YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**Sichot of the Roshei Yeshiva**

**Parashat MISHPATIM**

**Sicha of HarAV Yaakov Medan**

**The Law of a Thief**

Translated by David Strauss

The *gemara* views thievery as one of the four principle categories of damages.[[1]](#footnote-1) As in the passages that precede the passage dealing with the thief, this section deals specifically with the theft of animals:[[2]](#footnote-2)

If a man steals an ox or a sheep and kills it or sells it, he shall pay five oxen for an ox and four sheep for a sheep. If a thief is found breaking in, and he is smitten so that he dies, there shall be no blood-guilt for him. If the sun has risen upon him, there shall be blood-guilt for him; he shall make restitution. If he has nothing, then he shall be sold for his theft. If the theft is found in his hand alive, whether it be ox, or ass, or sheep, he shall pay double. (*Shemot* 21:37-22:3)

The structure of the section indicates that there are two categories of thieves. In the case of the second thief, the stolen animal is found alive in his hands, and he must pay double. The first thief is one who slaughtered or sold the stolen animal. He is distinguished from a thief by whom the stolen animal is found alive in his hands in four ways:

1) The very act of slaughter or sale, which is added to the act of stealing;

2) His punishment is different. He is liable not only for double restitutions, but for four or five times the value of the stolen animal;

3) Only in reference to the first thief does the Torah discuss the possibility of breaking in, which can end in a bloody conflict;

4) Only with regard to a thief who slaughtered or sold the animal does the Torah say that if he cannot pay for the stolen animal, he is sold into servitude.

Regarding the last two points – the law of breaking in and the sale of the thief into slavery – the Halakha does not distinguish between a thief who slaughtered or sold the animal and an ordinary thief, but the verses do distinguish between them, as we shall explain.

A thief who slaughtered or sold the animal is not someone who stole another person's animal because he desired the animal. He is interested in money or in meat. Money and meat are the two centers of criminal desire that express the root criminality of a professional thief, who also takes care to obscure the traces of his theft. We are not dealing here with a local moral failure. This thief is not like an intentional murderer, who may have done what he did out of anger, but rather like one who murdered with guile, who carefully and coolly planned his act – as well as his escape from justice – to the last detail. The punishment of the premeditated murderer is formulated in exceedingly sharp words:

And if a man come presumptuously upon his neighbor, to slay him with guile – you shall take him from My altar that he may die. (*Shemot* 21:14)

The difference between an "ordinary" thief and a thief who sells the property he stole is further reflected in the law regarding one who kidnaps a person:

And he that steals a man and sells him, or if he be found in his hand – he shall surely be put to death. (*Shemot* 21:16)

In order to become liable to the death penalty, it does not suffice to kidnap a person; the kidnapper must also sell his victim to another person. In the book of *Devarim* we learn that even if the kidnapper abuses his victim and enslaves him, he is not liable for the death penalty unless he sells him to someone else:

If a man be found stealing any of his brethren of the children of Israel, and he deals with him as a slave and sells him – then that thief shall die; so shall you put away the evil from your midst. (*Devarim* 24:7)

The nature of a thief who slaughters the animal that he stole is similar to that of a thief who sells it. The despicable act of the slaughterer is well described in the parable of the poor man's sheep delivered by the prophet Natan to David after the offense that he committed against Uriya the Chiti:

And the Lord sent Natan to David. And he came to him, and said to him: “There were two men in one city – the one rich and the other poor. The rich man had exceedingly many flocks and herds, but the poor man had nothing save one little ewe lamb, which he had bought and reared; and it grew up together with him, and with his children; it did eat of his own morsel, and drank of his own cup, and lay in his bosom, and was unto him as a daughter. And there came a traveler to the rich man, and he spared to take of his own flock and of his own herd to dress for the wayfaring man that was come to him, but instead **took the poor man's lamb and dressed it for the man that was come to him**.” And David's anger was greatly kindled against the man, and he said to Natan: “As the Lord lives, the man that has done this deserves to die; **and he shall restore the lamb fourfold,** because he did this thing and because he had no pity.” (II *Shemuel* 12:1-6)

The fourfold restitution accords with what is stated in our *parasha*: "and four sheep for a sheep." (We will deal with David's claim that the thief in the parable "deserves to die" below.)

In any event, a thief who sells or slaughters the animal is a "professional" thief, and it is precisely such a person who will presumably try to break into a house at night and even be prepared to kill the homeowner. Therefore, the homeowner is permitted to kill the thief if he feels that his life is in danger.

Let us clarify this *halakha* somewhat. Simple reason dictates that if a person is afraid that someone else wishes to kill him, and he goes ahead and kills him first in order to save himself, he should be exempt from all punishment. Furthermore, he did well in that he saved himself from the hands of the murderer at the cost of the murderer's life.[[3]](#footnote-3) The novelty in the law governing a thief who breaks into someone's house is that the homeowner is not certain that the thief he encounters is prepared to kill him. It is impossible to assess the likelihood that the thief will kill the homeowner, and it stands to reason that no two cases are the same. Despite this uncertainty, the Torah permits the killing of the thief even in a case in which there is only a small chance that he will kill the homeowner, as long as this is a reasonable possibility. Only when it is clear ("like the sun," as Rashi puts it, following the *gemara* in *Sanhedrin* 72a) to the homeowner that the thief will **not** kill him is the homeowner forbidden to kill the thief. The reason that the Torah permits killing the thief based on a doubt is that it was the thief who began the offense, putting the homeowner – who is afraid for his own fate and for the fate of his family – into a state of mortal danger. Since it was the thief who created the homeowner's uncertainty, he must pay the price of that uncertainty.

