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## Applying Maimonides' Hilkhhot Teshuvah—Laws of Repentance – in the Criminal Law System of the State of Israel: an Israeli Judge's Perspectives

Moshe Drori

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**APPLYING MAIMONIDES' HILKHOT TESHUVAH—LAWS OF  
REPENTANCE —  
IN THE CRIMINAL LAW SYSTEM OF THE STATE OF  
ISRAEL:  
AN ISRAELI JUDGE'S PERSPECTIVES**

*Moshe Drori\**

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\* LL.B (distinguish, 1970), Faculty of Law, Hebrew University of Jerusalem; LL.M (distinguish, 1975), Faculty of Law, Hebrew University of Jerusalem; Member of the Israeli Bar (1973); Judge, District Court of Jerusalem (2001-2012); Vice President, District Court of Jerusalem (2012-2019); retired, April, 2019; Lecturer (status as Professor), since 1976, Faculty of Law, Hebrew University of Jerusalem. This paper is an enlarged version of a lecture at Touro Law Center, April, 2019.

## I. INTRODUCTION

### A. Maimonides

One thousand years ago (1135), Rabbi Moses ben Maimon, Rambam, commonly known as Maimonides, was born in Spain, Europe. He was a Torah scholar. He worked as a rabbi, physician, and was a philosopher in Morocco, Egypt, and Africa, where he was the leader of the Jewish community. He died in Egypt in 1204 and was buried in Tiberias, Eretz Israel, Asia.

His code of Jewish law entitled *Mishneh Torah* (“Repetition of the Torah”) contains the religious aspects and the legal (“secular”) aspects of all the sources of Judaism. Maimonides, in the framework of his Code, introduced an innovation: he devoted a separate section to *Hilkhot Teshuvah* (“Laws of Repentance”),<sup>1</sup> which are not concentrated in any one tractate neither in the Mishna nor the Babylonian Talmud. Maimonides included these laws in the first part of his code, namely, in *Sefer Ha-madda* (“Book of Knowledge”). These matters would appear to “belong” in the religious realm of Jewish law.<sup>2</sup>

Professor Samuel J. Levine, in his book *Jewish Law and American Law: A Comparative Study*<sup>3</sup>, dedicates chapter 26, in volume 2 of the book, to analyze this subject: “Teshuva: A Look at Repentance, Forgiveness, and Atonement in Jewish Law and Philosophy and

<sup>1</sup> Hereinafter, every quotation from Maimonides *Hilchot Teshuvah* (“Laws of Repentance”), will be according the chapter and the halacha, in Hebrew and a translation to English.

<sup>2</sup> See MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (HA MISHPAT HA-IVRI) 2212 (1994) (Compare the dictum of the Deputy President of the Israeli Supreme Court, Prof. Menachem Elon); A.L.A. 18/84 Adie Carmi v. State's Advocate P. D. 44(1)353, at p.375:

גדול כוחה של תשובה, שמשקמת היא את העבריינין, מוחקת את העבר ופותחת דף חדש בחייו - נאמר בתורה, שנוי בנביאים, משולש בכתובים ונלמד בדברי הגותם והלכתם של חכמים. ה"נשר הגדול", רבינו משה בן מימון, הקדיש לנושא התשובה חלק מיוחד בספרו משנה תורה.

"The Power of Teshuvah (repentance) is very big, that it rehabilitate the offender, deletes his past and opens a new page in his life; it is said in the "Torah" ("Teaching"), second time in the "Nevi'im" ("Prophets"), and third time in the Ketuvim ("Writings"), and is part of the contemplation and the Hallacha of the sages. The "Great Eagle", Rabenu Moshe Ben Maimon, has dedicated to the subject of Repentance special part in his book Mishne Torah".

*Id.*

<sup>3</sup> See SAMUEL LEVINE, *JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY* (2018).

American Legal Thought".<sup>4</sup> Levine's research begins by citing American professors,<sup>5</sup> judges<sup>6</sup>, and then he compares them with Jewish Law sources, mainly Maimonides.

My attitude, in this article, is to see when and how the Israeli judges quote and implement Maimonides' *Hilkhhot Teshuvah* ("Laws of Repentance") in their judgements. Through this way of research, one can see whether Maimonides' *Hilkhhot Teshuvah* ("Laws of Repentance") is actually a legal source, which is used and implemented nowadays, at least in the State of Israel; thus, Israel fulfils her values as a Democratic and Jewish state.<sup>7</sup>

### **B. Applying Jewish Law Into the Israeli Legal System**

One might well ask where these laws belong in the framework of case law, which deals with the legal aspect of the *halacha* ("Jewish law")? Nevertheless, upon careful study of these laws, I have concluded that it is possible, and even necessary, to apply them in the framework of Israeli law, especially when we are faced with a lacuna or with the need to apply Jewish law.<sup>8</sup> For this purpose, it is immaterial whether we regard these laws as part of the values of the State of Israel as a Jewish state,<sup>9</sup> Or whether they constitute a legitimate source of Jewish law. We will see how Maimonides' *Hilkhhot Teshuvah* ("Laws of Repentance") were applied in several decisions in the Israeli Supreme Court, and then I will elaborate about some issues in my decisions, as a Judge in the District Court of Jerusalem (the Capital of the State of Israel).

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<sup>4</sup> 2 *id.* at 205-22 (This chapter in Levine's book was originally published at Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 *FORDHAM URB. L.J.* 1677 (2000) (see p. ix, vol. 1)).

<sup>5</sup> Stephen P. Gravey, *Punishment as Atonement*, *UCLA L. REV.* 1801 (1999); LEVINE, *supra* note 3, at 205, n. 2, and in various places all around the chapter; and see at 220, n.84, citing two more articles of Gravey, that were published in 2003 and 2004.

<sup>6</sup> See generally Richard Lowell Nygaard, *On the Role of Forgiveness in Criminal Sentencings, Sentencings*, 27 *SETON HALL L. REV.* 980 (1997).

<sup>7</sup> See Article 1A of *Basic Law: Human Dignity and his Freedom*, KNESSET (last accessed Apr. 20, 2020) [https://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod2.htm#9](https://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm#9).

<sup>8</sup> See Article 2 of The Law of the Foundations of Israeli Legal System, 5750-1980.

<sup>9</sup> *Basic Law*, *supra* note 7.

## II. REFERRING TO MAIMONIDES' HILKHOT TESHUVAH ("LAWS OF REPENTANCE") – SUPREME COURT

The Israeli Supreme Court had referred to Maimonides' *Hilkhot Teshuvah* ("Laws of Repentance") in 15 judgments.

The first judge who used Maimonides in his precedent judgment concerning *mens rea* and volition was Justice Dr. Shimon Agranat<sup>10</sup> in *Mandelbrot*.<sup>11</sup> Among many sources, he quotes Maimonides' *Hilkhot Teshuvah* ("Laws of Repentance"), Chapter 5:1:

רְשׁוּת לְכָל אָדָם נְתוּנָה: אִם רָצָה לְהִטּוֹת עֲצָמוֹ לְדֶרֶךְ טוֹבָה וְלַהֲיוֹת צַדִּיק - הָרְשׁוּת בְּיָדוֹ. וְאִם רָצָה לְהִטּוֹת עֲצָמוֹ לְדֶרֶךְ רָעָה וְלַהֲיוֹת רָשָׁע - הָרְשׁוּת בְּיָדוֹ<sup>12</sup>

and immediately afterwards he quotes Roscoe Pound: "Our traditional criminal law thinks of the offender as a free moral agent who, having before him the choice whether to do right or wrong, intentionally chose to do wrong."

Ten years later, Justice Dr. Yizhak Kister, discussing suspended sentences, argued that it is like a pardon to the accused, who complete repentance,<sup>13</sup> and he quotes Chapter 2:1 and 2:4.<sup>14</sup>

In another case, the Supreme Court quoted chapter 3:1-4 to support the statement that the sentence of the accused is based on the specific felony that he did, and only as a background, the court may take into consideration good deeds that he had done in the past.<sup>15</sup>

<sup>10</sup> He was a Justice in the Israeli Supreme from 1948 to 1976 (during 1965-1976, he was the President).

<sup>11</sup> CrimA 118/53 Zelman Mandelbrot v. The Attorney General 10 PD 281 (1956) (Isr.).

<sup>12</sup> *Id.* Translated as:

Every man was endowed with a free will; if he desires to bend himself toward the good path and to be just it is within the power of his hand to reach out for it, and if he desires to bend himself to a bad path and to be wicked it is within the power of his hand to reach out for it.

