# Academic Thesis

# *Taqqanat ha-shavim*
# (Rehabilitation of the Repentant Offender):
# From M. *Gittin* to our days

*in part completion of the requirements*
*for the ordination as a Rabbi*

*Submitted to the*
**Abraham Geiger College**
*at the*
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# Preliminary parts

## 1 – Notes on Transliteration:

### 1.1 – Principles:

After many hesitations, we found what appeared to us as the best model of transliteration in Menachem Kellner's work on Maimonides and mysticism[1]. His reservations towards a fully scientific system of transliteration seemed to us perfectly reasonable, and perfectly reflect consideration of the type of work we propose here, in terms of its content, purpose, and readership. We therefore made ours the fair and clear principles that he proposed in his book.
The system advocated here reflects a broad approach to transcription, rather than the narrower approaches found in the *Encyclopedia Judaica* or other systems developed for text-based or linguistic studies. As this *exposé* is not primarily philological in its character, our aim has been to reflect the pronunciation prescribed for modern Hebrew, rather than the totally scientific spelling of Hebrew word structure; we then mostly used conventions that are generally familiar to the English-speaking reader.
Following the convention of using conventions familiar to the majority of readers, however, transcriptions that are well-established will be retained even when they are not fully consistent with the transliteration system adopted.

### 1.2 – Transliterations:

In accordance to this general approach, such will be our transliteration of the various grammatical phenomena:

● No attempt is made to indicate the distinction between *'alef* and *'ayin*. They are indicated by an apostrophe only in intervocalic positions where a failure to do so could lead an English-speaking reader to pronounce the vowel-cluster as a diphthong.

● Likewise, no distinction will made between *tet* and *tav*, *sin* and *samekh*,

[1] Menachem Kellner, *Maimonides' Confrontation with Mysticism*, The Littman Library of Jewish Civilization, Oxford – Portland, Oregon, 2007, p. xviii-xix.

● Contrary to the usual English usage, we distinguished between the *qof* and the *kaf*; we will then write *taqqanat* and not *takkanat*.

● Likewise, the distinction between *ḥet* and *khaf* has been retained, using [*ḥ*] for the former and [*kh]* for the latter; the associated forms are generally familiar to readers, even if the distinction is not actually borne out in pronunciation.

● For the same reason the final *heh* is indicated too.

● The *dagesh* is not indicated except where it affects pronunciation.

● The *sheva na* is indicated by an [*e*] -- *periqat ol*, *reshut* – except, again, when established conventions dictates otherwise.

● The *yod* is represented by [*I*] when it occurs as a vowel (*bereshit*), by [*y*] when it occurs as a consonant (*yesodot*), and by *yi* when it occurs as both (*yisra'el*).

■ Other "regular" consonants:

● *Tzadi* will be rendered by [*tz]*.
● B*et* by [*b]*.
● *Vav* by [*v]*.
● Ḥ*et* par [*ḥ]*.
● *Peh* by [*p]*, and without a *dagesh* by [*f*].
● *Shin* by [*sh]*.

### 1.3 -- Other grammatical phenomena -- quotations:

● The *dagesh ḥazaq* is indicated by a double letter.

● The connectors (*ha-* ; *ve-*) have been made salient in our transcriptions and will be linked to the substantive they determine by a dash

● Names have generally been left in their familiar forms, even when this is inconsistent with the overall system.

● Hebrew words will be written in slanting characters, with no capital letters (except in the context of a book title, or the title of an article). When using a Hebrew word, its English translation will be given in inverted comma.

● We asked ourselves the question if, whenever we quoted a Hebrew word we also had to give its written form in square Hebrew characters. Our adopted policy has been that whenever the quotation has a certain length, we should certainly give the quotation in square Hebrew characters; when it does not exceed a few words, transliteration is enough.

● One word on our English. As the writer of these lines is not a native English speaker, we apologize in advance for any disturbance due to a lack of clarity. Unfortunately we did not have the time to have this document read, checked, and corrected by a native English speaker, our drama being more than often our awareness that something must be wrong in a given sentence, without being able to correct it…
As for the style, we probably imported some of our French literary habits, which will undoubtedly produce, here and there, some strange syntax collages and an overall flowery, if not baroque, kind of English… Our sole hope is that occasional perplexity, or embarrassed smiles, will not prevent the reader's understanding of the subject.
In any case, we just ask for the reader's kindness, an appropriate wish, we hope, in accordance with this subject on repentance…

# 2 – Abbreviations:

## 2.1 – Principles:

We have followed a few classical references, scholarly works we particularly praise and which served to us as a model.
Here they are:

● <u>For general abbreviations</u>:
-- *Encyclopaedia Judaica*, Keter, Jérusalem, 1971, p. 73.

● <u>For Biblical and Talmudic references</u>:
-- Ismar Elbogen, *Jewish Liturgy. A Comprehensive History*, trad. Raymond Scheindlin, The Jewish Publication Society, Philadelphia, 1993, p. xix-xxi.
-- Menachem Elon, *Jewish Law. History, Sources, Principles. Ha-Mishpat Ha-Ivri*, Volume IV, trad. Bernard Auerbach et Melvin J. Sykes, The Jewish Publication Society, Philadelphia, Jerusalem, 5754 / 1994.

-- Isaac Klein , *A Guide to Jewish Religious Practice*, The Jewish Theological Seminary of America, p. xi-xiv.

● For Rabbis names and traditional names of places:
-- *Encyclopaedia Judaica*, Keter, Jérusalem, 1971.

### 2.2 – Current abbreviations:

| | |
|---|---|
| *Ad loc.* | *ad locum*, "at the place" |
| b. | born; *ben, bar* |
| B.C.E. | Before Common Era (= B.C.) |
| C.E. | Common Era (= A.D.) |
| c. | circa |
| *Cf.* | *confer*, compare |
| Chap., chaps. | Chapter, chapters |
| d. | died |
| ed. | Editor, edited |
| *e.g.* | *exempli gratia*, "for example" |
| f., ff. | and following page(s) |
| *ibid.* | *ibidem*, "in the same place" |
| lit. | literally |
| *loc. cit.* | in the place cited |
| n. | note |
| no., nos. | number(s) |
| *op. cit.* | *opere citato*, "in the previously mentioned work" |
| p., pp. | page(s) |
| R. | Rabbi or Rav (before names) |
| *s.v.* | *sub verbo*, *sub voce*, "under the (key) word" |

### 2.3 – Biblical References:

| | | | |
|---|---|---|---|
| *Gen.* | Genesis | *Deut.* | Deuteronomy |
| *Ex.* | Exodus | *Josh.* | Joshua |
| *Lev.* | Leviticus | *Judg.* | Judges |
| *Num.* | Numbers | *I Sam.* | I Samuel |

| | |
|---|---|
| *II Sam.* | II Samuel |
| *I Kgs.* | I Kings |
| *II Kgs.* | II Kings |
| *Is.* | Isaiah |
| *Jer.* | Jeremiah |
| *Ezek.* | Ezekiel |
| *Hos.* | Hosea |
| *Joel* | Joel |
| *Amos* | Amos |
| *Obad.* | Obadiah |
| *Jonah* | Jonah |
| *Mic.* | Micah |
| *Nah.* | Nahum |
| *Hab.* | Habakkuk |
| *Zeph.* | Zephaniah |
| *Hag.* | Haggai |
| *Zech.* | Zechariah |
| *Mal.* | Malachi |
| *Ps.* | Psalms |
| *Prov.* | Proverbs |
| *Job* | Job |
| *S. of Songs* | Song of Songs |
| *Ruth* | Ruth |
| *Lam.* | Lamentations |
| *Qoh.* | Qohelet (Ecclesiastes) |
| *Esth.* | Esther |
| *Dan.* | Daniel |
| *Ezra* | Ezra |
| *Neh.* | Nehemiah |
| *I Chron.* | I Chronicles |
| *II Chron.* | II Chronicles |

### 2.4 – Talmudic References:

| | |
|---|---|
| *Avot* | Avot |
| *A.Z.* | Avoda Zara |
| *B.B.* | Bava Batra |
| *B.M.* | Bava Metzia |
| *B.Q.* | Bava Qama |
| *Bekh.* | Bekhorot |
| *Ber.* | Berakhot |
| *Betzah.* | Betzah |
| *Bik.* | Bikurim |
| *Dem.* | Demai |
| *Deut. Rab.* | Deuteronomy Rabba |
| *Ed.* | Eduyot |
| *Eruv.* | Eruvin |
| *Ex. rab.* | Exodus Rabba |
| *Git.* | Gittin |
| *Gen. Rab.* | Genesis Rabba |
| *Ḥagiga* | Ḥagiga |
| *Ḥal* | Ḥalla |
| *Hor.* | Horayot |
| *Kel.* | Kelim |
| *Ket.* | Ketubot |
| *Kil;* | Kilaim |
| *Lev. Rab.* | Leviticus Rabba |
| *Ma.* | Ma'aserot |
| *Mak.* | Makot |
| *Makhsh.* | Makhshirim |
| *Meg.* | Megilla |
| *Me.* | Me'ila |
| *Mekhilta* | Mekhilta de-Rabbi Yishmael |
| *Men.* | Menaḥot |
| *Mid.* | Middot |

| | |
|---|---|
| *Miq.* | Miqva'ot |
| *M.Q.* | Mo'ed Qatan |
| *Neg.* | Nega'im |
| *Nid.* | Nidda |
| *Num. Rab.* | Numbers Rabba |
| *Ohal.* | Ohalot |
| *'Orla* | *'Orla* |
| *Par.* | Parah |
| *Pe.* | Pe'a |
| *Pes.* | Pesaḥim |
| *Qid.* | Qiddushin |
| *R.H.* | Rosh hashana |
| *Sanh.* | Sanhedrin |
| *Shab.* | Shabbat |
| *Shevu.* | Shevu'ot |
| *Sheq.* | Sheqalim |
| *Sifre Deut.* | Sifre to Deuteronomy |
| *Sifre Num.* | Sifre to Numbers |
| *Sota* | Sota |
| *Sik.* | Sukkah |
| *Ta.* | Ta'anit |
| *Tam.* | Tamid |
| *Tem.* | Temurah |
| *Ter.* | Terumot |
| *Toh.* | Toharot |
| *T.Y.* | Tevul Yom |
| *'Uqtzin* | 'Uqtzin |
| *Yev.* | Yevamot |
| *Zav.* | Zavim |
| *Zer.* | Zera'im |
| *Zev.* | Zevaḥim |
| *Naz.* | Nazir |
| *Ned.* | Nedarim |

● B.T. = *Babylonian Talmud* (*Bavli*)

● J.T. *Jerusalem (Palestinian) Talmud* (*Yerushalmi*)

● M. = *Mishnah*.

● T. = *Tosefta*.

### 2. 5 – Medieval texts:

| | |
|---|---|
| M.T. | *Mishneh Torah* |
| Sh. Ar. | *Shulkhan Arukh* |
| O.H. | *Oraḥ Ḥayyim* |
| Tur | *Arba'a Turim* |
| Y.D. | *Yoreh de'ah* |

## 3 – Presentation of our subject:

*Taqqanat ha-shavim* is not a clear and definite domain of the law as could be isolated, for example, “the law of torts”, “the laws of obligation” or “family law”. To begin with, the Hebrew expression is difficult to translate, and the usual “rehabilitation of the offenders”, or “rehabilitation of the criminals” generally thought to do justice to the Hebrew actually reduce its meaning to a particular domain which, without being false, is in fact but one of the many locations where its underlying principle of repentance, as we will see, led the Sages in their legal thinking.

In our opinion, *taqqanat ha-shavim* is a lot more than a particular sub-part of Jewish law; it is rather, as we will try to demonstrate, a line of reasoning, and perhaps even more: a spirit, a certain turn of the mind in the way of ruling, a profound ethical value which, if never losing its technicity and therefore its applicability in real legal situations, pervades the whole scope of Jewish legal thinking.

What we will try to do in the present work is first to explain the meaning of *taqqanat ha-shavim* in the context of its inception, and then follow the extraordinary history of its developments and complexifications -- with the savoury diversity of its day-to-day cases, be it under Ashkenazi latitudes, or under sefardi latitudes, up to its reception in modern Israeli legislation.

As for its inception, the concept of *taqqanat ha-shavim* starts almost furtively, at the end of a *mishnah* in *Gittin* 5:5, where the expression “*taqqanat ha-shavim”* appears in the frame of the rulings regarding the returning of stolen property. Our subject, therefore, has admittedly a “place of birth”, but as we will see, it soon branches out in the later *pesiqah* (“legal decisions”) in all kinds of directions, pervading a wide scope of domains of the Jewish law.

In this regard, this study could also be defined as dealing with the attitude of Jewish sources to a basic area of human rights: the rights of an offender once he has undergone his punishment.

Starting with the idea that theft or robbery is a breach in one’s relationship to God but also a breach of our relationship with society at large, the question is then the following: how are we

to imagine that this break can be reconstructed and healed again in a sound and socially acceptable link?[2]

The attitude that was thought suitable by the rabbis toward sinners who wish to repent is the principle of following the ways of the Almighty. As such, the Sages who ruled that we should always accept penitent sinners relied on the biblical passage on which God calls on sinners: "Return, my sons" (*shuvu vanim shovavim*)[3].

The process of reconciliation with God encompasses a number of steps and components, but the general tendency, if not the basis of the legal thinking at work is definitely "not to close the door in the face of the penitent", and therefore make any effort to facilitate his or her repentance.

As usual when dealing with Jewish law, and because everything has been "given by one Shepard"[4], the purely ethical and spiritual aspects of repentance, which represents the internal, psychological and personal side of the subject of *taqqanat ha-shavim*, cannot be separated from its various social dimensions, be it money, personal status, the working sphere or the honour of the community (*kevod ha-tzibbur*).

In this line of thought, *taqqanat ha-shavim* can be said to tackle with three wide perspectives. The first concerns the vast domain of repentance, its relation with intention, or with expiation, and also raises the question of which proper way repentance has to be expressed and channelled; if we were to sum it up with a philosophical bent, we could say it addresses the whole question of determining how an internal, mental phenomena can be socially expressed and be deemed to be efficient.

A second range of preoccupations, solidly anchored in the vivid and sometimes dramatic whirlwinds of human society, deals with the legal rights of the punished offender to take up his career once again, and to be restored to his previous occupation and position. Does the fact that an individual has committed some wrongdoing have to remain attached to him forever and seal his social fate? Should society isolate him or fully accept him back?

Last but not least, a third aspect of the question concerns the right of information on an offender's past. Though this aspect will not be given equal weight in our treatment of the traditional sources of the *rishonim* or even the *aharonim* – mostly because the very notion of

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[2] Menachem Elon, *Jewish Law. History, Sources, Principles. Ha-Mishpat Ha-Ivri*, Volume IV, trad. Bernard Auerbach et Melvin J. Sykes, The Jewish Publication Society, Philadelphia, Jerusalem, 5754 / 1994, vol IV, p. 1708.

[3] *Jer.* 3:14.

[4] *Qoh.* 12:11.

"information" as we know it remains unknown before the 20th century – we will see all its importance in the modern Israeli legislation.

As for our plan in the present *exposé*, it will follow the lineaments according to what we just said.

We will start by presenting and explaining the founding mishnah of M. *Gittin* 5:5, where the whole subject is kicked off, and through some detour by the laws of flogging and retrenchment (*karet*), which entail an essential ethical concept for our subject -- the principle that once the offender has been flogged he is to be considered as "your brother" --, we will follow the endeavour of the Sages in their allowing penitence to change the status of the offender: yesterday ostracized as an evil doer, today "our brother".

We will then turn to the subsequent rulings by the *rishonim* and the *aharonim*, who somewhat restrict the potential infinite extension of the principle of *taqqanat ha-shavim*, and facing real – and sometimes very difficult -- cases, try to make it workable at the level demanded by society.

In this perspective, three main horizons were figured out by the rabbis as a limiting criterion of reasoning, and consequently, a domain of thought we will cover in the following order: first the characteristics of the offense committed, secondly the nature of the office previously held by the offender, and coveted by him after his punishment. The third aspect, a little different in its nature, and not necessarily working in the direction of limiting the offenders' claims, is the whole question of the restoration of confidence.

As is clear from the very nature of the subject, we will constantly oscillate and try to keep the tension between the internal, intimate and personal pole of repentance and the external, public and relational concerns of society.

We therefore thought adequate, before immediately starting with our foundational *mishnah*, to proceed with a exposition of three essential notions for our subject, the three of which will set for us the general and proper frame of Jewish social ethics, without which some very far-reaching – and sometimes surprising—aspects of *taqqanat ha-shavim* could not be understood: social justice, repentance and punishment.

# 1 / Three perspectives on Jewish Social Ethics:

As we already mentioned, we assume it will be helpful to dispose of some background insights on the Jewish conception of social ethics. It does not enter in our intention to present a full account of the question, but only to provide a general frame and some minimal elements without which some effects of *taqqanat ha-shavim* would be very surprising, if not unintelligible.

The general notions of social justice, repentance and punishment will be each in turn examined and expounded with a back-mind thought towards our subject. Let us begin with the broader context: social justice.

## 1.1 – Social Justice:

*"Justice, justice shall you pursue"*[5] is one of the major *Torah's* principles. But probably as much significant is that this principle appears in a context where a few verses earlier is registered *Torah's* demand for the institution of courts wherever people dwell, verses also warning against prejudice in judgment. One of the first lessons we can draw from this is that by mixing substantive issues with procedural ones, the *Torah* very clearly indicates its awareness that the two are inextricably intertwined: that procedures bears on substance, in the same manner that substance demand specific procedural rules[6].

This constant intertwining between "pure values" and practical procedures is probably one of the most fundamental aspects of Jewish social ethics, and certainly one to be remembered when we will specifically deal with *taqqanat ha-shavim*.

Let us try now to break down this general notion of social justice in its main components.

### 1.1.1 – The Emphasis on the Worth of the Individual:

The first source for the Jewish ideal of a just society and social justice is to be found in the Biblical perception of the human person as created in "The Divine Image", and as the source of his inalienable dignity[7].

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[5] *Deut.* 16:20.

[6] Eliott N. Dorff, *To Do the Right and the Good. A Jewish Approach to Modern Social Ethics*, The Jewish Publication Society, Philadelphia, 2002, p. 114.

[7] Rabbi David Rosen, *Social Justice in the Jewish Tradition*, at www.rabbidavidrosen.net/articles.htm, September 2003, p. 1.

Worthy of note is that this creation was for the Sages not just a fact, a given, but more than that, an expression of God's love. As the *Talmud* puts it[8]:

חביב אדם שנברא בצלם; חיבה יתרה נודעת לו שנברא בצלם, שנאמר "כי בצלם אלוהים, עשה את האדם"

> *"Beloved is man, for he was created in the image of God; but [it was by] a special love that it was made known to him that he was created in the image of God, as the Torah says, "For in the image of God He made man"*[9]."

Nevertheless, aware that the infinite value of sanctity vested in the individual could potentially be interpreted as a green line for an unbridled individualism, the rabbis were prompt to check and balance it with the non-less infinite requirement of equality. In the famous discussion in the *Midrash**[10] on "the most important principle in Scripture", for example, as Rabbi Akiva[11] declares that it is the commandment "to love's neighbor as oneself"[12], Ben Azzai[13] completes this position by insisting that the most important principle is the teaching that every human person is created in the Divine Image, and thus any act of misbehavior against another human person is an act of misbehavior against God Himself[14].
In other words, the sanctity of all human life and its inalienable dignity were not considered as a goal or an achievement in themselves, but as a starting point, a foundational stone for the vision of social justice in Judaism: the absolute equality of all members of society.

As for the balance between uniqueness and equality, this paradox was well expressed by the Talmudic saying that *"A man strikes many coins from one die and they are all alike. The Holy One, blessed be He, however, strikes every person from the die of the first man, but no one resembles another."*[15]

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[8] *Pirqey Avot* ["Ethics of the Fathers"] 3:18.
[9] *Gen.* 9:6.
[10] Words followed by an asterisk are expounded in the glossaries; cf. p. 181*sq*.
[11] R. Akiva ben Joseph (c. 50 – 135), most of the time simply named Rabbi Akiva, one of the foremost rabbi of 4th generation of the *tannaim* (110-130).
[12] *Lev.* 19:18.
[13] Simon ben Azzai (early second century), generally referred as Ben Azzai, 4th generation of the *tannaim*.
[14] *Gen. Rabbah* on *Gen.* 5:1; *Sifra* on *Lev.* 19:18.
[15] *Sanh.* 38a; *Ber.* 17a. See also R. Ben Zion Bokser, *The Wisdom of the Talmud*, Evinity, Santa Cruz, CA, 2009 [first edition, 1951], p. 104.

This leads us to a second crucial element of the Jewish social *Weltanschauung*, along with equality, namely the principle that each individual has the responsibility, the obligation to respond, in one's own unique way, to the ethical demands that arise in the course of his life.
The *Torah* and all the subsequent rabbinical thinking then consider that the individual has the ability to make choices, to discern between good and bad and to make moral choices, and to act on them[16]. The whole *Torah*, in the view of the Sages, only made sense if we have the freedom to obey or disobey. This, of course, provided a very base for the notion of repentance.

## 1.1.2 -- A Community-Oriented individual:

The Biblical basis for the idea of social justice found also its expression in the concept of Covenant. The Covenant made with the Israelites at Mount Sinai is a confirmation and an expansion upon those previously made with the Patriarchs, and reflects the special duty of the people of Israel to testify to the Divine Presence in the world. As such, this Covenant reflects the intrinsic value of both the individual and the community[17] standing in relation to God. This entails finding a creative balance between the two at the level of the individual, between his rights and duties[18].

We touch here a very important point of the political responsibility theory in Judaism, which may sometimes be difficult to understand from the point of view of the liberal political theories of the 17th and the 18th century[19] – those which precisely gave their shape and spirit to our liberal states and societies in the Western World--, namely, the fact that the source and purpose of an individual's obligation, in Judaism, is not the governed (as a result of a pact to get out of the so-called "state of nature"), but God, as the source of all commandments.
The individual is then totally defined by his or her membership in the group, and this membership is not voluntary[20] and cannot be terminated at will. Thus, in Jewish thought the community has not only practical but also theological status.

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[16] Eliott N. Dorff, *op. cit.*, p. 10.
[17] A variety of terms are used in the *Torah* to express the idea of the collective. From the *"'am"* ("people") whose crossing of the Red sea unites individuals around the idea of *"'im"* ("with"), we pass to *"'edah"*, constituted by the common spiritual experience of the *"'edut"* ("testimony") at Mount Sinai, and then, since the time of Moses' *"Vayaqhel"*, to the notion of *"qehilah"* ("assembled community"), structured by and around the spiritual project of the construction of the *mishkan*.
[18] Rabbi David Rosen, *op. cit.*, p. 20.
[19] We particularly refer here to the political systems of T. Hobbes (1588-1679), J. Locke (1632-1704) and J.-J. Rousseau (1712-1778).
[20] Except for the very significant and far-reaching possibility of conversion.

Interesting is, then, the balance that results from this general frame between duties and rights. A duty is something someone basically owes to someone else. Hence that latter person has a right to expect the performance of the former's duty, and even, as D. Novak mentions it[21], even if there are times when that duty is not or cannot be legally sanctioned by any human society[22]. Why is that? Because what cannot always be sanctioned by a human society can always be sanctioned by God. The universe itself is viewed as the greatest social context for the operation of rights and duties, and this universe is ruled by God, however abstruse that rule might be to human beings sometimes.

This of course entails a rather idiosyncratic vision of the social arena, where the indissoluble link between the individual and the group means that each individual is responsible for every other[23]. As the *Talmud* puts it:

כל מי שאפשר למחות לאנשי ביתו ולא מיחה נתפס על אנשי ביתו באנשי עירו נתפס על אנשי עירו בכל העולם כולו נתפס על כל העולם כולו

> *"Whoever is able to protest against the wrongdoings of his family and fails to do so is punished for the family's wrongdoing. Whoever is able to protest against the wrongdoings of his fellow citizens and fails to do so is punished for wrongdoing of the people of his city. Whoever is able to protest against the wrongdoings of the world and fails to do so is punished for the wrongdoing of the world[24]."*

At the same time, this communal view does not swallow up the individual's identity[25], and even serves as a regulator for the inevitable excesses deriving from the constant *massa u-matan* ("trade-off") between human beings.

It is thus an inevitable and frequent fact that social process brings individuals into a position where they exercise power over some others. In the social theory of Judaism, it then precisely

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[21] D. Novak, *Jewish Social Ethics*, Oxford University Press, New York, 1992, p. 3-35.

[22] See B. *Baba Kama* 93a and *Tos.*, *s.v. de-'ika*, where it is emphasized that divine justice for a violation of one's rights may be sought in the absence of a human means to rectify the wrong. For the notion that divine justice comes quicker for those who do not hesitate to protest to God the violation of their rights, see *ibid.*, *Tos.*, *s.v. eḥad* on *Ex.* 22:22–23.

[23] *Mishneh Torah*, H. *Teshuvah* 3:4.

[24] *Shab.* 54b.

[25] Cf. Milton R. Konvitz, Judaism and the American Idea, Schoken, New York, 1980, p. 143, 150 ; cf. also Eliott N. Dorff, *op. cit.*, 2002, p. 21.

becomes the task of the community to develop such instruments of social control as will rationalize that power with moderation and justice[26].

This concern we can see expressed in the Talmudic legislation regulating wages and hours of labour, for example, or in commodity prices and rates of profit. It was deemed similarly that the task of the community was to provide facilities for promoting public welfare, such as public baths, adequate medical services, and convenient educational facilities for all[27].

Last but not least, an important manifestation of the sanctity of the individual over the group is the overpowering emphasis that the Sages put on the rule of law[28]. It was determined that Kings or high-ranking persons in the society do not determine the rules and must abide, like anybody else, to the law. This point will prove crucial for our subject and the question of what attitude to adopt regarding the principle of *taqqanat ha-shavim* when the offender is a King or a high-status individual such as the leader of a community.

### 1.1.3 -- Human Nature, Forgiveness and Law:

The Jewish conception of mankind, as we saw, is that of a unity deriving its character from a common origin and a common destiny. Human behaviour may be infinitely varied, but human nature which underlies it is essentially the same. Having said that, the rabbis developed a very realistic vision as regards human nature, acknowledging its dual and constant impulses, good and evil, as natural equipment for life.

If one probes sufficiently, as a Talmudic saying goes, no wonder will one find *"even the greatest of sinners abound in good deeds as a pomegranate abounds in seeds. On the other hand, the greatest of saints have their share of moral imperfection…"*[29]

This probably accounts for a general trend in the Jewish tradition to be confident that God will forgive both individual Israelites and the people of Israel as a whole. Does not *Torah* proclaim that God Himself "forgives iniquity, transgression, and sin?"[30]

This seminal phrase we will have to remember in the debate on repentance (*kapparah*)[31].

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[26] Ben Zion Bokser, *The Wisdom of the Talmud*, by Ben Zion Bokser, Evinity, Santa Cruz, CA, 2009 [first edition, 1951], p. 102-103.
[27] *Yev.* 89b; *B.B.* 8b; *Sanh.* 17b.
[28] Eliott N. Dorff, *op. cit.*, p. 24.
[29] *Eruv.* 19a ; *Sanh.* 101a.
[30] *Ex.* 34:7.
[31] Cf. Part 3.5.3, p. 123-24, and Part 3.5.4, p. 124-30.

The tight relationship between law and social life is certainly another distinct feature of Jewish social ethics, and as we said in the beginning, accounts for a basic intuition that substantive, content-loaded values cannot be artificially separated from their procedural implementation. As such, Jewish society, probably more that any other society, went all the way to put its intellectual and spiritual efforts to translate its theological insights into legal terms and a fully developed juridical system.
This global feature has an interesting correlative at the individual level: as D. Novak mentions, Jewish covenantal tradition, with its attendant legal system of *Halakhah**, is the best example of a historical community where the correlation of rights and duties and duties and rights seems to be without exception[32].

