**Penal vs. Monetary Obligations**

Throughout *Nashim* and *Nezikin* there are several *gemaros* which distinguish between the penal fines which are referred to as *kinasos,* and monetary payments referred to as *mamon* payments. For example, one’s obligation to pay back double the amount that he stole is referred to as a *kinas,* while the principal amount is referred to as a monetary payment. This article will focus on understanding the nature of *kinas* payments, in particular whether there is a *chiyuv latzeis yedei shomayim* (an obligation to pay regardless of judicial enforcement) with regards to *kinas* payments, and the parameters of the *gemora’s* and the Rishonim’s understandings of the distinction between the two forms of obligations.

Rabban Gamliel and Tevi

*Bava Kama 74b*

*מעשה בר''ג שסימא את עין טבי עבדו והיה שמח שמחה גדולה מצאו לר' יהושע אמר לו אי אתה יודע שטבי עבדי יצא לחירות אמר לו למה א''ל שסמיתי את עינו אמר לו אין בדבריך כלום שכבר אין לו עדים הא יש לו עדים חייב*

*There was an episode with Rabban Gamliel who blinded his servant Tevi and was jubilant about it. He found Rebbi Yehoshua and said to him “Do you know that Tevi my servant has been set free?” Rebi Yehoshua responded “Why?” Rabban Gamliel responded “For I blinded him”. Rebi Yehoshua said to him that actually Tevi does not go free as there were no witnesses to see the episode*

The *gemara* above relates a story of Tevi, the slave of Rabban Gamliel. Despite his social status as a slave, Tevi is described across *shas* as a very pious individual. *[[1]](#footnote-1)* Such piety is believed to have given his master, Rabban Gamliel a particular desire to set him free. However, due to the *issur* of *l’olam bahem Tavo’odu* that forbids freeing a Canaanite slave, he was unable to fulfil his wish. One day, Rabban Gamliel happened to mistakenly blind his beloved slave. Rather than being disheartened as a result of the harm he caused Tevi, he was ecstatic and overjoyed as he had coincidentally discovered a way to let Tevi free without transgressing the prohibition of freeing a Canaanite slave. This solution was based upon the versein *parshas Mishpotim* which states:

וכי יכה איש את עין עבדו או את עין אמתו ושחתה לחפשי ישלחנו תחת עינו

*And when a man strikes the eye of his servant of maidservant and destroys it, he shall send him free in lieu of the eye[[2]](#footnote-2)*

Unfortunately for Rabban Gamliel (and, perhaps more unfortunate for Tevi), his joy was put to an end by Rebi Yehoshua, who informed Rabban Gamliel that his belief was based upon a *halachic* error. Because of a technicality that the freedom of servant from his master’s servitude is categorized as a *kinas* payment and one who admits to such an obligation (without *eidim*)is exempted from payment,[[3]](#footnote-3) Tevi would ultimately not be allowed to go free. Therefore, according to Rebi Yehoshua, because there were no witnesses present that were able to testify to the injury inflicted by Rabban Gamliel upon his slave, the transgression of emancipating Canaanite slaves would continue to apply to Tevi.

The Yerushalmi in the third *perek* of *kesubos*[[4]](#footnote-4) infers from this story that in a situation where *beis din* is unable to enforce payment of a *kinas*, there is also no obligation to pay *latzeis* *yedei shamayim*. This yerushalmi places *kinas* payment at odds with *mammon* payments, where lack of proof of one’s actions in a *beis din* does not absolve them of their obligation[[5]](#footnote-5). For example, one who crashes his car into somebody else’s car and causes damage is obligated to pay for his actions regardless of the whether or not there is proof. Thus, Rabban Gamliel’s obligation to free Tevi is inherently different from a normal monetary payment, in that his liability is totally dependent upon *beis din*’s ruling which is based upon witness testimony.