*Id.*

<sup>13</sup> CrimA 395/65 Alli Alli Ibrahim v. The Attorney General 19(3) PD 581, 584 (1965) (Isr.); see also, Dr. Yizhak Kister, *The Approach of Judaism toward the Criminal and his Rehabilitation*, 25 HAPRAKLIT, 481-87 (1969).

<sup>14</sup> Kister, *supra* note 13.

<sup>15</sup> CrimA 291/81 Ploni v. The State of Israel 35(4) PD 438, 444 (1981) (per Justice Menachem Elon; concurring jj. Dr. Moshe Baiski and Yehuda Cohen).

Several cases in the Supreme Court used Maimonides' *Hilkhot Teshuvah* ("Laws of Repentance") as a reference to support a lenient sentence where the court was convinced that he has changed his behaviour and there are high chances that he will not go on in the path of criminal life.<sup>16</sup>

In a case reviewing a decision of the Committee for Releasing Prisoners,<sup>17</sup> Justice Menachem Elon<sup>18</sup> quotes chapter 3:14.<sup>19</sup>

In another case, an appeal on a disciplinary punishment of the Tribunal of the Israel Bar Association, Deputy President Elon quotes chapter 7:4, 6, 7<sup>20</sup> on the importance of the Teshuvah, as a reference to reduce

<sup>16</sup> CrimA 705/81 Zion Miara v. The State of Israel 36(4) PD 223, 225 (1982) (quoting chapter 2:2) (per JJ. Miryam Ben Porat, Aaron Barak, Elisha Sainbaum).

<sup>17</sup> H.C.J. 287/82 The Attorney General v. Committee for Releasing and Daniel Alli 37(3) PD 264 (1983) (Isr.).

<sup>18</sup> *Id.* (JJ. Shoshana Netanyahu and Elisha Sainbaum concurring.).

<sup>19</sup> "שאין לך דבר שעומד בפני התשובה" – "for nothing can stand in the way of Teshuvah."

<sup>20</sup> Maimonides *Hilhot Teshuvah*:

A Baal-Teshuvah should not consider himself distant from the level of the righteous because of the sins and transgressions that he committed. This is not true. He is beloved and desirable before the Creator as if he never sinned.

Furthermore, he has a great reward for he has tasted sin and yet, separated himself from it, conquering his [evil] inclination. Our Sages declared: "In the place where Baalei Teshuvah stand, even the completely righteous are not able to stand." The level of Baalei Teshuvah transcends the level of those who never sinned at all, for they overcome their [evil] inclination more.

ד ואל ידמה אדם בעל תשובה שהוא מרוחק ממעלת הצדיקים מפני העונות והחטאות שעשה אין הדבר כן אלא אהוב ונחמד הוא לפני הבורא כאילו לא חטא מעולם.

ולא עוד אלא ששכרו הרבה שהרי טעם טעם החטא ופירש ממנו וכבש יצרו אמרו חכמים מקום שבעלי תשובה עומדין אין צדיקים גמורין יכולין לעמוד בו כלומר מעלתן גדולה ממעלת אלו שלא חטאו מעולם מפני שהן כובשים יצרים יותר מהם.

6. ...Teshuvah brings near those who were far removed. Previously, this person was hated by God, disgusting, far removed, and abominable. Now, he is beloved and desirable, close, and dear.

the period of suspension, in order to enable the accused to work again as an advocate, in his process of rehabilitation.<sup>21</sup> Quoting the same passages from Maimonides (through the previous precedent), Justice (later, the President) Aharon Barak, ruled that in balancing the rehabilitation considerations with the purity of the executive branch of the Government and the public's confidence in the Government, an individual who had committed serious crimes, even after years, cannot be a director general in a ministry; therefore, the High Court of Justice abolished the decision of the Government to appoint him.<sup>22</sup> In a third case, both judges (Elon and Barak) sat together; Elon quotes the same words of Maimonides from his first precedent and unanimously decided that criminal a record, nine years before deciding to nominate a member of the Religious Council in Netanya, is a sufficient reason not to nominate him.<sup>23</sup> In a fourth case, with a similar problem, Justice Yaakov Tirkel after quoting Maimonides Chapter 7:4, 6,<sup>24</sup> emphasize that the rehabilitation of a private criminal is more important than the public considerations because the reform of the individual is an interest of the public, which gets rid of the criminal, who will hopefully become a law-abiding citizen.<sup>25</sup> In a fifth case, the Supreme Court, after quoting those precedents and chapter 7:6, decided that there is no obstacle to appointing an Attorney General, although he was involved in an enquiry.<sup>26</sup>

Justice Elyakim Rubinstein reviewed an administrative detention,<sup>27</sup> and in analyzing the risk from the appellant, he quoted a passage from

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התשובה מקרבת את הרחוקים אמש היה זה שנאוי לפני המקום משוקץ ומרוחק ותועבה והיום הוא אהוב ונחמד קרוב וידיד

7 How exalted is the level of Teshuvah! כמה מעולה מעלת התשובה!

*Id.*

<sup>21</sup> ALA 18/84 Adie Carmi v. State's Advocate 44(1) PD 353 376-377 (1993) (jj. Avraham Halima and Yaakov Maltz concurring).

<sup>22</sup> HCJ 6163/92 Yoel Eizenberg v. The Minister of Building and Housing 47(2) PD 229 264 (1993)(jj. Eliezer Goldberg and Elyahu Matza concurring).

<sup>23</sup> HCJ 1935/93 Shlomo Machfud v. The Minister for Religious Meters PD (1994) (Isr.); the third judge, Gabriel Bach, agreed to the result.

<sup>24</sup> Maimonides, *supra* note 20.

<sup>25</sup> DNP 9384/01 Muhamad El Nasasra v. Israel Bar Association – the Central Committee 59(4) PD 637 692 694 (2004) (Isr.).

<sup>26</sup> HCJ 43/16 The Movement Ometz Citizens for Standard Administration and Social and Legal Justice (2016) (Isr.), per Justice Noam Solberg, para. 10.

<sup>27</sup> AMM 2595/09 Dr. Hamdan Abdalla Shchada Sofi v. The State of Israel (2009) (Isr.).

chapter 3:4.<sup>28</sup> He argued that the dictum illustrated that if there is a specific activity in a terror organization, and his role is so important that “he tips his balance and that of the entire world to the side of guilt and brings destruction” such that even someone else would replace him, he is still very dangerous and should remain in administered detention.<sup>29</sup>

A rapist was sentenced to 35 years in prison. After his judgment, before the hearing in his appeal to the Supreme Court, he had sent a letter to one of the girls that he had raped. In his long letter, he described the rape, in detail, and apologized. Justice Chanan Meltzer, quoting chapter 2:3,<sup>30</sup> said that it is not relevant to the issue of convicting him in the offence of harassment of a witness, because

<sup>28</sup> Maimonides *Hilchot Teshuvah*:

Accordingly, throughout the entire year, a person should always look at himself as equally balanced between merit and sin and the world as equally balanced between merit and sin. If he performs one sin, he tips his balance and that of the entire world to the side of guilt and brings destruction upon himself.

[On the other hand,] if he performs one mitzvah, he tips his balance and that of the entire world to the side of merit and brings deliverance and salvation to himself and others. This is implied by [Proverbs 10:25]: “A righteous man is the foundation of the world,” i.e., he who acted righteously, tipped the balance of the entire world to merit and saved it.

לפיכך צריך כל אדם שיראה עצמו כל השנה כולה כאילו חציו זכאי וחציו חייב וכן כל העולם חציו זכאי וחציו חייב חטא חטא אחד הרי הכריע את עצמו ואת כל העולם כולו לכף חובה וגרם לו השחתה עשה מצוה אחת הרי הכריע את עצמו ואת כל העולם כולו לכף זכות וגרם לו ולהם תשועה והצלה שנאמר וצדיק יסוד עולם זה שצדק הכריע את כל העולם לזכות והצילו

*.Id*

<sup>29</sup> *Id.* at. 15.

<sup>30</sup> *Hilchot Teshuvah*, *supra* note 1 at 57.

“Anyone who verbalizes his confession without resolving in his heart to abandon [sin] can be compared to [a person] who immerses himself [in a *mikvah*] while [holding the carcass of] a lizard in his hand. His immersion will not be of avail until he casts away the carcass.” This principle is implied by the statement, [Proverbs 28:13], “He who confesses and forsakes [his sins] will be treated with mercy.”

