

Hoda'ot ve-Halva'ot

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Dedicated to the honoree of this festschrift, who unknowingly also contributed to the arguments presented in this paper

1. INTRODUCTION

In four *sugyot* or discussions contained in the Babylonian Talmud, and there alone—i.e., Gittin 88b; Baba Kamma 84b; Sanhedrin 2b; *ibid.*, 32b—there appears a statement according to which the broad category referred to in the *Mishnah* as *dinei mamonot*—i.e., monetary law—ought to be subdivided into two groups, the more lenient of which, in terms of the judicial procedure required is referred to as *hoda'ot ve-halva'ot*—lit. “admissions of liability and loans.” As I have demonstrated elsewhere, this category first appears in the words of Rava in *Bab. Sanhedrin* 32b, where he proposes a distinction between two groups that together constitute monetary law: the one known as *dinei kenasot*, i.e., “laws of [monetary] penalties” (this is the common explanation, but later we will see that we have to define *dinei kenasot* in another manner), and the other known as *hoda'ot ve-halva'ot*, “admissions of liability and loans.” This distinction is presented by Rava in his remarks on the first *Mishnah* in *Sanhedrin* (3a), and it was accepted by the anonymous authors

of the Talmud, who utilized it in the three additional discussions mentioned above.¹ But what is meant by the term *hoda'ot ve-halva'ot*? It is important to clarify this subject, to which this paper is devoted, because every area of monetary law not included within this group falls under the rubric of *dinei kenasot*.

An examination of Rava's words in the two *sugyot* in which he explicates the term *dinei mamonot*—namely, *Sanhedrin* 3a and 32b—will enable us to construct the following definition:

According to Rava, the term *dinei kenasot* includes everything that is not *hoda'ot ve-halva'ot*, namely: robbery and [bodily] injury, [property] damage and half-[payment of] damage, double payment, etc.² In the category of *hoda'ot ve-halva'ot* laymen (*hedyotot*) may conduct the judicial procedure, whereas cases of *gezelot ve-ḥabalot*—i.e., “robbery and injury”—must be conducted by expert judges (*mumḥim*; *Sanhedrin* 3a) with stricter judicial procedures—i.e., the bringing of witnesses and their thorough examination (*derishah ve-ḥakirah*; *Sanhedrin* 32b).

We find that this understanding lies at the basis of Maimonides' words in his *Code*, at *Hilkhot Sanhedrin* 5.8:³

דיני קנסות כגון גזילות וחבלות ותשלומי כפל ותשלומי ארבעה וחמשה והאונס והמפתה וכיוצא בהן אין דנין אותם אלא שלשה מומחים והם הסמוכין בארץ ישראל, אבל שאר דיני ממונות כגון הודאות והלואות אינן צריכין מומחה אלא אפילו שלשה הדייטות ואפילו אחד מומחה דן אותן, לפיכך דנין בהודאות והלואות וכיוצא בהן בחוצה לארץ, אע"פ שאין בית דין של חוצה לארץ אלהים שליחות בית דין של ארץ ישראל עושיק, ואין להן רשות לדון דיני קנסות בשליחותן.

Cases involving *kenasot*, such as robbery, injury, claims for twofold or fourfold or fivefold restitution, for rape or seduction, or claims of a similar nature, are adjudicated by three well-qualified judges, i.e., judges who received their ordination in Palestine. But cases that do not involve action in tort, such as *hoda'ot ve-halva'ot*, do not require for their adjudication three well-qualified judges. Three laymen or even one well-qualified judge may try them. Therefore cases of *hoda'ot ve-halva'ot* and the like may be tried even outside Palestine, for although no tribunal outside Palestine can be designated as *Elohim*, it acts merely as agent for the court of Palestine. It is denied, however, the power to act as agent for the court of Palestine in matters involving *kenasot*.

The definition of *dinei kenasot* proposed by Maimonides, following Rava, also serves him for the law regarding the examination of witnesses (*ibid.*, *Hilkhot Eduṭ* 3.1-2):

¹ On the entire argument found in this section, see RADZYNER 2001a, 207-25, 289-91.

² See the novella attributed to Rabbenu Yonah on *b. Sanhedrin* 3a, s.v. *u-mah ta'am*.

³ Note Maimonides' language, from which it follows that *dinei kenasot* are part of *dinei mamonot*, a view consistent with his approach elsewhere. See RADZYNER 2001a, 223 n. 201.

אחד דיני ממונות ואחד דיני נפשות בדרישה וחקירה, שנאמר משפט אחד יהיה לכם... במה דברים אמורים בהודאות והלואות מתנות ומכירות וכיוצא בהן, אבל בדיני קנסות צריכין דרישה וחקירה...

The questioning and interrogation of witnesses is required with regard to cases involving both monetary law and capital punishment, as Leviticus 24:22 states: “You shall have one judgment.”...

When does the above apply? With regard to *hoda’ot ve-halva’ot*, presents, sales, and the like. Cases involving *dinei kenasot*, by contrast, require the full process of questioning and interrogation.

This distinction is also reflected in the words of the Babylonian *gaon*, head of the yeshiva in Baghdad, a contemporary of Maimonides and his scholarly opponent, Rabbi Shmuel b. Ali:⁴

ועל כן נעתקה מדור לדור, מהם נשיאים ראשי ישיבות ומהם אבות בתי דינין, ולא ימשו ראשי הדורות, כל אחד ואחד מהם בוחר מי שהוא ראוי לשיבה וקוראו ומסכים עליו וסומכו. ואם יאמר האומר כי ימים רבים לישר' בלא סמיכה, בראותו האמור כי אין סמיכה בחוצה לארץ, יש לאל מלים להשיבו ולהרגיעו כי האמור אין סמיכה בחוצה לארץ—הני מילי לדון דיני קנסות, אבל לדיני הודאות והלואות יש סמיכה, יש על עיקר זה ראיות לא תכילם אגרת זו...

Therefore [a tradition] has been passed down from generation to generation, among them Exilarchs and heads of *yeshivot*, and among them heads of rabbinical courts, and the heads of the generations have not passed away: each one of them chooses one whom he finds suitable to sit [in judgment] and calls him and agrees to him and lays his hands on him [i.e., ordains him]. And if one were to say that for many days Israel has been without *semikhah*, seeing that there is no *semikhah* outside of the Land [of Israel], I have the power to answer his words and to reassure him, that those who say that there is no ordination outside of the Land refer by this to *dinei kenasot*, but regarding *hoda’ot ve-halva’ot* there is *semikhah*—and regarding this principle there are [many] proofs which this letter is too short to include.

2. THE COMPASS OF THE GROUP HODA’OT VE-HALVA’OT

To begin, one needs to understand the title chosen for this group. It seems to have been important to Rava to give this group a title composed of a pair of items. As mentioned, it seems quite clear that Rava set out to interpret the *Mishnah* at the beginning of *Sanhedrin* by claiming that *hoda’ot ve-halva’ot* is identical to the class of *dinei mamonot* mentioned at the beginning of the *Mishnah*. As this *Mishnah* is composed of various pairs: robbery and injury, [property] damage and half-[payment of] damage, double payments and four-fold and fivefold payments, rape and seduction⁵ and spreading a bad name, it

⁴ ASSAF 1930a, 69, cf. 16.

⁵ *Ones u-mefateh* (“the rapist and the seducer”) are a single unit throughout the *Mishnah* regarding their law, with the exception of *Mish. Ket.*, where it states the difference between the two. See *Mish.*

is clear why Rava was interested in finding a pair to appear at the beginning of this *Mishnah* as well.⁶ Thus—notwithstanding, as I shall argue below, that “loans” are included within the rubric of “admissions of liability”—he had an interest in using a pair of words, specifically.

If we adhere to the explanation offered in the two *sugyot* in *Sanhedrin* mentioned above for a certain [judicial] leniency in “admissions and loans”—“so as not to close the door before borrowers”—then we must interpret this group in a narrow sense, saying that “both of them deal with matters of lending and borrowing,” as stated by Rashi at both 2b and 32b. However, most of the commentators argue that this group is far broader. Although some of them are willing to admit that initially “*hoda’ot* and *halva’ot* are concerned with matters of borrowing money”, the rule that the procedure may be conducted by lay judges also applies to other common areas involving possible loss of money, so that laymen are permitted to adjudicate them as representatives of the expert or “well-qualified” [i.e., ordained] judges of the Land of Israel.⁷ This understanding seems self-evident. Would it occur to anyone that the *Mishnah* would not provide information regarding the possibility of adjudication in cases of sales, gifts and the like? Rava would also seem to have been troubled by this question and, by using the term *hoda’ot ve-halva’ot*, to have intended to refer to all those cases which do not fall under the rubric of those monetary obligations specified in the *Mishnah* which are included under the term *dinei mamonot*.⁸

We thus find that Maimonides argues that “admissions of liability and loans” are only an example of other *dinei mamonot*, such as “gifts and sales” and the like.⁹ The Ramah states, regarding the exemption from thorough examination: “And one cannot say that these words apply to admissions of liability and loans

Shebi. 10.2; *Yeb.* 7.5; 11.1; *’Ar.* 3.4

⁶ On the editing of the *mishnayot*, emphasizing the [creation of] a fixed number of units, see MELAMED 1986, 215-25; and cf. WALFISH 1994, 126 and his sources there. If we relate here to the matter of the literary fashioning of the *Mishnah*, one might add an additional detail that will illuminate the choice of the formulation of the word-pair *hoda’ot ve-halva’ot*: namely, the similarity in sound of the two items chosen. The *Mishnah* itself, in a number of places, chose to formulate its words in similar-sounding pairs: see BRAVERMAN 1989, 72-3.