At the same time, a strong "reality principle" also pervades Jewish legal thinking, with awareness that justice can never be fully captured in law. The notion of *naval bi-reshut ha-Torah* ("scoundrel with the sanction of the *Torah*") provides a striking image to this awareness.
Consequently – this is of tremendous impact for our subject –, and although the basic biblical assumption seems to be that Law provides in itself a sufficient basis for a good life and goodness, the rabbis added a further requirement and declared that on some occasions people are obliged to act *lifnim min-shurat ha-din** ("beyond the letter of the law")[33].
The principle of *taqqanat ha-shavim*, as we will see, offers a perfect parallel to this concern.

What is meant by all this, and this again will prove central in the discussions of the rabbis and *posqim** ("decisors", "adjudicators"), is that forgiveness and penitence are not only individual acts made towards another individual. It is much more than a psychological, internal and individualistic phenomenon, but constitutes a shared, public and central element of the general social scheme and agenda of Judaism.
As forgiveness is viewed as a critical part of ongoing human interactions, much thought was given as to the proper way to accomplish it. This, for example, imposes a reciprocal obligation on the wronged party: He or she, when asked for forgiveness, must forgive. Injured parties who refuse to do so even when asked three times in the presence of others are, in turn,

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[32] Cf. D. Novak, *op. cit.*, p. 25. See also D. Novak, *The Election of* Israel, Cambridge University Press, Cambridge, 1995), xvii, n. 2.
[33] *Bava Metzia* 83a ; *Mekhilta de-Rabbi Yishmael*, "Amalek", "Yitro", on *Ex.* 18:20 (H. S. Horovitz and Israel Abraham Rabin (eds.), Bamberger & Wahrman, Jerusalem, 1960), p. 198, parashah 2.

deemed to have sinned[34]. They are called cruel and are not regarded as descendants of Abraham; for ever since Abraham forgave Abimelech, forgiveness has been a distinguishing mark of Abraham's descendants, a special gift God bestowed upon them[35].
We don't want to enter into more details now, but the general conception emerging from the lines above provide a sufficient frame, we hope, to characterize the "place of birth" of the *taqqanat ha-shavim* principle.

### 1.1.4 -- Punishment:

Here again, we won't fully enter the discussion, inasmuch as that we will dedicate a specific part to this subject[36]; be it enough, though, to say for the moment that Judaism considered with much seriousness the rules under which, as a community, it had to and could punish its members[37].
One clear expression of communal distaste for an act or transgression was the penalty of *ḥerem** ("excommunication"), in which the very essence of the punishment was that the community severed its link with a particular person, the defined as no longer fit to live within it.
On the other hand – and we see, in this whole chapter, how the existence of a particular idea is immediately matched by its counterpart--, once an offender has paid its penalty, Jewish law requires that the community take him back into the community wholly. "When the parties to a suit are standing before you", Judah ben Tabbai said[38], "you should regard them both as guilty; but when they have departed from you, you should regard them as innocent, for they have accepted the verdict."[39]
In this regard, Jewish law demands that forgiveness be complete, and posit a very interesting link between repentance and punishment which we will have to investigate[40].

These different aspects of Jewish social justice, as we tried to demonstrate, all point to a general conception that while wrongs are to be redressed, and as such punished, society and

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[34] *B. Q.* 92a ; *Tanḥuma*, *Hukkat* 19; M.T., *H. Teshuvah* 2:10.
[35] Eliott N. Dorff, *To Do the Right and the Good*, p. 189 ; *Gen.* 20:17 ; *Betzah* 32b; *Yev.* 79a; *Numbers Rabbah* 8:4.
[36] See Part 1.3, p. 35-52.
[37] Eliott N. Dorff, *op. cit.*, p. 190.
[38] Judah ben Tabbai (first century B.C.E.) lived in the time of Alexander Yannai and was one of the *zugot* ("pairs"), the colleague of Simeon b. Shetaḥ.
[39] M *Avot* 1:8.
[40] See Part 3.5.4 et 3.5.5, p. 124-34.

its fundamental principle of *'arvut* ("communal responsibility of one towards the other"), as derived from God's will, must make far-reaching and even bold efforts in order to mend human ties through forgiveness and reconciliation.
And as we just briefly depicted how this ultimate goal was embodied in a general frame of mind, we have now to turn more specifically towards the phenomena of repentance itself.

## 1.2 – Repentance:

Since we have dealt with the general conception of society and *'arvut* ("communal responsibility") out of which stemmed the constant Rabbi's seeking of repairing human wrong-doings through forgiveness and reconciliation, our goal now will be to say a little more on repentance (*teshuvah*) itself.
Though the idea of repentance occurs in different forms in most religions, it only finds its true meaning in a monotheistic faith that sees the relationship between God and man as primarily ethical in nature, and view God's ethical claim upon the individual as absolute.
As for the term "*teshuvah*" itself, two distinct meanings come to focus. The first derives from the verb "to return", meaning here going back to the straight path, coming back home after a period of absence. The second derives from the verb to "reply", and denotes a response to a question or a call, *i.e.* an awareness that God is demanding something from us. The Jewish idea of *teshuvah* embraces both those meanings: It is a movement of return to one's source, to the original paradigm of human life, and also, simultaneously, a response to a divine call.

As this relationship between God and man was the very start conceived as a covenant between two partners, when man sins, he violates this covenant and ruptures normal relations between himself and God. *Teshuvah* is then the process by which this break is mended and the covenant renewed.
An essential idea about this breach and restoration is that the path of "return" is always open, and therefore, an individual, at any time or any point in his life, has the opportunity to abandon his evil deeds.
This constant possibility repentance is more than once underlined in the Bible, as in this occurrence in Deuteronomy[41]:

וְשַׁבְתָּ עַד-יְהוָה אֱלֹהֶיךָ

[41] D*eut*. 30:2.

We will then present in the following lines the essential value of repentance as a tool in the process of repairing one's sin, but this alone would be incomplete; for we will try to expound *teshuvah* also as a religious value in itself: a religious category expressing man's fundamental posture before and with God.
Several aspects will be distinguished: after presenting some of the historical development of the notion, we will scrutinize its close link with the idea of atonement, before focusing on a distinctive tension, among the Sages and the *posqim*, between an internal and external conception of repentance. This will be sufficient, we hope, as a general and conceptual introduction to repentance, which in turn will build a basis for the more halakhical study of *taqqanat ha-shavim*.

## 1.2.1 – *Teshuvah ba-dorot* – a short history of repentance:

### 1.2.1.1 – Biblical Times:

Although the term *teshuvah* was coined by the Sages, the idea clearly originates in the Bible, especially in the prophetic passages. According to some commentators, though, the fact that the concept of turning back to God is not a prophetic innovation but goes back to Israel's ancient traditions is clear from Amos[42], who uses it without bothering to explain its meaning[43]. The proper contribution of prophets was to formulate a model based on the cycle of sin, punishment, repentance and restoration, which dominated Jewish religious thought for many generations.

A different view -- showing a nationalistic bent which is also a component of *teshuvah* up to our times -- was expressed by Isaiah, where repentance is thought as reserved to those who will survive God's wrath[44]. Only the surviving remnants would actively engage in repentance to qualify for their new implantation in a renewed Zion[45]. The name of the prophet's firstborn was supposed to carry this message: *She'ar-yashuv*, "a remnant will return".

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[42] *Amos* 4 :6-11.
[43] Jacob Milgrom, « Repentance », *Encyclopedia Judaica*, Keter, Jérusalem, 1971, xiv, col. 73-74.
[44] *Amos* 7; *Is.* 6.
[45] *Is.* 10 :20-23 ; 17 :7-8 ; 27 :9 ; 29 :18 *ff.* ; 30 :18-26 ; 31 :6-7 ; 32 :1-8 ; 15 *ff.* ;33 :5-6.

A further development was introduced by Ezekiel, who expounds the Biblical idea with the notion of the permanent openness of God towards repentance[46]:

וְאַתָּה בֶן-אָדָם, אֱמֹר אֶל-בֵּית יִשְׂרָאֵל, כֵּן אֲמַרְתֶּם לֵאמֹר, כִּי-פְשָׁעֵינוּ וְחַטֹּאתֵינוּ
עָלֵינוּ; וּבָם אֲנַחְנוּ נְמַקִּים, וְאֵיךְ נִחְיֶה. יא אֱמֹר אֲלֵיהֶם חַי-אָנִי נְאֻם אֲדֹנָי יְהוִה, אִם-
אֶחְפֹּץ בְּמוֹת הָרָשָׁע, כִּי אִם-בְּשׁוּב רָשָׁע מִדַּרְכּוֹ, וְחָיָה: שׁוּבוּ שׁוּבוּ מִדַּרְכֵיכֶם
הָרָעִים, וְלָמָּה תָמוּתוּ--בֵּית יִשְׂרָאֵל.
יב וְאַתָּה בֶן-אָדָם, אֱמֹר אֶל-בְּנֵי-עַמְּךָ צִדְקַת הַצַּדִּיק לֹא תַצִּילֶנּוּ בְּיוֹם פִּשְׁעוֹ,
וְרִשְׁעַת הָרָשָׁע לֹא-יִכָּשֶׁל בָּהּ, בְּיוֹם שׁוּבוֹ מֵרִשְׁעוֹ

*« Therefore, son of man, say to the house of Israel: « Thus you speak saying: Our transgressions and our sins are upon us, and we pine away in them, and how can we live? » Say to them: "As I live, says the Lord God, I have no pleasure in the death of the wicked, but that the wicked turn from his way and live: turn, turn, turn your evil ways, for why should you die, O house of Israel?" ... The righteousness of the righteous shall not deliver him in the day of his transgression, and as for the wickedness of the wicked, he shall not stumble thereby in the day that he turns from his wickedness.""*

What we can see here is a refinement of the original idea. *Teshuvah*, as in the primal sources, is basically God's wish, but we find here expressed the idea that repentance is also a human process matching this divine will, and indeed one in which man is permanently entitled.

### 1.2.1.2 – The Talmudic period:

While the prophets had devoted their thinking first and foremost to the collective scale of the whole people, which had violated the covenant and must return, the Sages were more concerned with the psychological and practical aspects of the *teshuvah* of an individual[47]. The community as a whole, *knesset Yisra'el*, could not sin; it was individuals who sinned by distancing themselves from the community. Not to separate from the community (*perishah*

[46] Cf. *Ezek.* 33, 10-12.
[47] Cf. Ehud Luz, Repentance", in Arthur A. Cohen, Paul Mendes-Flohr (eds.), *Contemporary Jewish Religious Thought. Original Essays on Critical Concepts, Movements, and Beliefs*, Charles Scriner's Sons, New York, 1987, p. 785-93.

*min ha-tzibbur*), to feel a sense of solidarity with the people and share in its distress – this, in the Sage's views, was the condition of *teshuvah*.

Expounding on this basis, the Sages were eloquent in describing the significance of repentance[48]. It was declared one of the things created before the world itself[49], reaching to the very throne of glory[50], prolonging man's life and bringing redemption[51].
At the same time, the Rabbis were aware of some theological difficulties raised by the whole concept of repentance: once the wrong has been done, how can it be amended? The general rabbinic answer is that it is a matter of Divine grace, as is shown by the following apologue:

> *"They asked of wisdom: "what is the punishment of the sinner?" Wisdom replied: "Evil pursues sinners"[52]. They asked of prophecy: "What is the punishment of the sinner?" Prophecy replied: "The soul that sins it shall die"[53]. Then they asked of the Holy One, blessed be He: "What is the punishment of the sinner?" He replied: "Let him repent and he will find atonement""[54].*

According to some scholars, the Rabbis indeed oscillated between two opposing doctrines of *teshuvah*[55]. On the one hand, repentance was thought superior to sacrifice, and therefore the existing means of atonement are superior to the old sacrificial system; on the other hand, the sacrificial system, like every other part of the Law, is perfect and divine, its loss being a punishment, a deprivation, and its return certain and desirable.
Proof to an intensive reflection as regards the notion of repentance is also the *maḥloqet* ("dispute") among Palestinian rabbis R. Johanan[56] and R. Abbahu[57] on the question if the repentant sinner is greater than the man who has never tasted sin or the reverse. R. Johanan holds that those who have never sinned are greater, and R. Abahu that the sinners who repent are better.

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[48] Cf. Louis Jacobs, « Repentance. Rabbinic Views », *Encyclopedia Judaica*, Keter, Jérusalem, 1971, xiv, col. 74-75.
[49] *Pes.* 54a.
[50] *Yoma* 86a.
[51] *Yoma* 86b.
[52] *Prov.* 13 :21.
[53] *Ezek.* 18 :4.
[54] J.T., *Mak.* 2 :7, 31b.
[55] C. G. Montefiore, "Rabbinic Conceptions of Repentance", *The Jewish Quarterly Review*, Vol. 16, No. 2 (Jan., 1904), p. 221-22.
[56] R. Johanan ben Nappaha, Palestinian *amora* of the 2nd generation (250-290). In his youth he studied with Judah ha-Nassi. He began teaching in his native city, Sepphoris and later opened his academy in Tiberias.
[57] Palestinian *amora* of the 3rd generation (290-320). He was the disciple of R. Johanan. He was the head of a group of scholars known as the "rabbis of Caesaria", where he lived.

It is not our intention to be exhaustive here, but it will prove fascinating that these debates, as we will see, find an echo in the practical reflections bearing on *taqqanat ha-shavim*.

### 1.2.1.3 – The Medieval and post-medieval Period:

Repentance was a favourite subject in medieval Jewish ethical and philosophical literature[58]. Saadiah Gaon (882-942)[59] discusses repentance in section five of his *Emunot ve-De'ot*, whereas Baḥya ibn Paquda (second half of 11th century)[60] devotes to it the seventh "gate" of his *Duties of the Heart*. Maimonides (1135-1204)[61] devotes the last section of *Sefer ha-Madda'* ["Book of Knowledge"][62], *Hilkhot Teshuvah* ["laws of repentance"], to repentance[63]. All three agree that the essential components of repentance are regret and remorse for the sin committed, renunciation of the sin, confession, then a request for forgiveness, and a pledge not to repeat the offense. Maimonides, in particular, emphasizes the importance of *vidduy* ("verbal confession")[64].

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[58] Cf. Samuel Rosenblatt, « Repentance in Jewish Philosophy », *Encyclopedia Judaica*, Keter, Jérusalem, 1971, xiv, col. 76

[59] Saadiah Ben Joseph Gaon was the greatest scholar and author of the gaonic period and important leader of the Babylonian Jewry. The first to write extensively in Arabic, he is considered the founder of Judeo-Arabic literature, and through his ground-breaking formulation of a Jewish equivalent of the Arabic *Kalam*, the founder of Jewish medieval philosophy. His major work, *Kitab al-Amanat wa-al-l-tiqadat* (translated in Hebrew by Judah ibn Tibbon in 1186 under the title *Sefer ha-Emunot be-Deot*) represents the first systematic attempt to integrate Jewish theology with components of Greek philosophy.

[60] Moral philosopher and *paytan* ("liturgical poet"), he lived in Muslim Spain, probably at Saragossa. His major work, *Kitab al-Hidaya ila Fara'id al-Qulub*, written around 1080 and translated by 1161 by Judah ibn Tibbon under the title *Ḥovot ha-Levavot* ["Duties of the Heart"] had a profound impact on all subsequent pietistic literature.

[61] Moses ben Maimon [known to English speaking audiences as "Maimonides" and Hebrew speaking as "The Ramba"m"] is the most illustrious figure in Judaism in the post-Talmudic era and the greatest Jewish philosopher of the medieval period. Born in Cordoba, he had to flee the Almohad persecutions of 1148, and after wandering from place to place, settled *c.* 1167-68 in Fostat, the Old City of Cairo. The *Mishneh Torah*, his 14-volume compendium of Jewish law, established him as the leading rabbinic authority of his time and quite possibly of all time. His philosophic masterpiece, the *Guide of the Perplexed*, is a fully-developed treatment of Jewish thought and practice that seeks to resolve the conflict between religious knowledge and secular.

[62] The first "book" of the *Mishneh Torah*.

[63] Three other major books were also devoted to the subject of repentance: *Sha'arey ha-Teshuvah* ("Gates of Repentance", Constantinople, 1548) by R. Jonah b. Abraham Gerondi (1200-1263), who lists twenty features for an authentic *teshuvah*. And also the *Ḥibbur ha-Teshuvah* ("Book on Repentance", Fano, 1583) by R. Menahem ben Salomon Meiri of Perpignan (1249-1316), who describes four conditions essential to repentance. R. Isaac Aboab of Castile's (1433-1493) *Menorat ha-Ma'or* ("The Candlestick of Light", Constantinople, 1514) is the third one. Cf. also Louis Jacobs, A Jewish Theology, Behrman House, London, 1973, chapitre 17, p. 243-59.

[64] M.T., *H. Teshuvah* 1:1.

There are also, according to these thinkers, different degrees of repentance. The highest level of repentance, according to Saadiah, is the repentance that takes place immediately after one has sinned, while the details of the sin are still before the sinner; a lower level of repentance is that which takes place when one is threatened by disaster, and the lowest, that which takes place just before death. According to Baḥya, the highest level is the repentance of someone, who, while still capable of sinning, has conquered his evil inclination entirely; for Maimonides, the highest level is attained when one finds oneself in the position of repeating the sin, and refrains to do so[65].

The classic conception of what exactly is meant by repentance was expressed by the latter:

ומה היא התשובה--הוא שיעזוב החוטא חטאו, ויסירנו ממחשבתו ויגמור בליבו שלא יעשהו עוד, שנאמר "יעזוב רשע דרכו, ואיש אוון מחשבותיו"[66]
וכן יתנחם על שעבר, שנאמר "כי אחרי שובי, ניחמתי, ואחרי היוודעי, ספקתי על ירך"[67]

> *"What is teshuvah? That a sinner should abandon his sins and remove them from his thoughts, resolving in his heart, never to commit them again as is stated "May the wicked abandon his ways...."[68] Similarly, he must regret the past as states: "After I returned, I regretted."[69]"[70]*

The idea of repentance continued to play a central role in the post-medieval period[71]. Pogroms and expulsions turned the Jews in on themselves and led them to ask forgiveness of God for the sins which he assumed were at the root of their suffering (*mipney ḥatoteynu*, "because of our sins"). Messianic movements gave further incentive to renewed religious fervour and "returning" to God, as did Pietistic movements such as that of *Ḥasidey Ashkenaz* [the

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[65] M.T., *H. Teshuvah* 2:1.
[66] *Is.* 55 :7.
[67] *Jer.* 31 :18.
[68] *Os.* 55 :7.
[69] *Jer.* 31:18.
[70] M.T., *H. Teshuvah* 2:2
[71] Alan Unterman, « Repentance. Post-Medieval Period », *Encyclopedia Judaica*, Keter, Jerusalem, 1971, xiv, col. 76-78.

"Ashkenazi from the Rhine Valley"]*, who practiced ascetic penitential techniques to purify the sinful flesh.

### 1.2.1.4 – Modern Times:

The 18th and 19th centuries saw the rise of two important movements in Eastern European Jewry in which the idea of repentance played somewhat different theological roles.

● For the *Ḥassidism**, the severity of the doctrine of repentance was rather toned down. Confidence in the loving response of God and His forgiveness helped lessen the sense of overburdening sin. Nevertheless, often following the teachings of lurianic *kabbalah**[72], *Ḥasidic* thought had a tendency to endow *teshuvah* with a metaphysical, cosmic dimension by correlating it with the idea of *tikkun* ("reparation of the world")* and with that of the ingathering of the divine sparks that had been scattered throughout the universe. They also delved more profoundly into the psychological aspects of sin and repentance.

● By contrast the *Mussar* movement exaggerated the factor of sin; repentance became the persistent task of the Jew, in each moment of his life. This advocated process of self-scrutiny and repentance reached its pinnacle for the follower of the Mussar movement in the month of *ellul*, preceding the High Holidays.

On the other hand, the modern period was also testimony for a drift of Jews away from traditional forms of religion and belief in God, a trend that took on a dual development. First, there is the traditional interpretation which still sees the repentance as something of which the believing, as well as the unbelieving Jew is in need. Second, there is the re-interpretation of repentance as the way back to God for those who have week roots in Judaism, or have at some stage abandoned whatever roots they had.

### 1.2.1.5 – Contemporary period:

Contemporary Jewish thought has sought to endow the idea of *teshuvah* with new significance, in light of two processes that have deeply affected modern Jewish life: secularization and assimilation[73].

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[72] Adjective formed after R. Isaac ben Solomon Luria (1534-1572), also referred to as *Ha-Ari* (*ha-Qadosh*) ["The (Sacred) Lion"]. A Jewish mystic in the community of Safed in Ottoman Galilee, he is considered as the father of modern expression of *Kabbalah*. His teachings were collected and assembled by Ḥayyim Vital his disciple.

[73] Ehud Luz, *op. cit.*, p. 90-93.

Pointing to names – and wisely restricting to give any further details on their theories -- is the only option here. The thinkers who have made the most signal contributions to illuminating the philosophical and psychological aspects of the idea of *teshuvah* in our time are Hermann Cohen(1842-1918)[74], Franz Rosenzweig (1886-1929)[75], Martin Buber (1878-1965)[76], Abraham Isaac Kook (1865-1935)[77], Joseph Dov Soloveitchik (1903-1993)[78], and A.D. Gordon (1856-1922)[79].

*Teshuvah* is central to the thought of all six, and almost all of them see the Jew's potential for *teshuvah* as resting upon his ability, precisely in a secularized and assimilates context, to re-cast for himself the religious significance of the tradition and make it applicable to a secular world.

*Teshuvah* then depends upon a new comprehension of modern reality (Kook), upon a spiritual reorientation that will be bold enough to make secular values part of a religious worldview (Rosenzweig), or upon transforming the self in such a way as to lead man away from an

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[74] Though he studied at the Jewish Theological Seminary at Breslau, Hermann Cohen gave up his initial plans to become a rabbi and turned to philosophy. He was one of the founders of the Marburg School of Neo-Kantianism where he lectured from 1973 until 1912. He spent the last year of his life in Berlin where he taught at the Hochschule fuer dir Wissenschaft des Judentums. Cohen's most famous Jewish works is *Religion der Vernunft aus den Quellen des Judentums* ["Religion of Reason out of the Sources of Judaism"], posthumously published in 1919), where his last attitude towards religion found its full expression.

[75] Theologian and philosopher. Born in Kassel, Germany, his education was primarily secular, studying history and philosophy, and considered converting to Christianity. Just before doing so occurred his seminal spiritual experience while attending Yom Kippur services at a small Orthodox synagogue in Berlin, after which he remained within Judaism. His major work his *Der Stern des Erlösung* ("The Star of Redemption", 1921 for the first version), where is lied down his *Neue Denken* ("New thinking"), a very personal theological and philosophical theory of Judaism and Christianity.

[76] Born in Vienna. Philosopher and theologian, Zionist thinker and leader. In 1902, Buber became the editor of the weekly Die Welt, the central organ of the Zionist movement. In 1923 he wrote his famous essay on existence, *Ich und Du* ("I and Thou"), in which is developed a "philosophy of dialogue", a form of religious existentialism structured by the distinction between the "I-Thou" relationship and the "I-It" relationship. Deeply stirred by the religious message of Ḥasidism, he considered his duty to convey that message to the world. Teaching for some years at the University of Frankfort, he then settled to Palestine in 1938 where he taught at the Hebrew university of Jerusalem until his retirement in 1951.

[77] Rabbinical authority and thinker, he was the fist ashkenazi chief rabbi of modern Eretz Israel. Born in Greiva (Latvia), he very soon developed his own views on Judaism, and in 1904, immigrating to Palestine and serving as the rabbi of Jaffa, actively contributed in the building of the religious Zionism movement. A prolific writer, he wrote, as far as our subject is concerned, *Orot ha-Teshuvah* (1955, trans. into English as "Rabbi Kook's Philosophy of Repentance", 1968).

[78] American orthodox rabbi, Talmudist and philosopher, he is the descendant of the Lithuanian Jewish Soloveitchik rabbinic dynasty. As Rosh Yeshivah of Rabbi Isaac Elchanan Theological Seminary at Yeshivah University, New York, he ordained close to 2000 rabbis over the course of almost half a century. He advocated a synthesis between Torah scholarship and Western, secular scholarship as well as positive involvement with the broader community. His main publication is his essay *Ish ha-Halakhah* (1944, "The Halakhic Man") in which he states his vision of God and man living in "a covenantal community".

[79] Aharon David Gordon, born in Troyanot (Russian empire), he was a Zionist ideologue of practical Zionism, and in 1904 settled in Eretz Israel, where he founded Ha-Poel ha-Tza'ir. His philosophy tries to promote physical labor and agriculture as a means of uplifting Jews spiritually. He spent his last years in Deganyah, where he died in 1922.

inauthentic way of life and toward an authenticity that will be characterized by continual creativity and renewal (Buber, Soloveitchik, Gordon).

### 1.2.3 – Repentance and atonement:

As the question of the relationship between repentance and atonement will play a significant role in future debates on *taqqanat ha-shavim*[80], we deemed useful to expose some starting points on this issue.

Man, at the time of his creation, was without sin, which alienates him from his maker[81]. Later, as the stipulations of the covenant with God were defined, the sin was viewed as any act that violates this covenant. This means that sin encompasses not only religious or ritual offenses, but also includes all other crimes as well, whether they are against individuals or are violations of any of the community laws described in the Torah as a whole[82].
These views about sin grew out of the Hebrew Scriptures' comprehension that human beings are by nature morally flawed or, at least, put into tension between two impulses, the *yetzer ha-tov* ("good impulse") and the *yetzer ha-ra* ("bad impulse"). People, according to this frame, have an inmate disposition to transgress God's commandments so as to sin, as is particular clear from the narrative of mankind's earlier history[83]. This inherent sinfulness of human appears throughout the later texts of the Bible. "There is no man who does not sin" proclaims Solomon[84]. The Psalmist echoes the same idea: "Enter not into judgement with thy servant; for no man living is righteous before thee"[85].
Such a strong view on sin demanded therefore a forceful and equivalent counterpart: this is where atonement and repentance enter into play.

The link took on its specificity when atonement came to the fore: in the Temple, atonement involved correct offerings for sin; for the prophets, as we saw, repentance would characterize the entire nation, Israel, come to its senses in the aftermath of God's punishment. In the oral part of *Torah*, though, repentance took on a profoundly social sense. This feature displayed

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[80] Cf. Part 3.5.5, p. 130-34.
[81] Cf. Isaac Cohen, *Acts of the Mind in Jewish Ritual Law. An insight into Rabbinic Psychology*, Urim Publications, Jerusalem, 2008, p. 55.
[82] Alan J. Avery-Peck, "Sin in Judaism", in Alan Avery-Peck, William Scott Green, Jacob Neusner (ed.), *The Encyclopedia of Judaism* (5 Volume Set), Brill, Leiden, Boston, Köln, 2000, p. 1320-32 [p. 1320].
[83] *Gen.* 1-11.
[84] *I Kgs.* 8 :46.
[85] P*s*. 143 :2.

itself in a dual aspect: as well as inclusive of repentance to one's fellow for sin against him, a more spiritual meaning of repentance gradually emerged as defining a stage in the relationship of Man with God[86].