The Difference between Kinas and Mamon Payments

*Makkos 5a*

*כן לענין תשלומי קנס*

*באו שנים ואמרו בחד בשבתא גנב וטבח ומכר ובאו שנים ואמרו בחד בשבתא עמנו הייתם אלא בתרי בשבתא גנב וטבח ומכר משלמין ולא עוד אלא אפילו אמרו בערב שבת גנב וטבח ומכר משלמין דבעידנא דקא מסהדי גברא לאו בר תשלומין הוא*

*…and similarly with regards to penal payments. If two witnesses came and said that on Sunday someone stole, slaughtered and sold and animal and two other witnesses come and say [it is impossible for you to know that as] on Sunday you were with us, but the incident actually occurred on Monday, the original set of witnesses have to pay. Furthermore, even if the second pair claimed the incident occurred on Friday, the first set must still pay as at the time of their testimony, the accused was not yet obligated to pay*

The Gemara in Makkos 5a distinguishes between witnesses who are found to be *eidim* *zomemim* who testify falsely in an attempt to obligate another to pay *mammon* payments and those who falsely attempt to obligate another *kinas* payments. With regards to the former, if it is proved that the subject whom they have testified against has happened to have been committed the same act at an earlier time, they will not be held to be *eidim zomemim*. However, with regards to the latter, even if the subject against whom they have testifiedis found to have committed the act he is being accused of, the *eidim* *zomemim* will be punished and be viewed as *eidim zomemim.* Rabbi Akiva Eiger*[[6]](#footnote-6)* explains that the reason behind this distinction lies in the same logic of the *Yerushalmi* in *Kesubos*; namely, that there is an obligation to pay *mammon* payments regardless of judicial ruling, while *kinas* payments are entirely dependent upon a judicial ruling that one is obligated. Therefore, when the accused against whom witnesses have testified has committed the same action at an earlier date with regards to *mammon* payments, it will be impossible to refer to the witnesses as *eidim zomemim.* However, the act that a subject committed at an earlier time which would obligate him to pay a *kinas* payment does not immediately obligate him to pay it, rather it is the witnesses’ testimony in *beis din* which creates the obligation. Therefore, because the testimony of these *eidim zomemim* have obligated him to make a payment which he was not previously obligated to pay, they will indeed be considered *eidim zomemim*.

Notwithstanding Rabbi Akiva Eiger’s seemingly clear explanation of the gemara, none of the *Rishonim* choose to follow his logic.

Rashi explains that the distinction between the two forms of payment is that if one were to admit to his obligation in a *kinas* payment they would be exempt, which is not true when it comes to monetary payments. [[7]](#footnote-7) There are quite a few problems with Rashi’s formulation:

1) As Tosfos argues in *Bava Kama*[[8]](#footnote-8), there is a disagreement between Rav and Shmuel in *Bava Kama* 75a whether one’s admission to an obligation of a *kinas* payment can continue to exempt them if witness testimony supersedes their admission. While according to Rav witness testimony will not impede one’s admission leading to an exemption; Shmuel believes that one’s admission would be meaningless in such a scenario. Therefore, since the case in *Makkos* 5a must be dealing with a scenario where the accused has admitted to being liable a *kinas* paymentprior to the *eidim zomemim*, Rashi has unnecessarily limited the *gemaro’s* logic to follow Rav’s opinion.

2) *Tosfos Rabbeinu Peretz* in *Bava Kama* 74a takes Tosfos’ question on Rashi further and points out that Rav only stated his opinion (that one’s admission will always lead to an exemption) in the event that one’s admission obligates him to pay some monetary obligation in addition to the *kinas* payment. However, an admission which results solely in the *kinas* payment (and therefore his exemption) is not a *halachically* effective admission.[[9]](#footnote-9) Therefore, Rashi’s distinction is incorrect both according to Shmuel and Rav.

3) Rashi applies his distinction to a case of *nefashos* (corporal punishment cases) as well as *kinas[[10]](#footnote-10)*. This is to say that if one were to admit to killing another he could no longer be obligated to be killed and there is nowhere else in *shas* that says that one’s admission would render *beis din* incapable of obligating him in a *nefashos* case.