⁷ For a sharp formulation of this idea, see LAZEBNIK 1972, 5: “And that we conclude here that one does not require experts regarding *hoda’ot ve-halva’ot*, including [adjudication of] a woman’s *ketubah*, inheritance, and damages of an ox against another ox, and all those others which we infer in Chapter *Ha-Hovel*, is because we act as emissaries [of the judges in the land of Israel] and may impose these monetary payments in Babylonia.” According to his words, certain kinds of damages are included under the rubric of *hoda’ot ve-halva’ot* despite the fact that the *mishnah* enumerates them separately from *dinei mamonot*, as “damage and half-damage.”

⁸ Compare BENOVIITZ 2000, 39-40.

⁹ *Hil. Sanhedrin* 5.8; *Edut* 3.2.

alone, but also to adjudication of matters of buying and selling, inheritance, and the like.”¹⁰ Rabbi Menahem Hameiri who, like Rashi, interprets the phrase *hoda’ot ve-halva’ot* literally, states that in terms of the law, “Inheritances and gifts and sales and collecting of *ketubah* [marriage contract]—all these are included under the rubric of *hoda’ot ve-halva’ot*.”¹¹ The Ran, in connection with the requirement of thorough examination, rules that: “Matters of betrothal and *ketubot* are certainly included under the rule of *hoda’ot ve-halva’ot*.”¹² Finally, the Netziv comments: “So as not to close the door before borrowers, here everyone agrees that all kinds of lawsuits fall under the category of borrowers.”¹³ And even some of the commentators on the Mishnah suggest that one is speaking here also of “*ketubot*, inheritance and gifts.”¹⁴

This entire group of commentators engaged in a down-to-earth, practical comparison of *hoda’ot ve-halva’ot* with other, similar laws, both in terms of the form of obligation and in terms of the rule of permitting adjudication to be conducted by laymen and the exemption from thorough examination of witnesses. Yet I have not found among the classical exegetes anyone who suggests that the term *hoda’ot* (admissions of liability) per se includes within itself all those laws suggested here: buying and selling, gifts, inheritance, and so forth. Rather, it is seen as only one example from the entire group. I would like to suggest that it was not for naught that Rava used the term *hoda’ot*. This term—to which the term *halva’ot* (loans) was added for stylistic reasons, as discussed earlier, notwithstanding that the term *hoda’ot* in itself includes cases of loans—included all of the obligations enumerated above, whose common denominator is that they are voluntary obligations or, to use modern terminology, contractual obligations: that is, obligations undertaken by a person with his own knowledge and of his own free will. This stands in contradistinction to payments for bodily or property damage, rape or seduction [of a virgin], etc., which are payments which a person is obligated to pay by virtue of the law.

An argument for a generalization of this type regarding the use of the term *dinei mamonot* (“monetary law”) in the opening *Mishnah* of *Sanhedrin* (which is glossed in the Talmud as *hoda’ot ve-halva’ot*) is proposed by Abraham Weiss.¹⁵ In his words: “*dinei mamonot* [is understood] as a general category

¹⁰ ABULAFIA [1999] on *Bab. Sanh.* 32b.

¹¹ MEIRI [1965] on *Sanh.* 3a, 6.

¹² GIRONDI [1978] on 32b, relying upon the *sugya* at *Bab. Yeb.* 122b.

¹³ BERLIN [1955] on *Bab. Sanh.* 32a.

¹⁴ LIPSCHÜTZ [1905] on *Mish. Sanh.* 1.1, §a. Cf. the commentaries of R. Ovadiah of BERTINORO [1905] and *Tosafot Yom Tov* (HELLER [1905]) to *Mish. B. K.* 8.1, s.v. *ro’in*.

¹⁵ WEISS 1944, 133-4 (139-40).

including all kinds of lawsuits and disputes whose origin lies exclusively in monetary matters,” where “monetary matters” are explained by him as “business transactions.” Thus, according to his view, *gezelot ve-ḥabbalot* (“robbery and bodily damages”) and “[property] damage and half-damage” are “monetary suits, but ones in which the source of the suit is not in a monetary agreement.” Samuel Krauss suggests something similar in his German-language commentary on *Mishnah Sanhedrin*, immediately at the beginning of our *Mishnah*:¹⁶ “Rechtsstreitigkeiten oder Prozesse, die eine Geldangelegenheit (z. B. Darlehen, Geschenke, Erbschaften) betreffen” (i.e., Legal disputes or lawsuits regarding a money proposition [such as loans, gifts, inheritances]). That is, he also uses the term “monetary transactions,” which he exemplifies: “such as loans, gifts, inheritances.” Similarly, Hanoch Albeck, who comments that he explains the *Mishnah* according to the approach of Rava,¹⁷ states in his interpretation of our *Mishnah* that it refers to: “Monetary law—such as matters of loans, inheritance and gifts.” Asher Gulak uses more elaborate language:¹⁸ “From the context [of this *sugya*] it follows that they saw *hoda’ot ve-halva’ot* as a special group from an halachic perspective, as opposed to ‘robbery and bodily harm’; together with ‘loans,’ *hoda’ot* served as a term for a certain kind of business matter.” And Rabbi Herzog writes:¹⁹ “The *gemara* defines *dinei mamonot* as laws of *hoda’ot ve-halva’ot*, but this category is quite extensive and also includes the adjudication of a woman’s *ketubah*, inheritance, wills, guardianship, and any other obligations arising from any connection created by negotiation.”

But the most comprehensive formulation is that of Gedaliah Alon:²⁰

The classical tradition, as is known, withdrew the adjudication of ‘penalty cases’ (where the amounts to be paid are punitive and do not coincide with the value of the loss sustained) from the jurisdiction of non-ordained judges, as these cases require the authority to enforce the judgments, and this was withdrawn from those without ordination by order of the Patriarch or Sanhedrin. Yet it also happened that the fields denied to the non-expert were extended to cover even ‘robbery and assault suits,’ including damages (or certain classes thereof) and only the adjudication of money disputes arising from business relations (obligations between the parties) were left to the judicial authority of the non-ordained. Furthermore, in principle, the current Halakhic tradition even removed the right from these courts to try cases of ‘admissions and loans’, and only allowed them to judge these cases in practice on the general (assumption) that these judges were ‘acting as the agents’ of the ordained judges

¹⁶ KRAUSS 1933, 56.

¹⁷ ALBECK 1957-9, *Seder Nezikin*, 169, 441.

¹⁸ GULAK 1994, 16 n. 23.

¹⁹ HERZOG 1989, 296.

²⁰ ALON 1977, 419.

(that is to say, theirs was only a delegated authority granted by the highest body in law, the Sages or the Sanhedrin or Patriarch).

This passage already alludes to the direction which I wish to develop: namely, that there is a [basic] distinction between *dinei kenasot*, which refers to those laws that originate in the imposition of the law upon the one being judged, for which the *halacha* requires those with “the authority to enforce the judgments,” i.e., “expert judges,” and *hoda’ot ve-halva’ot*, which are described as “money disputes arising from business relations (obligations between the parties),” for which we allow adjudication to be conducted by laymen, as well as certain leniencies in the judicial procedure (i.e., no thorough examination), because the issue of evidence is less critical.

The root of these things is the distinction between an obligation which a person undertakes by himself, for which the term *hoda’ah*—“admission of liability”—is appropriate, as we shall explain below, and in which the function of the court is merely to *clarify* the existence of an obligation which was already created at the moment of undertaking the obligation, and a monetary obligation which is imposed upon a person and requires him to pay his fellow by the power of law, an obligation which is “decreed” upon him, one *created* by the law through its representative—namely, the court. An additional distinction, one which applies to a significant part of the group of *dinei kenasot*, is of course the manner of determining the amount of the obligation. The imposition of damages requires valuation on the part of the judges, whereas in the case of obligations created by agreement the amount of the payment is usually clear.