ג כל המתודה בדברים ולא גמר בלבו לעזוב הרי זה דומה לטובל ושרץ בידו שאין הטבילה מועלת לו עד שישליך השרץ וכן הוא אומר ומודה ועוזב ירוחם

*.Id.*



whether he intended to regret, or to receive the mercy of the Supreme Court, or again to harass the complainant, from the legal point, it is enough that he was aware to the components factual element of the offence of harassment of a witness.<sup>31</sup>

Another judgment in the Israeli Supreme Court<sup>32</sup> analyzed two new Acts of the Israeli Parliament (the Knesset), imposing limitations on sex offenders.<sup>33</sup> Justice Chanan Meltzer, quoting chapter 2:1<sup>34</sup>, said that Maimonides and previous sources demanded that Baal-Teshuvah should be in a position that he could to hold himself, even he can commit the offence again. But others sources, from the last generations (“Achronim”) had preferred another approach, that Baal-Teshuvah should avoid himself to be in a situation that would tempt him to commit the offence.<sup>35</sup>

### III. APPLYING MAIMONIDES’ HILKHOT TESHUVAH (“LAWS OF REPENTANCE”) – JERUSALEM DISTRICT COURT

I have cited Maimonides’ *Hilkhot Teshuvah* (“Laws of Repentance”) in twenty-five judgments and decisions that I have handed down.

In this lecture (article), it is not possible to deal with the above question in-depth and to analyze the judgments and the decisions, nor to quote them in full. I will confine myself to five examples of recourse that I

<sup>31</sup> RCrimA 9689/05 Benny Sela v. The State of Israel 16 (2009) (Isr.).

<sup>32</sup> BSP 7057/09 Plonit v. Almoni (2010) (Isr.).

<sup>33</sup> The Law of Limitations on the Returning of Sex Offender to the Neighborhood of the Victim, 5765-2004; The Law of Protection of the Public from Sex Offenders, 5766-2006.

<sup>34</sup> Maimonides *Hilchot Teshuvah*:

1 [Who has reached] complete Teshuvah? A person who confronts the same situation in which he sinned when he has the potential to commit [the sin again], and, nevertheless, abstains and does not commit it because of his Teshuvah alone and not because of fear or a lack of strength.

For example, a person engaged in illicit sexual relations with a woman. Afterwards, they met in privacy, in the same country, while his love for her and physical power still persisted, and nevertheless, he abstained and did not transgress. This is a complete Baal-Teshuvah.

א. אי זו היא תשובה גמורה? זה שבא לידו דבר שעבר בו ואפשר בידו לעשותו ופירש ולא עשה מפני התשובה, לא מיראה ולא מכשולון כח. כיצד? הרי שבא על אשה בעבירה ולאחר זמן נתייחד עמה, והוא עומד באהבתו בה, ובכח גופו, ובמדינה שעבר בה, ופירש ולא עבר - זהו בעל תשובה גמורה.

*Id.*

<sup>35</sup> *Id.* at 19 (referencing NAHUM RAKOVER, REHABILITATION OF CRIMINALS IN JEWISH LAW 586-594 (Jerusalem, supp. 7, 2007)) (in Hebrew).

had to the said *Hilkhot Teshuvah* ("Laws of Repentance") for the purposes of my judicial rulings.

### A. Freedom of Choice

A basic element for understanding a person's responsibility for his actions is the assumption that he has freedom of choice, and that the world is not deterministic. Maimonides formulates this assumption in rules 1 – 4 of the fifth chapter of *Hilkhot Teshuvah* ("Laws of Repentance"):

רְשׁוּת לְכָל אָדָם נְתוּנָה: אִם רָצָה לְהִטּוֹת עֲצָמוֹ לְדָרֶךְ  
טוֹבָה וְלִהְיוֹת צַדִּיק - הָרְשׁוּת בְּיָדוֹ. וְאִם רָצָה לְהִטּוֹת  
עֲצָמוֹ לְדָרֶךְ רָעָה וְלִהְיוֹת רָשָׁע - הָרְשׁוּת בְּיָדוֹ. הוּא  
הֵן " (בראשית ג כב) שְׁכַתּוּב בַּתּוֹרָה  
הָאָדָם הִיָּה כְּאֶחָד מִמְּנוֹ לְדַעַת טוֹב וְרָע."

כְּלוּמַר הֵן מִיִּן זֶה שֶׁל אָדָם הִיָּה יָחִיד בְּעוֹלָם וְאִין מִיִּן שְׁנַי  
דוּמָה לוֹ בְּזֶה הָעֵנָן שֶׁיְהִיָּה הוּא מֵעֲצָמוֹ בְּדַעַתוֹ  
וּבְמַחְשָׁבְתוֹ יוֹדֵעַ הַטּוֹב וְהָרָע וְעוֹשֶׂה כָּל מַה שֶׁהוּא חָפֵץ  
וְאִין מִי שֶׁיַּעֲכֹב בְּיָדוֹ מִלְּעֲשׂוֹת הַטּוֹב אוֹ הָרָע. וְכִיּוֹן שֶׁכֵּן  
הוּא כֵּן יִשְׁלַח יָדוֹ

Every man was endowed with a free will; if he desires to bend himself toward the good path and to be just it is within the power of his hand to reach out for it, and if he desires to bend himself to a bad path and to be wicked it is within the power of his hand to reach out for it. This is known from what it is written in the Torah, saying:

Behold, the man is become as one of us, to know good and evil (Gen 3.22), that is as if saying: Behold, this species, man, stands alone in the world, and there is no other kind like him, as regards this subject of being able of his own accord, by his reason and thought, to know the good and the evil, and to do whatever his inclination dictates him with none to stay his hand from either doing good or evil; and, being that he is so, 'Lest he

put forth his hand, and take also from the tree of life, and eat, and live forever'. (Ibid.).

אל יעבר בַּמַּחְשְׁבֹתָהּ דְּבַר זֶה וְשִׂאמְרִים טַפְשֵׁי אַמּוֹת הָעוֹלָם וְרַב גְּלַמֵי בְּנֵי יִשְׂרָאֵל שֶׁהִקְדוּשׁ בְּרוּךְ הוּא גּוֹזֵר עַל הָאָדָם מִתְחַלֵּת בְּרִיתוֹ לִהְיוֹת צַדִּיק אוֹ רָשָׁע. אֵין הַדְּבָר כֵּן אֶלָּא כָּל אָדָם רְאוּי לוֹ לִהְיוֹת צַדִּיק כְּמִשָּׁה רַבָּנוּ אוֹ רָשָׁע כְּיִרְבָּעָם אוֹ חָכָם אוֹ סָכָל אוֹ רַחֲמָן אוֹ אַכְזָרִי אוֹ פִּילִי אוֹ שׁוֹעַ וְכֵן שְׁאֵר כָּל הַדְּעוֹת. וְאֵין לוֹ מִי שֶׁיִּכְפֹּהוּ וְלֹא גּוֹזֵר עָלָיו וְלֹא מִי שֶׁמוֹשְׁכּוֹ לְאַחַד מִשְׁנֵי הַדְּרָכִים אֶלָּא הוּא מַעֲצָמוֹ וּמַדְעֵתוֹ נוֹטָה לְאֵי זֶה דְרָף שֶׁיִּרְצֶה. הוּא שֶׁיִּרְמֶיהוּ אָמַר מִפִּי עֲלִיוֹן לֹא תֵצֵא הַרְעוֹת וְהַטּוֹב". כְּלוֹמַר אֵין " (איכה ג לה) הַבוֹרָא גּוֹזֵר עַל הָאָדָם לִהְיוֹת טוֹב וְלֹא לִהְיוֹת רַע. וְכִינֵן שְׂכָן הוּא נִמְצֵא זֶה הַחוּטָא הוּא הַפְּסִיד אֶת עֲצָמוֹ. וְלִפְיֶכָה רְאוּי לוֹ לִכְפּוֹת וּלְקוֹנֵן עַל חַטָּאָיו וְעַל מַה שֶׁעָשָׂה לְנַפְשׁוֹ וּגְמֻלָּה רַעָה. הוּא שֶׁכְּתוּב מַה יִתְאוּנֵן אָדָם חַי" וְגו'. וְחֹזֵר וְאָמַר הוֹאִיל " (איכה ג לט) אַחֲרָיו וּרְשׁוֹתָנוּ בְּיָדֵינוּ וּמַדְעֵתָנוּ עָשִׂינוּ כָּל הַרְעוֹת רְאוּי לָנוּ לְחֹזֵר נִחְפְּשָׁה " (איכה ג מ) בְּתִשׁוּבָה וְלַעֲזֹב רְשָׁעֵנוּ שֶׁהִרְשׁוֹת עִתָּהּ בְּיָדֵינוּ. הוּא שֶׁכְּתוּב אַחֲרָיו: 'דְּרָכֵינוּ וְנִחְקָרָה וְנִשׁוּבָה' וְגו'

Permit not your thought to dwell upon that which ridiculous fools of other peoples and a majority of asinine individuals among the children of Israel say, that the Holy One, blessed is He! decrees at the very embryonic state of every man whether he should be just or wicked. The matter is not so. Every man is capable of being as just as Moses our Master or as wicked as Jeroboam, wise or incony, merciful or human, miser or philanthropist, and so in all other tendencies. There is none to either force things upon him or to decree things against him; either to pull him one way or draw him another way, but he alone, of his own free will, with the consent of his mind, bends to any path he may desire to follow. It is concerning this that Jeremiah said: "Out of the mouth of the Most High proceedeth not the evil and the good" (Lam. 3. 38) which is as if saying, the Creator decrees not that man should be either good or bad. Now, this being so, the consequence hereof is that the

sinner alone brought harm upon himself. It is, therefore, meet that he should lament and shed tears because he sinned, and because of what he did to his soul and rewarded it with evil. Even this is the meaning of the succeeding Verse: "Wherefore doth a living man complain, or a strong man? Because of his sins" (Ibid.). Again, he continues, in the succeeding Verse seeing that it all is in our power, and we did all the evil of our own free will and accord, it is, indeed meet for us to turn in repentance and abandon our wickedness, for our free will is in our hands now as well as at the time we committed the sins saying: "Let us search and try our ways, and return to the Lord" (Ibid.-40).