To answer the numerous questions on Rashi we must explain that when Rashi says that ‘if one were to admit to the *chiyuv*, they would be exempt from any obligation,’[[11]](#footnote-11) he does not mean to say that if witnesses were to supersede an admission, the subject would still be exempt from payment. Rather, Rashi distinguishes between the two categories of obligation (*mamon* payments vs. *kinas* paymentsand *nefashos*) in that when it comes to cases of *kinas* payments and *nefashos*, one’s admission does not create an obligation. This formulation is to be juxtaposed to *Mamon* payments, where a lack of witnesses does not hinder *beis din*’s ability to enforce payment when one admits to the charge due to the rule of *hodaas baal din kmeah eidim damei.[[12]](#footnote-12)* Such a rule in cases of kinas and *nefashos*, however, is non-existent. Therefore, Rashi’s is not attempting to find a practical difference between the two types of payment (as Tosfos and Tosfos Rabbeinu Peretz understood), rather, Rashi is explaining that the ethos of the types of payment differ. As opposed to Rabbi Akiva Eiger who bases his distinction between the types of payments upon whether there is an obligation to pay extra judicially (*latzeis yedei shomayim)*; Rashi bases the distinction upon what the *eidim* are coming to do in such scenarios.

Because Rashi and Tosfos both choose to distinguish between monetary and *kinas* obligations in the *gemora* in *Makkos* in a different light than Rabbi Akiva Eiger[[13]](#footnote-13), the question is whether there is a possibility that there could be a *chiyuv* *latzeis* *yedei* *shamayim* in *kinasos* according to the *Rishonim*. As explained earlier, the *Yerushalmi* in *Kesubos* and Rabbi Akiva Eiger[[14]](#footnote-14) believe that the story of Rabban Gamliel’s slave Tevi is a clear proof that there is no *chiyuv* *latzeis* *yedei* *shamayim* in *kinas* payments, the question is whether this submission is conclusive according to all other opinions. To find a conclusive answer to the question at hand it is necessary to consider the opinions of other *rishonim* in relation to this topic.

The Understanding of Other Rishonim

Sefer Hachinuch 51

*אלה הדינין הנקראין דיני קנסות כבר אמרנו שאין דנין אותן אלא בית דין הסמוכין ובארץ ישראל, אבל המזיק חיב לשלם בדיני שמים בכל מקום, ואם תפש הנזק אין מוציאין מידו בשום מקום.*

*Penal punishments may only be judged in a Beis Din of smuchin in Eretz Yisroel, however, the perpetrator of damage is obligated to pay in order to fulfil his heavenly obligation and [therefore] if the damaged party takes grabs the payment, we do not extract it*

The Sefer Chinuch explicitly argues on Rabbi Akiva Eiger and the *Yerushalmi* in *Kesubos* above who believe that there is an obligation to pay *latzeis* *yedei* *shamayim* in a *kinas* which *beis* *din* is unable to enforce. The question then follows, what does he do with the proof from the Gemara in *Bava* *Kama* 74b of Rabban Gamliel and Tevi brought by the Yerushalmi earlier?

The Sha’ar Hamelech*[[15]](#footnote-15)* argues that the story of Rabban Gamliel and Tevi fails to prove that there is no *chiyuv latzeis yedei shamayim* in *kinas* payments because the story could be distinguished from all other cases of *kinas* obligations. As opposed to the opinions quoted above, the Sha’ar Hamelech believes that reason Rabban Gamliel was not able to free Tevi was because the courts would not allow him to do so without their conclusive knowledge that he inflicted an injury upon Tevi (due to prohibition of freeing a Canaanite slave[[16]](#footnote-16))***.*** Therefore, the Sha’ar Hamelech concludes that only where there an *issur* *de’oraysa* opposing the application of a *kinas* obligation would there be no *chiyuv latzeis yedei shamayim*. However, in all other cases of *kinas* payments, there could very well be a *chiyuv* *latzeis* *yedei* *shamayim* even when the kinas is unenforceable in *beis* *din*.

It could be understood that the Sefer Hachinuch disregards the proof from Rabban Gamliel because he follows the same reasoning of the *Sha’ar Hamelech*. However, this explanation of the Chinuch lacks in that it fails to explain why he chose to ignore a clear gemara in the Yerushalmi simply due to the existence of an alternative understanding of the story of Tevi.