The Rabbis consequently held that people could escape the inclination to sin at all point of their personal life. As a result, the concept of sin was soon intimately tied to the notion of atonement, and just as the rabbis recognized that all people, by nature, have a propensity to sin, so they held that atonement for sin was always possible[87]. If, thus, after sinning, an individual returns to God by means of *teshuvah*, this means reverting to his original condition; in this way he heals his own ills.
And even more than that. The attainment of *teshuvah* not only heals, but also prolongs man's life. As Elazar ben Dordia[88] related in his own self-examination, the first step towards that healing process is to acknowledge that the remedy can come from no other source other than oneself: *eyn ha-davar taluy ela bi*, "It all depends on me"[89]. Moreover, if we only make a determined effort, the Almighty will help us to move forward and attain complete purification[90].

This tight link between repentance, atonement and purification was even pushed further in later developments as in the kabbalistic speculation, which associated repentance not merely with salvation of the individual soul but with the cosmic drama of redemption. This doctrine gained ground and reached its climax in lurianic *Kabbalah*, where repentance was an essential step in the process of *tikkun olam* ("reparation of the world").
Through repentance, the Jew was able to assist God in the elevation of the holy sparks entrapped in the shells and then usher in the messianic age – the work of creation having been completed and perfected.

## 1.2.4 – Repentance: between mental and practical & efficacy:

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[86] Jacob Neusner, "Repentance in Judaism", in Alan Avery-Peck, William Scott Green, Jacob Neusner (ed.), *The Encyclopedia of Judaism* (5 Volume Set), Brill, Leiden, Boston, Köln, 2000, p. 1254-58 [p. 1255].
[87] Alan J. Avery-Peck, "Sin in Judaism", p. 1329.
[88] We could not find any biographical data on him, except that the Maharal of Prague says of his last name that it means "dregs" in Aramaic, pointing to his difficult position in society (he was apparently known for his lost for harlots, cf. *A.Z.* 17b).
[89] *A.Z.* 17a.
[90] *Shab.* 104a ; *Yoma* 38b.

There again, the fear is that we could easily, unduly and untimely anticipate on a very important and interesting tension that we will see among the *posqim* as to the following questions: in what way can repentance be said effective? Can it "work" by itself, or must it be "wrapped up" in other elements, more external, practical and public factors? And there again at this stage, we will save precise textual debates for later on[91], and will content ourselves in preparing the ground thereof with the exposure of the general lineaments.

As in other fields, even such a spiritual notion as repentance had to go through the prism of the general practical conception of the Rabbis, and their inmate tendency to clothe their ideas in the mould of legal thinking. In accordance to this approach, they viewed the essence of repentance as laying in such a thorough change of mind that it results in a change of life and a visible change of conduct.
Having said that, it is no less true that the question of the good balance to be found between the internal and external factors of repentance was not unilaterally dealt with by the Rabbis, and their debates display, if not a wide array of different approaches, at least a tension between two opposites poles.

One line of thought is exemplified by our afore-mentioned passage of the *Palestinian Talmud*[92], which in its own language posits the question of the source, and therefore the nature, and the efficacy of repentance:

> *« They asked of wisdom: "what is the punishment of the sinner?" Wisdom replied: "Evil pursues sinners."[93] They asked of prophecy: "What is the punishment of the sinner?" Prophecy replied: "The soul that sins it shall die."[94] Then they asked of the Holy One, blessed-be-He: "What is the punishment of the sinner?" He replied: "Let him repent and he will find atonement."[95]*

First to be noted is the strong link suggested between *teshuvah* and atonement. But above all the crucial fact in this little apologue is that repentance is only imagined, conceived by God, and not by inferior entities, all too riveted and trapped, so to speak, in their narrow-minded procedures of punishments and extremist solutions such as death. The case is made, here, that

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[91] Cf. Part 3.5.4, p. 124-30, and 3.5.5, p. 130-34.
[92] Cf. Part 1.2.1.2, p. 26.
[93] *Prov.* 13:21.
[94] *Ezek.* 18:4.
[95] TJ, *Mak.* 2 :6 ; See also Louis Jacobs, last *op. cit.*, p. 247-48.

it is not even enough to depict repentance as an invisible, mental or spiritual phenomena; rather, *teshuvah* is a phenomena with no equivalent, only to be grasped by a superior conscience.

Less lofty in his approach, but still in this line of thinking prone on seeing *teshuvah* as a purely intimate process is the following *responsum* from R. Ezekiel Laudau of Prague (1713-1793)[96], faced with the case of a man who had repeatedly committed a serious crime for three years. Opposed to the penitential approach made popular by the *ḥasidey ashkenaz* in his region of influence, he answered that *"basically, repentance consists of relinquishing the sin, confessing with a broken heart and sincere remorse."*

The second line of reasoning rather leans towards a public, socially demonstrative, an objectivation of repentance. Numerous *posqim* insisted that the penitent sinner had to confess his sins. According to R. Judah b. Bava[97], a general confession is insufficient; and the details of each sin must be stated explicitly. But even here, the question was subject to controversy. R. Akiva holds that a general confession is enough[98]. Public confession of sins were frowned upon as displaying a lack of shame when the transgressions were committed publicly, or, according to others, in the case of offenses against other human beings.[99]
We will have more than enough time to expand on these views.

## 1.2.5 – Therefore…:

What is to be retained from all these passages?

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[96] *Noda' bi-Yehudah* ["Known in Judah"], O.Ḥ. n° 35. Ezekiel ben Judah Landau: halakhic authority. Born in Opatow, Poland, he was appointed *dayyan* in Brody in 1734 and rabbi of Yampol in 1745, where he tried to mediate in the famous "Emden – Eybeschütz Controversy". He later established a *yeshivah* in Prague. All his life, as he was esteemed in many different circles, he was able to intercede with the Austrian government on various occasions when anti-Semitic measures had been introduced. Though not opposed to secular knowledge, he objected to the *Haskalah* movement. He was one of the greatest writers of *responsa* in his time. His *Noda' bi-Yehudah* ["Known in Judah", Prague, 1776, 1811] contains some 860 *responsa*. See also L. Jacobs, *op. cit.*, p. 250.
[97] *Tanna* of the 4th generation (110-35), martyr of the era of Yavneh.
[98] *Yoma* 86b.
[99] *Ibid*.

Probably the incredible weight given to repentance as a fundamental value of Jewish, one that one deemed created before the creation, a greatness who finds its expression in this passage the Talmud[100]:

> א"ר יונתן גדולה תשובה שמביאה את הגאולה שנאמר (ישעיהו נט) ובא לציון גואל ולשבי פשע ביעקב
>
> *"Rabbi Yohanan says: "What is the greatness of teshuvah?" That it brings the redemption as is said [in the Torah]: "He shall come as a redeemer to Zion, to those in Jacob who turn back from sin [declares the Lord]."[101]"*

Now, as we have seemingly adopted for ourselves the motto that "*al shloshah devarim* Jewish social ethics *omed*", we will now have to turn towards the "third pillar": the Jewish conception of punishment.

## 1.3 – Punishment:

We have already underlined that one of the distinct feature of Jewish social ethics is to constantly intertwine value contents with procedural considerations, in other words, theological intuitions and legal procedures. In this perspective, punishment rather stands of course on the procedural side of the coin, representing the visible and social embodiment of how the Sages viewed and dealt with the fundamental theological element of sin.
We will start by examining some foundational ideas of this Jewish approach on punishment. A second step will be devoted to describing how the legal system, though in constant development, tried to encapsulate and protect these intuitions as efficient tools in their environment over the course of the generations. Eventually, we will try to ask ourselves, with some categories of modern legal philosophy in mind, what functions are actually devolved to punishment in Jewish tradition. We will also try to figure out if the way of the rabbis fits in these categories, or if the Jewish legal system – at least seen through the restricting lenses of punishment -- rather bears testimony to an idiomatic construction.

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[100] *Ibid*.
[101] *Is.* 59 :20.

## 1.3.1 – Basic Principles of Punishment:

Discussing the Jewish theory of punishment could easily fill up a whole book. What we will do now is just bring up three main broad perspectives which certainly don't claim to any encapsulation of the subject, but whose choice is rather justified by the perspective of our background concern and desire to build a conceptual basis for it: *taqqanat ha-shavim*.

### 1.3.1.1 – The Reversible Drive of Punishment:

One of the most striking and fundamental idea of the whole conception of punishment in the Jewish tradition is certainly the notion that, whether it is God's justice as in the case of *karet* ("entrenchment", or "premature death") or man's justice, sin or crime is not indelible. This is what we call the "reversible drive" of punishment.

This conception certainly echoes another fundamental theological idea according to which God created a world which is not fully complete – as the commandment of circumcision bears testimony – until man recognizes this fact and sets up to take on himself and to collaborate with God to make a better world (*tikkun olam*).

Whatever the innumerable implications of this *Weltanschauung*, this means for our subject that the whole theory about sin and punishment is thought and worked out by the Rabbis in the perspective that there is no past fact which cannot be mended, and indeed, any past event or fact having occurred in the world can be re-directed by a transformative and future perspective, precisely defining the idea of *teshuvah*. Punishment, therefore, is no final stage of whatever theory of "putting a stop" to sin, but rather a crucial step in this open process of "reversible drive".

The original and foremost purpose of punishment in biblical law was the appeasement of God[102]. God abhors the criminal ways of other nations[103], whose practices the Israelites must

[102] Haim Hermann Cohn, « Punishment », *Encyclopedia Judaica*, Keter, Jérusalem, 1971, xiii, col. 1386-90 [col. 1386).
[103] *Lev.* 20 :23.

not follow and from whose abominations they must not learn[104]. By violating His laws, His name is profaned[105].

One of the first stage by which the biblical legal system built around the idea of reversibility was the talionic conception, whith various areas of the law reflecting its underlying purpose, namely the restitution of the *status quo ante* by inflicting on the offender the injury inflicted by him[106], and by doing to him what he had done to another[107]. This kind of sanction, where the nature and "intensity" of punishment is meant to be commensurate with those of the crime, was at first intended to represent exact justice[108].

Interestingly, it was precisely by proving that this kind of exact justice also involved some sort of injustice that some Sages justified the abolition of talionic punishment, except for murder[109]. And while they did not abolish it for murder, many of them held that judges must do everything in their power to avoid passing death sentence[110], *e.g.* by rigorously cross-examining the witnesses long-enough to have them contradict themselves[111] and thus render their evidence unreliable.

J. Neusner brings an interesting element that throws a background light on the conception that sin or crime is not indelible[112]. If, as he argues, one of the most profound questions facing the Jewish legal thinking concerns the fate of the individual at the hands of a perfectly just and profoundly merciful God, then, he discerns, two principles are at work.

The first operating ground is the conviction that because they enjoy freedom of will and make choices on their own, all creatures are answerable to their Creator. The second principle, indeed drawn and brought from the "widest image" possible – and which works in a rather opposite direction--, is the axiomatic belief that at the end of days the dead are raised for eternal life.

We found Neusner's idea interesting in backing our idea of a "reversible drive" of punishment, for if we develop his starting point, positing a system of human justice between his two large and rather conflicting poles, means two things: on one hand, to take seriously the disruptions introduced by sin, and try to deal with it with an action-response type of legal thinking; on the

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[104] *Deut.* 20 :18.
[105] *Lev.* 22, 31-32.
[106] *Lev.* 24 :20.
[107] *Lev.* 24, 19.
[108] The first lineaments of the *lex talionis* conception were already present in Babylonian legal thinking.
[109] *B.K.* 84a.
[110] *Mak.* 1 :10.
[111] *Mak.* 7a.
[112] Cf. Jacob Neusner, *Making God's Word Work. A Guide to the Mishnah*, Continuum, London, New York, 2004, p. 165-66.

other hand, it implies bearing in mind the world-to-come ultimate station, then acknowledging how ridiculous it would be to adopt a more punitive stance that God Himself, and therefore setting for oneself the goal of constantly "re-opening" the system towards mending things, which implies a reversibility type of thinking.

### 1.3.1.2 – Equality and Dignity:

Equality and dignity, which also certainly express two of the most fundamental theological conceptions of tradition on the Creation of man, are two values which we will be constantly found reflected in the formulation of punishment as far as *taqqanat ha-shavim* is concerned.

As for equality before the law, Talmudic *halakhah* determines, for example, that public figures are not immune from punishment. As we will see more extensively[113], a high priest is not punished differently than a layman in any respect[114], and a president who sins may be flogged[115]. The same applies to a rabbinic scholar. One notable exception is the king who, according to the *Mishnah*, may not be judged[116]. It will be most significant to see what were the reasons invoked for this exemption, apparently dating back to an episode in which King Yannai[117] was summoned to court but the members of the Sanhedrin refused to judge him[118].

The fundamental value of dignity also appears as an obligation in the legal system: to respect the dignity of every individual even when the individual in question is an offender who is serving a sentence. The obligation applies even during the process of the sentence itself. Concerning the appropriate attitude toward the offender during and after his punishment, the Rabbis, for example, ordered that even the execution of a person sentenced to death must be carried out in such fashion that minimizes suffering and does not include humiliation.
In this respect, the well-known Biblical principle *"you shall love your fellow as yourself"*[119] was interpreted by the Rabbis as obligatory even with regard to an offender awaiting punishment, included capital punishment. In this case, even an individual sentenced to death

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[113] See Part 3.4, p. 101 *ff.*.
[114] *Sanh.* 18a.
[115] TJ *Horayot* 3 :1.
[116] *Sanh.* 2 :2.
[117] Alexander Jannaeus, king of Judea from 103 B.C.E. to 76 B.C.E. Under the name "King Yannai" he appears as a wicked tyrant in Talmudic sources, reflecting his conflict with the Pharisee party.
[118] *Sanh.* 19a, b ; M.T., *H. Sanh.* 2:5.
[119] *Lev.* 19 :18 ; *Sifra*, *Kedoshim* 2.

is considered "your fellow." This will prove a crucial basis of the reasoning in many debates where *taqqanat ha-shavim* is involved.

In the same manner -- this branches out as a second dimension of the dignity concept, Jewish law seeks to prevent any offender being permanently stigmatized. But here again, we directly touch one of the core subjects of this *exposé*: *ad kan leshonenu!*

## 1.3.1.3 – Between Man and God:

A third element that we will constantly wish to put forward in our *exposé* is the fact that the *Torah* rarely draws lines between such ostensibly diverse realms as moral principles, cultic rituals, social welfare, and norms of civil litigation, seeing all the precepts as deriving from one source: God[120].

Though some discrete distinctions were of course introduced by the Sages[121], this never contradicts the fundamental fact that in each realm distinguished by rabbinic laws, an intricate counterpoint always operates whose ultimate goal is to achieve a harmony among persons and with God.

A general motto for this conception could be found in the following verse and Rashi's (1040-1105)[122] commentary on it: *"And you should do that which is right and good…"*[123] Rashi expounds: *"Good -- in the eyes of the Lord; right – proper in the eyes of men."*[124]

This we will briefly expanded in the following points.

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### 1.3.1.3.1 – The Dual Scope of Jewish legal Thinking:

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[120] Eliezer Segal, "Jewish perspectives on restorative justice", In Michael L. Hadley (ed.), *The spiritual Roots of Restorative Justice*, p. 181-97, SUNY Series in Religious Studies, Harold Coward, State University of New York Press, Albany, New York, 2001, p. 183.

[121] Some of these distinctions are between monetary (*diney mamonot*) and capital cases (*diney nefashot*); or between human-divine and interpersonal matters; civil law and ritual prohibitions (*heter ve-issur*); between financial reparative and punitive payment (*knas*); or between the "line of the law" as enforced by the judiciary, and "within the line of the law" (*lifney mi-shurat ha-din*), or acting according to higher or more compassionate standards than the law can demand.

[122] Rashi -- an acronym of Rabbi Shlomo Titzḥaki. Born in Troyes, in northern France, he went to learn at the age of 17 in the *yeshivah* of Rabbi Yaakov ben Yakar in Worms, then moved to Mainz where he studied under Rabbi Isaac ben Judah, with Rabbenu Gershom and Rabbi Eliezer ha-Gadol, the leading Talmudists of the previous generation. Returning to Troyes at the age of 25, he joined the *beyt din* there and around 1070 founded a *yeshivah* which attracted many disciples. Famed as the author of the first comprehensive commentary on the *Talmud* (covering 30 tractates) as well, as for a comprehensive commentary on the Torah, he is particularly acclaimed for his ability to present the basic meaning of the text in a concise yet lucid fashion, a work which remains a centerpiece of contemporary Jewish study. His commentary on the *Talmud* has been included in every edition of the *Talmud* since its first printing in the Bomberg edition in the 1520s.

[123] *Deut.* 6 :18 ; cf. *A.Z.* 25a.

[124] Rashi, *Deut.* 12:28 *ad loc*.

The constant two levels of reference in Jewish law, human affairs and man-to-god relationship, can be seen by contrasting the laws of property, for example, with general sins thought to damage the whole *klal Israel*.

Thus the principal crimes against a person and property --murder, mutilation, and theft-- are punished at the instance of the party injured. The murderer is pursued and brought to justice, or is killed outright[125] by the avenger of blood. Mutilation and other injuries to the person are paid for in money; the thief is condemned to make double restitution, and is enslaved if unable to pay. These are clear examples of a "man to man" justice.

But there were also many offenses which were not so much directed against any one person as against the whole nation of Israel[126]. They included all those violations of God's declared will which were thought to bring down His wrath and vengeance upon the nation: such acts as idolatry, Sabbath-breaking, blasphemy of the sacred name, incest, adultery. For these offenses, the witnesses to the evil deed were called upon by the Lawgiver, not only to prosecute the offender, but to help in the execution of the sentence[127]. Crucial to the understanding of this supplementary level of law is the fact that these crimes had also to be expiated, not only by a fine, or compensation in money, but also, in the case of a forbidden act through ignorance, for example, by a sin-offering is prescribed[128]. For certain dishonest actions, a sin-offering, together with restoration of the thing wrongfully withheld, plus one-fifth its value, are also prescribed.

We thus see the constant double-level at work, a reminder of what makes the legitimacy of the law in Jewish tradition – by opposition to the liberal theory of general consent which empowers the body of the governed – is not the general will, but God as the source of the commandments.

**1.3.1.3.2 – Human Deflection:**

What we mean by this expression is the revolutionary stance assumed by the Sages during the Talmudic period in order to place themselves as the interpreters of God will's, allowing some divine laws to be clearly amended and re-formulated, "taken in charge" at a human level, "deflected", so to speak, without ceasing to claim that they were divine.

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[125] *Num.* 35 :21.
[126] Louis Ginzberg, Lewish N. Dembitz, "Crime", *Jewish Encyclopedia*, p. 357-559.
[127] *Deut.* 13 :7-11 ; 17 :2-7.
[128] *Lev.* 4 : 1-3.

A striking example of this process is to be seen in the substitution operated by the Rabbis for the ever-threatening divine punishment (*karet*) by the judicial punishment of flogging, making it clear that whoever underwent judicial punishment would not be visited with any further divine punishment[129]. This is clearly a bold innovation which distances itself from the general conception that the measure of punishment must always conform to the gravity of the offense and to the blameworthiness of the individual offender, "according to the measure of his wickedness" (*kedey rish'ato*)[130].

This is not the place here to elaborate further, and this case was just meant to convey the idea that the Rabbi's deflection of divine law was a key element of the general "reversible drive" animating the Jewish legal thinking.

## 1.3.2 – The Expression of Punishment:

After having seen some of the basic ideas of the Jewish approach on punishment, our second stage will be devoted to describing how punishment was concretely carried out by the Jewish courts over the course of the centuries. This will be of course but a brief overview, not even an historical one of an ever-developing system of law, but only a selected presentation of some of the remarkable or key points.

### 1.3.2.1 – Some Basic Principles:

One basic principle is that those sins or crimes that affect the social order or endanger the health of the community come to trial in the court conducted by the Sages and are penalized in palpable and material ways[131]. Aside from the imposition of financial penalties, the range of punitive measures mentioned in the traditional Jewish sources is basically limited to the following options: capital punishment, fines, exile, corporal punishment, and atonement[132]. Significantly, the "eye for an eye" stipulations of *Exodus*[133] were expounded by the Sages to furnish the source for a sophisticated system of compensation for injuries, including payments for medical expenses, suffering, lost work time, humiliation, and permanent depreciation.

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[129] *Mak.* 3 :15. Haim Hermann Cohn, *op. cit.*, col. 1388
[130] *Deut.* 25 :2.
[131] Jacob Neusner, *op. cit.*, p. 165-66. The idea encapsulated by the words "the court conducted by the Sages" implies a dominant inquisitorial model of Jewish procedural law, and accordingly will be dealt with in Part 1.3.2.
[132] Eliezer Segal, *op. cit.*, p. 188.
[133] *Ex.* 21 :22-24.

As for capital punishment, which is an extreme case but for that reason a good vantage point to judge a legal system, it is most often associated with specifically "religious" and cultic violations. Out of its reverence for human life, early rabbinic law interpreted the death penalty out of existence by insisting on unreasonably difficult standards of testimony. It demanded, for example, that the witnesses must have explicitly warned the culprit of the criminal status of the act and its penalty before commission of the act. In the same fashion, it asked that the culprit must have stated that he or she was going to commit the crime despite this warning. In other words: quasi-unrealistic and impossible conditions.
This teaching is expressed by a well-known *mishnah*:

> *"A Sanhedrin that passes the death penalty once in seven years is called a murderous court. Rabbi Eleazar ben Azariah*[134] *says that this is true of a court that passes such sentence even once in seventy years. Rabbi Tarfon*[135] *and Rabbi Akiva say: Had we been members of the Sanhedrin, no one would have been executed."*[136]

## 1.3.2.2 – The Talmudic Period:

A key moment in the evolution of the conception towards punishment was the destruction of the Second Temple, which indeed seriously impacted on the links between punishment, atonement and the concrete expression of punishment.
We have to remind, indeed, that the execution of the death penalty was viewed by the Rabbis as an important stage in the atonement process for the gravest of sins. Hence, it was to be accompanied by a confession[137]. The destruction of the Second Temple and the ensuing abrogation of the sacrificial cult and capital punishment were therefore initially perceived as a catastrophe that deprived the Jews of the opportunity for atonement. This led the Sages of those generations to posit various substitute means of atonement; *e.g.*, death or physical suffering[138].

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[134] Eleazar ben Azariah – *tanna* of the 4th generation (110-135) and one of the sages of Yavneh. When Rabban ben Gamaliel was deposed as *nassi* because of his bad behaviour toward Joshuah b. Ḥananiah, Eleazar was chosen to succeed him., apparently because of his aristocratic lineage but also for his great wealth. He was both a halakhist and an aggadist; he was apparently alive at the time of the Jewish revolt under Trajan (115-117).
[135] Rabbi Tarfon – *tanna* of the 3rd generation (80-115). One of the leading scholars at Yavneh, R. Tarfon was a priest. The Temple was still standing in his youth; His main disputant was R. Akiba and many halakhic discussions between them are recorded; in several matters he acted strictly in accordance with Beyt Shammay. He was particularly distinguished by his erudition. There is no information about is death, but according to one *aggadah* (*Lam.* R. 2:5) he was one of the ten martyrs.
[136] *Mak.* 7a.
[137] M. *Sanh.* 6 :2.
[138] Eliezer Segal, *op. cit.*, p. 189.

This evolution cannot be developed here, but the sheer mention of this example is interesting inasmuch as it shows how an external event, one with a religious significance, could altogether have a direct impact on some technical and localized point of the legal system.

Altogether, the criminal jurisprudence of the *Mishnah* may be regarded as fairly modern in its approach. The avenger of blood has been abandoned. The idea of making fathers and sons suffer for each others' guilt lies so remote in the past, that the sages give to the text in Deuteronomy[139] this entirely renewed meaning: *"Fathers shall not be condemned on the testimony of their sons"*[140]. In another domain, the "congregation" which is to judge of matters of life and death becomes a court of twenty-three learned judges. An execution by stoning or burning is regulated so as to inflict the least possible pain. All possible advantages are given to the accused in order to temper the severity of the Pentateuchal law.

As for Jewish criminal law during the Talmudic period, it includes, *inter alia*, the following characteristics: on the one hand, before commission of an offense, the prospective offender must have been admonished by two witnesses, who explain to the prospective offender the specific offense he is about to commit, and the offender must answer them, stating that he is aware of the offense and that he is nevertheless deliberately committing the offense[141]. On the other hand, a very strict ruling on the conditions of evidence was designed, which in practice prevented the admission of many forms of testimony and evidence.
One unhappy result was that those two requirements made it very difficult to maintain a system of criminal judgment that could realistically deter criminal behaviour. In order to cope with these difficulties, Jewish law was forced to introduce two additional tracks of judgment and punishment. The first is that of "punishment not in accordance with *Torah* law" (*anishah she-lo min ha-din*), which authorizes the court, in accordance with the exigencies of the times, to impose punishment, as well as to legislate enactments with regard to punishment, on a far broader scale than that prescribed by biblical law.
The second track is "the King's Law" (*mishpat ha-melekh*), which was defined with abundant detail by Rabbi Nissim of Gerona (1320-1376)[142], and complements the law of the *Torah* by

[139] *Deut.* 24 :16.
[140] *Sanh.* 28a.
[141] M.T., *H. Sanh.* 1-2.
[142] *Derishot ha-Ran* #11. Nissim ben Reuben Gerondi (or “of Gerona”, or “The Ra”n”) is one of the most important Spanish Talmudists. He never held any rabbinical post, even though he fulfilled all the functions of a rabbi and *dayyan* in his community. One of his main works is a commentary on the *halakhot* of R. Isaac Alfasi (1013-1103) to the *Talmud*.

adjudicating and punishing those offenses or cases regarding which punishment cannot be imposed and enforced under strict biblical law.

### 1.3.2.3 – Medieval Times:

If one of the supreme duties of the Jewish communities in every age was the obligation to keep Jewish affairs from ordinary law-courts, it is all the more true especially after the beginning of the Crusading epoch[143]. The internal government was largely delegated to Jews themselves, and the Jewish courts were often able to try not only civil but even criminal cases in which Jews were involved as litigants or malefactors.

Within this framework of relative Jewish autonomy, a great variety of penalties could be imposed on wrongdoers, including fines, imprisonment, *ḥerem* ("excommunication"), and – extremely rarely – capital punishment (mainly reserved for informers), according to judgment passed by a *beyt din** under the ordinances of the community[144]. New and previously unknown penalties were resorted in this period, sometimes for crimes not provided for in Talmudic law.

The manner of execution usually followed that obtaining in the host country, such as bloodletting from an arm, drowning, strangulation, or stoning. Flogging was most common, particularly in lands like Germany where capital punishment was not resorted to.

The most severe social penalty was the *ḥerem*, most customary in Spain and Poland-Lithuania. Sometimes a man's entire family was banished with him. This penalty was imposed on suspected murderers who had only one witness to testify against them, for assault and battery resulting in death, for wife-beating, fornication, stealing, and forgery[145].

The sinner could also be deprived of certain citizenship rights, such as membership in the plenary assembly and the right to vote. Most damaging socially and economically – especially in Eastern Europe – was expulsion from a *ḥevrah* ("guild") by the *kahal**, since expulsion from a guild could also mean the loss of one's livelihood.

With the weakening of Jewish autonomy in modern times these penalties became, in various stages in different countries, obsolete and inoperative[146].

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[143] Israel Abrahams, *Jewish Life in the Middles Ages*, Atheneum, New York, 1985, p. 49.
[144] Isaac Levitats, « Punishment in the framework of Jewish Autonomy », *Encyclopedia Judaica*, Keter, Jerusalem, 1971, xiii, col. 1388-90 [p. 1388].
[145] *Ibid.*, col. 1389.
[146] *Ibid.*, col. 1390.

## 1.3.3 – The Functions of Punishment:

This third aspect of our reflection on punishment will be devoted to an evaluation of the Jewish theory of punishment as standing out on the background of modern legal philosophy and categories, *i.e.* the question of what functions is actually pursued by the Rabbi's legal thinking.

