

**YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

TALMUDIC METHODOLOGY

By: Rav Moshe Taragin

**CAN A KAL VE-CHOMER BE EMPLOYED TO ADMINISTER
MONETARY COMPENSATION**

One of the 13 exegetical methods by which the Torah is decoded is “*kal ve-chomer*.” Two *halakhot* often exhibit basic similarity, with slight differences in severity. If those differences are significant enough, we can label one scenario “*kal*” (less severe), while the other *halakha* is designated as “*chomer*” (more severe). Logic dictates that laws which apply to the “*kal*” *halakha* should certainly apply to the “*chomer*” one – even if the Torah did not specifically assert those *halakhot* for the *chomer*. This tool is so basic that it opens R. Yishmael’s list of 13 exegetical tools.

The *gemara* in *Makkot* (10a) derives a well-known principle that limits the application of a *kal ve-chomer*. “*ein onshin min ha-din*.” Although *kal ve-chomer* may be used to determine *halakhot*, it can not be employed to derive a PUNISHMENT. The *gemara* reaches this conclusion based on the fact that the Torah lists a full sister as an “*erva*;” after all, if a half-sister is an *erva*, certainly a sister from both parents should be considered one! The *gemara* concludes that *ein onshin min ha-din* – we cannot infer a punishment through the tool of *kal ve-chomer*, and therefore the Torah was compelled to iterate each and every type of *erva*.

Although this concept holds fast in general areas, there seems to be an exception. In the beginning of *Bava Kama*, *Chazal* question the need to delineate 4 different types of *avot nezikin*. Why didn’t the Torah merely describe one form of *mazik*, and we would infer the others through *kal ve-chomer*? The *gemara* ultimately claims that the tool, although operative, would fail in this case, as we can isolate particular reasons not to learn one form of *mazik* from another. It does seem, however, that the *gemara* was prepared IN THEORY to derive one type of

nezek from another, which would seem to reject the principle of *ein onshin min ha-din*. Similarly the *gemara* confidently derives *toladot* - types of damages that are similar but not identical to the Torah's description. In these cases, like the original Biblical templates, the *mazik* is *chayav* to pay. Once again, this seems to flout the principle of *ein onshin min ha-din*.

Yet a third *gemara* in *Bava Kama* (49b) questions why the Torah describes two separate cases involving a pit - a pit that was dug and a pit that was uncovered. If uncovering a dangerous pit makes a person liable for damages, certainly digging a new one should make him *chayav*! The *gemara* therefore derives a different *halakha* from this repetition. Once again, if the laws of *ein onshin* prevent derivations of punishments, the repetition of digging and uncovering is absolutely NECESSARY and should not enable a different *halakha* derivation.

Interestingly, the Mekhilta of R. Yishmael does impose the concept of *ein onshin min ha-din*. Commenting on the repetition of the *halakhot* regarding digging and uncovering pits, the Mekhilta resolves the problem - as we expected the *gemara* to – by claiming *ein onshin min ha-din*. Similarly, when attempting to derive the *toladot* of one of the *avot-nezikin-keren*, the Mekhilta is compelled to cite a *pasuk*. This approach is consistent with the overall theme of *ein onshin* and accentuates our question – why didn't the Bavli follow this logic?

Perhaps the question revolves around the issue of how to understand compensation for damaging other people's possessions (*nizkei mammono*). We have been assuming that this compensation is a penalty or punishment, but perhaps it is, in fact, a very rational reimbursement. If so, we may argue that while PENALTIES or PUNISHMENTS can not be derived through *kal ve-chomer*, monetary reimbursement can be. Perhaps the Bavli viewed *nizkei mammon* in this fashion and therefore felt comfortable inferring one track of REIMBURSEMENT from the others.

An interesting Tosafot in *Kiddushin* (13b) may contribute to a better understanding of this question. Tosafot describes two different types of monetary obligations: those which are self-evident and don't need a *pasuk* to install them and those that are not obvious and would not be obligatory unless the Torah

mentioned them. The *gemara* refers to the first type as “*milve she-einah ketuva ba-Torah*,” and it includes loans and contractual payments, while the latter is referred to as “*milveh ha-ketuva ba-Torah*,” such as the monies used for *pidyon ha-ben* and *erakhin* (dedications to *hekdesh*). These categories and the applicable scenarios are not novel. What is NOVEL is Tosafot’s inclusion of *nizkei mammon* as a *milveh ha-ketuva batorah*, implying that such compensation is not self-evident but obligatory ONLY because the Torah requires it. This would suggest that the payment is more penal; if it were compensatory, it should be a more self-evident payment and obligatory even if the Torah had not written it. Perhaps this penal view of *nezikin* payments is what informed the Mekhilta’s view that *ein onshin [nizkei mammon] min ha-din*. The Bavli, on the other hand, may have viewed *nizkei mammon* as more compensatory, and therefore inferable through *kal ve-chomer*.

Of course, Tosafot may not have been able to explain the Bavli in this fashion. Asserting that *nizkei mammon* is a *milve ha-ketuva ba-Torah* would cast these payments as penal and the principle of *ein onshin min ha-din* should obtain. Evidently, there must be a different logic allowing the Bavli to freely derive one form of *nezek* from another according to Tosafot. Investigating the logical basis of the principle of *ein onshin* may help explain why it should not apply to the cases in *Bava Kama*.

Rashi in *Sanhedrin* (73a) differentiates between a *kal ve-chomer* and a *hekesh* (textual juxtaposition). Why can penalties be derived from the latter but not from the former? Rashi claims that a *hekesh* (and a comparable situation of *ma matzinu*) are truths that are textually latent; a *kal ve-chomer* is based on personal logic WHICH WAS NOT DELIVERED THROUGH THE MESORAH, and is therefore not authoritative enough to warrant derivation. Seemingly, the *ein onshin min ha-din* limitation upon *kal ve-chomer* is based on lack of AUTHORITY. If this is true, it would indeed be difficult to distinguish between general penal derivation and monetary issues in the application of the principle of *ein onshin min ha-din*.

In contrast, *ein onshin min ha-din* may be based on the fear of error. How can we independently derive an *onesh* that may mistakenly require a particular punishment? If this is the basis of the principle, we may distinguish between

corporal punishments, which are irreversible, and monetary ones, which can be repaired. Perhaps the Bavli is operating under the notion that the general aversion to *onshin min ha-din* is based upon the fear of error and would not apply in any situation of *mammon* regardless of the nature of the payment.

Even if the payments for damages are penal – since they are ultimately monetary payments and not corporal punishments, the concern for error is mitigated and a *kal ve-chomer* can be employed to extend payments to non-stated situations.

To summarize, there are two approaches toward solving the Bavli's readiness to employ *kal ve-chomer* to extrapolate payments for damages. Either the Bavli understood these payments to be compensatory and not penal. The limitation upon *kal ve-chomer* employment may be in penal cases, not reimbursements. Alternatively, the Bavli may have viewed damage payments as penal **but nevertheless**, any monetary payments can be logically extrapolated because we aren't hamstrung by the fear of error. This assumes that the principle of *ein onshin min ha-din* is based upon the fear of error and not the formal lack of authority to independently administer penalties.