*Rashba* in *Bava Kama 74b*

*מכאן נראה דכל קנס שאין לו עדים אפילו תפס לא עשה ולא כלום שהרי טבי עבדו של רבן גמליאל גדול היה וזוכה בעצו להיות בן חורין, ואם איתה כי אין לו עדים מאי הוה הא תפס ונפק ליה לחירות מיד שסימא את עינו, אלא שמע מינה דאפילו תפס מפקינן מיניה דאינו זוכה אלא בבית דין ובעדים.*

*From here it appears that any kinas that comes about with eidim, even if the damaged party grab their payment, it counts for nothing [and we would force them to return it] since Rabban Gamliel’s servant Tevi was an adult and therefore should have acquired his freedom. Therefore, if it was the case that when there are no witnesses, grabbing payment is indeed considered a good payment, Tevi should have upon being blinded acquired his own freedom [i.e. grabbed his own freedom]. Rather we can conclude from here that even if one grabs, we would be required to extract it from him since one can only be rewarded money in Beis Din and with witnesses*

This excerpt from the Rashba’s commentary on the story of Rabban Gamliel takes the Yerushalmi’s understanding of the story further, and may shed light on the reason behind the Sefer Hachinuch’s dissent from the understanding of the *Yerushalmi*. The Rashba sees the story of Rabban Gamliel and Tevi as proof not only that there is no *chiyuv latzeis yedei shomayim* in *kinas* payments but also proof that a claimant in a *kinas* case has no right to take the money he is owed in an extrajudicial manner (*tefisah*). If *tefisah* were to be legally sanctioned, explains the Rashba, then surely Tevi should be considered to have been *tofeis* himself and should be allowed to go free. Although in normal *mamon* obligations it would seem to be clearthat a claimant who takes that which he is owed without seeking *beis din’s* permission beforehand is legally sanctioned,*[[17]](#footnote-17)* when it comes to *kinas* payments, the Rashba explains that *tefisah* is not allowed in any scenario, until the tortfeasor has been obligated in *beis din*.

Although at first glance the Rashba seems to be quite an understandable opinion, the Gemara in *Bava Kama* seemingly directly contradicts his formulation.

Bava Kama 15b

*והשתא דאמרת פלגא נזקא קנסא …*

*ואי תפס לא מפקינן מיניה*

*Now that we conclude that paying half the damage is considered kinas… if payment is grabbed, we do not extract it*

With regards to an obligation to pay a *kinas* following the goring exacted by a *Tam* ox (one which has not gored 3 times[[18]](#footnote-18)), the *gemara* explains that when the victim’s owner is *tofeis* the money he is owed without *beis din’s* consent, they are permitted to keep the money taken extra-judicially. If so, how could the Rashba disagree with an explicit Gemara which seem to directly contradict his inference from the story of Rabban Gamliel and Tevi?

The Ra’avad*[[19]](#footnote-19)* (who follows the Rashba’s logic explained above) explains that the Gemara’s statement, which seems to allow *tefisah,* is limited to cases of the *kinas* of a *tam* ox. He understands that, although the Gemara in *Bava* *Kama* 15b concludes that a *tam* ox is considered a form of *kinas* payment, it still retains certain monetary aspects which in turn allow one to extra-judicially snatch that which he is owed. This distinction between the *kinas* of a *tam* ox and other *kinas* payments is a novel idea which other Rishonim seem not to bring in these *gemoras*. [[20]](#footnote-20)

The commentaries of the Rashba and Ra’avad shed light on the issue around the Sefer Hachinuch brought earlier. As mentioned earlier, it would be illogical to say that the Sefer Hachinuch would contradict a *gemora* in the *Yerushalmi* without anything coercing him to explain differentl. However, it can be seen from the Rashba and Ra’avad that their belief that there is no *chiyuv latzeis yedei shomayim* in *kinas* payments forces them to conclude that one is not allowed to extra-judicially snatch *kinas* payment. Therefore, it is possible to explain that the Sefer Hachinuch is forced to learn the story of Rabban Gamliel and Tevi in a similar way as the *Sha’ar* *Hamelech* which contradicts the *Yerushalmi* because he sees the *gemoros* which allow extrajudicial snatching to be in direct contradiction of the Yerushalmi’s understanding of the story. The fact that the Ra’avad was forced to limit the Gemara in *Bava* *Kama* *15b* quoted above (because of the *Yerushalmi* and his perception that there is no *chiyuv latzeis yedei shomayim* in *kinas* payments) gives rise to the possibility that one who does not limit the *gemora* in *Bava Kama* 15b would instead see it as a proof that there is a *chiyuv latzeis yedei shomayim* in *kinas* payments.[[21]](#footnote-21)