3. THE MEANING OF “ADMISSIONS OF LIABILITY”

The meaning of the term *hoda’ah* in the vocabulary of the Sages is an obligation that a person takes upon himself; in a legal procedure, *hoda’ah* may refer to a debt or obligation which the one being sued admits, based on the principle that “A person is believed regarding his own admission to a debt.”²¹

²¹ From the language of the definition in the *Encyclopaedia Talmudica* [Hebrew], VIII: 404, s.v. *hoda’at ba’al din*. Cf. below, n. 23 and cf. also LIFSHITZ 1988, 279. On the use of the term *hoda’ah* in the sense of finding in favor of the plaintiff—in this case, transferring ownership of a disputed inheritance to his hands—see *Bab. Baba Batra* 33a; and see the Palestinian responsum in ASSAF 1933, 94-5. This responsum was analyzed by LIEBERMAN 1991, 534-7, and on its basis and on that of sources from the Yerushalmi he arrived at the conclusion that, in the Land of Israel, *hoda’ah* also meant “accepting a legal ruling and its execution”.

The *Mishnah* around which the relevant discussion in the Talmud and the halachic literature revolves appears in *m. Sanh.* 3.6:

כיצד בודקים את העדים היו מכניסין אותן ומאיימין עליהן ומוציאין את כל האדם לחוץ ומשיירין את הגדול שבהן ואומרים לו אמור היאך אתה יודע שזה חייב לזה אם אמר הוא אמר לי שאני חייב לו איש פלוני אמר לי שהוא חייב לו לא אמר כלום עד שיאמר בפנינו הודה לו שהוא חייב לו מאתים זוז.

How does the court examine the witnesses? They bring them in and threaten them [i.e., regarding the gravity of false testimony], and remove every other person, and leave the greater of them and say to him, “Tell us how you know that this person owes that one?” If he says, “He said to me that ‘I owe him’”; [or] “Such-and-such a person said to me, ‘He owes him’”, he has said nothing, unless he says, “In our presence he admitted to him that he owes him two hundred *zuz*.”

This is not the place to discuss the nature of the obligation created by such an “admission” in the presence of witnesses or a court; the nature of the language of obligation, “I owe,” “I obligate myself” or “I admit” (*hayav ani*; *mithayev ani*; *modeh ani*); the rubric or definition of the general relations between debt and acquisition; and the place of admission in this system or the nature of the acquisition brought about by admission (*odita*).²² In general, the significance of “admission” is, as mentioned, its confirmation of an obligation that a person has undertaken of his own accord, even if it occurs as the result of a prior claim. However, in our context, it is understood primarily as a means of creating the obligation itself. Rav Saadya Gaon draws a distinction between these two meanings of “admission”:²³

וכת' רבי' סעדיה גאון ז"ל בנוסח שטר הודאה הכי במותב תלתא כחדא הוינא וקבענא דוכתא לדינא דפלוני ופלוני ושדרנא שליחא בתר פלוני ואיייתניה וטען עליה פלוני באלפא זוזי ואודי בהון וכו'... והדין נוסחא היא באודיתא דבי דינא... ואיכא נמי אודיתא שאינה מאלו העניינין והוא כגון ההוא דגרס בפר' מי שמת (ב"ב. קמט.) בענין איבעיא להו שכיב מרע שהודה מהו וכו' עד... ולקנינהו באודיתא... נפק אודיתא מבי איסור...

Rabbenu Saadya Gaon, of blessed memory, wrote in his formulation of a document of admission of liability (*hoda'ah*) as follows: We were in an assembly of three men sitting together and fixed a place for the adjudication of so-and-so and so-and-so, and we send a messenger after so-and-so, and brought him, and so-and-so claimed against him [a debt of] one thousand *zuz*, and he admitted to it... And this is the formula for an admission (*odita*) of the court... And there is also an admission of liability (*odita*) that differs from these

²² In all of the above cases, there exist numerous discussions among the *poskim* and the interpreters of the Talmud, from the Geonic period down to our own day, and the subject has been discussed and summarized extensively in the in research literature. The Talmudic sources upon which the discussions have revolved are primarily the *sugyot* in *Bab. Ket.* 101b-102b, *Baba Batra* 40a and *Sanhedrin* 29a. And cf. GULAK 1922, vol. 2: 34, 44-7; HERZOG 1967, vol 1: 196-200; Vol 2: 42-7, 93-106; COHN 1975; and many others

²³ In his words cited by ALBARGELONI, 41-2. And cf. LIFSHITZ 1988, 265-6 and n. 322.

matters, such as that which appears in Chapter *Mi SheMet*, (*Bab. B.B. 149a*) “The question was asked: ‘one who was dying and admitted [liability], what is the law?’” etc., down to ... “and let him acquire it by admission’.... An admission was produced from Issur’s house.”

The document quoted by Rabbi Judah al-Bargeloni [Spain, 11th-12th century]²⁴ as a “document of admission of liability” represents the second meaning of *hoda’ah*, and deals specifically with the admission of a borrower; that is to say: the creation of the debt as a result of a loan confirmed by means of *hoda’ah*. The witnesses describe what was said in their presence as follows:

...מחמת שאני לי בפניכם הודאה גמורה... שיש לו אצלי כך וכך דינרין והם עלי בהלואה וברשו...

... As I have made before you a complete *hoda’ah* ... that I owe him so-and-so many *dinars* and I owe them as a loan and *Rashu*...²⁵

But of particular interest to us is the beginning of the discussion as recorded in this document:

והשטר הכ”ב הוא שטר הודאה—והוא מענין הודאות והלואות ואע”פ שדינה כשטר חוב כי כל הודאה בקנין הרי כשטר חוב וגם ההודאה נמי בלא קנין אם אומ’ לעדים כתובו וחתמו דינה כשטר חוב כמו שפירשנו בהלכות הודאה וכפירה גם בהלכות הקנין ומשפטי ההלואה...

And the document herein written is a document of *hoda’ah*, and it concerns matters of *hoda’ot ve-halva’ot*. And even though it is like a document of indebtedness, because any admission of acquisition is like a document of indebtedness, and also the *hoda’ah* herein is without acquisition. If one says to the witnesses “Write it and sign it,” it is considered as a document of indebtedness, as we explained in the Laws of Admission and Denial and also in Laws of Acquisition and the Laws of Loans....

In any event, the use of the phrase *hoda’ot* as a generic term for *dinei mamonot* was chosen because there is no other phrase which incorporates all those obligations which a person undertakes or creates of his own free will, as opposed to those to which he is obligated by law. The Hebrew gerund *hithayvut* (“obligation”) is late and appears neither in Rabbinic nor in Geonic literature.²⁶ It follows that the most suitable or appropriate term for all the types of voluntary

²⁴ ALBARGELONI, 41-3; and cf. the “document of conditions of servitude,” ALBARGELONI, 125; for the use of the term *shetar hoda’ah* in the case of a document for the voluntary return of a gift by its recipient, see HARKAVY §313.

²⁵ רש, i.e., debt. See KOHUT 1878-92, 305-7, s.v. רש (5.4).

²⁶ BEN-YEHUDA 1945 s.v. enumerates sources from the period of the *rishonim* as the earliest of all. Cf. GULAK 1939, 1; 1922, vol. 2, 11-12: “... However, a general legal definition to indicate all business transactions, similar to the Roman *contractus*, is not found in the Talmudic period.” But it would seem that in the present paper we propose a “general legal definition” of this type.

obligations which a person may undertake is *hoda'ah*. Even if the Hebrew root יד"ה (YDH) does not appear explicitly to refer to obligation, it is clear that all obligations are based upon the admission of the one who is obligated to fulfill them or the right of the one entitled to them.²⁷ This is the case, for example, when the seller writes “My field is sold to you” (*Bab. Baba Batra* 51a); in the statement (or writing) of gift: “I have given such-and-such a field to so-and-so / it is given to so-and-so / it is his’ —then it is his” (*Bab. Gittin* 40b); the declaration (or writing) by the slave-master, “I have made so-and-so my servant a free man / he has been made a free man / behold he is a free man’—then he is a free man” (*ibid.*); and in many cases.²⁸

Given that admissions of liability were seen as tantamount to self-obligation since early times,²⁹ it is not surprising that the general term applicable to the totality of obligations, one which was available to Rava, was *hoda'ot*—admissions of liability. Moreover, from examination of a large number of legal documents (*sheṭarot*) concerning different kinds of business and from different periods, it follows that it was common to find therein the explicit use of the verb *hoda'ah*—admission. In order to emphasize the force of admission of liability, several of them explicitly state that it was done of the person’s free will.³⁰ Indeed, obligations using the specific form of admission are not unique to Jewish law.³¹

But notwithstanding that the use of the term *hoda'ah* does not refer to its use specifically in writing—as in the above-mentioned *Mishnah* in *Sanhedrin*, it follows from “the very fact that verbal admission of liability in their presence [i.e. that of the witnesses] was tantamount to full obligation”³²—the best proof for the explicit use of verbs of the root YDH to refer to a wide range of

²⁷ FALK 1972, 136-43; and cf. LIFSHITZ 1988, 340-1.