וְדָבַר זֶה עֵקֶר גָּדוֹל הוּא וְהוּא עֲמוּד הַתּוֹרָה וְהַמְצָנָה  
 רְאֵה נִתְּתִי לְפָנֶיךָ הַיּוֹם אֵת " (דברים ל טו) שֶׁנֶּאֱמַר  
 רְאֵה אֲנֹכִי נֹתֵן לְפָנֶיךָ " (דברים יא כו) הַחַיִּים". וְכַתִּיב  
 הַיּוֹם". כְּלוּמַר שֶׁהַרְשׁוּת בְּיַדְכֶם. וְכֹל שִׁיחַפֵּץ הָאָדָם  
 לַעֲשׂוֹת מִמַּעֲשֵׂה בְּנֵי הָאָדָם עוֹשֶׂה בֵּין טוֹבִים בֵּין רָעִים.  
 מִי יִתֵּן וְהָיָה לְבַבְכֶם " (דברים ה כו) וּמִפְּנֵי זֶה הָעֲנִין נֶאֱמַר  
 זֶה לָהֶם". כְּלוּמַר שֶׁאֵין הַבוֹרָא כּוֹפֶה בְּנֵי הָאָדָם וְלֹא גּוֹזֵר  
 עֲלֵיהֶן לַעֲשׂוֹת טוֹבָה אוֹ רָעָה אֲלֵא הַכֹּל מְסוּר לָהֶם.

And, this matter is a great and component part, the very pillar of the Torah and its precepts, even as it is said: "See, I have set before thee this day life and good, and death and evil" (Deut. 30.15), and it is, moreover, written: "Behold, I set before you this day a blessing and curse" (Ibid. 11.26). This is as if saying, the power is in your hand, and whatever human activity man may be inclined to carry on he has a free will to elect either good or evil. And, because of this very subject it is said: "Oh, who would grant that they had such a heart as this, to fear Me, and to keep all my commandments at all times" (Ibid. 5.26). This is as if saying, that the Creator forces not the sons of man, and makes no

decrees against them that they should do good or evil, but that it all is in their own keeping.

אלו האל הִנֵּה גֹזֵר עַל הָאָדָם לֵהִיּוֹת צַדִּיק אוֹ רָשָׁע אוֹ  
אלו הִנֵּה שָׁם דְּבַר שְׁמוֹשָׁה אֶת הָאָדָם בְּעֵקֶר תּוֹלְדוֹתוֹ  
לְדַרְדֵּר מִן הַדְּרָכִים אוֹ לְמַדְע מִן הַמַּדְעוֹת אוֹ לְדַעַה מִן  
הַדְּעוֹת אוֹ לְמַעֲשֵׂה מִן הַמַּעֲשִׂים כְּמוֹ שְׂבוּדִים מְלַבֵּם  
הַטְּפָשִׁים הַכְּבִירִי שְׁמַיִם הַיָּאֵד הִנֵּה מְצַנֵּה לָנוּ עַל יְדֵי  
הַנְּבִיאִים עֲשֵׂה כֹּה וְאַל תַּעֲשֵׂה כֹּה הִיטִיבוּ דְרָכֵיכֶם וְאַל  
תִּלְכוּ אַחֲרֵי רַשְׁעֵכֶם וְהוּא מִתְחַלֵּת בְּרִיתוֹ כְּכֹר נִגְזֵר עָלָיו  
אוֹ תּוֹלְדוֹתוֹ תְּמַשֶּׁה אוֹתוֹ לְדַבֵּר שְׂאֵי אֶפְשָׁר לְזוּז מִמֶּנּוּ.  
וּמֵה מְקוֹם הִנֵּה לְכָל הַתּוֹרָה כְּלָה וּבָאֵי זֶה דִּין וְאִינָה  
מִשְׁפָּט נִפְרָע מִן הַרְשָׁע אוֹ מִשְׁלֵם שְׂכָר לְצַדִּיק. הַשְּׁפָט כָּל  
הָאָרֶץ לֹא יַעֲשֵׂה מִשְׁפָּט. וְאַל תִּתְמָה וְתֹאמַר הַיָּאֵד יִהְיֶה  
הָאָדָם עוֹשֵׂה כָּל מֵה שְׂיַחֲפֹץ וְיִהְיֶה מַעֲשָׂיו מְסוּרִים לוֹ וְכִי  
יַעֲשֵׂה בְּעוֹלָם דְּבַר שְׂלֹא בְּרִשׁוֹת קוֹנֵה וְלֹא חֲפָצוֹ וְהַכְּתוּב  
כָּל אֲשֶׁר חֲפֹץ ה' עֲשֵׂה בְּשָׂמַיִם " (תהילים קלה ו) אוֹמֵר  
וּבְאָרֶץ". דַּע שֶׁהַכֹּל כְּחֲפָצוֹ יַעֲשֵׂה וְאֵף עַל פִּי שְׂמַעֲשִׂינוּ  
מְסוּרִין לָנוּ. כִּי צַד. כְּשֵׁם שְׂהִיּוֹצֵר חֲפֹץ לֵהִיּוֹת הָאֵשׁ  
וְהַרוּחַ עוֹלִים לְמַעְלָה וְהַמַּיִם וְהָאָרֶץ יוֹרְדִים לְמַטָּה  
וְהַגְּלָגַל סוֹבֵב בְּעֵגוּל וְכֵן שְׂאֵר בְּרִיּוֹת הָעוֹלָם לֵהִיּוֹת  
כְּמִנְהַגֵּן שְׂחֲפֹץ בּוֹ. כִּכָּה חֲפֹץ לֵהִיּוֹת הָאָדָם רִשׁוֹתוֹ בְּיָדוֹ  
וְכָל מַעֲשָׂיו מְסוּרִין לוֹ וְלֹא יִהְיֶה לוֹ לֹא כּוֹפֵה וְלֹא מוֹשֶׁה  
אֵלָּה הוּא מַעֲצָמוֹ וּבְדַעְתּוֹ שְׂנַתֵּן לוֹ הָאֵל עוֹשֵׂה כָּל  
שְׂהָאָדָם יְכוֹל לַעֲשׂוֹת. לְפִיכֹה דְנִין אוֹתוֹ לְפִי מַעֲשָׂיו. אִם  
עֲשֵׂה טוֹבָה מִיטִיבִין לוֹ וְאִם עֲשֵׂה רָעָה מְרַעִין לוֹ. הוּא  
שְׂהַנְּבִיא אוֹמֵר מִיָּדְכֶם הִיְתָה זֹאת לָכֶם. גַּם הִמָּה בְּחֵרוֹ  
שְׂמַח " (קהלת יא ט) בְּדְרָכֵיהֶם. וּבְעֵנִין זֶה אָמַר שְׂלֵמָה  
וְדַע כִּי עַל כָּל אֵלָּה " (קהלת יא ט) "בְּחֵרוֹ בְּיָדוֹתֶיךָ  
יְבִיאֵךְ הָאֵלֵהִים בְּמִשְׁפָּט". כְּלוֹמַר דַּע שְׂיֵשׁ בְּיָדְךָ כַּח  
לַעֲשׂוֹת וְעֵתִיד אֶתְּהָ לִתֵּן אֶת הַדִּין

