

YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

TALMUDIC METHODOLOGY
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Parshiyot Balak and Pinchas describe the heroism of Pinchas. Though the Torah portrays his feats with admiration, the Halakha has a less than favorable view of vigilantism. An interesting exception, however, can be found in the gemara in Bava Kama (27b). The gemara describes an incident whereby two people had a sharing arrangement for a well of water. They drew water from the well on rotating days. Once, one of the partners drew water on a day which wasn't his and did not heed the incessant warnings and protests of his partner. The victim took a hammer and assaulted his partner. The initial position of the gemara is that such behavior is, in certain situations, justifiable based upon the principle "Avid inish dina le-nafshei" - a person may execute justice for himself. The exact conditions for this behavior and the nature of this rule will be explored within this article.

At first glance, we might perceive this measure as EXTRA-LEGAL. In certain unique situations in which the delay of prosecuting the case through legal means will be harmful, a person can effectively take the law into his own hands. When he does so, he is in fact circumventing the law. The gemara effectively legalizes an 'assault' which under normal conditions is prohibited. By no means are his actions given the credibility or authority of law and justice. Rather, Halakha allows for limited vigilantism (at least in financial areas) in strictly guarded circumstances.

The phrasing of the gemara, however, might suggest an alternate position. The gemara (28a) in describing a woman defending her husband who is being beaten justifies her consequent aggression by claiming "since she has no other recourse to save her husband her hand becomes the EXTENSION OF BEIT DIN." This presentation implies a more integrated relationship between standard due process and avid inish. It suggests that in these unique circumstances the victim has the same power as the court's officer in executing justice (what we might loosely define as a citizen's arrest).

Similar impressions may be gathered from the Rambam who groups the laws of *avid inish* in *Hilkhot Sanhedrin* rather than in *Hilkhot Nizkei Mammon*. This classification may very well indicate that the Rambam understood the process of *avid inish* to flow from the court's own jurisdiction.

A third expression of this theory - that the vigilante can be considered as the court's agent - can be located in the comments of the *Nimukei Yosef* (page 12b in the pagination of the *Rif*). He questions the extent to which an actual court officer can beat a recalcitrant litigant to encourage him to appear in court. He proves from our episode (where the victim of the water-theft hit his partner 100 times) that a court agent can similarly dispense unlimited beating. Had the *Nimukei Yosef* viewed *avid inish* as extra-legal recourse, he might not have been so quick to apply the standards of that action to an officer acting as the court's messenger. Evidently, he viewed *avid inish* as executing the court's justice and saw this as a viable model for determining the laws of a classic court-appointed agent.

SUMMARY:

After initially suggesting that *avid inish* constitutes taking the law into your own hands, we noticed three elements which might suggest otherwise. The syntax of the *gemara*, classification scheme of the Rambam, and the comparison of the *Nimukei Yosef* all pointed in the same direction: *avid inish* is an opportunity for a victim, under certain circumstances, to deputize himself as a court agent.

This essential question might influence several halakhic issues. For example, can *avid inish* be executed by an individual who could not possibly be seen as a court agent? The *Maharik* (*shoresh* 161) claims that *avid inish* cannot be facilitated through a Gentile. Had *avid* been a license for extra-legal self-defense in extreme circumstances, soliciting the assistance of a Gentile would seem logical. Evidently, the *Maharik* viewed *avid inish* as acting through *beit din* - an identity which is absurd in the case of a Gentile.

How confident in his legal position must one be to take the law into his own hands? It would seem fairly obvious that the vigilante must act according to *halakha* (as the victimized water-partner did). It would be ridiculous to allow complete anarchy whereby each person may use force to apply any law they

interpret to be accurate. Rashi claims such when he writes (27b s.v. Lo) that the dissenting opinion (which outright rejects *avid inish*) would not even allow PROPER justice to be dispensed by the vigilante. We can infer from Rashi that the lenient position which endorses *avid inish* did so only in the event of halakhically valid law being executed through a vigilante. Such a limitation would seem obvious regardless of how one understands *avid inish*.