²⁸ Cf. the proofs cited in the *sugya* at *Bab. Ketubot* 102a.

²⁹ See FALK 1972, 141, and cf. GULAK 1994, 12, who demonstrates that use of documents of admission of liability were widespread among Jews in the tannaitic period. As noted by Katzoff, *ibid.*, n. 11, Gulak’s sources for this statement are actually later; however, further on in his words he cites other tannaitic sources that confirm this statement, even if they do not explicitly use the phrase *hoda'ah*.

³⁰ See FALK 1972, 141-2; the document of *hoda'ah* cited by R. Judah al-Bargeloni mentioned above (and in his other documents of liability); a document of indebtedness in the form of admission in *Sefer ha-Ittur* (cited by GULAK 1926, §220); and many others.

³¹ See the sources cited by FALK 1972, and cf. GULAK 1994, 12-16. This is not the place to elaborate upon the role of foreign influences on the Sages regarding this matter. Gulak of course draws comparisons to Hellenistic and Roman law, but it is worth noting as well that Persian law in the Parthian and Sassanian periods bases acquisition and the various kinds of contractual obligation on the admission of the two parties in the presence of witnesses, and on their affirming their commitment before a judge. See PERIKHANIAN 1983, 657, 670.

³² The wording of GULAK 1994, 15.

obligations is found in the world of *sheṭarot* (business documents), for “the very use of bills is no more than the use of an admission out of court which can later on be proved in court.”³³ It would therefore appear that, following this survey, there no longer remains any doubt that the term *hoda’ot* is fitting to serve as the name for the entire gamut of voluntary undertakings,³⁴ and that the broad sense of the term *hoda’ot ve-halva’ot* as including numerous types of transactions and obligations derives from “the fact that those transactions were executed by means of admission, and therefore were referred to appropriately by this concluding formula. A similar practice is found in Greek law, in which the general rules of ὁμολογία³⁵, obligation or undertaking of any kind, and particularly verbal obligation, was common.”³⁶ It was with good reason that the following was recently written in a study concerning business documents from the Judean Desert:³⁷

It would appear that the gradation of transactions in documents from the Judean Desert in relation to monetary laws of various kinds is similar to what is referred to in the Talmud as *hoda’ot ve-halva’ot*, particularly when the contracts of sale mentioned here regularly included a section dealing with admission of having received payment. Apart from documents of sale, in “documents of admission” there is also mentioned, as expected, the “admission” testifying to the nature of these documents.

³³ The wording of FALK 1972, 128.

³⁴ Compare the type of documents noted below to the words of the commentators and researchers mentioned above, regarding the extent of the category of *hoda’ot ve-halva’ot* (i.e., sales, gifts, inheritance, loans, marriage and *ketubah*). GULAK 1994, 16 elaborates as follows: “From all that has been said, it becomes clear that documents of loan, sale, gift and mortgage were formulated in an admission form of the lender, the seller, or the giver of the gift, making it possible to write them even in the absence of the second party to the contract. The fact that a case of this type is adduced without any additional explanation in the laws of the Mishnah or Tosefta that we have mentioned proves that documents of an admission form were accepted among the Jews during that period”.

³⁵ The term *homologia* appears in the Jerusalem Talmud, where its sense is, evidently, “receipt.” See SPERBER 1984, 33, and also *Aruch HaShalem* (KOHUT [1955]), 118: “Its meaning in the Greek language is a document of admission and agreement.” Cf. SEGAL 1991, 115: “We have seen how a ‘receipt’ is referred to in the Yerushalmi as *homologia*, because this is a document that the lender gives in acknowledgment of having received payment.” Cf.: LIEBERMAN 1962, 140-1 n. 11. Indeed, receipts were also formulated in the form of an Admission; see GULAK 1994, 175-7.

³⁶ The wording of GULAK 1994, 16. I will concentrate upon Hebrew and Aramaic documents in which it is possible to identify the root YDH. Of course, there are also extant Greek documents written by Jews which use a term parallel to *hoda’ah*; for example, P. Yadin 21 & 22, which are documents of sale or rental in which both sides acknowledge or agree to the existence of the transaction. See LEWIS, YADIN & GREENFIELD 1989, 94-101, 146-7, and see further RADZYNER 2005.

³⁷ SAR-AVI 2008, 30. Cf. his notes for the numerous sources for this statement.

4. CLARIFYING THE USE OF THE TERM HODA'OT ON THE BASIS OF ITS USE IN LEGAL DOCUMENTS³⁸

This quality of legal documents—namely, that they are written as the language that speaks for and as the words of the person who thereby obligates himself—is found in almost all Hebrew legal documents, from the most ancient period to our own time, almost without exception. Likewise, the fragments of such documents found in the *Mishnah* and the Talmud clearly prove that *sheṭarot* were written in their day using such language, as the speech of the person who obligated himself thereby.³⁹

Nevertheless, I will exemplify here only the explicit use of the root YDH in the language of legal documents.

4.1. BILLS OF SALE

1. P. Dura 28—the bill of sale of a maidservant:⁴⁰

This is a Syrian document from the year 243 CE from the city of Dura-Europus. The seller and her representative use the phrase *modina* [I admit / acknowledge]. That is, the former acknowledges that she has sold her maidservant and received the price that was determined, and the latter acknowledges that she drew up the document on her behalf.

The redactor, Jonathan A. Goldstein, observes that it is difficult to find parallels to this document (albeit we shall see that there are such), but the *sheṭarot* of Rav Hai Gaon are similar. Indeed, evidently, in Rav Hai Gaon, all documents of indebtedness or obligation are formulated as a declaration of the one obligating himself, using an explicit language of admission of liability. The redactor claims that this document is the earliest one among the Semitic documents of *homologia* (it would seem that this claim is incorrect), but the *Mishnah* accepts as self-evident the existence of such documents, and documents of conveyance from Rav Hai Gaon are all of this type. Such formulations of admission of liability first appear in Egypt in the first century BCE, and under Roman rule moved to other places as a unique form.

³⁸ Alongside the more ancient documents, I shall present the documents formulated by Rav Hai Gaon, based upon ASSAF 1930b, because “it is the most ancient extant organized collection of business documents” (ibid., 5; however, one should note that today we know of fragments from an earlier collection by Rav Saadya Gaon).

³⁹ GULAK 1926, xxxiii-xxxvi.

⁴⁰ The bill was published in GOLDSTEIN 1966. On pp. 9-10 he relates to the document’s formula of admission, from which his words cited above are taken.

2. Rav Hai Gaon's *Sefer ha-Sheṭarot*—"6. A bill of sale land in the fields" (p. 26); "7. Bill of sale of servants" (p. 27):

שהדותא דהות באנפאנא וכו' קא מודינא קדמיכון דנסיבית וקבילית מיניה כן וכן רזבניית ליה
בהון...

We state that there stood in our presence, etc. and I admit before you that I took and received from him so-and-so much and sold it to him for that (money) ...

4.2. DOCUMENTS OF TENANCY AND RENTAL⁴¹

1. P. Hever (Yadin) 45—Bill of rental of a field:⁴²

This is a Hebrew document of rental of a field located in Nahal Hever, dated "the third year of Shimon ben Kosiba Prince of Israel, in Ein Gedi," in which the lessor declares to the lessee:

אלעזר בן אלעזר בר חיטא מן עין גדי אמר לאליעזר בן שמואל משם: מודא אני לך היום שהחכרת
לך תגנה שלנו...

Eleazar son of Eleazar, son of Hayyata, from Ein Gedi, stated to Eliezer, son of Shmuel from there: I acknowledge to you this day that I have leased to you our garden (plot) ...

2. *Sefer ha-Sheṭarot* of Rav Hai Gaon—"11. A bill of rental of a house" (p. 30):

שהדותא דהות וכו' קא מודינא קדמיכון דדרתא פלנית או חנותא פלנית ד[אית] לי... אוגרית יתיה
לדיליה לפל'...

Testimony that was ... I admit before you that residence such-and-such or store such-and-such that I [have]... I have rented it to so-and-so.

4.3. DOCUMENTS OF LOAN⁴³

1. P. Mur 18—Document of Indebtedness:⁴⁴

This is an Aramaic document of indebtedness found in Wadi Murabba'at, dated "the second year of Emperor Nero" (i.e., 54/55 or 55/56 CE⁴⁵). It begins with the declaration:

⁴¹ Cf. GULAK 1926, 196.

⁴² YADIN 2002, 58.

⁴³ Cf. GULAK 1926, 211-13.

⁴⁴ BENOIT ET AL. 1961, 101.

⁴⁵ See the discussion in LEHMANN 1982, 182-3.

איתודי אבשלום בר חנין מן צויה בנפי מניה עמי אנה זכריה בר יהוחנן... כסף זוזין עס[רי]...]