But the homeowner might be able to prevent the bloody clash if he hides in his house and allows the thief to take his ox or his sheep. Does the Torah obligate the homeowner to hide and allow the thief to carry out his plan, or do we permit him, in his attempt to save the animal, to bring himself and the thief into a state of bloody conflict?

The *gemara* (ibid.) says about this: "There is a presumption that a person will not restrain himself from defending his property." In other words, the Torah understands the psychology of the animal's owner; he is unable to restrain himself from defending his property, even if that involves putting his own life at risk. The Torah agrees, at least after the fact, with the homeowner's defense of his property, even at the cost of a bloody clash. Even if his defending his property will force him to kill the thief, no claim may be brought against him for this. And all this because it was the thief who began the offense!

There is reason to assume that the mortal danger in which the homeowner finds himself – which permits him to kill the thief – also exists in the opposite direction. Due to of the uncertainty, the thief should be permitted to kill the homeowner when he is liable to stand up against him. But this is not correct! The uncertainty permits the homeowner to kill the thief, but not the other way around. Why? Because it was the thief who started the transgression. Perhaps this is what David meant when he said, "The man that has done this deserves to die." The thief would deserve to die if he were discovered while trying to break into the homeowner's house.[[4]](#footnote-4)

As mentioned above, the Torah mentions only the thief who slaughters or sells the stolen animal as someone who is sold into servitude if he is unable to make restitution. This accords with what is stated in the *gemara* (*Kiddushin* 18a): "'Then he shall be sold for his theft' – but not for his double repayment." In other words, if the thief has the money to cover the value of the animal, then even if he has no means by which to pay the double payment, he is not sold into slavery in order to finance the penalty. In light of this, if the animal is found in the thief's hands, the thief can never be sold into slavery; the animal will be returned to its owner's home, and the thief's inability to pay the twofold reimbursement does not lead to being sold into slavery. Selling the thief into slavery applies only in a case in which the thief sold or slaughtered the animal and cannot pay anything, because he already ate the meat or spent the money paid for the animal. In such a case, the thief is sold into servitude.

As for the *halakha*, the only difference between the two thieves is whether the thief can be sold into slavery, and here too the difference is for technical reasons. But it is possible that the original statement remains intact. The Torah's statement that we ought to be stringent with the thief to the point of selling him into slavery applies only a full-fledged thief who has immersed himself in thievery and tries to conceal it. Sometimes, this thief breaks into a house, and he is motivated by desire for money and meat like a professional thief. In contrast, perhaps there is room to be lenient with someone who suffered a local failure, someone who desired someone else's animal and took it home with him. A professional thief is rooted in improperly benefiting from someone else's work. Therefore, he must work as a slave for another person, and that other person will benefit from his toil for six full years.

1. We have little to add regarding the plain meaning of the text in the section dealing with an ox that gores another ox. I wish, however, to comment on a parallel in the laws of the nations, in the laws of Eshnunna. These laws date back to 1930 BCE, from the days of King Dadusha, who ruled several decades before Hammurabi. The city Eshnunna is located at Tel Asmar on the Tigris about 80 kilometers northeast of Baghdad. The laws were written in Akkadian and were uncovered in 1945 and 1947 at Tel Harmal in Baghdad. We find in section 53 (p. 98 in M. Malul, *Kovtzei Ha-Dinim Ve-Osafim Mishpatiyim Acherim min Ha-Mizrach Ha-Kadum* [Haifa, 2010]): “If an ox gores another ox and thus causes its death, the two ox-owners shall divide the value of the living ox and the carcass of the dead ox. If an ox is a gorer and the ward authorities notify its owner, but he fails to keep his ox in-check and it gores a man and thus causes his death, the owner of the ox shall weigh and deliver 40 shekels of silver. If it gores a slave and thus causes his death, he shall weigh and deliver 15 shekels of silver.” The parallel with the Torah's laws regarding a *shor tam* and a *shor mu'ad* is surprising and interesting, and it requires consideration. I wish to focus on one difference from Torah law. In the Torah, the law governing the goring of a slave is appended to the law governing the goring of a free man, whereas in the laws of Eshnunna, it is appended to the law governing the goring of an animal. Similarly, in the inscription of Sancheriv in Tel Lachish, the human captives are counted together with the captured animals in one number. This difference between Torah law and the laws of the nations points to a fundamental point – a slave is a human being and not just property. [↑](#footnote-ref-1)
2. Thieves who steal items from the plant world or inanimate objects appear later in the *parasha.* We first encounter one who steals the produce of another person's field in order to feed his cattle: "If a man causes a field or vineyard to be eaten, and shall let his beast loose, and it feeds in another man's field – of the best of his own field, and of the best of his own vineyard, shall he make restitution" (*Shemot* 22:4). Afterwards, we encounter one who steals inanimate objects – money or other articles: "If a man delivers to his neighbor money or articles to keep, and it is stolen out of the man's house – if the thief be found, he shall pay double" (*Shemot* 22:7). [↑](#footnote-ref-2)
3. The *gemara* in *Sanhedin* brings a different source for the allowance to kill a pursuer, and not a thief who broke into a person's house. [↑](#footnote-ref-3)
4. Moreover, since the homeowner is permitted to kill the thief, the Gemara rules that the thief is exempt from paying for any damage that he may have caused, based on the law of *kim lei biderabba minei*, namely,that a person who committed an act entailing the death penalty or lashes and the payment of monetary compensation, the more severe penalty (death or lashes) is imposed on him, and he is exempt from the monetary payment. This emphasizes the liability for the death penalty that applies to the thief at the time of the break-in. [↑](#footnote-ref-4)