Had the decree of God prompted man to be either just or wicked, or had there been a fundamentally inborn

something to draw man to either of the paths, or to any one branch of knowledge, or to a given tendency of the tendencies, or to particular act of all actions as the astrologists maintain by their foolish inventions, how did He charge us by the prophets, to do thus and not to do such, improve your ways, and do not follow your wickedness, whereas man from his embryonic state already had a decree of his conduct issued, or his inborn nature draws him toward a given path of conduct from which he can not deviate? Moreover, what need would there be, under such circumstances, for the Torah altogether? And by what law, and under what system of justice could the wicked be punished, or the just rewarded? Shall the judge of the whole earth not exercise justice? Now, do not wonder and ask: "How is it possible for man to do what his heart desires, and have his entire course of action lodged within himself seeing that he can not do aught in the world without the permission of his Master and without His Will, even as the Verse says: "Whatsoever the Lord pleased, that hath He done, in heaven and in earth, in the seas and in all deeps" (Ps. 135.6)? Know all that man does is in accordance with His Will, although our actions are really in our own keeping. For example? Even as it is the Creator's Will that fire and air shall ascend upward, and that water and earth shall descend downward, or that the sphere shall revolve in a circle, and that other creatures of the universe should likewise follow their respective natural laws, as it was His Will for them to be, so was it His Will that man shall have the free choice of conduct in his own hand, and that all his actions should be lodged within him, and that he should be neither forced or drawn, but he, of his own free will and accord, as God endowed him with, he exercises in all that is possible for man to do. He is, therefore, judged according to actions; if he did good, his is rewarded with good; and if he did wrong, he is punished. This is in harmony with what the prophet

said: “This hath been of your own doing” (Mal. 1.9); and: “According as they have chosen their own ways” (Is. 66.3); and of this very subject Solomon said: “Rejoice O young man, in thy youth, and let thy heart cheer thee in the days of thy youth, and walk in the ways of thy heart, and in the sight of thine eyes; but know thou, that for all these things God will bring thee into judgment” (Ecc. 11. 9); as if saying: “True, it is within the power of thine hand to do so, but thou art to render an accounting on the day of judgment”.

By virtue of this principle of freedom of choice, I have elaborated and extended the right of a medical patient to receive compensation for a breach of his autonomy, since it is autonomy that reflects the free choice of the patient.<sup>36</sup>

Because of the freedom-of-choice principle, I had infrequently given credibility to detainees for drug offences who sought to participate in a rehabilitation process during their detention, in the framework of the alternative of detention within the community. Even in the case of individuals with criminal histories for drug offences, in some cases, I granted the request, in reliance upon the said freedom of choice, as articulated in the above-cited Maimonidean rulings.<sup>37</sup>

### **B. Penitence as a Consideration for Non-Conviction or for a Lighter Sentence**

In one particular case, in which I ruled that under the circumstances there was justification for not convicting, I discussed *Hilkhoh Teshuvah* (“Laws of Repentance”) at length, and I attached significant weight to the offender’s expression of regret in front of the complainant, in the courtroom, and the acceptance of the complaint.<sup>38</sup> My ruling was based on the conception of “complete repentance” in Chapter 2: 1-5 in Maimonides:

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<sup>36</sup> See CA 3235/01 The Estate of The Late Brurya Zvi V. Bickur Cholim Hospital, Jerusalem (2007) (Isr.). From this principle, I had decided that even a prisoner in jail has the right to choose his physician - APP 834/03 Yizhak Bar Mocha V. The State Of Israel (2003) (Isr.).

<sup>37</sup> See BS 1152/02 Yaakov Asraf v. The State Of Israel (2002) (Isr.); BS 4348/03 The State Of Israel v. Israel Haviv (2003) (Isr.).

<sup>38</sup> See CrimC 2003/06 The State Of Israel v. Ploni (2008) (Isr.).

אי זו היא תשובה גמורה. זה שָׁבָא לְיָדוֹ דְּבַר שְׁעֵבֶר בּוֹ  
 וְאֶפְשָׁר בְּיָדוֹ לַעֲשׂוֹתוֹ וּפְרָשׁ וְלֹא עָשָׂה מִפְּנֵי הַתְּשׁוּבָה.  
 לֹא מִיָּרֵאָה וְלֹא מִכְשָׁלוֹן פֶּחַ. כִּי צָד. הָרִי שְׁבָא עַל אִשָּׁה  
 בְּעֵבֶרָה וְלֹא אַחַר זְמַן נִתְיַחַד עִמָּה וְהוּא עוֹמֵד בְּאַהֲבָתוֹ בָּהּ  
 וּבְכַח גּוּפוֹ וּבְמִדִּינָה שְׁעֵבֶר בָּהּ וּפְרָשׁ וְלֹא עָבֵר זֶהוּ בַעַל  
 וְזָכַר “ (קהלת יב א) תשובה גמורה. הוא שְׁשַׁלְמָה אָמַר  
 אֶת בּוֹרְאֵיָהּ בִּימֵי בְּחֹרֶתֶיָּהּ.” וְאִם לֹא שָׁב אֶלָּא בִּימֵי  
 זְקֻנוֹתוֹ וּבָעֵת שְׁאֵי אֶפְשָׁר לוֹ לַעֲשׂוֹת מֵהַ שְׁהֵיָה עוֹשֵׂה אִף  
 עַל פִּי שְׁאִינָה תְּשׁוּבָה מְעַלָּה מוֹעֵלֶת הִיא לוֹ וּבַעַל תְּשׁוּבָה  
 הוּא. אֶפְלוֹ עָבֵר כָּל יָמָיו וְעָשָׂה תְּשׁוּבָה בְּיוֹם מִיתָתוֹ וּמֵת  
 עַד “ (קהלת יב ב) בְּתְּשׁוּבָתוֹ כָּל עֲוֹנוֹתָיו נִמְחָלִין שְׁנֹאֲמַר  
 אִשָּׁר לֹא תִחַשְׁדָּה הַשָּׁמֶשׁ וְהָאֹר וְהַיָּרֵחַ וְהַכּוֹכָבִים וְשָׁבוּ  
 הָעֵבִים אַחַר הַגְּשָׁם” שֶׁהוּא יוֹם הַמִּיתָה. מִכְּלָל שְׁאִם זָכַר  
 בּוֹרְאוֹ וְשָׁב קִדְּם שְׁיָמוֹת נִסְלַח לוֹ

What is complete repentance? He who once more had in it in his power to repeat a violation, but separated himself therefrom, and did not do it because of repentance, not out of fear or lack of strength. For example? One who knew a woman sinfully, and after a process of time he met her again privately, and he still loving her as theretofore, and he being in a state of potency, and the meeting is in the same land where the sin was first committed, if he parted without sinning, he has attained complete repentance. Of such Solomon said: “Remember then thy Creator in the days of thy youth” (Ecc. 12.1). Even if he made no reparation save in his old age, at a time when it was already impossible for him to repeat his misdeeds, although it is not the best repentance, it still is of help to him and he is considered a penitent. Moreover, though he continued a life of sin but did repent on his dying day, and did die a penitent, all of his sins are forgiven, even as it is said: “While the sun, or the light, or the moon, or the stars, be not darkened, nor the clouds return after the rain”



(Ibid. 12.2), yea, that is the day of death. Deduct herefrom that if he remembered his Creator and did repent ere he died, he was forgiven.

ומה היא התשובה. הוא שיעזב החוטא חטאו ויסירו  
 ישעיה ( ממחשבתו ויגמר בלבו שלא יעשהו עוד שפאמר  
 יעזב רשע דרכו" וגו'. וכן יתנחם על שעבר " (נה ז  
 כי אחרי שובי נחמתי". ויעיד " (ירמיה לא יח) שפאמר  
 עליו יודע תעלומות שלא ישוב לזה החטא לעולם  
 ולא נאמר עוד אלהינו למעשה " (הושע יד ד) שפאמר  
 ידנינו" וגו'. וצריך להתנדות בשפתיו ולומר ענינות אלו  
 שפאמר בלבו:

What is repentance? The sinner shall cease sinning, and remove sin from his thoughts, and wholeheartedly conclude not to revert back to it, even as it is said: "Let the wicked forsake his way" (Is. 55.7); so, too, shall he be remorseful on what was past, even as it is said: "Surely after that I was turned, I repented" (Jer. 31. 19). In addition, thereto he should take to witness Him Who knoweth all secrets that forever he will not turn to repeat that sin again, according to what it is said: "Say unto Him.... neither will we call any more the work of our hands our gods" (Hos. 14.3–4). It is, moreover, essential that his confession shall be by spoken words of his lips, and all that which he concluded in his heart shall be formed in speech.<sup>39</sup>