I, Avshalom son of Hanin from Toyah, in the region acknowledged that I [borrowed] from Zechariah bar Yehoḥanan... money in the sum of twenty silver *zuz*...

Scholars differ as to which party is the one making the admission here,⁴⁶ but the view of Ranon Katzoff make sense. He argues, on the basis of the *Mishnah*, that we are dealing here with an admission of the borrower, who obligates himself in this manner. It is interesting to note the words of Reuven Yaron:⁴⁷

Text 18, a papyrus of the year 2 of Nero (55/56 C.E.) is the fragment of a recognizance of debt. Its main interest is in the use of the verb 'ytwdy (the Aramaic equivalent of ὁμολογέω), from which the Talmudic 'oditha' — 'admission (of indebtedness)' — is derived; until now it was known only from amoraic sources of considerably later date.

2. P. Hever /Se 49—a document of indebtedness from the time of Bar Kokhba:⁴⁸ this is a Hebrew document of indebtedness from “the second year of the redemption of Israel by Shimon ben Kosiba, Prince of Israel.” It begins with the declaration:

איתודי יהודה בן יהודה סרטא מן החרמת עמי אני יהוסף בן חנניה כסף זוזין ארבעה סלע אחת
תסלע הזוא אנ מקבל המך שאפרך בכל זמן שת[ומ]ר לי ואשה את השטר הזה

I, Judah son of Judah SRTA from HHRMT acknowledge (the following declaration): I Joseph son of Hananiah have in my possession four silver *zuzim* which equal one *sela*. I receive from you this *sela* (on condition) that I shall pay it back whenever you tell me (to do so) and I shall demand this bill.

This is not the place to enter into the controversy as to whether this also includes a declaration of the lender, or whether perhaps the borrower alone is speaking here. Scholars disagree as to whether the document as such constitutes the admission of the borrower confirming the money he has received, thereby reaffirming his obligation to return the loan he has received and confirming the existence of this debt.

⁴⁶ For a summary of the various opinions, see Katzoff, in GULAK 1994, 15 n. 21 and 16 n. 23; to which one may add FALK 1972, 139.

⁴⁷ YARON 1960, 158.

⁴⁸ SEGAL 1991; BROSHI & QIMRON 1994. Katzoff, in GULAK 1994, 15 n. 21, has a different way of interpreting this document, one based upon the interpretation of *Mish. Sanhedrin* 3.6; and see below, §5.2.

3. Rav Hai Gaon's *Sefer ha-Sheṭarot*—"13. A document of loan" (p. 20):

סהדותא דהוה באנפנא... אמר לנא... מחמת דבצבו נפשי כדלא באונס ולא במרע ולא בשגוג... קא
מודינא קדמיכון דנסיבית וקבילית מיניה כן וכן זוהי דכספא...

Testimony that took place in our presence ... He said to us... that of his own free will, not under duress, and not in illness, and not by error... I admit before you that I took and have received from him so-and-so many *zuzim* of silver.

4.4. DOCUMENTS OF DEPOSIT

P. Yadin 17—Document of Deposit:⁴⁹

This document, found in Nahal Ḥever, testifies to money that a woman deposited with her husband, in a place called Meḥoza at the southern end of the Dead Sea, on the 21st of February 128. The first and main part of the document is written in Greek and formulated in the third person, followed by an Aramaic passage in which the husband testifies to the deposit he has received and its conditions:

[י]הודה בר אלעז[ר כ]ת[ושי]ן מודיאנה די קבלת מן בבתא [אנ]תתי במנדע יעקוב אדונה בר ישוע
לחשבן פקדון כסף דנרין תלתמאה ויתהום אתיהם לה בכל זמן די תצבא...

Yehudah son of Elazar Khtosion: I acknowledged that I have received from Babatha my wife, with the knowledge of Jacob her *kyrios* son of Yeshua', on account of deposit, three hundred silver denarii, and I will return them to her at any time that she wishes...

4.5. MARRIAGE DOCUMENTS

1. P. Yadin 18—Marriage document (*ketubah*?):⁵⁰

This is a document of marriage between two Jews from Ein Gedi, dated 5th of April 128, likewise found in Nahal Ḥever. The first and main part thereof is formulated in Greek and is written in the third person, followed

⁴⁹ LEWIS, YADIN & GREENFIELD 1989, 71-5, 141.

⁵⁰ LEWIS, YADIN & GREENFIELD 1989, 76-82, 142-3. There is a sharp debate concerning the nature of this document between Katzoff and Wasserstein, as to whether it reflects a Jewish marriage contract (*ketubah*) or is a non-Jewish marriage document. However, this debate has little bearing upon our discussion. See *ibid.*, esp. 247 and 250; WASSERSTEIN 1989; KATZOFF 1991. It may be that the language of admission was also used in receipts for *ketubah* monies, as in a suggested supplement to P. XḤev/Se (formerly P. Hever) 13 in YARDENI & GREENFIELD 1996, 204. The document there in question has aroused sharp controversy as to its nature; however, it is quite clear that one is speaking there about a receipt for a *ketubah*. See the summary in SCHREMER 1996. In general, receipts were formulated as admissions; see above, n. 35.

by an Aramaic passage in which the father of the bride testifies that he has given his daughter as wife, and the bridegroom testifies to his financial obligations:

[יהודה ק]מבר ברן [חנניה ב]יה <ר> שמלה מדי אנה בחובת כסף דנרין [חמ]ש מאה פרנ שלמציון...
אנתתי...

Yehudah Cimber son of Ḥananiah son of Somala: I acknowledge the debt of five hundred silver denarii, the dowry⁵¹ of Shalamzion my wife...

2. Bodl. MS. Heb. d 65, fol. 30 (Cat. 2877)—*ketubah* from the Cairo *genizah*:⁵²
In this marriage document from Damascus, dated 956, the bridegroom uses the following language:

מודי אנה ישראל חתנה בר מ יצחק סט להתנסבה להדא עיתכה בתולתה כלתה במ נצר ננ ואהוי
...זאיין ומפרניס ומלביש ומוקיר ומיקיר יתה כהלכת [גוב]רין יהודאין...

I, Israel, the groom, son of M(aster) Isaac, (may his) e(nd be) g(ood), acknowledge that I am marrying the virgin bride 'Atika, d(aughter of) M(aster) Naṣr, (may his) s(oul be at) r(est). And I shall nourish, provide for, clothe, esteem, and honor her, in the manner of Jewish [m]en...

Mordechai Akiva Friedman⁵³ claims that this is in fact the only *ketubah* found in the Genizah to use this wording, but notes that there are other *ketubot* in which language of “admission” (*hoda'ah*) also appears, albeit not in the sense of obligation. Thus, for example, in the *ketubah* of a Jew from Rome: “I, so-and-so the bridegroom... acknowledge (*modeh*) today in your presence that of my own knowledge and will and desire that I have taken to myself as wife so-and-so the virgin...”

4.6. ADDITIONAL DOCUMENTS

In addition to the documents enumerated above, a document has been found in the Judaean Desert transferring rights to [a certain parcel of] land; the Aramaic portion of this document uses language of *hoda'ah*.⁵⁴ In Rav Hai Gaon's treatise

⁵¹ On the significance in this document of the term *pherne* (φερνή), used in Rabbinic language to signify *mohar* or *ketubah*, see Katzoff in LEWIS, KATZOFF & GREENFIELD 1987, 239.

⁵² FRIEDMAN 1980-1, vol. 2, 198, 202.

⁵³ FRIEDMAN 1980-1, vol I, 119 with n. 3, and cf. *ibid.*, 467 with n. 62. Add to this the document of “additions to the *ketubah*” from Berlin, cited by Gulak 1926, 45.

⁵⁴ See P. Yadin 20, in LEWIS, YADIN & GREENFIELD 1989, 88-93, 145: “I knowledge to you, you Shelamzion., [according to] what [is written] above, that I will act and clear the title <according to> all that is [written] above.”

tise other documents have been found which are formulated as admissions: a document of gift (p. 29), in which the one giving the gift declares before the witnesses: “You are witnesses that... I admit (*modina*) that I have given this to so-and-so”; a will (*diatheke*) in which the one making it orders “I admit before you that I give after my death such-and-such a residence...”;⁵⁵ a document of guarantee (p. 30), which the guarantor declares: “I admit before you that so-and-so many *zuzim* that so-and-so son of so-and-so has lent to so-and-so, and upon which he has written a document of indebtedness, I am his guarantor, and it is with knowledge of my guarantee that he has made the loan...”; as well as a document of authorization (p. 32), a document of partnership (p. 33), and a document of a business transaction (p. 35).⁵⁶

It follows from this survey that the language of *hoda’ah* (“admission”) serves as a general term for all obligations based upon agreement, for it served in practice for their coming into existence, or at least to describe them. As we stated at the beginning of the chapter, the term *hoda’ot* referring to any obligation, is combined with the word *halva’ot* in order to create a pair, conforming to the structure of the *Mishnah* as stated above.