Let's be immediately more specific, though, in saying that we shall not dare enter in the full discussion with all the arguments attached to such or such school of thought, and that our purpose will prove limited, here, by a methodological requirement: as a full discussion on which categories is the Jewish theory of punishment relevant to indeed implies knowledge of the further development of our subject, we will reserve a more comprehensive and conclusive discussion of the topics for our conclusion.

We will first give a broad description of the main approaches recognized by modern legal philosophy, and then try to discern what functions are assigned to punishment in Jewish legal thinking.

### 1.3.3.1 – Categories of Modern Legal Philosophy:

The Modern view on what justifies punishment in a given legal system generally distinguishes four principles which are generally taken into consideration in sentencing: retribution[147], deterrence --as regards both the offender and others--, prevention, and rehabilitation[148].

#### 1.3.3.1.1 – The Retributive, Utilitarian and Restorative Models:

The **retributive model** is a theory according to which justice requires that a man should suffer because of, and in proportion to his moral wrongdoings. For a retributivist, whatever other purposes are served by a penal system, it only exacts justice so far as it gives an offender his moral deserts[149].

This approach is generally thought as opposing the utilitarian principles of Bentham: if someone does something wrong, we must respond to him or her as an individual and not as a part of a calculation of overall welfare. Wrongdoing must be balanced, and so the criminal

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[147] Retribution is here understood as the way in which society through its courts can show its abhorrence of particular types of crime.

[148] J. W. Harris, *Legal Philosophies*, Butterworths, London, 1980, p. 52.

[149] *Ibid.*, p. 49.

deserves to be punished. Retributivism emphasizes retribution rather than maximization of welfare.

This approach matches a basic intuition about just punishment stating that it should be proportional to the crime. However, it is sometimes faces the critics that retributivism is merely revenge in disguise. Despite this criticism, there are numerous differences that can be drawn between retribution and revenge: the former seeks to be impartial, has a scale of what is appropriate and seeks to correct a moral wrong, whereas the latter is personal, unlimited in scale, and can often satisfies oneself in correcting even a slight wrongdoing.

The **utilitarian model**, as already hinted, requires that the function of justice has to seek the maximization of the total or average welfare across all relevant individuals. Punishment, as a bad treatment of some individual, cannot therefore be good in itself, but punishment might be a necessary sacrifice that maximizes the overall good in the long term, in at least one of the three following ways:

● Deterrence, which is the idea that an appropriate and credible threat of punishment might potential offenders to make different choices[150], again considered from a utilitarian point of view: well-designed threats might lead people to make choices that maximize their own welfare.

● Rehabilitation, in other words, the idea that punishment might turn bad people into better ones.

● Security or incapacitation. According to this approach, there may be people who are irredeemable. Imprisoning, in that perspective, might very well then maximize welfare by limiting their opportunities to cause harm and therefore the benefit lies within protecting society.

A critic of the utilitarian model argues that a sheer, cold calculation might lead to sometimes justify punishing the innocent, or inflicting disproportionately severe punishments, as long as a benefit is expected. No real moral checks, it is suggested, really prevents the possibility of a general and cynical *calculemus*. It might also turn out that punishment would never be right,

[150] Historically, a lot of theories of punishment were based on the notion that fearful consequences would discourage potential offenders. An ancient example of this principle can be found in the Draconian Law of Ancient Greece. Modern theories of the punishment and rehabilitation of offenders are broadly based on principles articulated in the seminal pamphlet *"On Crimes and Punishments"* published by Cesare, Marquis of Beccaria (1738-1794) in 1764. They focus on the concept of proportionality. In this respect, they differ from many previous systems of punishment, for example, England's *Bloody Code*, under which the penalty of theft had been the same regardless of the value stolen. Subsequent development of the ideas of Beccaria made non-lethal punishment more socially acceptable. This in turn brought the idea that convicted prisoners had to be re-integrated into society when their punishment was complete. As we see, almost two thousand years separate this later refinement of the legal reasoning from the enactments of *taqqanat-ha-shavim*…

only depending on the local facts taken into consideration and their limited actual consequences.

The **Restorative justice** conception is the concept which focuses on the needs of victims and offenders, instead of satisfying abstract legal principles or punishing the offender[151]. It is based on a theory of justice that considers crime and wrongdoing to an offense against an individual or community rather than the state or a general society.

**1.3.3.1.2 – Procedural Aspects:**

At a purely technical level, the purpose of any criminal justice system is to punish the offender and protect the innocent. The state machinery of the judicial system is operative to prevent the crime and penalize the offender. There, though, exist two different general models designing different measures to deal with the offender to bring him to justice. They may be broadly termed as the *inquisitorial model* and the *adversary model* of justice.

The **inquisitorial model** of justice, sometimes known as civil law system or continental law system, aims to attain justice with the composite effort of the prosecutor, the police, the defence lawyer and the court. If the purpose of justice is served, minor error in the procedure is ignored.
The court or the prosecutor plays an active role in procuring evidence, in the investigation of the case and the examination of the witness. The accused must help the prosecutor and the court to attain justice. Since the court itself is active to secure justice, legal representation from the side of accused is not regarded indispensable.

The **adversary model** of justice is close to Anglo-American system. It advocates the supremacy of law, *e.i.*, equal treatment of law for all segments of society. It places the court in a neutral position, where legal representation from both sides plays then a leading role in the system. It insists upon due process of law, and the neutral behaviour of the judge is supposed to promote the sense of justice and fairness of the trial. This system also claims that it would promote the supremacy of law, fairness in the proceedings, secures right to privacy of the individual.

[151] Eliezer Segal, *op. cit.*, p. 183.

For the most part, in this respect, Jewish courts follow an inquisitorial model, where the judge is in charge of investigating the claims; this clearly distinguishes them from the accusatorial or adversarial procedures[152].

Talmudic Sages, nevertheless, were familiar with the adversarial character of the Roman courtrooms, a fact that accounts for the intensive use of a whole dramatic imagery by the rabbis, portraying the "Heavenly Court" with its *synegoros* ("defense attorney") and *kategoros* ("prosecutor"): Jewish law has typically frowned upon the employment of professional attorneys, insisting on direct confrontation between the litigants and the judges[153]. Court procedure usually insists on direct testimony before the judge and the other litigant[154].

## 1.3.3.2 – What Function does Jewish approach of punishment pursue?

As we said above, we won't draw here any conclusion, and will simply display some of the possibilities which, by the way, are not exclusive one from the other.

### 1.3.3.2.1 -- Appeasing God -- Putting away the evil:

It seems that where no modern theory of punishment cannot, in some way or another, be traced back to biblical concepts, the primary and most ancient purpose of punishment in biblical law was the appeasement of God[155]. God loathes the criminal behaviour of other nations[156], whose practices the Israelites must not follow and from whose abominations they must not learn[157]. By violating His laws, His name is profaned[158].

As such, another common function and goal of punishment in the Bible is to "put away the evil from the midst of thee"[159]. The principle underlying the elimination of evil, as distinguished of that of the evildoer[160], tends to promote a second conception, according to which the act of punishment is not so much directed against the individual offender as it is a demonstration of resentment and disapproval of that particular mode of conduct.

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[152] *Ibid.*, p. 184.
[153] Cf. M *Avot* 1:8 traditionally rendered as: "Do not behave like the lawyers".
[154] Cf. TB *Shevu.* 30a-31a, where the concern is chiefly to prevent one litigant from gaining an advantage over the other.
[155] Haim Hermann Cohn, *op. cit.,* col. 1386.
[156] *Lev.* 20 :23.
[157] *Deut.* 20 :18.
[158] *Lev.* 22, 31-32.
[159] *Deut.* 17 :7, 12 ; 19 :19 ; 21 :21 ; 22 :24 ; 24 :7.
[160] *Ps.* 104 :35 ; *Ber.* 10a.

It has also been said that the imposition of capital punishment on such offenders as the rebellious son (*ben sorer u-moreh*)[161], the rebellious elder (*zaqen mamre'*)[162], the abductor (*gonev ish*)[163], and the burglar (*ha-ganav*)[164] was justified on the ground that they are all potential murderers[165]; and rather than let them take innocent human lives, they should themselves be eliminated[166].

**1.3.3.2.2 -- Deterrence:**

Similarly, punishment is inflicted on the offender not so much fort his own sake as for the deterrence of others: that all people should hear and be afraid[167]. From the point of view of criminal law enforcement policies, the deterrent aspect of punishment in Jewish law is already the most important of all: people who hear and see a man heavily punished for his offense are supposed to be deterred from committing the offense and incurring the risk of such punishment.

A further distinction, incidentally, has also been introduced: the principle known in modern criminology as "general prevention," the deterrence of the general public, but also that of "special prevention," the prevention of the individual offender from committing further crimes, that is reflected in Jewish law.

The “general prevention” has itself two aspects: one, to deter others from offending in like manner; the other, to root out the evil elements in the nation and to keep the poison from spreading. Sometimes both motives are named together. Thus the man who rebels against the judgment of the high priest or supreme judge must die:

> *"And you shall put away the evil from Israel. And all the people shall hear, and fear, and do no more presumptuously"*[168].

While in the case of the idolater condemned to death, we read: *"So you shall put away the evil from the midst of thee."*[169]

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[161] *Deut.* 21 :18-21.
[162] *Deut.* 17 :12.
[163] *Ex.* 21 :16.
[164] *Ex.* 22 :1.
[165] Maimonides, *Guide* 3 :41.
[166] Haim Hermann Cohn, *op. cit.*, col. 1387.
[167] *Deut.* 17 :13 ; 19 :20 ; 21 ; 21.
[168] *Deut.* 17 :12-13.
[169] *Ibid.* 7.

This latter motive is brought out strongly in dealing with idolaters, who are regarded as "a root that bears gall and wormwood"[170].

Still another element pointing that the deterrent function of punishment was a very serious consideration for the legal scholars is the rule that where punishment had proved to have had no beneficial deterrent effect on the offender and he has committed the same or some similar offenses over and over again, he would be liable to be imprisoned and "fed on barley until his belly bursts"[171].

#### 1.3.3.2.3 -- Vengeance:

Some commentators have viewed the Biblical conception of punishment as simply the advocacy of a firmly embedded value in the hearts of people and rulers: vengeance. And vengeance should not fall on the evil-doer only, but on all his children also -- on his father, if alive, and on all his father's descent: only thus can God's wrath be appeased.

The prophets will refine this conception and protest against this savage conception:

> *"Fathers shall not be put to death for sons, and sons shall not be put to death for fathers; every one shall be put to death for his own sin"*[172].

As an illustration of actual practise based upon this conception, there is the act of David, who on the complaint of the Gibeonites against the dead king Saul, avenges them by hanging five of Saul's grandsons[173]. But when, seven generations after David, Joash, King of Judah, was murdered, Amaziah, his son and successor, caused only the murderers to be put to death, and did not punish their sons, *"according to that which is written in the book of the Law of Moses"*[174]. The declaiming of the prophets Jeremiah[175] and Ezekiel[176] against the proverbial saying, *"The fathers have eaten sour grapes, and the teeth of the children are set on edge",* shows that a desire to punish the children for the sins of the fathers was still alive among the people.

#### 1.3.3.2.4 -- Expiation:

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[170] *Deut.* 29 :17.
[171] *Sanh.* 9 :5.
[172] *Deut.* 24 :16.
[173] *II Sam.* 21 :1-9.
[174] *II Kgs* 14 :6.
[175] *Jer.* 31 :29.
[176] *Ez.* 18 :2.

Closely linked to the notion of the appeasement of God, but working in another direction, is the expiatory purpose of punishment: a crime and more particularly the shedding of blood pollute the land.

The process which stands for regret and expiation is based on the Biblical fundamental intuition that considers every human act as being accomplished before God, and thus, which identifies transgression in sin[177]. According to this idea, the role of punishment is to bring the offender-sinner to shame, remorse and expiation. The link between the two is well express in *Leviticus*, where the Israelites are ordered to mortify their souls in order to gain expiation for the sins of the collectivity: "you shall mortify your soul"[178].

### 1.3.4.3 – A Provisional Conclusion:

The Torah's unambiguous insistence on punishing offenders seems, at first sight, to position it at odds with the ideals of Restorative Justice[179]. Indeed, if we portray the institution of judicial punishment as primarily seeking vengeance, in order to erase past wrongs by inflicting them on the perpetrators, this would stand in strong contradiction to any restorative aspiration.

The ancient rabbis were well aware of the law's obligation to impose suffering on criminals, both for their moral discipline and in order to discourage other potential offenders. Is this then, a clear sign of a non less clear retributive position? Nothing is less certain.

An interesting saying illustrates the view that short-sighted compassion can be the cause of a long-term societal catastrophe:

> *"Said Rabbi Joshua ben Levi[180]: If a person acts compassionately in a situation where cruelty is required, in the end that person will act cruelly when compassion is required.*[181]

Would this piece of seasoned wisdom be, then, surprisingly, the mark of a utilitarian argument?

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[177] Shlomo Giora Shoham, Gavriel Shavitt, Gabriel Cavaglion, Tomer Einat, *'Averot ve-'oneshim : mavo' la-penologiyah. 'Al torat ha-'anishah ve-ha-shiqum, meni'at pesha' ve-'aḳifat ḥoq* ["Crimes and Punishments: An Introduction to penology and Criminal Justice"], Ah, Jérusalem, 2009, p. 73.

[178] *Lev.* 23:27.

[179] Eliezer Segal, *op. cit.*, p. 189.

[180] Joshuah ben Levi – Palestinian *amora* of the first generation (220-2250). Native of Lydda, he apparently was in the company of Judah ha-Nassi in his youth. He taught in his native town, and occupied himself greatly with communal needs. He was also active in the relationships between the community and the Romans, and was a member of various missions to them in Caesaria and in Rome (JT *Ber.* 5:1, 9a ; *Gen. R.* 78:5). He was an halakhist whose opinions were always accepted, but he was especially renowned as an aggadist (*B.Q.* 55a).

[181] *Ecclesiastes Rabbah* 7:25.

Without allowing ourselves to indulge in any further discussion at this stage of the *exposé*, this quick survey of the three main conceptual approaches is a first indication that the Jewish legal approach might seem much more complex that simply and clearly fitting any category previously presented.

This complexity was advanced eloquently by Maimonides in his analysis of rationale for punishment:

> *"The utility of this is clear and manifest, for if a criminal is not punished, injurious acts will not be abolished in any way and none of those who design aggression will be deterred. No one is as weak-minded as those who deem that the abolition of punishments would be merciful on men. On the contrary, this would be cruelty itself on them as well as the ruin of the order of the city. On the contrary, mercy is to be found in His command, may he be exalted: "Judges and officers shalt thou make thee in thy gate"*[182]*"*

It seems from these word that the key track in order to appreciate the specificity of the Jewish approach as to the function of punishment is to be found in the idea that the law, more than a technical tool-system of dealing with crime, offenders and innocents, according to whatever conceptual paradigm, is first and foremost an expression of the righteousness and the loving care of God, thus placing the level of relevance at a totally different level than any utilitarian or even retributive consideration.

We will come back to this issue, as we already said, only we will dispose of all the elements of development of our subject.

[182] *Deut.* 16 :18.

# 2 / *Taqqanat ha-shavim* – A Subject is Born…:

With some preparatory knowledge on our three pillars of Jewish social ethics at our disposal, what we are probably eager to do now is get started with our foundational *mishnah** on the subject of *taqqanat ha-shavim*, and promptly engage ourselves towards the subsequent two-thousand years journey of its developments.

This won't be immediately possible, though, for the following reason: *taqqanat ha-shavim*, as we shall see, consists in a specific line of reasoning which appears in the context of the restoration of stolen property. The proper place to start, therefore, is with the laws of theft and robbery. In other words, after the broader context of Jewish social ethics, we need now a few data on the narrow context.

This chapter will then begin with our last introductory detour, some backlight on the general rules on stolen property, before turning to the halakhical study of *taqqanat ha-shavim* proper.

## 2.1 – The laws of Stolen Property:

After beginning with a few general remarks on this particular domain of Jewish law, we will focus on three essential dimensions as far as stolen property is concerned: restoration, punishment, and atonement.[183]

### 2.1.1 -- A General Outlook on the Laws of Stolen Property:

Stealing is repeatedly prohibited in the Bible. Though the different prohibitions appear in different contexts, related to capital offenses such as murder and adultery[184], or in the context of fraudulent and oppressive dealings with men[185], the general definition is that an object which is in the possession of a person without the consent of its owner when that person

[183] These notions we have already encountered in our general presentation; this part of our study will adopt a different view, though, inasmuch as it will deal with the particular determinations taken on by these values as they occur in the field of stolen property laws.
[184] As in the *Decalogue*, for exemple. See E*x*. 20:13 ; *Deut.* 5:17.
[185] *Lev.* 19:11 ; 19:13.

knows – or should know – that the latter does not consent, is considered to be stolen or robbed by him[186].

Having said that, it should be mentioned that the issue is further complicated due to a distinction between two different species of robbery, namely *gezel*[187] and *genevah*[188]. Let us briefly define "theft" (*gezel*) as committed clandestinely, while "robbery" (*genevah*) is an openly committed act[189].
It does not matter whether or not the thief (or robber) intended to enrich himself, permanently or at all, or whether he committed the offense only with the intention of borrowing and returning the property taken, or with the resolve to pay all damages and penalties[190]. This distinction is of practical significance for criminal law only[191]; in dealing with civil cases the law relating to a robber applies equally to a thief and vice versa.

Now, as we know that purely social questions can never be separated from moral, "religious" values, or theological teachings in the Jewish tradition, the theological- procedural problem indeed raised by theft or robbery is the following: as the latter constitute a breach in an individual's relationship to God, as well as a breach of the general state of our relationships with the *klal israel*, how can this break be mended and brought to reconciliation?[192]

The Jewish answer to that is a three-fold combination of restitution, punishment and atonement. All play a significant role in the laws of robbery as set out in *Leviticus*[193]. Crime is thus treated by the *Torah* at least at these three following levels:

● The restoration of the stolen object to its rightful owner;

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[186] This is so regardless of whether the person holding it intends to restore it to the possession of the person entitled to it after a time or not at all; cf. *Sh. Ar.*, *ḤM* 348:1.
[187] Generally rendered as *theft*.
[188] Generally rendered as *Robbery*. See *Sh. Ar.* , *ḤM* 259 :7 and M.T., *H. Gezelah va-Avedah* 1:3 for a brief definition of who is the *gazlan*, and *Sh. Ar.* 248:3 or M.T., *H. Genevah* 1:3 for a definition of the *ganav*. *B.Q.* 79b deals with the issue of why the *ganav* has to pay twice the value of his theft whereas the *gazlan* has just to give back the produce of his theft, following Lev. 5:23. Maimonides gives an original opinion of his own in the *Guide* 3:41.
[189] M.T., *H. Genevah* 1:3.
[190] *B.M.* 61b; *Tosef.*, BK 10:37; *Sifra Kedoshim* 2.
[191] Shalom Albeck, "Theft ad Robbery", in M. Elon (ed.), *The Principles of Jewish Law*, Transactions Publishers, New Brunswick, New-Jersey, 1975, pps. 492-495.
[192] Menachem Elon, *Jewish Law. History, Sources, Principles. Ha-Mishpat Ha-Ivri*, Volume IV, trad. Bernard Auerbach et Melvin J. Sykes, The Jewish Publication Society, Philadelphia, Jerusalem, 5754 / 1994, p. 1708.
[193] L*ev*. 5:20-26.

● An additional punitive payment to the victim, probably deterrent in purpose, consisting in this case of one fifth of the total;
● Atonement for the trespass against God, to be administered by a priest, through the bringing of an *asham* sacrifice ("guilt-offering").

The Jewish oral tradition has of course studied, expounded, and expanded each element of this structure in meticulous details[194]. We will briefly look over each successively.

## 2.1.2 -- Restoration :

It goes without saying, as is a clear premise of Biblical law[195], that misappropriation or destruction of property requires at the very least the restoration of the stolen object or its equivalent value. This is to be seen, for example, in the laws of theft -- as we mentioned above[196], damage caused by one's chattels[197], arson, loss of a bailment[198], killing someone's animal[199].
Interesting is also the following source[200]:

כ וַיְדַבֵּר יְהוָה, אֶל-מֹשֶׁה לֵּאמֹר. כא נֶפֶשׁ כִּי תֶחֱטָא, וּמָעֲלָה מַעַל
בַּיהוָה; וְכִחֵשׁ בַּעֲמִיתוֹ בְּפִקָּדוֹן, אוֹ-בִתְשׂוּמֶת יָד אוֹ בְגָזֵל, אוֹ, עָשַׁק אֶת-
עֲמִיתוֹ. כב אוֹ-מָצָא אֲבֵדָה וְכִחֵשׁ בָּהּ, וְנִשְׁבַּע עַל-שָׁקֶר; עַל-אַחַת,
מִכֹּל אֲשֶׁר-יַעֲשֶׂה הָאָדָם--לַחֲטֹא בָהֶנָּה. כג וְהָיָה, כִּי-יֶחֱטָא וְאָשֵׁם--
וְהֵשִׁיב אֶת-הַגְּזֵלָה אֲשֶׁר גָּזָל אוֹ אֶת-הָעֹשֶׁק אֲשֶׁר עָשָׁק, אוֹ אֶת-
הַפִּקָּדוֹן אֲשֶׁר הָפְקַד אִתּוֹ; אוֹ אֶת-הָאֲבֵדָה, אֲשֶׁר מָצָא. כד אוֹ מִכֹּל
אֲשֶׁר-יִשָּׁבַע עָלָיו, לַשֶּׁקֶר--וְשִׁלַּם אֹתוֹ בְּרֹאשׁוֹ, וַחֲמִשְׁתָּיו יֹסֵף
עָלָיו: לַאֲשֶׁר הוּא לוֹ יִתְּנֶנּוּ, בְּיוֹם אַשְׁמָתוֹ. כה וְאֶת-אֲשָׁמוֹ יָבִיא, לַיהוָה,
אַיִל תָּמִים מִן-הַצֹּאן בְּעֶרְכְּךָ לְאָשָׁם, אֶל-הַכֹּהֵן

*"And the Lord spoke unto Moses, saying: If any one sin, and commit a trespass against the Lord, and deal falsely with his neighbour in a matter of deposit, or of pledge, **or of robbery**, or have oppressed his neighbour; or have found that which was lost, and deal*

[194] Cf. Eliezer Segal, *op. cit.*, p. 184.
[195] *Ibid.*, p. 184-85.
[196] *Ex.* 22 :3.
[197] *Ex.* 22 :5.
[198] *Ex.* 22 :12.
[199] *Ex.* 24 :21.
[200] *Lev.* 5:20-25.

*falsely therein, and swear to a lie; in any of all these that a man does, sinning therein; then it shall be, if he hath sinned, and is guilty, that* ***he shall restore that which he took by robbery****, or the thing which he has gotten by oppression, or the deposit which was deposited with him, or the lost thing which he found, or any thing about which he hath sworn falsely, he shall even restore it in full, and shall add the fifth part more thereto; unto him to whom it appertains shall he give it, in the day of his being guilty. And he shall bring his forfeit unto the Lord, a ram without blemish out of the flock, according to thy valuation, for a guilt-offering, unto the priest."*

This passage also brings to the foresight the other aspects associated with restoration: the punitive aspect ("*and shall add the fifth part more thereto"*); and the atonement element ("*And he shall bring his forfeit unto the Lord, a ram without blemish out of the flock, according to thy valuation, for a guilt-offering, unto the priest"*).

As for the gravity of theft, Tractate *Bava Qama* offers this dramatic statement[201]:

א"ר יוחנן כל הגוזל את חבירו שוה פרוטה כאילו נוטל נשמתו ממנו

*"R. Johanan said: "To rob a fellow-man even of the value of a perutah is like taking away his life"."*

Another testimony of how grave theft was considered by the Sages is the following. It is a well-known fact that the three worse sins in Judaism, those for which one is obliged not to try saving one's life if pressured to commit them, are murder (*shefikhut damim*), incest (*arayot*) and idolatry (*avodah zarah*). It then will be noteworthy for our subject that a whole line of reasoning in the *Talmud* precisely draws a parallel between them and robbery, even depicting robbery as the worst.
This seems to be implied by the following quote:

א"ר יוחנן בא וראה כמה גדול כחה של חמס שהרי דור המבול עברו על הכל ולא נחתם עליהם גזר דינם עד שפשטו ידיהם בגזל שנאמר (בראשית ו) כי מלאה הארץ חמס מפניהם והנני משחיתם את הארץ

[201] *B.Q.* 119a.

*"R. Johanan said: Come and see how great is the power of robbery, for here it is, though the generation of the flood transgressed all laws, their decree of punishment was sealed only because they stretched out their hands to rob, as it is written, "for the earth is filled with violence through them, and, behold, I will destroy them with the earth""*

Now – and this is just to point towards and give a taste of the idea of *taqqanat ha-shavim*, it would seem paradoxical at first glance that for all the seriousness of the robbery offence, Rabbis would dare be lenient on those cases. And though, we will have to admit that this would precisely totally miss the mark as to their reasoning… For rabbis, in that case, precisely because of the gravity of the act -- and therefore because of the guilt of the offender, figured out that it should be all the more so difficult for such an offender to get out of his sin. Therefore, through awareness that the price of punishment should not be too high so as to prevent any willingness to repent, the sages endeavoured to create circumstances in which it would be easier for a repentant robber to make amends. This brings us to the verge of the *taqqanat ha-shavim*, which is a sufficient goal for this part of the *exposé*…

Let us end this brief overview on restoration with this Mishnaic statement illustrating the seriousness with which the requirement of restoration was regarded:

*"One who robbed his fellow and submitted to an oath must carry it to him all the way to Media. It is not allowed to hand it to the victim's child or agent, though it may be turned over to a court-appointed bailiff."*[202]

## 2.1.3 – The Punitive Aspect:

The precise purpose of the supplementary of the one-fifth payment in the biblical law of robbery is not specified, but it fits the classic definition of a *qnas*[203] ("fine", "pecuniary penalty") in that it causes the criminal's payment to exceed the amount of the actual damage[204].

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[202] *B.Q.* 9 :5.

[203] The Hebrew *qnas* apparently derives from the Latin *"census"* in the sense of an extension of the Roman censor's authority over public morals. Cf. *Justinian's Code* (Iv, vi, 16 ff.) which employs a classification very similar to that of Talmudic law: In Roman law, those legal actions that result in the restoration of property to its lawful owners are *rei gratia comparatae*, *i.e.* reparative. Those that result in payments that are greater than the original damage or misappropriation are *poenae*, that is, punitive.

[204] Cf. Eliezer Segal, *op. cit.*, p. 187.

In other cases of *qnas* payments the oral tradition declared that perpetrators can be exempted from this penalty if they confess to their crimes, rather than being sentenced by the court. While this could possibly fit, at first glance, our modern definition of plea-bargaining or as a pragmatic incentive for cooperation with the judicial system, this is not the way it was construed at all in any of the traditional sources. We are here facing another clear example of what we earlier called the "dual scope" of Jewish law, which points to a totally different level of signification -- indeed a moral and theological level--, than would be seen at first sight if we indeed reason and stay at the sheer level of technical and laic legal thinking. This we will discuss in our conclusion.

Whatever these final assessments will deliver, let us precise for the time being that the one-fifth additional payment for a robbery is paid only if the robber confessed to the crime, not if he was convicted on the testimony of witnesses. This indicates that the penalty was regarded as having an atoning power analogous to that of confession.
This leads us to the following part.