כל המתנדת בדברים ולא גמר בלבו לעזוב הרי זה דומה  
 לטובל ושרץ בידו שאין הטבילה מועלת לו עד שישליך  
 השרץ. וכן הוא אומר ומודה ועזב ירחם. וצריך לפרט  
 אפא חטא העם הזה " (שמות לב לא) את החטא שפאמר  
 "חטאה גדלה ויעשו להם אלהי זהב

He who confesses by speech but has not his heart's consent to abandon his erstwhile conduct, behold him,

<sup>39</sup> Compare LEVINE, *supra* note 3, at 210, n.24.

he is like one taking an immersion of purification and in his grasp is an impure creeping thing, when he knows the immersion to be of no value till he cast away the impure creeping thing. Even so it is advised to do, saying: "But whoso confesseth and forsaketh them shall shall obtain mercy" (Pro. 28. 13). In confessing to God, it is obligatory to name the sin, even as it is said: "Oh, this people have sinned a great sin, and have made them a god of gold" (Ex. 32.31).<sup>40</sup>

מדרכי התשובה להיות השב צועק תמיד לפני השם  
בבכי ובתחנונים ועושה צדקה כפי פחו ומתרחק הרבה  
מן הדבר שחטא בו ומשנה שמו כלומר אני אחר ואיני  
אותו האיש שעשה אותו המעשים ומשנה מעשיו כלן  
לטובה ולדרך ישרה וגולה ממקומו. שגלות מכפרת עון  
מפני שגורמת לו להכניע ולהיות ענו ושפל רוח:

Among the ways of repentance are, for the penitent to continue to cry out in tearful supplication before the Name, to bestow alms according to his means, and to distance himself exceedingly from the thing wherein he sinned, to have his indentivity changed, as if saying: "I am now another person, and not that person who perpetrated those misdeeds", to completely change his conduct for the good and straight path, and to exile himself from his place of residence, for exile atones iniquity, because it leads him to submissiveness and to be meek and humble-spirited.

ושבח גדול לשב שיתודה ברבים ויודיע פשעיו להם  
ומגלה עברות שבינו לבין חברו לאחרים ואומר להם  
אמנם חטאתי לפלוגי ועשיתי לו כף וכף ונהריני היום שב  
ומתנחם. וכל המתגאה ואינו מודיע אלא מכסה פשעיו  
מכסה פשעיו " (משלי כה יג) אין תשובתו גמורה שגאמר

<sup>40</sup> Compare. LEVINE, *supra* note 3, at 211, n.27.

לא יִצְלִיחַ". בְּמַה דְּבָרִים אָמוּרִים בְּעֵבְרוֹת שְׂבִין אָדָם  
 לְחַבְרוֹ אָבֵל בְּעֵבְרוֹת שְׂבִין אָדָם לְמִקּוֹם אֵינּוּ צָרִיךְ  
 לְפָרְסָם עֲצָמוֹ וְעִזּוֹת פָּנִים הֵיא לּוֹ אִם גָּלָם. אֶלֶּא שָׁב  
 לְפָנֵי הָאֵל בְּרוּךְ הוּא וּפּוֹרֵט חֲטָאָיו לְפָנָיו וּמִתְנַדֵּה עֲלֵיהֶם  
 לְפָנֵי רַבִּים סְתָם. וְטוֹבָה הֵיא לּוֹ שְׁלֹא נִתְגַּלָּה עֲוֹנוֹ  
 "אֲשֶׁרִי נִשְׁוִי פֶשַׁע כְּסוּי חֲטָאָה" (תהילים לב א) שְׁנֵאָמַר

The penitent who confesses publicly is praiseworthy, and it is commendable for him to let the public know his iniquities, and to reveal the sins between himself and his neighbor to others, saying to them: "Truly, I have sinned against that man, and I have wronged him thus and such, but, behold me this day, I repent and am remorseful". But he, who is arrogant and reveals not but covers up his sins, is not a wholehearted penitent, of whom it is said: "He that covereth his sins shall not prosper" (Prov. 28.13). But that is saying solely concerning sins between man and man, but sins between man and God, the penitent need not make public, on the contrary it would be impudent of him to reveal them. He, however, should repent before God, blessed is he! and before Him he should detail his sins; and then make public confession upon them by simply saying: "I have sinned". Such procedure is, indeed, for his own good, even as it is said: "Blessed is he, whose transgression is forgiven, whose sin is covered (Ps. 32.1).

In another case,<sup>41</sup> which dealt with a Jewish juvenile who threw a rock and a fire-bomb following a prayer assembly for the three boys who were kidnapped in the summer of 2014, the question arose: should this minor be convicted or not? The Probation Service recommended that he not be convicted, and in this framework, they described the process of therapy and rehab that the minor had undergone in various institutions. In a comprehensive judgment, which was handed down on the day before *Yom Kippur* ("the Day of Atonement"), I referred to Maimonides' *Hilkhos Teshuvah* ("Laws of Repentance"), both in

<sup>41</sup> See CrimC 39422-06-14 The State Of Israel v. Ploni Minor (2016) (Isr.).

relation to the actual expression of regret and to the change that a penitent undergoes, and also in relation to his promise not to transgress in the future.<sup>42</sup>

<sup>42</sup> Those are Maimonides' words in Hebrew and the translation into English, from Maimonides *Hilchot Teshuvah* Chapter 2:6-8:

אף על פי שהתשובה והצעקה יפה לעולם. בעשורה הימים שבין ראש השנה ליום הכפורים דרשו ה' בהמצאו". במה " (ישעיה נה ו) היא יפה ביותר ומתקבלת היא מיד שנגאמר דברים אמורים בהחיד אכל צבור כל זמן שעושים תשובה וצווקין בלב שלם הם נענין "פה' אלהינו בכל קראנו אליו" (דברים ד ז) שנגאמר

Although it is ever well to cry out and repent, but during the space of the ten days' time between Rosh ha-Shanah and Yom ha-Kippurim it is exceedingly better, and the supplication is presently accepted, even as it is said: "Seek ye the Lord while He may be found" (Is. 55.6). But that is saying solely concerning an individual, but a community every time they cry out a whole hearted repentance they are answered, even as it is said: "As the Lord our God is in all things that we call upon him for" (Deut. 6.7).

יום הכפורים הוא זמן תשובה לכל לחיד ולרבים והוא קץ מחילה וסליחה לישראל. לפיכך חובים הכל לעשות תשובה ולהתנדות ביום הכפורים. ומצות ודוי יום הכפורים שיתחיל מערב היום קדם שיאכל שמה יחגק בסעודה קדם שיתענה. ואף על פי שהתנדה קדם שיאכל חזר ומתנדה בלילי יום הכפורים ערבית וחזר ומתנדה בשחרית ובמוסף ובמנחה ובנעילה. והיכן מתנדה. יחיד אחר תפלתו ושליח צבור באמצע תפלתו בברכה רביעית:

Yom ha-Kippurim is the time set aside for repentance for all, the individual as well as the many; for it is the goal of exoneration and quittance in Israel. Because thereof all are obliged to make reparation and confession on the Day of Atonement. The commandment to confess on the Day of Atonement obliges everyone to commence it during the afternoon on the ninth day of Tishri, before the evening meal, lest he be sufficated eating his meal before he confess. And, though he did confess before his meal, one is obliged to confess gain during the night prayer of the Day of Atonement, and to repeat the confession during the Morning, Addition, Oblation, and Closing Prayers. At what part of the prayers is the confession made? Every individual delivers it after the silent Benedictions, but the public Reader in the midst of his prayers, after the Fourth Benediction.

הודוי שנהגו בו כל ישראל אכל אנחנו חטאנו (פלנו) והוא עקר הודוי. עברות שהתנדה עליהם ביום הכפורים זה חזר ומתנדה עליהן ביום הכפורים אחר אף על פי שהוא עומד "כי פשעי אני אדע וחסאתי נגדי תמיד" (תהילים נא ה) בתשובתו שנגאמר

In another case, involving a person who committed two offences of robbery and had undergone processes of rehabilitation over a long period, I based my decision on the above rulings of Maimonides, and I was lenient in his sentence.<sup>43</sup>

On the other hand, when it was clear that an accused person was not completely sorry, that he had not internalized the severity of his acts, and it was assessed that he was at risk of committing similar offences in future, then the consideration of freedom of choice militated for harshness.<sup>44</sup>

I will conclude this matter of penitence by citing a dissenting opinion of mine, which related to the future expectation that a person would repent. In that case, a person murdered his young daughter, and the question under discussion was whether he was entitled to keep his photos of the child, or whether he must give them to the child's bereaved mother. In my decision, I ruled that a copy should be made of the photos, so that the defendant – who had already been sentenced to life imprisonment – in the hope that looking at these photos would lead him to repent, could retain one copy.<sup>45</sup>

### C. Regret, Apology and Compensation of the Victim as Part of the Process of Repentance

For Maimonides, it is insufficient for a person to feel regretful or even to express his regret aloud. He must compensate the victim and apologize to him.<sup>46</sup>

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The accepted confession of all Israel contains this verse: "But all of us have sinned", which is the component part of the confession. Sins which he had made confession of one Day of Atonement, one should repeat and make confession on every other Day of Atonement. though he continues to be a penitent, even as it is said: "For I acknowledge my transgressions, and my sin is ever before me" (Ps. 51.3).