5. THE DIFFERENCES BETWEEN HODA’OT VE-HALVA’OT AND DINEI KENASOT

From this point on, we may offer a new definition of *dinei kenasot*. If monetary law as a whole is divided into *hoda’ot ve-halva’ot* and *dinei kenasot*, then if the former refers to obligations voluntarily undertaken or based upon mutual agreement, the latter refers to obligations based upon law, which are not dependent upon the will of the one so obligated. It is clear that this definition includes many individual items: damages to body and to property, the returning of stolen goods, and obligations imposed by the Torah resulting from various actions between people. The term covering all of these payments cannot be a “punishment” or “payment greater than the damage caused,” as in the conventional definition of *kenas* as “fine” or “penalty”,⁵⁷ but rather a payment imposed by force of law. But in a certain sense the distance between this definition and “punishment” is not that great, as we may easily understand.

⁵⁵ Cf. GULAK 1926, 123.

⁵⁶ Cf. the references cited above (n. 37); LIFSHITZ 1988, 265-6 n. 322.

⁵⁷ See, e.g., RADZYNER 2001a, 1-2, 194-5.. Nonetheless, the definition of *kenas* as punishment follows from the *Mishnah*, and particularly from the latter *sugyot* in the Babylonian Talmud. See *ibid.*, 116-23, 185-8.

These definitions, which divide monetary law into two groups—consensual obligations and obligations based upon law—involve a number of implications, involving both judicial arrangements and the monetary status of the obligation defined as *kenas*.⁵⁸ Here I wish to propose an explanation for the two requirements presented by Rava in *Sanhedrin* regarding the arrangements for adjudication of *dinei kenasot*: first, the requirement of “expert judges” (*mumḥim*; *Bab. Sanhedrin* 3a); second, the requirement of close and thorough examination of the witnesses (*derishah ve-ḥakirah*; *ibid.*, 32b). Or, to perhaps formulate it more accurately: why, according to Rava, does the *Mishnah* exempt *hoda’ot ve-halva’ot* from these requirements?

5.1. THE DISTINCTION BETWEEN OBLIGATIONS BASED UPON AGREEMENT AND OBLIGATIONS BASED UPON LAW

One first needs to pose the question whether Jewish Law in general recognizes a distinction between obligations by virtue of law, and obligations based upon mutual agreement with regard to the arrangements of adjudication or its results, as it would recognize with regard to the form of payment of the debt or obligation?⁵⁹ Many legal systems, both ancient and modern, draw such a distinction between contractual obligations and damages.⁶⁰ These matters were formulated as follows by the former President of Israel’s Supreme Court, Justice Meir Shamgar:⁶¹

⁵⁸ On the implications relating to his monetary status, see at length *ibid.* 2001a, 328-51.

⁵⁹ *Mish. Gittin* 5.1. GULAK 1922, vol. 2: 14-15, mentions this alone as the difference between “obligations of damages” and “contractual obligations,” to use his language.

⁶⁰ In the words of Gaius (*Institutiones* 3.88): *omnis enim obligatio vel ex contractu nascitur vel ex delicto*, “Every obligation is created [either] from a contract or from an offense”. In the *Aurea*, according to the *Digest* (44.7.1), Gaius added a further miscellaneous category of obligations: *Obligaciones aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris*, “Obligations arise either from contract or from wrongdoing or, by some particular law, from various forms of causes.” This division of all obligations was developed further in Justinian *Institutiones* 3.13, and was a basic concept in Roman law. See, for example, JOLOWICZ 1972, 159-74, 271-304. We can find this fundamental division in many legal systems. See, for example, ZIMMERMANN 1996, 10-11: “This is the *summa divisio obligationum*, which Gaius—probably putting the old Aristotelian distinction between voluntary and involuntary transactions to systematical use—introduced in his *Institutes*. It has remained fundamental ever since and is a reflection of the fact that different rules are needed to govern the voluntary transfer of resources between two members of the legal community on the one hand, and possible collisions between their private spheres on the other: the one body of rules being concerned with the fulfillment of expectations engendered by a binding promise, the other with the protection of the status quo against wrongful harm”.

⁶¹ Civil Appeal 407/89, *Zuk Or vs. Car Security*, PD 48 (5) 661, pp. 698-9.

Particular importance is attached to the imposition of personal responsibility for damages as opposed to personal obligation of a contractual nature. This distinction stems from the nature of the responsibility. A Contractual responsibility is based upon a voluntary undertaking. A contractual creditor is a voluntary creditor. No person is compelled, generally speaking, to enter into a contractual relationship with a corporation. Responsibility for damages is imposed upon the wrongdoer willy-nilly.⁶² It is not based upon any willed or voluntary act of the one who suffered the damages. Thus, the subject of damages is not a voluntary one...

The question is whether Jewish Law likewise recognizes the fact that responsibility for damage, which is “imposed upon the wrongdoer willy-nilly”, can cause the wrongdoer to be exempt from some legal obligations, obligations which he would otherwise not be exempt from, had he accepted them upon himself of his own free will. If so, does this have any connection to the fact that an obligation that derives from the agreement of the parties, and not from the law, will lead to a leniency in the judicial procedure, to the detriment of the one who is obliged? In other words, would it be correct to say that, if the obligating factor is the law, then for the sake of its clarification or, perhaps more correctly, its use as an obligating factor in a specific case, a court of a higher level (*mumḥim*) is needed, as well as a deeper and more thorough examination of the testimony (*derishah ve-ḥakirah*), without which it is impossible to impose an obligation?

I will first relate to the former question. The only difference we have found explicitly in Talmudic literature relates to the quality of the land from which the debt of the wrongdoer may be collected.⁶³ This distinction is not liable to help significantly in our discussion, if only because the reason for this distinction is not at all clear.⁶⁴ However, in the writings of the *rishonim* (Rabbis who lived approximately during the 11th to 15th centuries) one finds a case in which an obligation undertaken by a person voluntarily would not be applicable in a case where a similar obligation came about by force of law. According to this view, the basis of this distinction follows from certain things stated explicitly

⁶² Note that which is imposed upon a person is the *law* which holds him accountable for responsibility for his damages. Likewise the Torah, as the source of the law (and the source of this expression—“imposed upon him willy-nilly”—literally, “like a mountain held over him like an upturned vat”), was given via imposition, and not with the agreement of those accepting it (see *Bab. Shabbat* 88a, *Avodah Zarah* 2b).

⁶³ *Mish. Gittin* 1.5.

⁶⁴ The reason given in the Mishnah, “for the improvement of the world,” (*mipnei tikkun ha-olam*) does not appear after the opening phrase, with the exception of the Munich MS. of the Talmud. *Tosefta* at *Ketubot* 12.2, as well as both Talmuds, presents the root of the difference as lying in the intention of the wrongdoer, but it is not clear whether the root of this law is in the Torah or in a rabbinic edict, a subject that greatly exercised the scholars. See WEINBERG 1977, vol. 4: 32-9, 69-70; WEISS 1956, 265-8; ALBECK 1959, 51; URBACH 1986, 90; and others.

in the Talmud, although according to the reading of most of its manuscripts this distinction does not hold.

I allude to the approach of Rabbenu Tam regarding what is known as *kim leih bede-rabbah mineih* (lit.: “he is subject to a greater (punishment)” — that is, in a case where a person is subject to two punishments for the same act, or for two acts performed simultaneously, he is only subject to the stricter or more severe punishment of the two; below: the Rule of Greater Punishment). This approach does not appear in the words of Rabbenu Tam per se, nor in other Franco-German halachic sources; rather, it is known to us via three Provençal *rishonim*, and is quoted by *Shiṭah Mekubetzet* in the name of R. Solomon ben Adret (Rashba).⁶⁵ Berachyahu Lifshitz, in his study of this subject,⁶⁶ discussed this approach at length; my concern here is only to show its relevance to the subject at hand, as a proof that the *rishonim* indeed drew an explicit distinction between obligations based upon law and those that arose from agreement.

