dealing with a thief, is placed here along with the laws of damages to animals, rather than in the first half of the parasha of damages which dealt entirely with damage to man. Its placement at the end of the laws of damage to animals might perhaps be aimed at distancing it as far as possible from the laws of "a person who causes damage to another person," thus emphasizing the principle of categorization according to the type of victim. It is also possible that the reason is that damage caused with regard to animals as a result of theft is less common than damage caused by a pit or another animal.

Following the conclusion of the three units dealing with damage to animals, we move on to two units dealing with damage to the produce of a person's field (Ibn Ezra 21:5 notes this). Unit (e) discusses a person sending his animal to graze in someone else's field or vineyard, and unit (f) deals with a fire kindled by someone in his own field which spreads to the field of his neighbor, such that "the sheaves or the standing corn or the field" are consumed. Here, too, Chazal specify that this refers only to the produce of the field and not to what lies "within it." This specification, like the one mentioned above relating to the pit ("ox - not a person; donkey - not vessels"), is deduced from the placement of the laws about fire in this part of the parasha of damages, which deals specifically with damage to that which grows in the field.

Just as units (b) and (c), dealing with damages to animals caused by a pit and an ox, exhibited stylistic similarities, so too is there a link between units (e) and (f), which both deal with damage to crops: the root "b-e-r" appears a total of five times, hinting at the connection between them.

What is missing from our parasha? Damage to "metaltelin" - inanimate movable property. Such property is to be found in the opening verse of the next unit, which discusses "shomrim." Aside from introducing the next unit, it simultaneously serves as a fitting conclusion to the preceding parasha of damages (22:6): "If a person gives his neighbor MONEY OR VESSELS to look after for him, and they are stolen from the neighbor's house, if the thief is found he shall pay double."

Although the context here is describing someone who watches over property for free, this verse concludes the laws pertaining to a thief that were discussed previously. There the text dealt with a thief who caused damage relating to an animal; here he causes damage relating to inanimate property, but in both cases the thief repays double the value of what he stole (whether the stolen property is found in his hands or not). Again we may ask, why are all the laws pertaining to a thief not listed together? The answer is that once again it is the question of what is harmed that determines the order. It is logical that the laws of damage to crops should intervene between damage to animals and damage to inanimate property.

ORDER OF WHAT IS DAMAGED - AN ORDER BASED ON VALUES

What is the significance of this organization of the laws of damages, according to the order of what is damaged? After all, in principle the repayment depends on the nature of who or what caused the damage, such that for example a distinction is made between an innocent ox and one known to be dangerous; likewise a person who steals must repay twice the value of what he stole, whether what he stole was an animal or inanimate property.

The order is based on the Torah's values: first we address damage to human life or bodily harm. Thereafter we turn our attention to a person's animals. The severity of this damage is measured not only by the inconvenience caused to the owner; it is also measured based on the principle that the animal is a living being. (Ibn Ezra, P.A. 21:33, notes both of these aspects.)

Thereafter the Torah deals with damage to the crop, which is dear to its owner who has invested much effort in it, and "a person desires his own measure of grain more than nine similar measures that are his neighbor's." Here, too, the crop has some intrinsic value since it is plant life.

Last of all, we come to "money or vessels" - inanimate property which is, on this scale, the least significant of all man's possessions.

This still does not explain why the Torah chooses this order. Although this order is logical in that it progresses from the most serious property harmed to the least serious, we have still to answer the question of what advantage it has over an order based on the agent causing damage, which would seem more suitable for a legal categorization.

ORDER OF VALUE - THE PROTECTION OF HUMAN RIGHTS

When Bava Kama is studied in yeshivot, there is generally an introductory shiur devoted to a question which is not dealt with explicitly in the tractate itself: aside from the obligation of repayment in the event of damage, is there any prohibition against actually causing the damage? If so, what exactly is that prohibition? Various opinions have been offered in response to this question.

In his book "Birkat Shemuel" (Bava Kama, siman 2), R. Barukh Baer Leibowitz writes:

"[The verses detailing a person's obligation to pay restitution for damage he has caused] refer not only to the issue of monetary obligation, but also to the fact that he is regarded as a 'mazik' (damager) and is punished by Heaven. For the parasha concerning a person who causes damage ('He who strikes an animal shall pay its worth') refers also to the issue of Divine prohibition and punishment... It also seems that the parasha referring to damage caused by a person's property likewise addresses not only monetary obligation, but also confers upon the owner the status of 'mazik' (because of the action of his property, which he should have watched over) and therefore he is to be punished by Heaven."

He then quotes the comments of his teacher, R. Chayyim Soloveitchik of Brisk, who agrees:

"The law of 'and he did not watch over it' entails a prohibition, not just a monetary obligation, and he is considered a 'mazik' and an evildoer in the eyes of Heaven. [R. Chayyim] brought proof for this from the obligation of 'kofer' (indemnity paid by the owner of a violence-prone ox which killed someone) - for this too is obligated because 'he did not watch over it' (21:29), and it relates to the owner's punishment by the hands of Heaven; he is punished because his ox murdered, and the indemnity-payment (kofer) is really an atonement (kappara). Similarly, the law of 'and he did not watch over it' regarding damages (an ox which killed an ox - 21:36) also relates to punishment by the hands of Heaven."

According to the above views, then, the prohibition of causing damage is included in the actual parashiot of damages themselves. But from the wording of the verses noted

by these two Torah giants, this conclusion is not clear: neither the verse (Vayikra 24:21), "He who strikes an animal shall pay its worth," quoted by the Birkat Shemuel, nor those quoted by Rav Chayyim of Brisk, "and he was known by his owner to be dangerous, and he did not watch over him" and "his owner did not watch over him" (referring to a violent ox that gores a person or another ox), actually teach that there is any prohibition of causing damage or any obligation to watch.

It is not the language of any specific verse but rather the structure and order of the laws of damages that come to teach us what these two great rabbis wish to convey: that the laws of damages are not just a legal system aimed at regulating matters that arise between man and his fellow. The moral (and not legal) order of this parasha expresses a principle: a person's life, his physical wellbeing and his possessions - from the most important among them down to the least important - are worthy of protection from harm caused by the actions and carelessness of others. The obligation of repaying damages is meant not only to resolve monetary disputes between man and his fellow man; they are the outgrowth of a perspective that protects a person and his possessions from harm resulting from his neighbor's misdeeds. Thus the parasha of damages is a kind of "dof human rights" that the Torah bestows on man, protecting his life and his freedom, his bodily wellbeing and the safety of his possessions.

(Translated by Kaeren Fish)

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