## 2.1.4 -- Atonement:

It was clear to the Jewish Sages that atonement, understood as the effecting of divine forgiveness, was conditional upon the criminal's repairing the damage caused to the victim[205]. To expect expiation while the effects of the damage have not been removed is, according to the Talmudic proverb, like immersing oneself in purifying waters while still grasping the defiling carcass of the "creeping thing"[206]
As perceived by the Rabbis, the laws of robbery in the *Torah* had in mind sinners or criminals who had already taken their first hesitant steps towards restitution[207]. Their interpretation of the crime of "robbery" was such that in most instances the criminals could have remained immune from judicial punishment had they been willing to persist in their perjury. The very fact that the issue of restitution has arisen implies that they have a desire to repent.
Such persons are offered guidance with regards to correcting or minimizing the specific damage that was inflicted upon their victims. However -- another expression of the "dual

[205] This view, according to E. Segal, also underlies *Matthew* 5:23: "First be reconciled to thy brother and then come offer thy gift." Cf. E. Segal, *op. cit.*, p. 195, n. 12.
[206] Cf. *Ta.* 16a.
[207] Cf. Eliezer Segal, *op. cit.*, p. 190.

scope", even after amends have been made on the human plane, the sinner will remain troubled by a separation from God.

The Sages were aware of the interdependence and apparent overlap of the various biblical ordinances related to restoration, punishment, and spiritual cleansing of a criminal. The general rule is that intentional sins must be atoned for by subjecting oneself to the prescribed penalties, whereas the sacrifices, usually accompanied by a confession, are required for sins of negligence or ignorance.

Now, we find a great deal of interpretative diversity with regards to the specific functions of other elements, such as repentance, the Day of Atonement, and its special rites. The following passage from the Mishnah provides a striking illustration of the intricacy – and complexity -- of the system. Among other things, it sheds light on two types of guilt: "certain" and "doubtful."

The "certain guilt" offering (*asham vaday*) is made when the offender is aware of his or her deed whereas the "doubtful guilt" offering is made on behalf of people who are uncertain whether they have committed a transgression.

And thus goes the *Mishnah*:

חטאת ואשם ודאי מכפרין. מיתה ויום הכיפורים מכפרין עם התשובה. התשובה מכפרת על עבירות קלות, ועל עשה ועל לא תעשה; ועל החמורות היא תולה, עד שיבוא יום הכיפורים ויכפר

> *"The sin-offering and the certain guilt-offering effect atonement. Death and the Day of Atonement effect atonement when combined with repentance. Repentance effects atonement for less serious transgressions: for the violation of positive or negative precepts. With respect to grave transgressions, it suspends them until the Day of Atonement arrives and effects the full atonement."*[208]

And the following *mishnah* continues[209]:

[208] M. *Yoma* 8 :8.
[209] M. *Yoma*, 8 :9.

עבירות שבין אדם למקום, יום הכיפורים מכפר; שבינו לבין חברו--אין יום הכיפורים מכפר, עד שירצה את חברו. את זו דרש רבי אלעזר בן עזריה, "מכול, חטאותיכם, לפני ה', תטהרו" (ויקרא טז,ל)--עבירות שבין אדם למקום, יום הכיפורים מכפר; שבינו לבין חברו--אין יום הכיפורים מכפר, עד שירצה את חברו. אמר רבי עקיבה, אשריכם ישראל, לפני מי אתם מיטהרין ומי מטהר אתכם--אביכם שבשמיים: שנאמר "וזרקתי עליכם מים טהורים, וטהרתם . . .

*"For transgressions between a person and the Almighty the Day of Atonement effects atonement. For transgressions between persons the Day of Atonement does not effect atonement until the person has conciliated his/her fellow.*
*Rabbi Eleazar ben Azariah expounded: "... that ye may be clean from all your sins before the Lord"[210]. This implies that] it is for transgressions between a person and the Almighty that the Day of Atonement effects atonement; however, for transgressions between persons the Day of Atonement does not effect atonement until the person conciliates his/her fellow.*
*Said Rabbi Akiva: How fortunate are you, Israel! Before whom are you cleansed, and who cleanses you? It is your Father in heaven, for it is said: "I will sprinkle clean water upon you, and you shall be clean…"[211]*

The process of forgiveness and atonement therefore begins with reconciliation between the sinner and the wronged party, and when done in sincerity, culminates in a cleansing by the Almighty himself.

## 2.2 – *Matnitin* – our *mishnah*:

Now is the time to turn to the halakhical study of *taqqanat ha-shavim* proper. We will start with our *mishnah* (2.2.1), and then will turn to some further developments expounding on the idea that placing undue strain on the offender's returning endeavour was not favoured by the Sages (2.2.2). We will then complete this preliminary study with a closely related

[210] *Lev.* 16 :30.
[211] *Ezek.* 36 :25.

consideration: the change of status of the offender to a "brotherly" status once he has been flogged (2.2.3).

### 2.2.1 – M. *Gittin* 5:5:

One primary source for the concept of *taqqanat ha-shavim* is the following *mishnah* in Tractate *Gittin* 5:5 :

העיד רבי יוחנן בן גודגדא על החרשת שהשיאה אביה שהיא יוצאה בגט ועל קטנה בת ישראל שנשאת לכהן שאוכלת בתרומה ואם מתה בעלה יורשה ועל המריש הגזול שבנאו בבירה שיטול את דמיו מפני תקנת השבים...

*R. Johanan B. Gudgada[212] testified[213] that a deaf-mute girl who has been given in marriage by her father can be put away with a get[214], and that a minor [orphan] daughter of a lay Israelite married to a priest can eat of the terumah[215], and that if she dies her husbands inherits her, and that if a beam which has been wrongfully appropriated is build into a palace[216] restitution for it may be made in money[217], so as not to put obstacle in the way of penitents (mipney taqqanat ha-shavim)…*

To fully grasp the import of our *mishnah*, one has to remember, as was said in the previous chapter, that the primary obligation regarding a stolen object is to return the item to its original owner. Only if the object no longer exists is repayment an acceptable option. In our case where the large beam still exists, though -- except that it has already been incorporated into a new building, the Rabbis make a clear exception to the general stringency as regards returning stolen property, and allow the thief to repay the value of the beam instead of returning the beam itself.

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[212] *Tanna* of the 3rd generation (80-110), he was a colleague of Joshua b. Ḥananiah. When young, he served as a Levite in the Temple. His children were death-mute, which throws some background on the content of our *mishnah*.
[213] The ruling is also to be found in M. *Eduyot* 7:9.
[214] Even though as a deaf-mute she is not capable of giving consent, and although her marriage having been contracted by her father is a binding one.
[215] Although her marriage is valid only by the rule of the Rabbis and not of the Torah. But she may eat only such as is *terumah* in Rabbinic law alone, but not what is *terumah* in Biblical law, which does not recognise her as the priest's wife.
[216] Or other types of building. The phrasing, here, just gives a striking example, but does not mean *lav davqa* ("not precisely") a palace.
[217] Instead of the actual beam being restored.

The Rambam did not miss the opportunity to point out the exception by comparing the Rabbi's ruling with what would normally be the case according to *Torah* law[218]:

אפילו גזל קורה, ובנה אותה בבירה, הואיל ולא נשתנת, דין תורה הוא שיהרוס את כל הבניין ויחזיר קורה לבעליה; אבל תיקנו חכמים מפני תקנת השבים, שיהיה נותן את דמיה ולא יפסיד הבניין. וכן כל כיוצא בזה

> *"Even if a person robbed a beam and used it in building a house, Scriptural Law requires that he tear down the entire building and return the beam to its owner, for the beam remained unchanged. Nevertheless, to encourage robbers to repent, our Sages ordained that the robber pay the worth of the beam and did not require him to destroy his building. The same applies in all similar situations."*

This ruling is certainly a good example of a measure, practical and concrete in its nature, but to which is attached a whole world of assumptions pertaining to psychology, if not philosophy and theology.

We might thus point out a profound and wise psychological insight of human's nature and motivations; an understanding that there would be but a slight chance, if any, that the thief go to the trouble of destroying the building in order to return the beam[219].

But this determination by the Sages of a resulting financial loss so burdensome that it might impede repentance by the culprit is certainly superseded by a larger theological consideration. For though this so-called wisdom might just as well be a kind of utilitarian trick in order to maximize some realistic ideal about the general smoothness of social relationships, this was obviously not the concern of the Rabbis. The operating interest, here, is not more and not less than repentance. Repentance, here, is the overriding purpose of the whole judicial system in the first place, a value in itself.[220]

A more socio-philosophical point of view would take note that the underlying vision of society at play here is one of dynamism; *i.e.*, in a "fixist" conception of society, things would

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[218] M. T., *H. Gezelah va-Avedah*, 1 :5.

[219] Rabbi Barry Gelman, *Mipnei Takanat Ha-Shavim* – מפני תקנת השבים. Outreach Considerations in *Pesak Halakhah*1", in Benjamin Shiller, Akiva Dovid Weiss (eds.), *Milin Ḥavivin (Beloved Words)*, vol. 3, December 2007 – Tevet 5768, Yeshivat Chovevei Torah Rabbinical School, p. 85-91 [p. 86].

[220] As we will see, this was at any rate the position of the House of Hillel, which became normative by the first century C.E. The view of the House of Shammai (Tosefta Baba Qamma 10:5 and parallels) was that the structure ought to be demolished in order to allow proper restitution.

have to return to what they were[221]. Here is on the contrary an acceptance that even though justice is about giving to everyone its due, the point of "return" has moved forwards in the meantime and cannot be the same as before. In that perspective, *taqqanat ha-shavim* is a disposition that ensures the possible penitence of the offender in an ever-moving-forward world.

The restriction of the stringency displayed by *taqqanat ha-shavim* is certainly also a good item for our discussion regarding the question of which philosophy of law Jewish ethics rather endorses. Our present case, at least, probably rules out the utilitarian option; in order to be convinced, most interesting is to contrast our *mishnah* and its "repentance bent" with the "unrepented" pragmatic approach of the Romans. Indeed, their illuminating rationale for a similar law, pretty far from repentance, was no more and no less than the following: *"to avoid the necessity of having buildings pulled down!"*[222]

Let us be honest, though, in our presentation of the *mishnah* of *taqqanat ha-shavim*, by acknowledging that the principle of *ve-heshiv 'et ha-gezelah* ("he will return what is has stolen by robbery")[223] was still felt by some as *the* reasonable ruling, and therefore a cause for raising dissent, as testified by the *maḥloqet** between Hillel[224] and Shammay[225] which is recorded in the following *barayta**[226]:

> *"[Concerning the theft of a beam that was used to build a palace] Beyt Shammay says: "Destroy (meqa'aqe'a) the whole palace and return it to the owner"; and Beyt Hillel*

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[221] Some commentators have argued that this was, long before, the revolutionary meaning of the Gan Eden episode; whereas the returning to the Golden Age is a pillar of all ancient society mythologies and their aspiration, man, in the Bible, goes out of Gan Eden never to return, in a bold statement of irreversibility. Some even say that was the invention of the "future". Cf. Shimon Peres citing Thomas Cahill, "Parashat Noa'h", in *Pothim Shavu'a* [Beginning the Week"], Jerusalem: Van Leer, 2001.

[222] Justinian, *Corpus Juris Civilis*, Paul Krueger & Theodor Mommsen (eds), Weidmann, Berlin, 1872, II i; An extensive bibliographical survey is found in B. Cohen, *Jewish and Roman Law*, Burning Bush Press, New York, 1966, p. 19-20.

[223] *Lev.* 5 :23.

[224] Hillel ha-Zaken ("the Elder"), one of the last *zugot* (pair » of Sages) with Shammai. He is associated with the development of the Mishnah. Renowned within Judaism as a sage and scholar, he was the founder of the House of Hillel and the founder of a dynasty of Sages who stood at the head of the Jews living until roughly the fifth century C.E. His personality, in which scholarship, wisdom was combined with righteousness and humility, became a model of conduct for subsequent generations.

[225] The colleague of Hillel. A jealous defender of the independence and authority of the *Sanhedrin*, Josephus reports that he had the courage to defy the tyrannical King Herod. Like his colleague Hillel, he founded an important *Torah* academy which in later generations was often in dispute with that of Hillel.

[226] B. *Gittin*, ad loc. Cf. Naḥum Raqover, "Ha-teshuvah : Heybetim Mishpatiim*, Miklhlalat "Sha'arey Mishpat", Parashat Nitzavim,* n° 43, p. 2.

*says: "He just has to pay the value of the beam (eyn lo ela demey merish) for the sake of the offender's repentance (mipney taqqanat ha-shavim)"."*

This will not be, though, the end of our "beam story"…

## 2.2.2 – Awareness of Undue Stringency on the Possibility of Repentance:

Clearly for the Rabbis, our "penitent's regulation" was not meant to apply solely to a beam and a house. *Taqqanat ha-shaving*, not only as a technical ruling in some definite cases in the frame of the laws of property, but also as a general approach to legal thinking, was gradually thought to extend to all similar cases, as Maimonides expressly stresses in the following passage:

כל הגוזל--חייב להחזיר הגזילה עצמה, שנאמר "והשיב את הגזילה אשר גזל"[227]

אפילו גזל קורה, ובנה אותה בבירה, הואיל ולא נשתנת, דין תורה הוא שיהרוס את כל הבניין ויחזיר קורה לבעליה; אבל תיקנו חכמים מפני תקנת השבים, שיהיה נותן את דמיה ולא יפסיד הבניין. וכן כל כיוצא בזה[228]

*"Whoever robs is obligated to return the article that he obtained by robbery itself, as it is written: "And he shall return the article he obtained by robbery." …*
*Even if a person robbed a beam and used it in building a house, Scriptural Law requires that he tear down the entire building and return the beam to its owner, for the beam remained unchanged. Nevertheless, to encourage robbers to repent, our Sages ordained that the robber pay the worth of the beam and did not require him to destroy his building.* ***The same applies in all similar situations****."*

In the same spirit, the Rabbis encouraged victims to forego their claims to restitution where that would facilitate the rehabilitation of the criminal. Thus we learn in the *Talmud*[229]:

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[227] *Lev.* 5 :23.
[228] Our emphasis.
[229] *B.Q.* 94b.

תנו רבנן הגזלנין ומלוי ברבית שהחזירו אין מקבלין מהן והמקבל מהן אין רוח חכמים נוחה הימנו אמר רבי יוחנן בימי רבי נשנית משנה זו דתניא מעשה באדם אחד שבקש לעשות תשובה א"ל אשתו ריקה אם אתה עושה תשובה אפילו אבנט אינו שלך ונמנע ולא עשה תשובה באותה שעה אמרו הגזלנין ומלוי רביות שהחזירו אין מקבלין מהם והמקבל מהם אין רוח חכמים נוחה הימנו

*"Our rabbis taught: When robbers or usurers come to make restitution, one should not accept it from them; and the spirit of the sages is not pleased with one who does accept it from them. Said Rabbi Johanan[230]: This teaching was expounded during the days of Rabbi [Judah the Prince][231], because of what was taught: "It once happened that a certain man wished to repent. His wife said to him: "Idiot! If you were to make full amends, then even your belt is not your own!" Consequently, he refrained from repenting.*
*It was at that point that they declared: When robbers or usurers come to make restitution, one should not accept it from them; and the spirit of the sages is not pleased with one who does accept it from them."*

Maimonides paraphrases this rule in his *Mishneh Torah* as follows:

כל הגוזל את חברו שווה פרוטה--כאילו נטל נשמתו ממנו, שנאמר "כן--אורחות, כל בוצע בצע; את נפש בעליו, ייקח"
ואף על פי כן, אם לא הייתה הגזילה קיימת, ורצה הגזלן לעשות תשובה, ובא מאליו והחזיר דמי הגזילה--תקנת חכמים היא שאין מקבלין ממנו, אלא עוזרין

[230] Johanan ben Nappaḥa, Babylonian amora of he second generation (250-290, d. 279). In his youth he studied with R. Judah ha-Nassi. He began to teach in his native place in Sephoris, where he was very popular, and later, opened an academy in Tiberias. In the *Diaspora*, whither his teachings were carried by his disciples, his authority was almost as great as in his native land, and few contemporary scholars in Babylonia opposed him.
[231] Judah the prince, born *c.* 135; *d. c.* 220. Judah devoted himself chiefly to the study of the traditional and of the written law. As he had close relations in his youth with most of the great pupils of Akiba, he laid the foundations of that wide scholarship which enabled him to undertake his life-work, the redaction of the *Mishnah*. On beginning his public activity, he moved the seat of the patriarchate and of the academy to Bet She'arim. Here he officiated for a long time. During the last seventeen years of his life he lived at Sepphoris, but it is with Bet She'arim that the memory of his activity as director of the academy and chief judge is principally associated.

אותו ומוחלין לו כדי לקרב הדרך הישרה על השבים. וכל המקבל ממנו דמי הגזילה, אין רוח חכמים נוחה הימנו

"*Whoever robs their fellow of even the value of a penny, it is as if they had taken their soul as it is said: "Such is the fate of all who pursue unjust gain; it takes the life of its possessor"*[232]*. Nevertheless, if the stolen item was no longer in existence and the robber wished to repent, and came of his own volition to repay the value of the stolen goods, the sages have enacted that we should not accept the payment from him. Instead we assist him, and forego the claim in order to bring the straight path closer to the penitents. And as for anyone who does accept restitution for the robbery, the spirit of the sages is not pleased with such a person"*[233]

To the same end, a further regulation was made with regard to the duty to return stolen articles:

אמרו הגזלנין ומלוי רביות שהחזירו אין מקבלין מהם והמקבל מהם אין רוח חכמים נוחה הימנו

*"... When robbers or usurers come to make restitution, one should not accept it from them; and the spirit of the sages is not pleased with one who does accept it from them."*

It should be noted, as is well pointed out by the Rambam ("…*and the robber wished to repent, and came of his own volition…")* that this regulation only concerns cases where the offender repents and wishes to make restitution.

Be it as it may, *taqqanat ha-shavim* strikes by its far-reaching consideration for the offender, and its wide-scope demand in ethical terms, especially if we think about the victim, from whom the same level of leniency attitude is also required.

This latter point will be clear from the following story, which also throws some light on how the principle was implemented during the time of *Sukkot* feast.

The *Talmud* relates the following story[234]:

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[232] *Prov.* 1:19.
[233] M.T., *H. Gzelah va-avedah* [« Laws pertaining to Robbery and – the Return of—Lost Articles »], 1:13.
[234] *Suk.* 31a.

ההיא סבתא דאתאי לקמיה דרב נחמן אמרה ליה ריש גלותא וכולהו רבנן דבי ריש גלותא בסוכה גזולה הוו יתבי צווחה ולא אשגח בה רב נחמן אמרה ליה איתתא דהוה ליה לאבוהא תלת מאה ותמני סרי עבדי צווחא קמייכו ולא אשגחיתו בה אמר להו רב נחמן פעיתא היא דא ואין לה אלא דמי עצים בלבד

*"A certain old woman[235] came before Rav Nachman[236] and said to him, 'The Exilarch* and all the Rabbis of the house of the Exilarch are sitting in a stolen sukkah'. She cried[237] but Rav Nachman took no notice of her. She said to him, "A woman with one father who had three hundred and eighteen slaves[238] runs out to you, and you take no notice? R. Nachman said to them [to his students who asked why he took no notice], "She is a noisy woman", but she can have only the cost of the wood[239]"."*

Does it not appear from this text that the attitude of Rav Nachman towards this woman is insulting and hurtful? Moreover, it does not fit at all with the image of a decider (*poseq*) and teacher like Rav Nachman, the very son-in-law of the *Resh-galuta**! We would rather certainly expect a Sage of that standard to behave *lifney mi-shurat ha-din** ("from beyond the line of the law"), abandoning the claim he is entitled to according to strict law, and certainly not hurting his contestant in court.

In sharp contrast with our story indeed, appears Rava's[240] behaving according to the following passage[241]:

רבא איגנבו ליה דיכרי במחתרתא אהדרינהו ניהליה ולא קבלינהו אמר הואיל ונפק מפומיה דרב

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[235] The Soncino edition adds here that it is about a woman from whom the servants of the Exilarch had robbed the wood with which his *sukkah* was covered.

[236] R. Nachman ben Jacob, Babylonian *amora* of the 3rd generation (d. c. 320) and a leading personality of his time. Born in Nehardea, teaching and serving as a *dayyan* there, his name is one of the most frequently cited in the Babylonian *Talmud*. One of his aggadic saying is: "When a woman is talking, she is spinning" (meaning that she is dressing a web to capture the male): that can throw some background light on his attitude towards the old woman…

[237] Meaning, she actually demanded that the wood would be returned to her.

[238] Rashi's commentary is that the "father", here, refers to Abraham the father of the Jewish people, and that the figure 318 refers to the 318 servants he had (*Gen.* 14, 14).

[239] The ruling is here that it would be wrong to destroy the structure in order to return the wood to her.

[240] Abba ben Joseph bar Ḥama, exclusively referred to in the *Talmud* as Rava (רבא), was a Babylonian *amora* of the 4th generation (320-350, b. 270). He studied at the Academy of Pumbedita, where he became famous for his debates with his study-partner Abaye. The debates between Abba ben Joseph and Abaye are considered classic examples of Talmudic dialectical logic.

[241] *Sanh.* 72a.

*"Rava was robbed of some rams through a thief breaking in. Subsequently they [the thieves] returned them, but he refused to accept them, saying. "Since Rav has thus ruled[242], [I abide by his decision]"."*

Now, returning to Rav Nachman, why could be the rationale for not behaving *lifney mi-shurat ha-din*?

What we see here, in fact, is precisely the principle of *taqqanat ha-shavim* at work. Rav Nachman's reasoning, indeed, was probably that if he had behaved *lifney mi-shurat ha-din*, and therefore returned the beam, his response would probably have created a situation where future robbers desiring to make repentance would have found more difficult to actually repent. Indeed, they would have probably been enticed to think that had they not behaved like Rav Nachman – meaning: having to give back the beam proper--, then they would not get a complete repentance, and this knowledge would weakened their resolution. Rav Nachman therefore stuck firmly according to the *taqqanah ha-shavim* principle and *prevented himself* to conduct *lifney mi-shurat ha din*…

One might smile at such a true and deep concern, wondrously matching, for that matter, what some ill-intentioned persons might possibly predicate as opportunistic egoism… But Rav Nachman having to be assumed as a "Sage from among Israel", that would fall short of understanding what has to be perceived as a real, righteousness-oriented reasoning.

Once again, his rather complex "repentance syllogism" can only be understood on the grounds of what we drew as the big picture of Jewish social ethics. The fact of being a "victim", for example, in that system, is not a sanctified category giving birth to special individual rights. The victim of a particular offense, just like anybody else in society, has the duty to ease the offender's repentance.

And this again is only reasonable not if we see this "duty" as a man-to-man effect of some previous "collective pact" – that would indeed seem rather unjust – but only if assumed as deriving from God's command. The projection of the case on God's ground, here, "flattens" the situation for everyone. Repentance being defined as the core value, it has then to be introduced in all aspects of the case – and also for the sake of future cases, whatever the

[242] Earlier on the same page, Rav rules that since the robber broke into a house, stole some utensils and departed, he is free to make use of them because he has purchased them with his blood, *i.e.* he risked his life, which the owner could have taken with impunity. Of course, that does not mean that he lawfully acquired them, but that the objects stand under his ownership, and that he is responsible for them should occur an injury. As to ownership itself, it remains the property of the first owner, just as in the case of a borrower.

possible and artificial impression that it might seem as a justification of one's interests – which it is not, as we tried to demonstrate.

### 2.2.3 – The Effect of Punishment:

What we want to do now is complete the presentation of our "*taqqanat ha-shavim mishnah*" with a related *mishnah*. It is not directly related to the seminal case of *Gittin* 5:5, but as its basic idea will constantly be cited and intermingled in the subsequent discussions of the *rishonim* and the *aḥaronim* revolving around the repentant offender, we thought it proper to present it here, as another auxiliary principle of the whole *taqqanat ha-shavim* discussion.

This *mishnah* deals with the general idea that after being punished the offender once again becomes a regular citizen for all intents and purposes. This reflects his position in relation to his Creator: the truly repentant offender is accepted by God as pure and unblemished.
This general stance is then applied in human criminal law: the *Mishnah* in the Tractate *Makkot* speaks about what effect *malkot* ("flogging") has on the penalty of *karet* ("retranchement").
And here is our passage in the *Mishnah*, citing the words of Ḥananiah b. Gamliel[243]:

כל חייבי כרתות שלקו, נפטרו מידי כרתן: שנאמר "ונקלה אחיך לעיניך" (דברים כה,ג)--משלקה, הרי הוא אחיך

> *"All those subject to the penalty of retranchement (karet) who have been flogged are thereby absolved from excision, as it is said: "Lest your brother be degraded in your eyes"[244] – once has been flogged, he is considered as your brother"."[245]*

The *Sifre**, *ad loc.*, expands on this notion: so long as he has not undergone his penalty, Scripture calls the offender a "wicked person"; thereafter he is called "your brother". The transition from "a wicked person" to "your brother" occurs automatically once punishment is received. The *Sifre* underlines that the *Mishnah* requires no further act.

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[243] *Tanna* from the 5th generation (135-170). He was one of the leading figure of his generation, chiefly know as an halakhist. He was the greatest of the scholars in Eretz Israel at the time of the hadrianic persecutions that followed the failure of the Bar-Kokhba revolt in 135. He later went to Babylonia, where he died.
[244] *Deut.* 25:3.
[245] M. *Mak.* 3 :15 (or TB *Mak.* 23a) ; Also in T.B. *Megillah* 7b.

In the same line of thought, Maimonides adds his own formulation of the idea:

אמש היה זה שנוי לפני המקום, משוקץ ומרוחק ותועבה; והיום הוא אהוב ונחמד, קרוב וידיד.

... אמש היה זה מובדל מה' אלוהי ישראל, שנאמר "עוונותיכם, היו מבדילים, ביניכם, לבין אלוהיכם"

צועק ואינו נענה, שנאמר "גם כי תרבו תפילה, אינני שומע"

ועושה מצוות ומקבלין אותן בנחת ושמחה, שנאמר "כי כבר, רצה האלוהים את מעשיך"

*"Yesterday, this one [i.e., the offender] was hated by the Holy One blessed be He – and was considered a detestable outcast, rejected, and abhorred… but today, he is beloved, near to him, and a friend… Yesterday he was separated from the God of Israel…. he cries [prays] and is not answered…; today he is cleaved to the Shekhinah… he cries out and is answered immediately…"*[246]

These two *mishnayot*, thus, *Gittin* 5:5 and *Makkot* 3:15 make a very strong case in putting repentance in the focus, if not as a fundamental and working principle of social ethics. We have to see now what became of these *tannaic* teachings in further generations. We will discover that *taqqanat ha-shavim* indeed turned as a whole subject in itself among the *rishonim* and the *aḥaronim*, and that they "plugged" on it all sort of questions and issues on which attitude to adopt towards the offender, his reinsertion in society.
Towards these issues we have to turn now.

[246] M.T., *H. Teshuvah* 7:6-7.

# 3 / *Taqqanat ha-shavim* in its developments:

We have seen in our foundational *mishnah* M. *Gittin* 5:5, and also through the Sage's teaching on the laws of flogging and retrenchment in M. *Makkot* 3:15, how the Talmudic scholars went all the way to remove obstacles before the offender in order to facilitate his repentance and even change his status from an ostracized state of "evil doer", to the status of being "our brother".
This part will now be dedicated to the study of the subsequent rulings by the *rishonim** and the *aharonim**, who considerably expounded and expanded the scope of these questions, by refining and adding all sort of considerations. These, of course, bear the trace and influence of their environment, be it the geographical, political, or temporal settings in which they were living; that won't be the meanest of our interest, beyond the sheer halakhical import, to be touched and moved by their detailed, lively *responsa*, addressing the burning issues of their communities, and by so doing, delivering precious and moving details on the life of their fellow Jews in whatever place they lived.