The more uncertain issue, though, would revolve around law which, though authentic, would not stand up in a court of law. The Rosh raises this demand: to execute your own justice, it is not sufficient to be right; you must also have the evidence to triumph in a real court of law. Only in such cases would *avid inish* allow you to 'accelerate' the process. Evidently, the Rosh believed that *avid inish* entails extending *beit din*'s reach. This association is only meaningful if *beit din* would have (in all probability) reached a similar verdict. It is interesting to note that the *gemara* in *Mo'ed Katan* (17a) apparently establishes a more lenient set of guidelines for a *talmid chakham* implementing justice independent of *beit din*. The *gemara* claims that when he is certain of his righteousness he may take action (ostensibly even if he would not have been able to prove his point in court). The operative question becomes whether this *gemara* represents classic *avid inish* – with slightly more lenient guidelines or must it be viewed as an isolated and logically independent rule. For example, the *Shita Mekubetzet* (on *Bava Kama* explaining the *gemara* in *Mo'ed Katan*) claims that this latitude granted to the *talmid chakham/victim* is a unique rule intended to protect *kavod ha-Torah*. As such, it would not influence our impressions of *avid inish*.

A similar issue would surround the implementation of *avid inish* regarding laws which *beit din* itself could not enforce. The Rosh demanded that *avid inish* 'shadow' standard judicial process (in terms of the strength of evidence which might prompt such enforcement). A parallel demand might be lodged regarding the types of *halakhot* which allow *avid inish*. The *gemara* in *Bava Kama* (88a) informs us that in our era, since we lack judges whose *semikha* is in direct lineage from Moshe (*semukhin*) we cannot litigate *knasot* (fines which are penal rather than compensatory in nature – for example the double payment of *kefel* which a thief pays). Would *avid inish* apply in this circumstance? Would a victim be permitted to seize not just the worth of his stolen item but also double its worth? Ironically, the Rosh allows *avid inish* to operate even for *knasot*, although *beit din* itself is powerless to adjudicate these fines. What makes his position startling is that, at the same time, he

allows avid inish only if the evidence was irrefutable and would have held up in court. Does he view avid inish as extending beit din's reach or as executing lone justice?

Thus far, we have analyzed the position which grants greatest license in the area of avid inish. The gemara also presents the stricter opinion which limits avid inish to a situation of irreparable loss. If the aggressive partner were drawing water, waiting for a verdict to come would have resulted in the loss of that day's water. According to this position, in typical cases, however, due process must be pursued. How might we define avid inish if it is limited only to cases of irrecoverable loss? This stricter view perhaps perceives avid as a departure from legal process and an extreme form of self-defense, reserved for abnormal circumstances. Hence, we might claim that the more lenient position argued precisely about that point. The lenient position viewed avid inish as ALTERNATIVE justice and hence broadened its sweep even to include cases where permanent loss was not being suffered.

Methodological Points:

1. The language employed by the gemara to describe a halakha is often very telling about the nature of this halakha. By the gemara referring to a woman protecting her husband as "the arm of the court," it might have been indicating the essence of this halakha.
2. The classification scheme of the Rambam might also reflect the halakha. By inserting these laws into Hilkhhot Sanhedrin rather than Hilkhhot Nizkei Mammon, the Rambam might have been defining avid inish as a form of justice. Note, however, the gemara's discussion of avid inish in Bava Kama and not Sanhedrin.
3. When a Rishon infers from halakha 'x' to seemingly unrelated halakha 'y,' we must re-adjust our perspective to understand the similarity between the two. When the Nimukei Yosef induces the laws of a court officer from avid inish, we are obviously witnessing a view of avid inish as justice.
- 4) In many cases of alternative legal process, we must inspect its relation to standard pesak. The same question arises with regard to tefisa (grabbing money which you feel you are owed AFTER beit din has reached a dead-end), peshara (compromise) and kana'im pog'in bo (Pinchas killing Zimri).