*Tosfos Bava Kama 33b ‘Ika Binayhu’*

*ונראה דאע"ג דלרבי עקיבא קיימא ליה ברשותיה משעת הנזק קודם העמדה בדין וחשבינן כאילו בא חצי נזק לידו מאותה שעה ואע"ג דקי"ל פלגא נזקא קנסא מכל מקום אם העידו עדים ששורו נגח ביום א' ואתו עדים אחריני ואמרו ביום א' הייתם עמנו אלא בע"ש נגח דמשלמין דבעידנא דקמסהדי גברא לאו בר תשלומין הוא דכל זמן דלא נתגלה הדבר שלא העידו עליו חשיב לאו בר תשלומין אע"ג דקם ברשותו דניזק בשעת הנזק*

*And it appears that even according to Rebi Akiva, [an animal that damages and is therefore required to be handed over to the damaged party as payment] enters the damaged party’s ownership from the time the damage occurred before any court case has happened and we considered it as if the ‘half payment’ has already come to his hand from that time. And even though we establish that according to halacho, ‘half-payment’ is a kinas, nevertheless, if witnesses testified that an ox gored on Sunday, and other witnesses [it is impossible for you to know that for] you were with us on Sunday, but rather the goring occurred on Friday, [the eidim zomemim] must pay because at the time of their testimony, the accused was not yet culpable since until the matter has been revealed to beis din through witnesses, the accused is considered as someone who is not obligated to pay even though the animal has entered under the ownership of the damaged at the time of the damage*

The Tosfos quoted above states that the fact that one is not obligated to pay a *kinas* payment until he has been commanded to pay by a *beis din* does not contradict the opinion in the *Tannaim* that the *kinas* payment is considered in the claimant’s domain from the time that the wrong was committed. Reb Shimon Shkop explains this distinction[[22]](#footnote-22) by saying that that *beis din’s* judgment in the case of *kinas* is a condition in the obligation. He explains that, although one should really be obligated to pay a *kinas* from the moment that the wrong is committed, he will not be liable until the obligation enforced in *beis din* because it is conditional on being forced to pay. Therefore, when Tosfos says that the payment for the *kinas* is in the claimant’s domain from the moment the damage occurs, this is only true retroactively from when *beis din* has obligated him. Similarly, Reb Shimon Shkop explains the opinion of the Rosh in the same light:

*Rosh Bava Kama 1:20*

*לא נראה לי דלאו תקנתא היא אלא דינא הוא דמדאורייתא מחייב ליה אלא שאין לו דיין בבבל שיכופנו ליתן לו בכל כה"ג עביד איניש דינא לנפשיה ולא מפקינן מיניה עד דיהיב כל דמחוייב ליה מדאורייתא*

*…this does not appear to me to be correct as it is not any sort of rectification but rather as far as the law is concerned, from the Torah he is obligated to pay but there is no Dayan – therefore in any similar case ‘a man can take the law into his own hands’ and we would not extract money the damaged party grabbed until the damager has paid back everything he owes him as far as the Torah obligation is concerned*

The Rosh explains that *tefisah* works in the present day (despite *beis din’s* lack of authority) because the tortfeasor is obligated to pay upon committing a wrong and only does not pay because there is no *beis din* who can enforce the payment[[23]](#footnote-23). Reb Shimon Shkop takes the view that the Rosh’s opinion fits in with Rabbi Akiva Eiger formulation and with the *Yerushalmi* quoted earlier, and explains that one’s obligation to pay *kinas* is conditional on *beis din* forcing him to pay. Following this understanding, Reb Shimon creates a novel idea in the opinion of the Rosh that *avid inish dina l’nafshei* (the legal sanctioning allowing one to take the law into his own hands) works even in a *kinas* obligation because every individual who snatches extra-judicially effectively takes the place of *beis din* as an authority to enforce payment.