This rabbinical literature – from which we will unfortunately only bring back a very limited sample of testimony here – is so abundant, dense, and bountiful with ramifications, that it proved difficult to categorize, or at least, worthy of qualifying to reasonable chapter-headings in view of a -- as much as possible -- clear *exposé*.
We finally decided to follow N. Raqover's book organization – at least for this part of our work--, which gives us the occasion to acknowledge here our debt towards his master sum on the subject of *taqqanat ha-shavim*[247]. Most of the *responsa* here are taken out from his book; what we only claim for ourselves is a responsible sense of partiality, a hope that our selection was accomplished through good intuition and *à propos* vis-à-vis our subject.

In this perspective, we will study first which arguments were given by the Sages to perpetuate and implement the principle of *taqqanat ha-shavim*, and concretely encourage the offender's way towards repentance (Part 3.1). One very important aspect of that encouragement we will also deal with, is the regulation of the information on the offender's past (Part 3.2).

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[247] Naḥum Raqover, *Taqqanat ha-shavim. Avaryan she-Ritzah 'et Onsho* ["The Rehabilitation of Repentants. The Criminal who Served his Penalty"], Sefarim ha-Mishpat ha-Ivri, Jerusalem, 2007. When further labelled in the course of this exposé as "N. Raqover", it will refer to this book. Other references to other works by this author will each time be specified by exception to this rule.

As the rabbis also figured out that limits had nevertheless to be designed for the good functioning of society, we will then map our subject by considering they did so by means of three limiting perspectives and criteria. The first we will look closely in Part 3.3: the characteristics of the offense committed. We will them move to the study of the nature of the office previously held by the offender (Part 3.4). We will end our study of the *rishonim* and *aḥaronim* with the third perspective, dealing with the question of the restoration of confidence (Part 3.5).

## 3.1 -- Reasons for Reinstatement of an Offender:

Following the course of our *mishnah Gittin* 5:5, encouraging offenders to reform was thought as an important factor in order to help building the new status of those who have mended their way[248].

An interesting source in this regard is the *responsum* of Rabbenu Gershom[249] on a case involving a *kohen* who apostatized ant then returned to Judaism. More precisely, Rabbenu Gershom was asked[250] if a *kohen* who had apostatized and then repented, was indeed fit to spread his arms for the priestly benediction, and claim to make an *alyah* to the *Torah* ("to be called up to the *Torah*") in the first position.

The opinion of the Rabbenu Gershom was the following:

> *"Even though he sinned, since he made repentance, he is fit to go up to the pulpit and thread his arms [in order to accomplish the priestly benediction]"*[251].

Even more illuminating is the reasoning and justifications for his answer. After having examined if there were something in the acts of the *kohen* any elements that could invalidate him, Rabbenu Gershom draws the conclusion:

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[248] N. Raqover, p. xiii-xiv.

[249] Gershom ben Judah Me'or ha-Golah (c. 960-1028), one of the first great German Talmudic scholars and a spiritual moulder of German Jewry. He was apparently born in Metz, but his home was in Mainz, where he conducted a *yeshivah*. His name is connected to many *taqqanot* ("enactments"), most famous of which is his *ḥerem* ("ban") against bigamy. His response and halakhic decisions are scattered throughout the works of the French and German scholars; his legal decisions were considered as authoritative.

[250] Cf. *Maḥzor Vitry*, #125, p. 96; see also A. Grossman, *Ḥakhamey Ashkenaz ha-Rishonim* ["The Early Germany Sages"], Jerusalem, 1988, p. 123, n. 70. Cf. also Naḥum Raqover, "Ha-Teshuvah: Heybetim Mishpatiim*, Miklhlalat "Sha'arey Mishpat", Parashat Nitzavim,* n° 43, p. 3.

[251] Cf. Nahum Raqover, « Ma'amado shel Kohen she-ḥata ve-Shav" ["The Status of a Kohen who Sinned and Made Repentance"], in *Sefer Zikaron le-Y. Refael*, Jerusalem, 2000, p. 520.

> *"Therefore, we don't have any proof neither from the Scripture neither from the Mishnah in order to invalidate him, and furthermore we have a helping proof from the Torah and the Mishnah not to invalidate him".*

He then goes to examine this verse: אַל-תּוֹנוּ, אִישׁ אֶת-אָחִיו, *"you shall not cheat on another"*[252], dealing with fraud. This verse, he points out, has been construed by the Sages also to mean that one should not insult another person (*ona'at devarim*).
The first justification of Rabbenu Gershom, then, in accordance to this interpretation, is that if the *kohen* is invalidated and is not authorized to get back to his previous position and status, this would precisely be a case of "wounding words" (*ona'at devarim*). That would amount, he adds, to what the Sages said regarding one who would say to a repentant: *"Remember your previous deeds."*
Rabbenu Gershom draws the parallel and goes to explain:

> *"If you would say: "He won't go up to the pulpit and he won't be called first to the Torah [reading]", you could not find more wounding words than this."*

Rabbenu Gershom's second argument concerns the necessary encouragement of the penitent towards the way of repentance: if one prevents the offender to return and try to open for him a new chapter in life, and invalidates him to get back to his position, this would amount to putting obstacles in his way that are likely to make it impossible for him to repent.
Developing his argument, Rabbenu Gershom then makes use of the *Talmud's* words regarding King Manasseh[253]. On the wrongdoings that Manasseh committed, the Scripture says[254]:

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[252] *Lev.* 25 :14.
[253] King of Judah (698-643 B.C.E.), son of Ḥezekiah. Manasseh -- He ascended the throne at the age of 12 and reigned for 55 years (*II Kgs*. 21:1). In those years Assyrian power reached its peak, to which Manasseh was submissive. The *Book of Kings* does not record any political events during his reign, but in *Chronicles* it is stated that, because he did what was displeasing to the Lord (abolishing the religious reform of his father and re-introducing alien rites into the Temple – *II Kgs.* 21:3), God caused the Assyrian rulers to put him in chain, transporting him to Babylon, where he submitted to God's will and was returned to Jerusalem and his throne (*II Chron.* 33:10-13). *Davqa* a case of reinstatement of the offender! – It should be noted, though, that the historical validity of this story is being put to doubt by scholars.
[254] *II Kgs.* 21 :2-3.

ג וַיַּעַשׂ הָרַע, בְּעֵינֵי יְהוָה--כְּתוֹעֲבֹת, הַגּוֹיִם, אֲשֶׁר הוֹרִישׁ יְהוָה, מִפְּנֵי בְּנֵי יִשְׂרָאֵל.
וַיָּשָׁב, וַיִּבֶן אֶת-הַבָּמוֹת, אֲשֶׁר אִבַּד, חִזְקִיָּהוּ אָבִיו; וַיָּקֶם מִזְבְּחוֹת לַבַּעַל, וַיַּעַשׂ
אֲשֵׁרָה כַּאֲשֶׁר עָשָׂה אַחְאָב מֶלֶךְ יִשְׂרָאֵל, וַיִּשְׁתַּחוּ לְכָל-צְבָא הַשָּׁמַיִם, וַיַּעֲבֹד אֹתָם

*"And he did that which was evil in the sight of the Lord, after the abominations of the nations, whom the Lord cast out before the children of Israel. For he built again the high places which Hezekiah his father had destroyed; and he reared up altars for Baal, and made an Asherah, as did Ahab king of Israel, and worshipped all the host of heaven, and served them."*

Nevertheless, in the *Chronicles* comes an addition to the whole story of Manasseh telling that, after all his wrongdoings and the punishments that fell on him, he underwent a significant change in his behaviour:

יג וּכְהָצֵר לוֹ--חִלָּה, אֶת-פְּנֵי יְהוָה אֱלֹהָיו; וַיִּכָּנַע מְאֹד, מִלִּפְנֵי אֱלֹהֵי אֲבֹתָיו.
וַיִּתְפַּלֵּל אֵלָיו, וַיֵּעָתֶר לוֹ וַיִּשְׁמַע תְּחִנָּתוֹ, וַיְשִׁיבֵהוּ יְרוּשָׁלַם, לְמַלְכוּתוֹ; וַיֵּדַע מְנַשֶּׁה,
כִּי יְהוָה הוּא הָאֱלֹהִים. יד וְאַחֲרֵי-כֵן בָּנָה חוֹמָה חִיצוֹנָה לְעִיר-דָּוִיד ... טו וַיָּסַר
אֶת-אֱלֹהֵי הַנֵּכָר

*"And when he was in distress, he besought the Lord his God, and humbled himself greatly before the God of his fathers. And he prayed unto Him; and He was entreated of him, and heard his supplication, and brought him back to Jerusalem into his kingdom. Then Manasseh knew that the Lord He was God. Now after this he built an outer wall to the city of David ... And he took away the strange gods..."*

An interesting point here, which Rabbenu Gershom does not fail to pick up, is the fact that there was a *maḥloqet* in the *Mishnah* regarding Manasseh in order to know if he deserved or not the "future world" (*olam ha-ba*). This *mishnah* runs as follows[255]:

שלושה מלכים וארבעה הדיוטות, אין להם חלק לעולם הבא: שלושה מלכים--
ירובעם, ואחאב, ומנשה. ורבי יהודה אומר, מנשה--יש לו חלק לעולם הבא,

[255] Cf. M. *Sanh.*10 :2 (T.B. 70a).

שנאמר "ויתפלל אליו, וייעתר לו וישמע תחינתו, וישיבהו ירושלים, למלכותו" (דברי הימים ב לג,יג).

> *"Three kings and four commoners have no portion in the world to come. The three kings are Jeroboam[256], Ahab[257], and Manasseh[258]. And Rabbi Judah says: "Manasseh has a portion therein, for it is written: "And he prayed unto him, and was entreated of him, and he hearkened to his supplication, and they restored him to Jerusalem, to his kingdom"[259]"."*

This passage is in turn expounded in the body of the *sugya* in the *gemara*[260]:

א"ר יוחנן כל האומר מנשה אין לו חלק לעוה"ב מרפה ידיהן של בעלי תשובה

> *"R. Johanan said: He who asserts that Manasseh has no portion in the world to come weakens the hands of penitent sinners."*

If we pay attention to the text, Rabbi Johanan does not positively conclude if Manasseh indeed has a right to the world-to-come or not. But he definitely states and warns against those who say that he is not entitled to it, because it would weakens the resolutions of future wanna-be penitents.
This is precisely these words of Rabbi Johanan that Rabbenu Gershom picks up, and uses for his own argument regarding the case of the *kohen*:

*"And then you [would] find yourself weakening the hands of the repentant, and it is wrong to do so. For Rabbi Johanan said: "He who asserts that Manasseh has no portion in the world*

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[256] Jeroboam ben Nebat First king of post-solomonic Israel, he reigned for 22 years, approximately from 928 to 907 B.C.E. Immediately on ascending the throne he endeavoured to reconquer the central and northern tribal territories at the expense of the kingdom of Judah and to widen the breach between the two kingdoms. His activities in matters of ritual are described in *I Kgs.* 12:25-33. He made two golden-calves, one at Dan and the other at Beth-El in the south. He is said in the sources to have raised a "iron curtain" between the people and the temple (JT *A.Z.* 1:1., 39a : *Sanh.* 101b), and is frequently stigmatised in the Bible as having "sinned and caused Israel to sin".
[257] Ahab, son of Omri and king of Israel (*I Kgs.* 16:29 – 22:40), he reigned over the Israelite kingdom at Samaria for 22 years (c. 874-852) B.C.E.). He continued his father's policy in searching for peaceful relations with the kingdom of Judah and set up a triangular pact between Judah, Israel and Tyre. His foreign policy strengthened the Israelite economy and military establishment. Nevertheless the judgement of the *Book of Kings* is very harsh on him, because of the affair of Naboth the Jezreelite (*I Kgs.* 21) and the introduction of the cult of the Tyrian *Baal* in Samaria.
[258] See p. 73, note 253.
[259] *II Chron.* 33 :13.
[260] T.B. *Sanh.* 103a.

*to come weakens the hands of penitent sinners."*[261] *And if you [would] say "he won't go up to the pulpit and won't be called first to the Torah [reading], it [would force him to] consider in his heart his apostasy, and woe to this very shame, woe to this very disgrace, preventing him to make repentance…"*[262]

[261] This is our previous quote in *Sanh.* 103a.

[262] Cf. also Naḥum Raqover, "Ha-Teshuvah: Heybetim Mishpatiim" ["Repentance: Judicial Aspects"], *Miklhlalat "Sha'arey Mishpat", Parashat Nitzavim,* n° 43, p. 4. And also Y. Ketz, *Beyn Yehudim la-Goyim* ["Between Jews and the Nations"], Jerusalem, 1961, chap. 3, "Mumarim ve-Gerim" ["Apostasy and Conversion"], p. 75.

## 3.2 -- Penal Sanctions Against Those Who Remind Penitents of their Past[263] :

We have seen the principle according to which *"since he has been flogged he is to be considered as your brother"* (cf. 2.2) and its corollary, *i.e.* that someone, after having received the lashes, also benefits from an exoneration from the punishment of "premature death" (*karet*).

The Rambam pushed the ruling a bit further and gave it a wider extension, applying it to the validation of an offender's return to his position, one who was flogged, as follows from these words from the *Mishneh Torah*[264]:

כל מי שחטא ולקה, חוזר לכשרותו: שנאמר "ונקלה אחיך לעיניך"
--כיון שלקה, הרי הוא אחיך. אף כל מחוייבי כרת בלבד שלקו, נפטרו מידי כרתן.

> *"Whenever a person sins and is lashed, he returns to his original state of acceptability, as implied by the verse: "And your brother will be degraded before your eyes."[265] Once he is lashed, he is "your brother." Similarly, all those obligated for karet who received lashes are absolved for karet."*

Clearly, though the ruling is apparently dealing with a typical technical rabbinical discussion on the *de-orayta* or *de-rabbanan* status of *karet* or *malqot* ("lashes"), the Sages took the expression *"Since he has been lashed, he is our brother"* very seriously; indeed, they took it as a kind of motto to be used in much larger contexts -- as a line of reasoning in itself[266].

What we have to see now is how far this reasoning goes. Does it mean that it prevents anybody to remind the offender of his past, whatever the offense? The principle also raises the question of how society or the judge can be sure that the offender actually accomplished an honest repentance – this latter question we will address later, though[267].

And we will now turn towards the first aspect of the question (Part 3.2.1), which in modern terms would certainly be labelled as the "right of information" on an offender's past. At a

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[263] Cf. N. Raqover, p. xiv-xv.
[264] M.T., *H. Sanh.* 17 :7. Cf . N. Raqover, p. 86.
[265] *Deut.* 25 :3.
[266] Cf. N. Raqover, p. 87.
[267] See part 3.5 of this *exposé*, p. 117-35.

second stage (Part 3.2.2) we will turn our attention to the penal aspects of the problem, the sanctions regarding reminding an offender's past.

## 3.2.1 – A Right of Information on the Offender's Past?

### 3.2.1.1 – Primary Sources:

The past of the criminal is a secret, and preventing disclosure of an offender's past has to do with the protection of his reputation[268]. This protection and the prohibition to remind the offender of his past were expressed by the Sages under the rulings of defamation (*lashon ha-ra*).
As such, it is a development of the primary *Leviticus* verse:

אַל-תּוֹנוּ, אִישׁ אֶת-עֲמִיתוֹ

*"… You shall not wrong one another"*[269].

This verse was more specifically interpreted as meaning "insulting words", *ona'at devarim*, something to be forbidden in the case of an offender who repented, as is stated in the *Mishnah*[270]:

ואם היה בעל תשובה, לא יאמר לו זכור מעשיך הראשונים

*"If he is a repentant, you won't say to him: "Remember your previous deeds"."*

That the root of the prohibition was put under the category of *leshon ha-ra* is obvious from the following source:

לֹא-תֵלֵךְ רָכִיל בְּעַמֶּיךָ

*"You shall not go as a talebearer among your people"*[271]

And the gravity of the *leshon ha-ra* is thus underlined by the Rambam:

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[268] Cf. N. Raqover, p. xiv-xv.
[269] *Lev.* 25:14.
[270] M. *B.M.* 4:10. Cf. N. Raqover, "Ha-teshuvah: Heybetim Mishpatiim*, Miklhlalat "Sha'arey Mishpat", Parashat Nitzavim,* n° 43, p. 3.
[271] Cf. *Lev.* 19:16. This prohibition has even been given the seal of a law in modern Israel: cf. *Ḥoq Issur Leshon ha-Ra* ["Law on the Prohibition of *Leshon ha-Ra*"], 1965; *Sefer ha-Ḥuqim ,* 1965 ["Legislation Yearbook 1965"], p. 320. Cf. N. Raqover, p. 88.

המרגל בחברו--עובר בלא תעשה, שנאמר "לא תלך רכיל בעמיך"
ואף על פי שאין לוקין על לאו זה, עוון גדול הוא וגורם להרוג נפשות רבות
מישראל; לכך נסמך לו, "לא תעמוד על דם ריעך" (שם). צא ולמד, מה אירע
לדואג האדומי

*« A person who collects gossip about a colleague violates a prohibition as [Leviticus 19:16] states: "Do not go around gossiping among your people."*
*Even though this transgression is not punished by lashes, it is a severe sin and can cause the death of many Jews »*[272]

And thus in another passage[273]:

אמרו חכמים, על שלוש עבירות נפרעין מן האדם בעולם הזה, ואין לו חלק
לעולם הבא--עבודה זרה, וגילוי עריות, ושפיכות דמים; ולשון הרע, כנגד
כולם. ועוד אמרו חכמים, כל המספר בלשון הרע--כאילו כפר בעיקר, שנאמר
"אשר אמרו, ללשוננו נגביר--שפתינו איתנו: מי אדון, לנו"
ועוד אמרו חכמים, שלושה לשון הרע הורגת--האומרו, והמקבלו, וזה שאומרין
עליו; והמקבלו, יותר מן האומרו

*« Our Sages said: "There are three sins for which retribution is exacted from a person in this world and, [for which] he is [nonetheless,] denied a portion in the world to come: idol worship, forbidden sexual relations, and murder. Lashon ha-rah is equivalent to all of them."*
*Our Sages also said: "Anyone who speaks lashon ha-rah is like one who denies God as is said: "Those who said: With our tongues we will prevail; our lips are our own. Who is Lord over us?""*[274]
*In addition, they said: "Lashon ha-ra kills three [people], the one who speaks it, the one who listens to it, and the one about whom it is spoken. The one who listens to it [suffers] more than the one who speaks it."*

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[272] M.T., *H. De'ot* 7:1.
[273] *Ibid.* 7:3.
[274] *Ps.* 12:5.

The interesting thing is that the prohibition of defamation is not confined to the mere denigration of another person; it includes, according to Maimonides, disclosure of information that may damage another, in his person, or his material possessions, and even when disclosure simply causes him anguish.

Though we shall deal with this aspect in a further development, let us add now, however, that some limits to the prohibition were imagined by the *posqim*, for instance when the disclosure is necessary for a worthy purpose. This would be the case when two people contemplate going into partnership, and something is known about one of them, something that may cause the other loss by being in partnership with him, a duty arises to disclose the facts.
Similarly, it is a duty to inform a person who is about to engage a thief as an employee, of the prospective employee's character. In such cases, the duty to give information extends only to what is necessary for the purpose.
But the general rule and principle remains, as we have seen that the moral and social background of the whole question is to be kept central in the reasoning. In regard to this, and since the spread of defamation may seriously affect the victim, there is clearly no social duty to answer requests for information that may be defamatory, as we shall now see in the following passages.

### 3.2.1.2 – The Ḥafetz Ḥayim's Ruling:

One first interesting passage re-elaborating the root of the prohibition of tale-bearing or gossiping appears also in an interesting manner in the works of R. Israel Meir Ha-Cohen of Radin in his *Ḥafetz Ḥayyim* (1838-1933)[275]. On the idea that the spread of defamation may seriously affect the victim, he states that there is clearly no social duty to answer requests for information that may be defamatory:

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[275] Rabbi, ethical writer and Talmudist. He refused to make the rabbinate his calling, and after his marriage subsisted on a small grocery store which his wife managed. Nor did he intend to established a yeshivah; so many students, however, flocked to him that in 1869 his home had become "the Radun Yeshivah". In 1873 he anonymously published his first book, *Ḥafetz Ḥayyim*, in Vilna, then another book on the same subject in 1879 and a third in 1925. He was one of the founders of Agudat Israel and one of its spiritual leader.

*"Know that there is no arguing about the principle that we wrote about, whether someone asks ([you for information] and insists towards you to tell ([about someone else], whether you tell from yourself. For if all the details of this principle are met*[276] *[that is to say, if all the conditions were met in such a way that it would be permitted to tell the story], even if you are not asked to tell, you have to tell; but if the conditions are not met [if all the conditions are not met in order to allow you to tell the story] – it is totally forbidden [to tell]."*[277]

### 3.2.1.3 – The "League of Volunteers'" Trial:

We move here to a completely different period, not so long ago in Israel…

The sensitive question on the social and ethical duty to tell or not to tell when the information may be relevant to society or for a particular social issue, was raised in a very famous trial that took place in 1960, known as the *mishpat shurat ha-mitnadvim* ("Trial of the League of Volunteers")[278], or else as the "Ben-Gurion v. Appelbaum" case[279].

In the suit for defamation that was presented against the "League of Volunteers", the defendants claimed as their right to be able to publish such defamation because the publication was in the frame of an ethical duty. The court, nevertheless, repelled this claim in the following passage:

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[276] The Ḥafetz Ḥayyim is here talking about his 10th principle, who deals with *lashon ha-ra* in relation with a possible public interest on the information about an individual.

[277] Ḥafetz Ḥayyim, *H. Issurey Rekhilut*, Principle 9, appendix 8.

[278] *Shurat ha-Mitnadvim* was founded in the winter of 1951–1952 by students from the Hebrew University as a volunteer organization promoting norms of good citizenship by furthering the social integration of new immigrants and exposing prodigality and corrupt practices in the public sector. At a certain stage of its existence it found itself in a head-on confrontation with the State authorities, which it criticized, and other national-level suborganizations (the Jewish Agency and the Federation of Labor in Israel). These institutions regarded themselves as the main mediators between the citizen and the governing authorities, and therefore as more "legitimate" than *Shurat ha-Mitnadvim*. For an analysis of the case, cf. Paula Kabalo, "Mediating Between Citizens and a New State: The History of Shurat Ha-mitnadvim", *Israel Studies* - Volume 13, Number 2, Summer 2008, pp. 97-121.

[279] *Tevi'ah ezraḥit* [« Civil Action »], Tel Aviv, 113/56, Ben-Gurion *vs.* Appelbaum ; cf. N. Raqover, p. 90.

*"The ethical or social duty is to transmit the issue by means of a [official] notification or complaint towards the operating authorities of the State, the Police or the Attorney General and his representatives, in order that they take the convenient measures, or to address directly to the court through the [appropriate] suit or complaint. There is no duty to diffuse such matter to the public. On the contrary: We cannot fathom to ourselves any ethical value which the utility thereof is dubious and the damage certain. Presenting the offender to court is a valuable goal in itself, but the court proceeds in its own ways, and it is not fit to circumvent them. The publication of accusations to the public is no part of these procedures. The certain damage [that would entail) – [is] public shaming of an individual in public. In a case where the accusation would prove not grounded, there would be no real hope of repairing the damage done. And if it would be the case that this man indeed had erred, one should leave the imposition of the punishment to the competent body, and not prejudge the person and rob him of his good name."*[280]

Also of the utmost interest was the justification given by the Court for its ruling, and the fact that its wording insisted on the link with the rich halakhic heritage of the past:

*"We derive our tort law from England, [but] we may breathe into it a spirit of our own. That law, as received in Israel, grants the defence of qualified privilege for publication when one is under some legal, moral, or social duty to publish."*[281]

And what is the nature of this duty? The court answered the following:

*"There is only one answer. There is the duty that Israeli morality and the local concepts of human behaviour impel. Our moral principles are different from those of other*

[280] Cf. N. Raqover, p. 91. We don't bring here the Hebrew text in order to gain some place and reduce the paging of our *exposé*.
[281] *Idem.*

*peoples, to a certain extent. We possess a rich store of ethics inherited from our forebears; these ethics were partly characterized by Maimonides as follows: "He who sees another person committing a wrong, or following a course which is evil, has an imperative to bring him back to the right path, to tell him that he is sinning against himself by his bad ways…" Since we may not humiliate a person in public, one must act cautiously."*[282]

*So far as concerns us here, disclosure of the tainted past of a person cannot be justified by the mere wish of others to be told about it. Nor does the good intention, of the person who would disclose such information constitute any justification. The publicizing must have some useful purpose which can be achieved only thereby."*[283]

In summary, regarding our subject, the publication of information on the murky past of an individual is not to be justified only because others desire this information. Even the good intention of the information-giver does not justify such a publication. In order for the information to be justified, it must possess an authentic utility, and its publication would be authorized only if there was no other way to reach this utility factor[284].

Following this tendency, and in accordance with the spirit of the halakhic authorities of previous centuries, the ruling of the courts is that the right of an individual to preserve and protect his honour (*kevodo*) takes clear precedence on the so-called "right of the public to know".

## 3.2.2 -- Sanction Against one who Reminds an Offender of his Previous Deeds:

We will now see three cases, three rulings by halakhic authorities which address the penal aspects of our problem: sanctions towards those who remind an offender his sinful past.

### 3.2.2.1 – Rabbenu Gershom's *Taqqanah*:

Reminding the past of an offender, as we saw, falls under the definition of "insulting discourse" (*ona'at devarim*). Worse, it is even considered close to sticking a mark of disgrace

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[282] M.T., *H. De'ot* 6:7-8. See N. Raqover, *Taqqanat ha-Shavim*, p. 91-92. And also Rav Simcha Kook, « The Commandment of Rebuke – Privately and Publicly », -- *Crossroads. Halakhah and the Modern World*, Vol. III, Zomet Institute, Alon Shvut – Gush Etsion, 1990, p.122-43.
[283] *Ibid.*, p. 90-91.
[284] Cf. N. Raqover, p. 92.

(*tav qalon*) on an individual. This line of thought was indeed interpreted on the principle that *"If he is a repentant, you won't say to him: "Remember your previous deeds"*[285]*."*

Again, we see that Rabbenu Gershom treated the question and answered it in a most interesting way. According to A. Grossman[286]: *"In the remains of his teachings survive a certain amount of issues dealing with some of the problems before which a lot of Ashkenazim fellows citizen were hesitant about"*.

One of these problems is precisely the delicate issue of the "convert by force" (*anuss*)

The justification given by Rabbenu Gershom for his refuse to invalidate a *kohen*[287] is the interdiction of "insulting discourse" (*ona'at devarim*), and encouragement of the offender to return through a process of repentance.

This in turn explains to us the basis for the *taqqanah*[288] attributed to him[289]. The purpose of this enactment is the following: to impose a penal sanction by determining that one who reminds an offender his previous deeds will be put in a state of banishment (*nidduy)**[290].

This enactment is quoted in a *responsum* from the Maharam (Rabbi Meir from Rotenburg – c. 1215 – 1293)[291]: *"The ban (ḥerem) not to shame the repentant with his transgression in his presence (bifneyhem).*[292]*"*

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[285] M. *B.M.* 4 :10.

[286] A. Grossman, *Ḥakhmey Ashkenaz ha-Rishonim* ["The Early Sages in Germany"], Jerusalem, 2001, p. 122.

[287] As we have seen before, cf. p. 71-74 of the present work.