This approach attempts to explain three cases in which the Talmud states that a person may be put to death and also pay, or be subjected to corporal punishment and pay, notwithstanding the Rule of Greater Punishment. Two cases appear in *Bab. Baba Kamma* 70b and another one in *Bab. Baba Metzi'a* 91a; the above approach revolves around the words of Rava which appear in both these *sugyot*. One should note that this approach is difficult to square with most of the extant texts of the Talmud,⁶⁷ as a result of which the majority of *rishonim* rejected it, but there may be one textual variant which supports it, and this may have been the one which was known to the originator of this

⁶⁵ MEIRI [1961] (*Baba Kamma* 214 with n. 183; *ibid.*, *Baba Metzi'a*, 334) refers to this view as the approach of “the French sages,” a term which he also uses to refer to Rashi and Rashbam. However, the author of *Sefer Hahashlamah* (MESHULLAM [1961]) mentions it explicitly in the name of Rabbenu Ya'akov (= Rabbenu Tam) in *Baba Metzi'a* 91a and as that of *Sefer ha-Yashar*, a book written by Rabbenu Tam, in *Baba Kamma* 70b. Rashba and Ra'abad, who are mentioned in *Shiṭah Mekubetzet* (ASHKENAZI [1997] *Baba Metzi'a* 91a), cite it in the name of “some commentators.” For similar use of this approach to similar purpose—“and the reason for the thing, is that they draw a distinction between *hoda'ot ve-halva'ot* and *gezelot ve-ḥabalot*”—see SCHACHTER, 227n.

⁶⁶ LIFSHITZ 1979, 168-79. Cf. the discussion in SHOCHETMAN 1981, 122-5, 214-17. It should be noted that almost all of the *acharonim* (the rabbis living from roughly the 16th century to the present), who deal with this approach, who are surveyed by LIFSHITZ, loc. cit., leave it within the boundaries of the specific discussion of the Rule of Greatest Punishment, and do not derive therefrom broader conclusions regarding the relationship between the sources of obligation. Only Rabbi Shimon SKOPF, Section 5, Chapter 3, who draws a distinction in this matter between obligations that a person takes upon himself and those imposed by force of law, connects this matter with his general distinction, at the beginning of Section Five, between obligations deriving from “conclusion of the intellect and legal teachings,” and those obligations whose source lies in the law alone.

⁶⁷ I refer here to the formulations in *Baba Kamma* 70a, whose reading does not fit this approach. However, in the extant versions of *Baba Metzi'a* the section beginning with the words “If he sued” is missing, as noted by Ra'abad (in ASHKENAZI [1997] at *Baba Metzi'a* 91a, cited below). Cf. MEIRI [1961] at *Baba Kamma*, loc. cit.

view.⁶⁸ The reason given by the “French sages,” cited in the words of Meiri in *Baba Kamma*, to those same unusual cases, is as follows:

וחכמי הצרפתים מחדשים בזו שיטה אחרת, לומר שאף בית דין מחייבין ליתן אתנן אף בחייבי מיתות. ואין גורסין בכאן מי אמרינן ליה זיל שלים, אלא ודאי אמרינן ליה זיל שלים. וכן בלקוט בתאנים שבתאנתי ותקנה לי גנבתך בית דין מחייבין ליתן, וכן בחוסם את הפרה משלם בידי אדם. לא אמרו אין אדם מת ומשלם אלא בדבר הבא דרך נזקים, אבל בדבר שקבלו עליו דרך תנאי ומשא ומתן כגון אתנן וכגון חוסם פרה שקבל עליו שלא לחסום ואף אם לא קבל עליו מ”מ הרי הוא כמי שקבל הואיל ומן התורה הוא וכן מכר בשבת בלקיטת תאנה מכירה היא ומשתלם בבית דין. ומ”מ שיטת הסוגיא אינה מוכחת כדבריהם.

And the French sages innovated a different approach regarding this matter, saying that the court may require a person to pay an *etnan* [harlot’s fee] even in a case where he is subject to the death penalty. And the text here should read not “Do we say to him ‘go pay’?,” but rather “We certainly say to him ‘Go pay!’” Similarly, in the case of “Gather figs [on the Sabbath] from my fig tree, and [by that act] transfer to me what you have stolen,” the court requires him to pay; similarly one who muzzles an ox [he has rented] pays him in human law [that is, the payment is enforced by the court, as opposed to a requirement “in heavenly law” that the court would not enforce]. For we do not invoke [the rule] “A person is not put to death and also required to pay” except in a matter that comes about by way of damages, but in a matter that he took upon himself by way of condition or transaction, such as payment of *etnan* or one who muzzled an ox where he took upon himself not to muzzle it, [or] even if he did not take this upon himself, in any event it is as if he took it upon himself as this is a law of the Torah, or similarly one who sold on Shabbat in exchange for gathering figs, this is a valid sale and may be collected through the Court. But in any event, the logic of the *sugya* does not require us to understand it in accordance with their words.

This approach is likewise cited by R. Abraham b. David of Posquières (Ra’abad) in the *Shiṭṭah Mekubetzet* (ASHKENAZI [1997] *Baba Metzi’a* ad loc.):

... ואיכא דמחקי מההיא נוסחא כל ההוא לישנא ולא גרסי בה טפי מדאיכא הכא ומפרשי דבא על אמו אף על גב דקם ליה בדבריה מיניה אמרינן ליה זיל הב לה מאי טעמא משום דאיהו אתני אנפשיה למיתן לה אתנן ובי דינא לא מחייבי ליה אלא מאי דחייב איהו נפשיה. הילכך כי אמר לו עקוץ תאנתי בשבת ותקנה לך גנבתך קנו בעקיצת התאנה דהא איהו קביל על נפשיה הכי ואף על גב דקם ליה האיך בדבריה מיניה הוי מכירה.

... And some delete from that text all those words, and do not read in that place any more than there is here, and interpret that if someone has sexual relations with his mother, even

⁶⁸ This is the reading in *Teshuvot ha-Geonim min ha-Genizah*, which is noted by SHOCHETMAN 1981, 123 n. 91, and published by GINZBERG 1909, vol. 2, 248. According to this reading, Rava’s words do not relate to the right of suit in court. See also the reading in MS. Escorial to *Baba Kamma* 70b–71a, whose variants are emphasized: “Since when he gave it to him, and he did not sue for it by law, it is considered *etnan*, the same applies here, even though regarding the matter of payment, if he sued him previously by law, we do not say to him ‘Go pay.’ Here too, as he thereby acquired it, and did not sue him by law, it is considered as a sale.” Cf. LIFSHITZ 1979, 175. In any event, comparison of *Baba Kamma* to *Baba Metzi’a* enables us to separate Rava’s words from the later interpretations that followed, that appear only in *Baba Kamma*. See also below, n. 72. It is also fitting to examine, in connection with this approach, the *sugya* in *Yer. Terumot* 7.1 (44c-d).

though we invoke the Rule of Greater Punishment, we say to him, “Go, give her [her *etnan*].” What is the reason? Because it is a stipulation he took upon himself to give her an *etnan*, and it is not the court that obligates him to do so, but rather a matter where he has obligated himself”. Therefore, when he said to him, “Pluck my figs on Shabbat, and [by that act] transfer to me what you have stolen,” they have executed the transaction through the plucking of the figs, for he has taken it upon himself thus, and even though we invoke the Rule of Greater Punishment, this is a valid sale.

And in the words of the *Hashlamah* (MESHULLAM [1961] *Baba Metzi'a* ad loc.):

ורבינו יעקב ז"ל פי' דאפי' בדיני אדם מחייב דכי אמרינן דאינו לוקה ומשלם הני מילי בתשלומי נזקין וכיוצא בהם אבל אתנן ושכירות פרה שברצונו קבל עליו לתת כך וכך מת ומשלם ולוקה ומשלם.

Rabbenu Jacob, of blessed memory, explained that he is obligated even in human law, for when we say that he cannot be subject to corporal punishment and also required to pay, these words apply to payment for damages and the like, but payment of *etnan* and the rent of an animal, where he voluntarily took upon himself to give so-and-so much money, he may [even] be subject to death and required to pay, or to corporal punishment and required to pay.

This approach is explained by Rabbi Joseph Saul ha-Levi Nathanson as follows:⁶⁹

...דכל הטעם דאמרינן קלב"מ הוא דאי אפשר לחייב רק משום רשעה אחת וזה כשאנו מחייבים משום רשעה לא נוכל לחייב רק משום רשעה אחת. אבל כאן המיתה היא בשביל רשעה אבל הממון ואתנן הוא משום דחייב עצמו ע"ד תנאי ומו"מ ולא שייך לומר משום רשעה אחת דכאן אין אנו מחייבים משום רשעה רק משום חיוב דבורו ותנאו. וזה ברור כשמש.

... For the entire reason why we say the Rule of Greater Punishment as that it is impossible to hold a person accountable for more than one “wickedness,” that is, when we hold him accountable for a wickedness we can only hold him accountable once. But here the death penalty is for his wickedness, but the money or *etnan* is because he obligated himself, by way of stipulation or transaction, and it is not relevant to say here “for one wickedness,” for in this case we are not holding him accountable because of a wickedness, but because of what he has undertaken by his words and his stipulation. And this is clear as the sun.

A similar approach was presented by R. David Bonfid, a disciple of the Ramban (Nahmanides).⁷⁰ In setting out to answer the question of the Tosaphists

⁶⁹ NATHANSON 1865-90 4.3 §39.