Reb Shimon Shkop understands this way in the Rosh only because he believes that the *Yerushalmi* is a conclusive opinion accepted by all Rishonim. However, once it is accepted that that there are Rishonim who believe that there is a *chiyuv latzeis yedei shomayim* in *kinas* payments, it may be possible to learn the Rosh on a simpler level without the novel understandings of Rabbi Shimon Shkop. Therefore, it is submitted that when the Rosh says ‘*medo’oraysa* *mechayev* *ley*,’ (that one is obligated in a *kinas* payment from a Torah level) he does not mean retroactively once there is *beis din’s* force, but rather that every *kinas* is an obligation from the moment a wrong is committed.[[24]](#footnote-24)

Conclusion

In conclusion, the *Rishonim’s* understanding of the nature of *kinas* payments and the distinction between *kinas* and monetary obligations varies greatly. On one hand the Rashba and the Ra’avad understand that extrajudicial snatching of *kinas* obligationsnowadays would not be legally sanctioned, while the Sefer Hachinuch goes as far as saying that the obligation to pay *kinas* is a *chiyuv latzeis yedei shomayim,* against the *Yerushalmi*. In-depth examination of the Rishonim in this topicwill hopefully provide an insight into the fundamental terms dealt with in this article and provoke thought concerning related issues throughout *Nezikin.*

1. See Mishna Brochos 1:7 and Sukka 2:1 [↑](#footnote-ref-1)
2. *Shemos* 21:20 [↑](#footnote-ref-2)
3. See Bava Kama 74b; Kesubos 10a, 32a. [↑](#footnote-ref-3)
4. Talmud Yerushalmi 23b [↑](#footnote-ref-4)
5. With regards to being obligated in an action ‘latezeis yedei shamayim’ without beis din enforcing the payment, examples can be seen in Bava Metzia 91a, Tosafos Sanhedrin 72a ‘lo’. The commandment to repay monetary obligations regardless of beis din’s ruling can be seen in Bava Kama 118a. For further discussion in this topic, see *Ktzos Hachoshen* 34*:*4, 400:1 [↑](#footnote-ref-5)
6. Gilyon Hashas Makkos 5a ‘*Tosfos’* [↑](#footnote-ref-6)
7. Rashi Makkos 5a ‘*bou shnayim’* [↑](#footnote-ref-7)
8. Tosfos *Bava Kama* 74a ‘*De’akati*’ [↑](#footnote-ref-8)
9. See Rebi Yochanan Bava Kama 75a [↑](#footnote-ref-9)
10. See Rashi (n7) [↑](#footnote-ref-10)
11. (n7) [↑](#footnote-ref-11)
12. Kiddushin 65b (Rashi ‘*hodaas’*), *Ktzos Hachoshen 34:4* [↑](#footnote-ref-12)
13. This is not to say that R’ Akiva Eiger is proved wrong, rather that the *Rishonim* do not necessarily agree with his understanding [↑](#footnote-ref-13)
14. This is also the opinion of the Rashba and the Ra’avad brought later on, the Gra *Bava Kama* 74b and Tosfos *Kesubos* 33b ‘*La’av*’ [↑](#footnote-ref-14)
15. *Hilchos Avadim* 5:17 [↑](#footnote-ref-15)
16. (n2) [↑](#footnote-ref-16)
17. *Bava Metzia* 6a,b; *Bava Kama* 27b [↑](#footnote-ref-17)
18. See *Bava Kama* 23b regarding the dispute as to whether an ox is required to gore three or four times in total to become a *shor mu’ad* [↑](#footnote-ref-18)
19. 34a [↑](#footnote-ref-19)
20. The Rashba cannot answer like the Ra’avad, because his commentary in *Kesubos* 41b ‘v’hashta’ [↑](#footnote-ref-20)
21. See the *Teshuvas Harivosh* 352 who similarly concludes that the existence of a *chiyuv latzeis yedei shomayim* is dependent upon the ability to extra-judicially snatch the obligated payment [↑](#footnote-ref-21)
22. See *Sha’arei Yosher* 7:21 [↑](#footnote-ref-22)
23. This is view is opposed to other rishonim who see *tefisah* in *kinas* nowadaysto be sanctioned because of a rabbinical decree [↑](#footnote-ref-23)
24. This understanding of the *Rosh* cannot be used to explain the Tosfos above because of his use of the term ‘*lemafreah.’* Therefore, it is conceded that Reb Shimon’s understanding will be necessary to explain Tosfos. [↑](#footnote-ref-24)