*Id.*

<sup>43</sup> See CrimC 23513-03-14 The State Of Israel v. Vitally Scenov (2016) (Isr.). Rehabilitation is very important consideration in imposing punishment, according article 40D of the Israel Penal Law, 5737-1977, (hereinafter Penal Law) as was added on 2012.

<sup>44</sup> See SCrimC 8032/07 The State Of Israel v. Ploni (2008) (Isr.).

<sup>45</sup> See BS 6809/04 Eli Phimpshstain v. The State Of Israel PM (2) 547 (2013) (Isr.).

<sup>46</sup> Maimonides *Hilhot Teshuvah* Chapter 2:9-11:

אין התשובה ולא יום הכיפורים מכפרין אלא על עברות שבין אדם למקום כגון מי שאכל דבר אסור או בעל בעילה אסורה וכיוצא בזה. אבל עברות שבין אדם לחברו כגון החובל את חברו או המקלל חברו או גוזלו וכיוצא בזה אינו נמסל לו לעולם עד שימתן לחברו מה שהוא חייב לו וירצהו. אף על פי שהתנזר לו ממון שהוא חייב לו צריך לרצותו ולשאל ממנו

Based on these words of Maimonides, I ruled that a person who had slandered another must apologize to the injured party.<sup>47</sup>

שמחל לו. אפלו לא הקניט את חברו אלא בדברים צריק לפיסו ולפגע בו עד שימחל לו.  
לא רצה חברו למחל לו מביא לו שורה של שלשה בני אדם מרעיו ופוגעין בו ומבקשין  
ממנו. לא נתרצה להו מביא לו שניה ושלישית. לא רצה מניחו והולך לו ונה שלא מחל  
הוא החוטא. ואם היה רבו הולך ובא אפלו אלה פועמים עד שימחל לו

Neither repentance nor the Day of Atonement atone for any save for sins committed between man and God, for instance, one who ate forbidden food, or had forbidden coition and the like; but sins between man and man, for instance, one injures his neighbor, or curses his neighbor or plunders him, or offends him in like matters, is ever not absolved unless he makes restitution of what he owes and begs the forgiveness of his neighbor. And, although he make restitution of the monetary debt, he is obliged to pacify him and to beg his forgiveness. Even he offended not his neighbor in aught save in words, he is obliged to appease him and implore him until he be forgiven by him. If his neighbor refuses a committee of three friends to forgive him, he should bring to implore and beg of him; if he still refuses he should bring a second, even a third committee, and if he remains obstinate, he may leave him to himself and pass on, for the sin then rests upon him who refuses forgiveness. But if it happened to be his master, he should go and come to him for forgiveness even a thousand times till he does forgive him.

*Id*; Compare. LEVINE, *supra* note 3, at 214, n.46.

אסור לאדם להיות אכזרי ולא יתפייס אלא יהא נוח לרצות וקשה לכעס ובשעה שמבקש  
ממנו החוטא למחל מוחל בלב שלם ובנפש חפצה. ואפלו הצר לו וקטא לו הרבה לא יקם  
ולא יטר. ונהו דרפם של גרע ישראל ולבם הנכון. אבל העובדי כוכבים ערלי לב אינו כן  
אלא (ועברתו) [ועברתו] שמרה נצח. וכן הוא אומר על הגבעונים לפי שלא מחלו ולא  
נתפייסו והגבעונים לא מבגני ישראל המה.

It is forbidden for a person to be cruel and refuse to be appeased. Rather, he should be easily pacified, but hard to anger. When the person who wronged him asks for forgiveness, he should forgive him with a complete heart and a willing spirit. Even if he aggravated and wronged him severely, he should not seek revenge or bear a grudge.

This is the path of the seed of Israel and their upright spirit. In contrast, the insensitive gentiles do not act in this manner. Rather, their wrath is preserved forever. Similarly, because the Gibeonites did not forgive and refused to be appeased, [II Samuel 21:2] describes them, as follows: "The Gibeonites are not among the children of Israel."

<sup>47</sup> This applies to civil cases of slander (AC 13661-10-12 Moshe Bader, Lawyer v. David Benjamin (2013) (Isr.)), and to disciplinary punishment of Advocates (AMLO (TA) 24122-10-12 Avraham Bezalel Beit Halevi V. Israel Bar Association, Tel Aviv Branch (2013) (Isr.)). In detail, see my article, Moshe Drori, *Apologizing in the Laws of Label and Slander and Different Areas of the Law: Application of Jewish Law into Israeli Law*, YUVALAI AHAVA: KOVETZ ZICHARON LEYUVAL HAIMAN, 301-313 (2017).

As opposed to this, when it was proved to me that there was no regret, but only continuing breach of the law, I ruled that there is no room for leniency.<sup>48</sup>

#### D. Conditional Punishment

In *Hilkhot Teshuvah* (“Laws of Repentance”), Maimonides describes a type of institution of conditional punishment, in the sense that a person is not punished immediately for a first offence that he commits. Rather, the punishment takes effect beginning with the third or fourth offence, as Maimonides and Ra’avad – Rabbi Avraham ben David – say in *Hilkhot Teshuvah* (“Laws of Repentance”), 3:5:

שעה ששוקלין עונות אדם עם זכותיו אין מחשבין עליו  
 עון שחטא בו תחלה ולא שני אלא משלישי ואילך אם  
 נמצאו עונותיו משלישי ואילך מרובין על זכותיו אותם  
 שתי עונות מצטרפים ודנין אותו על הכל ואם נמצאו  
 זכותיו כנגד עונותיו אשר מעון שלישי ואילך מעבירים  
 כל עונותיו ראשון ראשון לפי שהשלישי נחשב ראשון  
 שכבר נמחלו השנים וכן הרביעי הרי הוא ראשון: שכבר  
 נמחל השלישי וכן עד סופן ...

When a person’s sins are being weighed against his merits, [God] does not count a sin that was committed only once or twice. [A sin] is only [counted] if it was committed three times or more.

Should it be found that [even] those sins committed more than three times outweigh a person’s merits, the sins that were committed twice [or less] are also added and he is judged for all of his sins.

If his merits are equal to [or greater than the amount of] his sins committed which were committed more than three times, [God] forgives his sins one after the other

...

The following principles may be inferred from Maimonides’ words:

<sup>48</sup> See ATM 604/02 Yeadim Tiyur Ltd. v. The State of Israel, Ministry of Education, Information Center, PM 495,520 (2002) (Isr.) (Citing chapter 2:3).

- a. When a person commits an offence for the first time, he is given a type of “conditional punishment.” The same applies after the second offence. Only after a third offence he is punished, both for the third offence and for the first and second offences.
- b. If the offender underwent a process as a result of which “his merits are equal to his sins,” he is also forgiven for the first and second offences, and he is punished only as of the third offence onwards.

Israeli law lays down a time limit in relation to the activation of conditional imprisonment, namely, that the second offence is committed within the period of the condition prescribed for the first offence, and this period shall be no less than one year and no more than three years.<sup>49</sup>

As opposed to this, in Jewish law, no such limit exists, and neither is there any need for an explicit provision of a type of sentence that warns the accused that he is liable to be punished if he commits the offence again.

Moreover, in Jewish law, *ab initio* the punishment will be conditional only. In contrast, in Israeli law, the court is authorized to impose an actual prison sentence, either by itself or together with a conditional sentence, even for a first offence.

Another difference relates to the number of offences committed after the condition is imposed. In Jewish law, the sentence kicks in “automatically” only the third time (for private offences) or the fourth time (for public offences). In contrast, according to Israeli law, the conditional sentence is activated for a second offence. Only in exceptional cases is it possible under Israeli law to extend the condition and activate it for a third offence.<sup>50</sup> In all events, the conditional sentence cannot be extended, under Israeli law, in such a way that the person is punished for the third offence only, since the conditional

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<sup>49</sup> Section 52(b)(1) of the Penal Law, 5737-1977.

<sup>50</sup> Section 56(a) of the Penal Law.



imprisonment may be extended only once and only in relation to the first offence.<sup>51</sup>

Under Jewish law, when the offence is committed a third time, the person is punished for this third offence and for the two preceding offences, in full.