[288] A *taqqanah* is a directive enacted by the halakhic scholars, or another competent body enjoying the force of law. To Rabbenu Gershom are attributed a lot of *taqqanot* which have left a lasting imprint on Jewish Law, particularly in the area of family law. Whether all the *taqqanot* attributed to him were in fact enacted by him is a matter of dispute among research scholars. One of the most famous *taqqanah* issued by Rabbenu Gershom – which there is no particular reason to be doubtful about – is the prohibition for a married man from taking another wife.

[289] For the attribution of the enactment to Rabbenu Gershom and on the *responsum* of Rabbenu Gershom regarding the case of the *kohen*, see Nahum Raqover, "Ha-Issur Lehazqir la-Avaryan 'et Avaro" ["The Interdiction to Remind the Offender of its Past"], *Qovetz ha-Tsionut ha-Datit, Muqdash le Zekher shel D"r Y. Burg* ["A Tribute to Dr. Y. Burg"], Jerusalem, 2001, p. 663.

[290] *Nidduy* is to be distinguished from *ḥerem* (proscription), and refers in tannaitic literature to the punishment of an offender by hi from the community at large. The biblical precedent to the term is to be found in *Num.* 12:14. *Nidduy* differs mainly from *ḥerem* in that with the *menuddeh* social intercourse was permitted for purposes of study and of business, whereas the *muḥram* had to study alone. Cf. Haim H. Cohn, art. "Ḥerem", in M. Elon (ed.), *The Principles of Jewish Law*, Transactions Publishers, New Brunswick, New-Jersey, 1975, p. 539-44 [p. 540].

[291] Scholar, tosafist, and supreme arbiter in ritual, legal and community matters in Germany. Born in Worms, he went to France to study under the great tosafists of this time, and then returned to Germany and settled in Rothenburg, where students flocked to his school. About a thousand of his *responsa* has survived, which he sent to the communities of Germany, Austria, Bohemia, Italy, France and even to Solomon b. Aderet of Spain. Meir's peaceful life as a scholar and teacher was rudely interrupted when he was put to prison in 1286 due to a complex series of political events following the election of Rudolph I of Hapsburg as Emperor of Germany. Despite a great effort by the Jews to release him through a ransom he died in prison.

[292] Cf. L. Finkelstein, *Jewish-Self-Government in the Middle-Ages*,2nd edition, New York, 1964, pp. 30-31, 175, 179.

Let us take good note that this cursive mention does not say if one is allowed to talk of an offender's transgression *not in his presence*…

The truth of the matter is that Rabbenu Gershom was not the first to rule in such a manner, for during the gaonic period Hai Gaon (939-1038)[293] had already put a *shamta* ("banishment")[294] on any person who would insult an individual who had converted to another religion and then had changed his mind, returning to Judaism and coming again to the synagogue and pray.
Rabbenu Gershom's enactment, nevertheless, remains unique inasmuch as the prohibition does not only deal with a particular issue (like conversion as in the Hai Gaon case) but bears a general scope, seeking to express a legal statement on a general and spiritual situation of someone who repents.

### 3.2.2.2 – The Ravad's Ruling:

The stance of adopting a legal punishment towards someone who would dare remind an offender one's murky past can also be found in a *responsum* of R. Abraham b. Isaac[295] from Narbonne (1110-1179). The case is about someone who killed his friend on *Purim* while being intoxicated from drinking wine. The respondent replies that since the criminal has taken upon himself the punishment that was imposed to him, legal sanction must be adopted against those who would remind him or his family of his criminal act[296]:

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[293] *Gaon* of Pumbedita, a position he held for 40 years. He occupies a prominent position in the history of the *halakhah*, measured by the fact that approximately a third of the extent gaonic *responsa* are his. He also was a mystic, who ascribed sanctity to the *Heikhalot* ("palaces") literature.
[294] The term sometimes used in Talmudic literature to refer to *ḥerem* or *nidduy*, a term that was sometimes interpreted in the Rabbi's *midrashim* as indicating a civil death (*sham mita*) or the loneliness (*shemamah*) involved in the punishment.
[295] Also named Ravad II, he was the Av Bet Din of Narbonne, in Provence. Author of the *Sefer ha-Eshkol* ["The Book of the Cluster"].
[296] *Teshuvot Rava"d*, in R . Yossef Qapaḥ's edition, § 149. CF. also N. Raqover, "Al Lashon ha-Ra ve-al Anishah aleyha be-Mishpat ha-Ivri" ["On defamation and its Punishment in Jewish Civil law"], *Sinai*, n° 51, 1962, p.107.

*"And after he accepted upon him the judgement of heaven that we cut down for him, [they should] banish (ḥerem), condemn to wander, ban [shamta] and curse anyone that would shame him and call him "murderer". And one who transgress this enactment, let him be exiled and separated from the community for thirty days, and then he will come back to his "camp" through an (expressed] authorization from his fellow congregants ... (and it should be that someone] shames his wife or his sons ... by saying to them: "Remember the deeds of your father"..."*

### 3.2.2.3 – Benjamin Ze'ev of Arta and the *Anussim*:

The imposition of penal sanctions regarding forced converted persons (*anussim*) constantly reappears, due to historical circumstances, in the later *responsa* literature. One particular interesting case may be mentioned here, appearing in a *responsum* of Binyamin Ze'ev of Greece (1475 - c. 1540)[297]. This case is about Marranos of Spanish and other origins, whose tragic circumstances are graphically described. The case involved one of his fellow congregants that kept calling the Marranos "apostates".

R. Benjamin, grounding his view on the underlying principle of *ona'at devarim*[298], rules that the insulting person has to be put under ban, since calling the Marranos apostates would place obstacles in the path of their return to Judaism, apart from being in breach of the regulation of Rabbenu Gershom. These are his words:

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[297] Benjamin Ze'ev ben Mattathias of Arta (Epirus). *Dayyan* and halakhist. After living at Larissa (1528) and Corfu (1530), he settled in Venice and towards the end of life returned to Arta. His collection of *responsa*, entitled *Binyamin Ze'ev*, were published in Venice in 1534 and contains 450 legal decisions and *responsa*. He is often cited by R. Moshe Isserles.

[298] As in our prior cases.

*"And because of our numerous sins, when the Jews were each one in his own place in Spain and Portugal, Sicily, Calabria or Apulia[299], It fell upon them a decree issued by this evil king[300] forcing them to apostate, but they resisted and sanctified the name of God, blessed be He. But he imposed on them [harsh] decrees: some of them were assassinated [because of these decrees], some slaughtered, some were drowned, and some let the water being poured upon them against their will[301], and they fled this place and sought refuge under the wings of Divine presence (shekhinah), and we would remind them of their forced conversion ('oness)? Behold, the majority of the Jews there were forced to convert! And if we don't chastise those who remind him of his apostasy, indeed you would put him to failure for the future, and prevent him to stand on the threshold of the divine presence."*

We thus see from this *responsum* that R. Benjamin follows exactly the trace of Rabbenu Gershom *Me'or ha-Golah*.

We started with the rather technical laws on flogging and retrenchment (*karet*) and with the principle that once the offender has been flogged, he is no longer liable for *karet*, and even more than that, he is to be considered as "your brother".
We had the possibility to see most clearly in this chapter, on the one hand, the particular relationship existing between the punishment and repentance, a relationship very far from the retributive approach which would insist on the full-fledged implementation of the sentence. But on the other hand, and this is probably the most patent feature, we see the clear social bent of the law, whose goal is to re-integrate the offender as a full partner of the social *massa u-matan* ("give-and-take") in its most familial sense: "being again like a brother".

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[299] The south eastern region of Italy bordering the Adriatic Sea. The apulian Jewry, dating back from the days of Titus, had seen a period of flourishing cultural life from the 11th century to the end of the 13th century. After a series of expulsion decree during the 15th century, all Jewish life in the region came to an end in 1541, which brought a wave of immigration in the neighbouring countries. R. Benjamin's *responsum* obviously deals with this background.
[300] The last decrees of expulsion date from 1533 and 1540, forcing all the Jews of the province to leave the next year.
[301] We could not fathom what it meant exactly. Perhaps they threw themselves to the sea trying to swim and get to more friendly shores? – It is not clear what would be the difference with the previous mention that they drowned, or were drowned.

## 3.3 -- Limits on the Reinstatement of Offenders – the Severity of the Offense:

The perpetuation and implementation of the principle of *taqqanat ha-shavim* by the *rishonim* and the *aḥaronim*, as we saw, tried to follow the initial spirit of the original *mishnah*, even adding and enriching the original drive with a deep consideration as to the encouragement of an offender willing to repent, and a frowning upon any attempt to remind the offenders' past. The Rabbis, as we saw, even designed, and were not shy applying penal measures to prevent any hindrance that could stand on the way of the sacred principle of repentance.
What we have to see now is the first of three kinds of *criterion* imagined by the Sages in order to somewhat restrict the potential infinite application of the repentance principle, and take into account the various "indicators" of a human society which advocate for some realistic rulings; rulings, at least, that have to be accepted by men as they are in societies as they are. The Sages, indeed, were very sensitive to possible social reactions when dealing with the question of allowing a penitent sinner to return to a position of authority.
Among the perplexities raised by this issue were the following questions: does the lenient tendency of encouraging the repentant who has undergone punishment extend to the point of accepting him back to his professional position and status? And if was the case, do we allow this whatever the gravity of the sin committed?

Three different aspects of this perspective will be called to our attention in this chapter: the process of repentance in the case of a grave offense (Part 3.3.1), the case of the criminal (part 3.3.2), and the general problem of reinstating any offender – of a grave offense -- to his previous position.

### 3.3.1 -- Repenting from a Grave Offense:

It should be clear from the start that even the worse offenses, like idolatry, murder and sexual offenses, event though they were thought as being in the category of *me'uvat ve-lo yukhal likton*, *"that which is crooked cannot be made straight"*[302], and that only death could atone for them, repentance, even in these cases was needed, and considered as possible[303].

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[302] *Qoh.* 1 :15.
[303] Cf. J.T. Peah 1 :1 ; B.T. *Sanh.* 10 :1. See also R. Rabbenu Baḥyeh ibn Paquda, *Ḥovot ha-Levavot*, Sha'ar 7 ("Gate of Repentance"), chap. 10; Ha-Meïri, *Ḥibbur ha-Teshuvah* 1:1, who explains that if there are some

In fact, one the first to bring the issue of someone having committed these crimes in the rabbinic literature was R. Moses ben Joseph di Trani (1500-1580)[304] in a most interesting case. The case involves a man who was considered as perfectly virtuous by his fellow-citizens of the city, and at some point addressed to local the *beyt din* and asked them what he should to improve his ways and get the expiation for his sins. When the judges asked him what were his transgression and his sin, the man replied that for a whole year he had been a brigand as a member to a professional organised crime gang, and that he would stand at the crossroads, killing people in order to rob them. And the next year, he would chase Jewish woman and have sex with them … And a third year, he added, he had committed apostasy, and there was no foreign idolatrous cult that he did not engaged into…!"[305]
The judges, as they found the case somewhat too difficult for them, transmitted the case to R. Moses di Trani…

R. Moses di Trani answered that indeed the sins of this man seemed so grave that apparently there was no possible repentance for them, but that in fact:

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> *" … For sure, because after his repentance he was really sorry for his wrongdoings, and after his confession he recognized his rebellion and smote upon his thigh[306], there is nothing that stands in the way of his repentance, for He give hands to the sinner, and extend His right in order to accept the repentant; and even if [this man] committed numerous sins, but repented in a complete way before God may He be blessed, the Saint-May-Be He Blessed accepts him, as the Scripture says: "…as for the wickedness*

transgressions for which there is no expiation through repentance, there is is still some reason, during a criminal's process of repentance, to be lenient regarding his punishment.
[304] Born in Salonika from a family of Spanish origin but orphaned as an early age, he was raised in Adrianople, and later emigrated to Safed where he studied under Jacob Berab. One of his four pupil to be ordained in the newly revived *semikhah*, he was very as a rabbi and *dayyan* for 54 years, but it was only after the death of Joseph Caro (in 1575), with whom he had many controversies, that he was appointed to the head of the community of Safed.
[305] Cf. N. Raqover, p. 153.
[306] Meaning, « to repent ».

*of the wicked, he shall not stumble thereby in the day that he turns from his wickedness."*[307]*"*

We see from this answer that even though someone commits one – and in our case, three! -- among the worst possible sins, clearly fitting the definition of *"ha-me'uvat lo yukhal litkon",* "*That which is crooked cannot be made straight"*, Moses di Trani rules that this is no reason to conclude that he is not entitled to *teshuvah* at all. In other words, even though the sin remains perpetually before him, and it is impossible to repair the wrong deeds, the repentance remains an effective and possible path.

## 3.3.2 -- The Return of a Murderer to one's Position:

### 3.3.2.1 – The Dispute of the *Tannaim*:

Let us turn now to the question of the reinstatement of a wrongdoer who has borne his penalty. In the *Mishnah*, opinion is divided in the case of the unintentional murderer. An individual who killed another involuntarily must flee to a city of refuge and remains there until the high priest dies, as is said in Numbers[308]:

וְהִקְרִיתֶם לָכֶם עָרִים, עָרֵי מִקְלָט תִּהְיֶינָה לָכֶם; וְנָס שָׁמָּה רֹצֵחַ, מַכֵּה-נֶפֶשׁ בִּשְׁגָגָה

*"Then you shall appoint cities to be cities of refuge for you, that the manslayer that kills any person through error may flee thither."*

And again[309]:

כִּי בָעִיר מִקְלָטוֹ יֵשֵׁב, עַד-מוֹת הַכֹּהֵן הַגָּדֹל; וְאַחֲרֵי מוֹת, הַכֹּהֵן הַגָּדֹל--יָשׁוּב הָרֹצֵחַ, אֶל-אֶרֶץ אֲחֻזָּתוֹ

*"Because he must remain in his city of refuge until the death of the high priest; but after the death of the high priest the manslayer may return into the land of his possession."*

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[307] *Ezek.* 33 :12.
[308] *Num.* 35 :11.
[309] *Ibid.* 35:28.

From this starting point, the *Mishnah* records a dispute between the Sages regarding the status of the prisoner exiled to the city of refuge: May an exile who has served his punishment and returned from the city of refuge, go back to a position of authority he formerly held?
Here are the words of the *Mishnah* on this issue:

> רוצח שגלה לעיר מקלט, ורצו אנשי אותה העיר לכבדו--יאמר להם רוצח אני; אמרו לו אף על פי כן--יקבל מהן, שנאמר "וזה דבר הרוצח" (דברים יט,ד). מעלות היו שכר ללויים, דברי רבי יהודה; רבי מאיר אומר, לא היו מעלות להם שכר. וחוזר לשררה שהיה בה, דברי רבי מאיר; רבי יהודה אומר, לא היה חוזר לשררה שהיה בה
>
> *"A manslayer, if on his arrival at the city of his refuge the men of that city wish to do him honour, should say to them, "I am a manslayer!" And if they say to him, "Nevertheless [we wish it], he should accept from them [the honour]. As it is said: "This is the word of the manslayer"[310]. They used to pay rent[311] to the Levites, these are the words of R. Yehudah; R. Meir says that they did not pay them any rent. And [on his return home] he returns to the office he formerly held, these are the words of R. Meir; R. Yehudah says that he does not return to the office he formerly held."[312]*

The *gemara* pursues the dispute[313], basing and proposing its different *derashot* on the expression *yashov ha-rotzeaḥ el eretz aḥuzato*, *"and the murderer shall return to his possession"*[314], trying to determine if it simply means that he returns to his place (but not to his job) or if he indeed is reinstated in his office.
It is noticeable that there is a little bit of a shift, here, in the *maḥloqet*. Indeed, whereas the tannaitic dispute was centred on the question whether a man could return to his previous job position or not, the *barayta* cited in the *sugya* discusses R. Judah[315] and R. Meir's[316] holding

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[310] *Deut.* 19 :4.
[311] It is not clear who «they» is. Some texts says the refugees, or according to others, the cities.
[312] M. *Mak.* 2 :8.
[313] T.B. *Mak.* 13a.
[314] This expression is primarily brought by the *Sifrey*, cf. *Sifrey de-be-Rav*, R. Meir Ish Shalom's edition, *Mass'ey*, end of *pisqa* § 160.
[315] R. Judah bar Ilai – *tanna* of the 5th generation (135-170). He came from Ushah in Galilee, but while young went to reside in Lydda to become one of the pupils of R. Tarfon. He also studied under Akiva. He played a leading role in the convention of scholars un Usha at which the *Sanhedrin* was re-established after the hadrianic persecutions. Many statements and teachings from him are recorded in tannaitic literature.

and "enrols" it towards a slightly different question: does a man returns to the "possessions" *of his father,* a rather vague term -- which could possibly include his professional position, and more particularly the honours attached to some high office possessed by his father and possibly transmitted to him by way of inheritance.

The Ritba (Rabbi Yom Tov ben Abraham Ishbili, 1250- d. 1330)[317], in a typically *rishonim* integrative endeavour, tries to reconcile both tannaitic and amoraic *maḥloqet*, saying that the *Mishnah* "shows us the force" of R. Judah -- who holds that he does not return to the office he himself previously held, and that the *barayta* comes to "show us the force" of R. Meir -- who holds that he even returns to the office of his father, even though he did not held it himself."[318]

It remains unclear, though, what opinion has his favour.

### 3.3.2.2 – Nomination from the Start (*le-khateḥilah*):

At this point one is entitled to ask the question: do R. Meir and R. Yehudah dispute the question only on whether an offender is allowed to get back to precisely the position he held before – or the position that his father detained --, or may be they were also arguing about the possibility of getting back to *any* position, any new position?

Ritba's expounding on this issue -- appointing him to a new position, is that the general opinion (meaning: not only R. Judah, but *even* R. Meir) agrees that you should not appoint him.

Here are his words:

S8

[316] R. Meir – *tanna* of the 5th generation (135-170). One of the leaders of the post-Bar Kokhba generation. Essentially an halakhist, he took a decisive role in the development of the *Mishnah*. The persecutions led him to flee from Eretz Israel, and upon his return he was among the Sages who assembled in the valley of Rimmon to intercalate the year. Afterwards he was among those who convened at Usha for the assembly that led to the renewal of the office of *nassi* and of the *Sanhedrin*, which had been abolished during the revolt and the subsequent oppression.

[317] Rabbi Yom Tov ben Abraham Ishbili was known from an early age as a *ḥakham* and *dayyan* in the community of Saragossa, and after the death of his teachers, among whom was R. Solomon b. Abraham Adret, was regarded by Spanish Jewry as its spiritual leader. In addition to his activity as a *poseq*, he devoted himself to the study of philosophy, in particular Maimonides' *Guide of the Perplexed*. Yom Tov's reputation rests upon hi *novellae* to the *Talmud*, known as the *Ḥiddushey ha-Ritba*.

[318] *Hiddushey ha-Ritba*, *Makkot ad loc.*, *s.v. "Ma'i"*.

*"According to all, if [his previous occupation] is not maintained nor his father's, one does not [provide] him with one now, even we would not appoint him responsible for guarding a pit of water (reish gargota), which is a secondary position, even though his murder was unintentional, and all the more so [we don't appoint him] for someone who committed an intentional crime."*[319]

It thus appears that the Ritba therefore rules out any kind of nomination.

On the contrary, R. Joseph Rozin, the "Rogatchover" (1858-1936)[320] is of the opinion that "according to all"[321] it is permitted to give the murderer a new position. And that R. Judah preventing position only means that one is not *obliged* to give him his position back, on the ground that the situation [after his returning] is different:

S 9

*"This means that since his right has come to expiration, it is as if a new reality [had been created], and constitutes a change of the matter … and it all results from this (and the upshot of all this is that) anyway if they want to appoint him after all this they can, because he is like a new face, and not in the frame (in the mind) of transgressing."*[322]

### 3.3.2.3 -- The Nature of the Office Tenure (*serarah**):

The question before us is now the following: what kind of office exactly would prevent an offender to get back to his position? Rashi, commenting R. Meir's words in the *Mishnah*,

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[319] *Ibid.*

[320] R. Joseph Rozin (1858-1936) : Polish Talmudist, called the "Rogatchover" after his birthplace Rogachov (now in Belarus). In 1889 he was appointed rabbi of the Hassidic community of Dvinsk, and had to flee to St-Petersburg during World War I. He had an encyclopaedic knowledge of all rabbinic literature, and liked to link the philosophical ideas of Maimonides as well as the late discoveries of science to it. He died in Vienna. During his lifetime he published a commentary on Maimonides' *Mishneh Torah* and volumes of response which were expanded after his death. All his work appears under the title of *Tzafenat Pane'aḥ* (the "Decipherer of Secrets"] after the title given by Pharaoh to Joseph (Gen. 41:45). His main work, a commentary on Maimonides, was published during his lifetime, as well as five volumes of *responsa*.

[321] And this again refers to both positions of R. Meir and R. Yehudah.

[322] *Tzafnat Paneaḥ*, Makkot 13a, s.v. *ve-eyno shav*.

comments: *"If he was president or the head of the family, he returns to his honourable [task] when he returns to his city at the death of the Great Priest."*

Though the Ritba and others try to figure exactly what Rashi's position means, and also the exact meaning and the nature of the *reysh gargota* office ("responsible for the pit of water")[323] that one would allow him – or not -- to take up as a job[324], the Maharsha (R. Samuel Eliezer Halevi Eidels, 1555-1631)[325] explains that this office has also an element of social responsibility to it, and that this is indeed an ethical office[326].

Truth of the matter is that the office of *gargota* also appears in another place in tractate *Qiddushin*, in the context of the issue of appointing a convert[327]. From where it appears that none would let a convert be appointed to any office, even for a minor office. The Rambam so defines the matter[328]:

> אין מעמידין מלך מקהל גרים, אפילו אחר כמה דורות--עד שתהיה אימו מישראל[329]: שנאמר "לא תוכל לתת עליך איש נוכרי, אשר לא אחיך הוא" ולא למלכות בלבד, אלא לכל שררות שבישראל--לא שר צבא, ולא שר חמישים או שר עשרה, אפילו ממונה על אמת המים שמחלק ממנה לשדות; אין צריך לומר דיין או נשיא, שלא יהא אלא מישראל: שנאמר "מקרב אחיך, תשים עליך מלך" (שם)--כל משימות שאתה משים עליך, לא יהיו אלא "מקרב אחיך

> *"A king should not be appointed from converts to Judaism. This applies even if the convert's ancestors had been Jewish for many generations, unless his mother or father is a native-born Israelite, as Deuteronomy 17:15 states: "You may not appoint a foreigner who is not one of your brethren."*

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[323] See our last citation p. 91 of the *Hiddushey ha-Ritba, Makkot ad loc., s.v. Ma'i*.
[324] Rashi explains that the *gurgata* basically supervises the allocation of water from a stream to various fields, deciding who can use the water for today, who on the morrow.
[325] R. Samuel Eliezer ben Judah Halevi Eidels: Born in Cracow, he later took up rabbinic positions in Chelm, in Lublin (1614) and in Ostrog (1625) where he founded a large *yeshivah*. In his master work, the *Ḥiddushey Halakhot* ["*Novellae* on the *Halakha*"], a commentary on the *Talmud*, he generally follows the position of Rashi and the Tosafists. He also had a command of *Qabbalah* and philosophy, and had a positive approach towards secular sciences. In 1590 he participated at a session of the *Council of the Four Lands* which pronounced a ban on those who purchased rabbinic office.
[326] *Ḥiddushey Aggadot*, B.B. *ad loc.*, *s.v. ve-ha-mitnasse'*.
[327] *Qid.* 76b.
[328] M.T., *H. Melakhim u-Milḥamot*, 1 :4.
[329] *Deut.* 17 :15.

*This does not apply to the monarchy alone, but to all positions of authority within Israel. A convert may not serve as an army commander, a leader of fifty, or as a leader of ten. He may not even supervise the allocation of water from a stream to various fields.*
*Needless to say, a judge or a nassi should only be a native-born Israelite, as it is stated (ibid.): "Appoint a king over you from among your brethren." This implies that all appointments must only be 'from your brethren."*

And there is also another *halakhah* regarding the *serarah* (the "authority" attached to an office), which is expressed by the Rambam[330]:

כשמעמידין המלך--מושחין אותו בשמן המשחה ... מאחר שמושחין המלך--הרי זה זוכה לו, ולבניו לעולם: שהמלכות ירושה להם, שנאמר "למען יאריך ימים על ממלכתו הוא ובניו, בקרב ישראל"
ולא המלכות בלבד, אלא כל השררות וכל המינויין שבישראל--ירושה לבנו ולבן בנו עד עולם

*"When a king is appointed, he is anointed with oil reserved for this purpose, ... Once a king is anointed, he and his descendents are granted the monarchy until eternity, for the monarchy is passed down by inheritance, as it is stated[331]: "Thus, he the king and his descendents will prolong their reign in the midst of Israel."*
*... and not only the monarchy, but all other positions of authority and appointments in Israel, are transferred to one's children and grandchildren as inheritances forever."*

So, after such a distinction between a simple "nomination" and an office defined as a *serarah*, meaning an office with authority attached to it, and therefore transmitted by inheritance from one's descendant, comes back the question: can we say that an office which is not a *serarah* but in which honour (*kavod*) is involved belongs to the category of offices which a man inherits from his father?

[330] M.T., *H. Melakhim u-Milḥamot*, 1 :7.
[331] *Deut.* 17 :20.

As we should be reminded here, this is not a purely academic question, since, as it seems from the rulings we have already seen, a type of office which is inherited would be prevented to be given to a convert, or for our matter, to a repentant.
N. Raqover, in this regard, brings a whole series of testimonies[332], among them cases that were brought before R. Abraham ha-Levi (c. 1650-1712)[333], the Rashba (R. Salomon b. Aderet, 1235-1310)[334] or R. Joseph ben Ḥayyim Ḥazan (1741-1819)[335], all pointing to the fact that offices where *kavod* is attached are indeed most of the times transmitted by way of inheritance to the son[336].

In more recent times, the Rav Kook discussed the issue of the nature of an office in which some *kavod* is involved in order to be able to decide if one has the right to dismiss someone from a job that he fulfils. The question asked from him was if one can dismiss a doctor from his office[337]. His answer is by the negative:

S 10

> *"It is a fact that in all nomination where some kavod is involved, like medicine, which comes through wisdom and studies, indeed has authority (serarah) attached to it. And since any authority that can be found in Israel is dealt with by the law of inheritance, as is explained in Rambam's words in H. Keley ha-Miqdash 4:21, thus, it is clear that all the time he is alive, the authority is in its possession."*

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[332] N. Raqover, p. 161-62.
[333] R. Abraham ha-Levi: Egyptian rabbi and author. He succeeded his father in 1684 as head of the Egyptian rabbinate. Though most of his works, consisting of Bible commentaries, sermons, and eulogies have remained in manuscript, a collection of his *responsa*, entitled *Ginat Veradim* ["The Rose Garden"] was published in 1716-17 in Constantinople by his son-in-law, the physician Ḥayyim b. Moses Tawil.
[334] R. Salomon b. Abraham Adret: Born in Barcelona, his principal teacher, all his life, was Jonah b. Abraham Gerondi and also studied under Naḥmanides. He became a successful banker and a leader of Spanish Jewry, serving as rabbi of the main Barcelona synagogue for 50 years. Possessing a remarkable command of Roman law and local Spanish legal practice, he played a vital role in providing the legal basis for the structure of the Jewish community and its institution. He wrote more than 3,000 *responsa* covering the entire gamut of Jewish life, and constituting a source of information of the first order for the history of the Jews of his period.
[335] Born in Smyrna. At first rabbi in his native city, he went to Palestine in 1811, settling in Hebron, where he became rabbi. In 1813 he was elected chief rabbi of Jerusalem, which position he held until his death. His main work is *Ḥiqrey ha-Lev* ["The searching of the Heart"], a volume of his *responsa* (Salonica, 1787).
[336] R. Joseph Ḥazan dedicates a long *teshuvah* on the question whether a *shaliaḥ tzibbur* indeed transmits his *kavod* to his son by way of inheritance. Cf. Raqover, p. 162.
[337] *Orah Mishpat*, *H. Umanim*, § 20.