⁷⁰ Quoted in GIRONDI [1978] on *Bab. Sanhedrin* 72a, s.v. *ahadrinhu*. LIFSHITZ 1979, 177 and SHOCHETMAN 1981, 217 disagree regarding the question as to whether this approach is the same as that of the “French sages” (NATHANSON 1865-90, loc cit., and AUERBACH 1974, *Hoshen Mishpat*, §47, consider the two views identical). If so, then this approach got as far as Spain, or was practiced there independently.

(*b. Sanhedrin 72a, s.v. lo*) regarding the distinction that exists regarding the obligation to return in the case of *etnan* and that of theft, he explained that a thief is obligated to make payment as a result of the law, whereas *etnan* is something the person has obligated himself to pay:

גבי אתנן צריך האדם לעמוד בדבורו אע"פ שלא יתחייב מן הדין

Regarding *etnan* a person needs to fulfill *his word*, even though he is not obligated *by law*.

This approach of the French sages which, as we said, may have support in the Talmud itself, is rejected by those *rishonim* who mention it (although it was accepted by certain of the *aḥaronim*).⁷¹ However, it shows us that there did exist an approach which acknowledged or recognized a distinction between obligations of damages and obligations arising from the person's own will. Again, this approach too is based upon the words of Rava!⁷²

Primarily, it is important to reemphasize the formulation of these things in the Ra'abad: "Even though we invoke the Rule of Greater Punishment, we say to him, 'Go, give her her *etnan*.' What is the reason? Because it is a stipulation he took upon himself to give her an *etnan*, and it is not the court that obligates him to do so, but rather a matter where he has obligated himself!"

Hence, I wish to suggest the following: an obligation, which already exists as a result of the person's own free will and which was not imposed upon him by law, necessarily brings in its wake a lesser need for the court's intervention, for in this case the Court does not *create* the obligation, but only *imposes* the execution of an obligation already created by the person himself. In other words, the obligations of *hoda'ot ve-halva'ot* created by the person's will are substantially different from those included under the rubric of *dinei kenasot* —those monetary obligations between people whose origin lies in obligation imposed by law. Thus, if the source of the obligation is the law, rather than the individual's own will, the court dealing with the creation of the

⁷¹ See n. 66, above, and add, e.g., KANIEVSKY 1988, *Ketubot* §30, who even answers the question of Ra'abad.

⁷² It was Rava who drew the distinction between *dinei kenasot* and *hoda'ot ve-halva'ot*. According to LIFSHITZ 1979, 171, 174–175, it is the approach of the French sages that provides a consistent explanation of the approach of Rava in both *sugyot*. This approach explains the words of Rava, "which seems to be a saying which was not part of the original source, that was introduced in order to resolve the difficulty in our *sugya*, and is cited here by the redactor, who clearly intended it for some reason, but who did not explain it, in exactly the same way as it was cited in the *sugya* in *Baba Metzi'a* 91a. Because there is no authorized interpretation, various different explanations have been attached to it, such as this [i.e., the one cited in *Baba Kamma*]." For a discussion regarding another area, that likewise claims the existence of a distinction between different kinds of obligations on the part of the Sages, see BRAND 2008, esp. 41.

obligation must of necessity be a real court—that is to say, one composed of expert judges⁷³—whose decision will be made after thorough questioning and examination of the witnesses. This may also be the key to understanding the law according to which a person cannot obligate himself (“admit”) to a *kenas* (מודה בקנס פטור).⁷⁴

We should also note the following: that *dinei kenasot* in this sense include, as mentioned, all those obligations imposed upon a person by force of law, including those fixed or specified by the Torah. However, the decisive majority of *dinei kenasot* involve cases of damages or “robbery and bodily harm,” which are far more common than those of rape of a virgin or goring by an ox of a Canaanite servant.⁷⁵ In those cases, the court is called upon, not only to impose the amount of the obligation, but also to determine the amount of payment in a case where it is not fixed.

5.2. EXAMINATION OF THE WITNESSES IN HODA’OT VE-HALVA’OT AND IN DINEI KENASOT

From this point on, we may more easily understand Rava’s approach in explaining the *Mishnah* in *Sanhedrin* 3.6. This *Mishnah* which, in his view, concerns *hoda’ot ve-halva’ot*, satisfies itself with only one question to determine whether the witnesses had knowledge of the debt at issue: “Tell us how you know that this one owes [money] to that one... Unless he says, ‘In our presence he admitted that he owes that one two hundred *zuz*,’ he has said nothing.” By contrast, matters of *dinei kenasot*, which constitutes the subject if *Mishnah* 4.1, require intensive questioning and examination, similar to capital matters. The distinction is simple, for in any event when the obligation is based upon *hoda’ah*—that is, a consensual obligation which brings both sides of their own free will to an agreed time and place—we may conjecture that the witnesses were also there with the consent of the two parties and there is no reason to examine them regarding the time of the incident in order to confute them through possible contradictions or inconsistencies. Indeed, the discussion in the *Bavli* on *mish. Sanhedrin* 3.6 deals with laws of *hoda’ah* and

⁷³ See RADZYNER 2001a, 263–277.

⁷⁴ RADZYNER 2001a, 320–327.

⁷⁵ Cases of damage are already referred to as *kenas* in the earliest sources (see RADZYNER 2007); and cf. *idem*, 2001a, 223–226, concerning the approach of Rambam in *Hil. Sanhedrin* 5.8 and those of other *rishonim*.

cites relatively ancient sources indicating the non-coincidental presence of witnesses at the moment of creating the obligation:⁷⁶

אם אמר הוא אמר לי כו' עד שיאמרו בפנינו הודה לו שהוא חייב לו מאתים זוז. מסייע ליה לרב
יהודה, דאמר רב יהודה אמר רב: צריך שיאמר אתם עדיי.

If he said, “He said to me...” unless they say “In our presence he admitted that he owes him two hundred זוז.” This supports the view of Rav Yehudah, for Rav Yehudah said in the name of Rav: “He must say, ‘You are my witnesses.’”

These matters are summarized in a comprehensive way by Shalom Albeck:⁷⁷

And Rava said (in *Sanhedrin* 32b), that this edict of the Sages, that one does not require intensive examination, was only instituted in the case of *hoda'ot ve-halva'ot*, and not for *dinei kenasot*: that is to say, in other monetary matters, which do require intensive examination... And why does one not require intensive examination of witnesses in the cases of *hoda'ot ve-halva'ot*, and we do not need to threaten them with a charge of fraudulent testimony so that they will tell the truth? Because witnesses of *hoda'ot ve-halva'ot* are not witnesses who happened by chance to come to the place of the occurrence and see the facts, without the litigants' telling them to come to the place in order to testify because they rely on them. Rather, [in our case] the litigants invited the witnesses to come and appointed them as witnesses, so that they might come thereafter and testify, because they know them and rely upon them, and everybody agrees that they were at the place and time of the act, and it is impossible to charge them with fraudulent testimony.⁷⁸ Hence there is no need to ask them questions concerning the time and place, which are [what is meant by] “intensive examination”.

⁷⁶ *Bab. Sanhedrin* 29a. The fact that the characteristic of *hoda'ot ve-halva'ot* is the presence of witnesses may be seen from Rashi's interpretation of this concept, cited in the next note. In the case of *gezelot ve-ḥabalot* he does not mention witnesses. Cf. BENOVIĆ 2000, 41-42; RADZYNER 2001b, 539-44, regarding the significance of this *mishnah* and an additional distinction of Rava derived from it.

⁷⁷ ALBECK 1987, 219, and cf. Rashi's comment at *Bab. Sanhedrin* 32b (and cf. also his words *ibid.* 2b and *Baba Kamma* 84b): “‘Rava said: ‘Both of these [opinions] are [describing the case] after the rabbinical decree, and our *mishnah* deals with *dinei kenasot*, where one need not be concerned about closing the door [to borrowers]; but in *hoda'ot ve-halva'ot* one does need to be concerned about closing the door [to borrowers] in *hoda'ot ve-halva'ot* in the laws of loans, where one party comes to court over witnesses of an admission of liability that he made in their presence, or witnesses of the loan [who saw] that he borrowed in their presence, where one must be concerned about closing the door [to borrowers].’”

⁷⁸ The charge of “fraudulent testimony” (*ḥazamah*) in Jewish Law applies only to witnesses who are demonstrated not to have been present at the time and place of the action.

6. SUMMARY

In the Babylonian Talmud Rava proposes a division of the broad tannaitic term *dinei mamonot*—monetary law—into two subgroups: *dinei kenasot* and *hoda'ot ve-halva'ot*.

The interpretation of the second term as the sum total of all consensual or agreed obligations, obligations which an individual takes upon himself, enables us to understand the former term. We may infer from this that *dinei kenasot* is the term referring to the totality of obligations whose root lies in the law, which are thus distinguished from the former group also in terms of bringing in their wake stricter judicial arrangements.

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