Under Israeli law, the rule is similar in the sense that if the conditional sentence is activated, it is served consecutively to the sentence for the new offence.<sup>52</sup> However, the court has discretion, “for reasons that shall be recorded,” to decide that the two sentences – that relating to the new offence and activation of the conditional sentence imposed for the first offence – “all or part shall run concurrently,” in the closing words of §58 of the Penal Law.

Over and above these differences, there is a meta-principle applying to both Jewish law and Israeli law. This is the judicial trust that not punishing the accused immediately will entail caution on his part and constitute deterrence, in the expectation that he will be grateful that he was not punished for the offence the first time. However, if and when it emerges that the accused was not worthy of the trust that was placed in him, and he committed another offence (a second offence in Israeli law, a third offence under Jewish law), he is punished both for the first offence and for the new offence.

In this context, it should be stressed that the activation of the conditional sentence is not a new punishment. Rather, it is a decision to implement a punishment that was already imposed for the first offence. All the discussion on this matter in Israeli law is about whether the new offence is indeed included in the formulation of the condition and whether it was committed within the period of the condition. If these conditions are met, not only is the punishment for the new offence to be imposed on the accused, but the conditional imprisonment is also to be activated. Logically, the conditional imprisonment should clearly be consecutive to the punishment for the new offence, but reality dictated that the court be given discretion in

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<sup>51</sup> Section 56(b) of the Penal Law.

<sup>52</sup> The beginning of section 58 of the Penal Law.

this matter too, to decide that the punishment that is activated will be entirely or partially concurrent with the new punishment.<sup>53</sup>

### E. Desecration of the Holy Name as a Consideration for Imposing a Harsh Sentence

The major part of Maimonides' *Hilkhot Teshuvah* ("Laws of Repentance") deals with the benefit and virtue of penitence. However, there is an exception, to be found in Chapter 1: 4 of the said Laws:

בְּמֵה דְּבָרִים אֲמוּרִים בְּשֵׁלָא חֲלַל אֶת הַשֵּׁם בְּשַׁעַר שְׁעָבֵר  
אֲבָל הַמְחַלֵּל אֶת הַשֵּׁם אַף עַל פִּי שְׁעֵשָׂה תְּשׁוּבָה וְהִגִּיעַ יוֹם  
הַכְּפוּרִים וְהוּא עוֹמֵד בְּתְּשׁוּבָתוֹ וּבָאוּ עָלָיו יְסוּרֵין אֵינּוּ  
מִתְּכַפֵּר לוֹ כְּפָרָה גְּמוּרָה עַד שְׁיָמוּת. אֲלֵא תְּשׁוּבָה יוֹם  
הַכְּפוּרִים וְיְסוּרֵין שְׁלִישְׁתָּן תּוֹלֵין וּמִיָּתָה מְכַפֵּרֵת שְׁנֵאָמַר  
(יִשְׁעִיהַ כֹּב) 'וְנִגְלָה בְּאֲזַנֵּי ה' צָבָאוֹת' וְגו' (יִשְׁעִיהַ כֹּב יֵד)  
:'. "אִם יִכְפֹּר הָעוֹן הַזֶּה לָכֶם עַד תִּמְתּוּן" (יֵד)

אַף עַל פִּי שֶׁהִתְשׁוּבָה מְכַפֵּרֵת עַל הַכֹּל וְעֲצָמוֹ שֶׁל יוֹם  
הַכְּפוּרִים מְכַפֵּר. יֵשׁ עֲבָרוֹת שֶׁהֵן מִתְּכַפֵּרִים לְשַׁעֲתָן וְיֵשׁ  
עֲבָרוֹת שֶׁאֵינן מִתְּכַפֵּרִים אֲלֵא לְאַחַר זְמַן. כִּי־צַד. עֲבֵר אָדָם  
עַל מִצְוֹת עֲשֵׂה שֶׁאֵינן בְּהַ כָּרַת וְעֲשֵׂה תְּשׁוּבָה אֵינּוּ זֶן  
(יִרְמִיהַ ג כֹּב) מִשֵּׁם עַד שְׁמוֹחֲלֵין לוֹ, וּבְאֵלוֹ נֶאֱמַר  
שׁוּבוּ בְּנֵי שׁוֹכְבֵי אֶרֶץ מְשׁוּבְתֵיכֶם" וְגו'. עֲבֵר עַל "  
מִצְוֹת לֹא תַעֲשֶׂה שֶׁאֵינן בְּהַ כָּרַת וְלֹא מִיָּתָה בֵּית דִּין וְעֲשֵׂה  
תְּשׁוּבָה, תְּשׁוּבָה תּוֹלָה יוֹם הַכְּפוּרִים מְכַפֵּר, וּבְאֵלוֹ  
כִּי בְיוֹם הַזֶּה יִכְפֹּר עֲלֵיכֶם". עֲבֵר " (וִיקָרָא טז ל) נֶאֱמַר  
עַל כָּרַתוֹת וּמִיָּתוֹת בֵּית דִּין וְעֲשֵׂה תְּשׁוּבָה, תְּשׁוּבָה יוֹם  
הַכְּפוּרִים תּוֹלֵין וְיְסוּרֵין הַבָּאֵין עָלָיו גּוֹמְרֵין לוֹ הַכְּפָרָה.  
וְלְעוֹלָם אֵין מִתְּכַפֵּר לוֹ כְּפָרָה גְּמוּרָה עַד שֶׁיָּבֹאוּ עָלָיו  
וּפְקֻדָּתֵי בְּשִׁבְט " (תְּהִלִּים פט לג) יְסוּרֵין, וּבְאֵלוֹ נֶאֱמַר  
בְּשַׁעַם וּבְנִגְעֵים עוֹנֵם". בְּמֵה דְּבָרִים אֲמוּרִים בְּשֵׁלָא חֲלַל

<sup>53</sup> See, in detail, my two decisions: IMLO 10248-04-16 Baba Mazen v. Israel Bar Association, Haifa Branch (2017), para. 255-265; IMSM 25813-04-17 Allona Shpira v. Civil Service Commission (2017).

אֶת הַשֵּׁם בְּשֵׁעָה שֶׁעָבַר אֶבֶל הַמַּחֲלָל אֶת הַשֵּׁם אַף עַל פִּי  
 שֶׁעָשָׂה תְּשׁוּבָה וְהִגִּיעַ יוֹם הַכַּפּוּרִים וְהוּא עוֹמֵד בְּתְּשׁוּבָתוֹ  
 וּבָאוּ עָלָיו יְסוּרֵינִי אֵינּוּ מִתְּכַפֵּר לוֹ כַּפָּרָה גְּמוּרָה עַד  
 שְׂיָמוּת. אֲלֵא תְּשׁוּבָה יוֹם הַכַּפּוּרִים וְיְסוּרֵינִי שֶׁלְּשָׂתָן  
 וְנִגְלָה " (ישעיה כב יד) תּוֹלִין וּמִיִּתָּה מְכַפֶּרֶת שֶׁנֶּאֱמַר  
 אִם יִכַּפֵּר הָעוֹן " (ישעיה כב יד) 'בְּאֲזָנַי ה' צָבָאוֹת" וְגו'  
 "הִזָּה לָכֶם עַד תִּמְתּוּן":

I invoked this ruling as a consideration militating for a harsh sentence in relation to students of a well-known Yeshivah, who stole a Torah scroll overseas and brought it to Israel.<sup>54</sup>

#### F. The Effect of the Process of Repentance on the Return of a Sex Offender to the Crime Victim's Locality

The Return of a Sex Offender to the Crime Victim's Locality Law, 5765-2004, as well as the Public Protection from Sex Offenders Law, 5766-2006, prescribe the restrictions imposed on sex offenders and the authority of the court to subject them to supervisory measures. In the framework of a decision that I handed down on the matter, I referred to the fact that in his *Hilkhot Teshuvah* ("Laws of Repentance"), Maimonides writes that one of the paths of repentance is for a person to exile himself from his home, since the exile atones for his sins.<sup>55</sup>

#### IV. CONCLUSION

Israel, as a Jewish state, can and should apply the Jewish heritage in her legal system. My duty as a judge was to do it. As I described in this article, in several judgements of the Israeli Supreme Court and in many of my decisions, applying Maimonides' *Hilkhot Teshuvah* – Laws Of Repentance In The Criminal Legal System Of The State Of Israel, contributes to better understanding the law, and can inspire other legal systems.

<sup>54</sup> See CrimA 2341-10-12 Meir Mualem v. The State of Israel (2012).

<sup>55</sup> See BS 8485/09 Plonit v. Ploni 182-195 (2009) (Isr.) (citing Maimonides *Hilchot Teshuvah* chapter 1:4).