Further on, the Rav Kook gives his opinion according to which everyone to whom the public transmits any subject-matter, even though it is not clearly a matter which has to do with actually leading the public, is said to detain "direction" (*hanagah*) and "leadership" (*parnasut*)[338]; the justification for this reasoning implies a reference to Betsalel, who was called "leader" though he did not actually possess any conduct of authority, but only his deeds had to do with the public.
The practical conclusion (in the case of the doctor) of all this reasoning is the following: since the rule of inheritance applies to a *serarah*, this *serarah* is thought as being possessed by him, and since the job of doctor is included in [the category of] *serarah*, this office is then part of his possession, and he cannot be dismissed from it.

Going back to our subject, it is not yet quite clear -- from the impossibility of dismissing someone from his office-- if it also applies also to an unintentional offender who just returned from his refuge city.
We shall go back to it.

### 3.3.2.4 – The Decision of the *Halakhah*:

What is the final decision of the *halakhah* on the question raised by the tannaitic dispute?
The Rambam rules like R. Judah, who holds that one who returns from a city of refuge is not reinstated in his office. Here are his words, with -- it is worthy being noted -- a particular emphasis on the serious nature of the calamity (*taqalah*) caused by the offender[339]:

> רוצח ששב לעירו אחר מות הכוהן הגדול, הרי הוא כשאר כל אדם; ואם הרגו גואל הדם--נהרג עליו, שכבר נתכפר לו בגלותו. [יד] ואף על פי שנתכפר לו, אינו חוזר לשררה שהיה בה לעולם, אלא הרי הוא מורד מגדולתו כל ימיו, הואיל ובאה תקלה זו הגדולה על ידו

[338] The *parnasut* is an institution that finds its root in the *Talmud*. In the Middle Ages, the *parnassim* were also called *tobey ha-'ir*, *boni urbis* or *boni viri*. Their number varied, being mostly seven, sometimes being twelve. These *boni viri* often yielded great power, and could even force their view on the congregation. Cf. Israel Abrahams, *Jewish Life in the Middles Ages*, Atheneum, New York, 1985, p. 55, n. 1.
[339] M.T., *H. Rotzeaḥ u-Ṣhemirat Nefesh* 7 :13-14.

*"When a killer returns to his city after the death of the High Priest, he is considered to be an ordinary citizen. If the blood redeemer slays him, the blood redeemer should be executed, for the killer has already gained atonement through exile.*
*Although the killer has gained atonement, he should never return to a position of authority that he previously held. Instead, he should be diminished in stature for his entire life, because of this great calamity that he caused. »*

Let us take good note here that though the offender is considered as having gained atonement, he is not to be reinstated in his previous office.
What we have here, to use the modern language of legal philosophy, is a distinctive piece and display of retributive thinking mixed with a solid social utilitarian concern.
And so did the Rambam rule in his Commentary to the *Mishnah*[340]: *"The halakhah follows R. Yehudah in his two discourses."*[341]

The Ritba[342], and also the Ribash (Isaac ben Sheshet Barfat, 1326-1408)[343] adopted the same ruling, holding the *halakhah* as being according to R. Yehudah.
Let us mention, though, that the obligation to rule according R. Yehudah is not accepted by all, and some indeed rule according to R. Meir, who authorizes a murderer returning from a city of refuge to get back to his position. Thus, following a *responsum* of the Maharam (R. Meir of Rothenburg, 1215-1293), R. Ovadiah of Bertinoro (1450 - c. 1500)[344] writes that *"the halakhah is not according to R. Yehudah"*[345].

## 3.3.3 – Returning of one Grave Offender to one's Position:

[340] Maimonides, *Perush al ha-Mishnah* 2:8.
[341] We understood it as meaning: in the *mishnah* as well as in the *barayta*.
[342] *Ḥiddushey ha-Ritba*, *Mak.* 13a.
[343] Born at Valencia, he settled early at Barcelona, where he acquired while still young a world-wide reputation as a Talmudic authority. Though he earned his livelihood in commerce, he was compelled to accept a position as rabbi at the age of fifty. He then became the rabbi of Saragossa, where he had to cope with the great persecutions of the Jews of Spain in 1391, and later moved to Algiers. He is the author of 417 *responsa*, of great historical importance as they reflect the conditions of Jewish life in the fourteenth century. He is generally considered as being very stringent in his halakic decisions.
[344] R. Obadiah en Abraham Yere di Bertinoro (c. 1450 – before 1516), n 41 – Italian rabbi, Bible and Mishnah commentator. Leaving his home in 1485 towards Israel, he made a long journey that took him successively to Palermo, Rhodes, Alexandria, Cairo and finally to Jerusalem (1488), giving him the occasion to describe at length the Jewish communities of these places. He then became the leader of the Jerusalem Jewry. Bertinoro's fame rests on his commentary on the Mishnah which was published in Venice (1548-49).
[345] Cf. N. Raqover, p. 167.

So again, and assuming that the general ruling is like the Rambam's -- *i.e.* not allowing one to return to one's position, we are faced to the necessity to evaluate the exact scope of the law: does the prohibition only applies to a criminal, or does it extent to other offenders?

The words of the Rambam would seem to indicate that there is a tendency towards stringency, depending on the gravity of the offense and because of the calamity caused by the offender. Would the Rambam rule accordingly for such other big calamities not resulting from murder? It is not completely clear from his words.
From the words of the Ritba we understand that the *halakhah* does not reduce itself to cases of murder, but on the other hand it only deals with grave offenses. In his commentary to Tractate *Makkot*[346], the Ritba suggests that R. Judah itself restricts his prohibition only the case of a murderer or in the case that he was sold as a slave to others[347]:

S 11

> *"... Which are very grave and disgusting things. But for every other transgressions – anybody that made a complete repentance, even from the start (le-khateḥilah) we appoint him to whatever office he is fit to, and needless to say, he comes back to [the office] he was holding or that his father was holding."*

Several cases taken from the *responsa* of the Ribash give us some other examples of what constitutes "grave and disgusting things", but we will bring here a case dealt with by the Maharam; it is of special interest in that it brings a new perspective on the tannaitic *maḥloqet*, and a new way of linking R. Meir's and R. Judah's position.

The Maharam was asked about a man who was accustomed to doing specific *mitsvot* in the community, for instance wrapping the *Sefer Torah* (*gelilah*) after the *Torah* reading, or being called to carry a second *Sefer Torah* [on Feasts or special *shabbatot*]. But at some point in his life, having come to suffer duress and poverty, the community gave this *mitsvah* to somebody

[346] *Ḥiddushey ha-Ritba*, *Mak.* 13a, *s.v. may ve-khen be-golah*.
[347] And afterwards would be freed.

else[348]. Later on he went back on his luck and became rich again, and asked to being returned to be able to accomplish those *mitsvot* again.

The Maharam rules in this case that he was perfectly entitled to be returned to the honour of doing them, since he only abandoned because of a duress situation, when he became poor. Interesting is his justification, which uses our law of returning the criminal that just went back from his city of refuge to his previous office.

His reasoning, apparently, upholds R. Meir's ruling according to which one puts him back into office, except that he adds further on in his *teshuvah* that according to Rabbi Judah, a distinction must be made between a situation where the *mitsvah* was prevented from the man due to duress or due to a transgression.

And thus go his sayings:

S 12

> *"And thus [according to R. Meir], who did not prevent the murderer who just came back from his city of refuge at the death of the Great Priest to get back to his office. But [it is] even [so] for R. Yehudah, who holds a different opinion, in the end of the chapter "elu hen ha-golin" [Here are those who are exiled"], [holding that] he is not reinstated in his office, [but] it is different there, for the Scripture says "the murderer shall return", and he derives [his interpretation] from [the double expression] "shivah, shivah"[349] ... And precisely there [it means] that he committed a transgression, or that he committed an unintentional crime, or that a Jewish slave sold himself or was sold after his rapture. But here, where he did not commit a transgression, he is returned [to his position]."*

[348] We have to hear from this that he was no longer able to pay for this honour of performing those *mitsvot*.

[349] This discourse refers to a *gezerah shavah* ["inference made through analogy"] between the "return" (*shivah*) expressed in verse of Lev. 25:41, "… he shall go back to his family and *return* [*yashuv*] to his ancestral holding", and the "return" (*shivah*) appearing in the verse of Num. 35:28, "… after the death of the high priest, the manslaughter may *return* [*yashuv*] to his land holding".

It is interesting here to see the different use made by the Maharam here of the opinion of Rabbi Judah. He does not stress, like the Rambam, the "calamity" element in order to justify the prohibition of his returning to office; on the contrary, he introduces a possible distinction in R. Judah's opinion between an "under duress" situation and a "not under duress situation". By doing so, he "enrols" him, so to speak, in the other direction of allowing his return, by restricting his prohibition *only in cases* where he committed a crime, and not to the other cases, which means, for most of the transgressions…

### 3.3.4 – Conclusion:

We have seen the greatness of the *teshuvah* in the minds of the rabbis and the extent to which they were ready to go in order to secure an offender's endeavour for repentance.
Nevertheless, we also saw that the Sages where concerned by certain important *criteria* in their eyes, not restrict this principle and make it a "workable" social principle. Among these criteria is the dimension of work, of the office previously held by the offender.
We saw a long range of opinions, all them expounding on the initial and formative tannaitic dispute between R. Meir and R. Yehudah, with a general trend to rule along the lines of R. Yehudah, *i.e.* not letting an offender to return to his previous post, or letting him inherit of the honour and authority of a traditional *serarah* held by his father.
Nevertheless, not everybody is of this opinion, and we saw, among those who were prone to rule according the minority opinion of R. Meir, some endeavour to restrict R. Judah's prohibition only to the case of a murderer.
As we will see now in the next chapter, further distinctions were also introduced by the rabbis to make socially workable the notion of repentance; these refinements, in addition to the nature and the gravity of the offense, or the gravity of the consequences, pertain to the *nature* of the office involved, *i.e.* a private or a public office, which in the latter case entails the whole issue of the trust being vested in the office holder by the public.
And we will find also that in this new perspective, the issue of the gravity of the offence also gains a renewed accuracy.

## 3.4 -- Limits on the Reinstatement of Offenders – The Nature of the Position:

We have seen in our previous chapters that, despite the far-reaching encouragement by the Rabbis to help the offender to make repentance, and despite the prohibition of mentioning his past, they did not go as far as to think that if someone, after having repented, and even had become a *tzaddik gamur* (an "accomplished just"), a situation would be created where an offender – *a fortiori* a criminal -- could pretend he had never sinned. Nor was it meant by the Sages that the offenders could "automatically" be allowed to be reinstated to their previous professional position.
We then mentioned that, out of an extreme sensibility to the complexity of social issues, and a deep concern for the achievement of some *equilibrium* between the ethical-psychological aspects of repentance *and* the social requisites of an arena made of relationships *beyn adam le-ḥavero*, some *criteria* were devised by the Sages in order to contain a potentially unlimited implementation of the repentance principle

A study of the first *criterion* led us to investigate the nature of the offense, its gravity and its consequences.
But this was not the final thinking of the Rabbis on this question: further categorical distinctions were introduced, and a broader approach was also adopted pertaining to the nature of the office talked about. Their discussion also revolved around the concern of what influence a given job can wield on society through the specific public the holder of this job is addressing to. In this respect, the rabbis discussed issues covering the private or public character of the office in question, and other related issues dealing with the trust being vested in the office holder by the public.

We will thus successively examine the situation concerning the high priest (part 3.4.1), the president of the Sanhedrin (Part 3.4.2), the community leader (3.4.3) or the *shaliaḥ tsibbur* (Part 3.4.5). Some consideration will also be given to a closely-related but slightly different problem: though most of the talks are dedicated to the discussion of reinstating an offender to his *previous post,* the Rabbis also asked themselves if an offender could also be nominated to a [new] post *from the start* (Part 3.4.4).

### 3.4.1 -- The High Priest – Returning to his Position:

What is the law concerning the high priest (*kohen gadol*)[350] who committed a sin and accomplished his sentence? Is he allowed to return in the same position? The *Babylonian Talmud* does not deal with the question, but its *Palestinian* counterpart does teach from the Scriptures that the sanctity of the priest is not cancelled and he continues to serve in his office after having been lashed; and thus is the language of the *Yerushalmi*[351]:

S 13

> *"Rabbi Ele'azar[352] said: "A High Priest who committed a sin – we give him lashes, [but] we don't move him from his position of greatness". Rabbi Mana[353] said: it is written: "… Upon him is the distinction of the anointing oil of his God, Mine the Lord's."[354] As if to say, such I am in my sanctity, such is Aaron in his sanctity".*

It seems, thus, that the law concerning the *kohen gadol* is specific to him, because it is derived from the fact that his sanctity cannot be annulled.
This law is confirmed by the Rambam for the same reason, stating that the anointing oil does not loose its sanctity[355].

But there are two ways account for this specific law ; one way consists in explaining that it constitutes an exception because of the sanctity -- and if one has not this sanctity one is not immune to be pulled out of one's job. The second approach consists in explaining that this law is not an exception, and this would be the law for all man. According to this reasoning, we don't state that the cause for not removing him is his sanctity, but rather say the following:

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[350] We will indifferently use both expressions, using one or the other only out of stylistic preoccupations.
[351] J.T. *Sanh.* 2 :1. Cf. also N. Raqover, p. 179 *sq.*
[352] Rabbi Eleazar ben Shammua: *Tanna* of the 5th generation (135-170), generally referred to simply as "Eleazar". He was a *kohen* and one of the last pupils of R. Akiva. After the Bar Kokhba revolt Eleazar, among others, was ordained by Judah b. Bava, who consequently suffered martyrdom at the hands of ther Romans (Sanh. 14a). Highly esteemed by the early *amoraim*, he was called by Rav "the happiest of the Sages" (Ket. 40a).
[353] It is not always certain which is meant: Mana the Palestinian *amora* of the 2th generation (250-290), or Mana (also called Mani, or Mana II) the *amora* of the 5th generation. It makes more sense here, as his saying is linked here with R. Eleazar, to assume that it is talked about the 3rd century *amora* – of whom little is known.
[354] *Lev.* 21 :12.
[355] Cf. Maimonides, *Perush al ha-Mishnah, Horayot*, 3 :2.

though we might think that his sanctity puts him in a different case than anyone else -- his sanctity being rather, here, a factor tending to stringency (the ruling would then be that he cannot get back to office)--, in fact *even with his sanctity* it is not so; his sanctity still remains after he has committed a sin; therefore nothing prevents that he'd be reinstated…

One good example of the first approach is given by a judgement passed by the Court of Tel-Aviv in a plea presented by an institute for toranic education, with a goal of dismissing professors teaching in the organisation on grounds that they had committed frauds in their jobs[356].

At some point of the argumentation, the court needed to discuss the limits of the principles that "one goes up in sanctity and one does not go down" *(ma'alim ba-qoedesh ve-eyn mordin*), and cited precisely the case of the High Priest who returns to his job after having received lashes. In the explanatory developments of its judgement, the court mentioned that the principle of the law regarding the High Priest lies in his sanctity (*bi-qedushato*), and that it is precisely the reason why he is not removed from his greatness (*mi-gedulato*)[357].

Help is then brought from the Rambam, who precisely elaborates on the difference between these two expressions (*qedushato* and *gedulato*), and also goes on explaining the difference between the law applicable to the Priest and the law applicable to any other position:

S 14

> *"This distinction between sanctity (qedushah) and greatness (gedulah) explains in a proper light the law concerning the High Priest, In which case it is impossible to make him step down because of the sanctity inherent in him; but with regard to a president, who was vested in authority and greatness, but not in sanctity, indeed it is permissible to annul his nomination and make him step down [from office]."*

Basing its judgement on this reasoning, the Tel Aviv court therefore concluded:

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[356] Cf. *Judgements of the Rabbinical Courts*, vol. 8, p. 147. Cf. N. Raqover, p. 182.

[357] "Greatness" sounds a little bit over-translated, and we might as well translate in a more neutral, technical way: "high position" could be a possibility, then simply referring to the office itself rather than to the value attached to it. But precisely here, as the reasoning opposes the two terms *gedulah* to *qedushah*, we saw fit to keep a value-oriented term. In other contexts, though, we could reverse to "high position".

S 15

*"It is therefore clear that when we deal with whatever authority in our times, it must be compared to the authority of the president, whose category is only similar to greatness, but we must make the analogy with the High Priest, who was sanctified by a corporal sanctity ... it is then clear that the sanctity of the High Priest enjoys a kind of sanctity that cannot be annulled easily, and after being lashed he goes back to his authority; but regarding a head of the yeshivah, after being lashed, he does not go back in to his authority".*

We mentioned above that there were two distinct approaches as to dealing with the sanctity of the High Priest. Here we will present R. Moshe Feinstein's (1895-1986)[358] different ruling, which epitomizes the second approach. According to his reasoning[359], the returning of the *kohen gadol* to his office finds its justification not as of a ruling by exception, but because it would have been the case for everyone, as is clear – according to R. M. Feinstein -- from the explanations given by the Sages on the phrase *kevan she-nilqah harey hu ke-aḥikhah* ("since he has been flogged, he is like your brother")[360].

And since they needed to expound "and even Aaron in his sanctity", it comes and teaches us that the law for the *kohen* is no different from that applicable to any man, and though we might have thought that his sanctity, far from "protecting him" so to speak, would have him dismissed and placed him in an impossibility to get back to his position, it is not so.

According to M. Feinstein's explanation, then, sanctity is not a vehicle towards exception, not does it "overload" the *kohen's* fate – which would be a kind of exception "in reverse". In

[358] Born near Minsk, he became a rabbi in 1921 in Luban, near Minsk, and emigrated to the United States in 1937, where he became one of the leading halakhic authorities of his time on a wide area of issues, especially on modern science and technology. His *responsa* are entitles *Iggerot Mosheh*, and follow the *Shulkhan Arukh* (1959-1963).

[359] *Dibrot Mosheh*, *Gittin*, $ 23, p.355, n. 56.

[360] Cf. M. *Mak.* 3 :15. We have discussed this principle in our part 2.2.3, cf. p. 68-69.

other words, the approach towards the *kohen gadol*, "even though" sanctity is attached to him, consists in sticking the case to the usual norm.

### 3.4.2 -- The President of the *Sanhedrin*:

#### 3.4.2.1 -- Who is the "President"?

Before we deal with the case of the president, we must be aware that the biblical, the *Talmudic* or post-*Talmudic* definitions of the *nassi* ("president") do not cover the same realities. The Bible, for example, already mentions the sin of the president and of the necessity that he brings a sacrifice:

אֲשֶׁר נָשִׂיא, יֶחֱטָא; וְעָשָׂה אַחַת מִכָּל-מִצְוֹת יְהוָה אֱלֹהָיו אֲשֶׁר לֹא-תֵעָשֶׂינָה,
בִּשְׁגָגָה—וְאָשֵׁם

> *"When a ruler sins, and does through error any one of all the things which the Lord his God has commanded not to be done, and is guilty…"*[361]

The president of the Bible is none other that the king – and this won't be our subject now; whereas the *nassi* ("president") of the Talmud refers to the head of the *Sanhedrin*.
The situation is far more complex as to post-*Talmudic* times, where the title *nassi* was used for a wide range of different political situations, as underlines Rabbi Abraham (1186-1237)[362], Rambam's son, in an interesting *responsum* dealing with this problem[363].

#### 3.4.2.2 -- Presentation to Court of the King and of the President:

Regarding the king, he apparently possesses immunity against being presented to the court, as the *Mishnah* states: *"The king – does not judge, and is not judged"*[364].

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[361] Remarkable is the fact that in the surrounding passages of this verse, where the Bibles examines different categories of potential sinners and introduces them by the conditional "if [such and such sins]", it firmly and ironically turns to a confident and realistic "when", when turning to the case of the president…
[362] R. Abraham ben Moses ben Maimon: leader of the Egyptian Jewish community (*nagid*) and religious philosopher; only son of Maimonides. Immediately after his father's death in 1204 he was appointed *nagid* despite his youth. His view of religion was a mystical one and he was close to the Sufis. In addition to his important halakhic activity, he was compelled all his life to come to the defence of is father's books.
[363] Cf. N. Raqover, p. 187-88. We don't have the space here to cite it – and it is not central to our subject.
[364] M. *Sanh.* 2 :2.

Nevertheless, these things were said with regard to the kings of Israel, who don't stand trial, whereas the king belonging to the House of David was a judge and was possibly judged[365], as the *Babylonian Talmud* says basing its judgement on the verse:

בֵּית דָּוִד, כֹּה אָמַר יְהוָה, דִּינוּ לַבֹּקֶר מִשְׁפָּט

*"O house of David, thus said the Lord: Execute justice in the morning"*[366]

The *Yerushalmi*, though, has it another way and makes no difference between the kings of Israel and those belonging to the House of David; rather, it asserts that no king can be a judge nor can it be judged, and it resolves the contradiction existing between the *Mishnah* (stating that the king is not judged) and the biblical verse (stating that he is judged) specifying that the judgment of the king only appears *before God*, as is expounded from the verse:

מִלְּפָנֶיךָ, מִשְׁפָּטִי יֵצֵא

*"Let my judgment come forth from Thy presence"*[367]

According to this *darshening* ("expounding"), the phrase *ve lo danim oto* ("he is not judged") is to be heard as *ve lo denim oto – al Shem* -- "he is not judged – by the Name")…

Now, what would be the judgment of someone who is not a king but holds a high office, like the head of the *Sanhedrin*? Here was brought an interesting distinction. Even the *Palestinian Talmud*, who holds that the judgment of the king takes place before God, rules that the president can stand trial, and be possibly punished, and even dismissed from office, not necessarily because he committed a transgression but possibly from totally different reasons.
Thus goes the famous episode of Rabban Gamliel from Yavneh[368], head of the *Sanhedrin* in the decades after the destruction of the Temple, who was dismissed because he had embittered R. Joshua's[369] life[370]:

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[365] B.T. *Sanh.* 19a.
[366] *Jer.* 21 :12.
[367] *Ps.* 17:2.
[368] Rabban Gamliel from Yavneh: *Tanna* of the 3rd generation (80-110). Grandson of the first Rabban Gamliel, his life was spared by the Roman conquerors at the request of R. Johanan b. Zakkai. He presided over the re-established yeshivah and Sanhedrin at Yavneh, but at one stage angered his colleagues who temporarily deposed him. On his reinstatement he was obliged to share the Presidency with R. Elazar ben Azaryah.
[369] Rabbi Joshuah: *Tanna* of the 3rd generation (80-110). One of the five disciples of Johanan b. Zakkai's inner circle. His ordination by his master took place before the destruction of the Temple (J.T. *Sanh.* 19a). He later

כשנכנסו בעלי תריסין עמד השואל ושאל תפלת ערבית רשות או חובה א"ל רבן גמליאל חובה אמר להם רבן גמליאל לחכמים כלום יש אדם שחולק בדבר זה אמר ליה ר' יהושע לאו א"ל והלא משמך אמרו לי רשות אמר ליה יהושע עמוד על רגליך ויעידו בך עמד רבי יהושע על רגליו ואמר אלמלא אני חי והוא מת יכול החי להכחיש את המת ועכשיו שאני חי והוא חי היאך יכול החי להכחיש את החי היה רבן גמליאל יושב ודורש ור' יהושע עומד על רגליו עד שרננו כל העם ואמרו לחוצפית התורגמן עמוד ועמד אמרי עד כמה נצעריה וניזיל בר"ה אשתקד צעריה בבכורות במעשה דר' צדוק צעריה הכא נמי צעריה תא ונעבריה

*"When the champions[371] came in, someone rose and inquired, "Is the evening tefillah compulsory or optional?" Rabban Gamliel replied: "It is compulsory". Rabban Gamliel said to the Sages: "Is there anyone who disputes this?" R. Joshua replied to him: "No." He said to him: "Did they not report you to me as saying that it is optional? He then went on: Joshua, stand up and let them testify against you!" R. Joshua stood up and said: "Were I alive and he [the witness] dead, the living could contradict the dead. But now that he is alive and I am alive, how can the living contradict the living?" Rabban Gamliel remained sitting and expounding and R. Joshua remained standing, until all the people there began to shout and say to Ḥuzpith the turgeman ("translator"): "Stop!" And he stopped. They then said: "How long is he [Rabban Gamliel] to go on insulting him [R. Joshua]? On New Year last year he insulted him; he insulted him in the matter of the firstborn in the affair of R. Zadok; now he insults him again! Come, let us depose him!""*

### 3.4.2.3 – The *Yerushalmi* on the Non-returning of the President of the *Sanhedrin*:

So, going back to our question: what is the law concerning the president of the *Sanhedrin*? Once again, this question is not dealt with in the *Babylonian* Talmud but in his *Palestinian* counterpart.

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settled in Peki'in, establishing a *beyt din* which he headed. Despite his pre-eminence in academic circle, he lived in poverty and earned his living as a blacksmith (*Ber.* 28a).

[370] *Ber.* 27b.

[371] Lit., 'masters of bucklers', 'shield-bearers', i.e., great scholars. The Rabbis often applied warlike terms to halachic discussion.

A first answer is given by Resh Laqish[372] according to which the president is judged but not returned to his position, for fear that *di qatal lon*, "[that] he kills us". In other words: that he might avenge on those who have judged him![373]

This line of reasoning is followed in the ensuing discussion between Resh Laqish and Rabbi Judah who apparently did not like the discourse of Resh Laqish on this matter (he summons him, but Resh Laqish flees…), according to which one dismisses the president who committed a sin.
Nevertheless, thought the law is clear and univocal – one does not reinstate a president to his former office after he committed a sin --, interesting is the variety of reasons given. Here are the following[374]:

● The president is susceptible to avenge in his judgments;

● Because the sin of the president is like he made the in public, and his sin is considered like *ḥillul ha-Shem* (desecration of the [holy] Name")[375]. R. David b. Zimra (the Radbaz, 1479-1576)[376], in his effort to reconcile it with Maimonides' opinion that a sinner is not to be demoted, except where the offending act has been done in public, explains the rule in another manner. He suggests that every wrongful act of a president of the *Sanhedrin* is deemed to have been committed in public, and involves *hillul hashem*, desecration of the holy name.

● The Radbaz still offers another explanatory perspective: the president of the *Sanhedrin* takes the place of Moses, and has to be a *mofet la-aḥerim*, "a model for the others", keeping the people on the right path. The holder of such a mission, of whom is required to be an example, cannot be held by one whose conduct prevents him from doing so. The Radbaz bases this on the adage "practice what you preach", which the Talmud derives from Zephania 2:1[377].

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[372] Simeon ben Lakish: *Palestinian amora* of the 2nd generation (250-290). He was active in Tiberias, and was the brother-in-law, disciple, colleague and disputant of R. Johanan. The difficult political and economic situation in the Jewish population forms the background of many of Resh Lakish's homilies.
[373] J.T. *Sanh.* 2 :1.
[374] We unfortunately won't have the place here to study in detail each of them. We therefore just enumerate them.
[375] This explanation is expounded by the Radbaz (see following note).
[376] R. David ben Solomon Ibn Abi Zimra, Talmudic scholar, halakhic authority and kabbalist. Born in Spain, he found himself in Safed at the age of 13, then moved to Jerusalem and finally to Egypt, where he became the *naguid*, the official head of Egyptian Jewry. His library, containing rare books, was famous, and great was his influence through the numerous *taqqanot* ("ordinances") he issued, making him known beyond the boundaries of Egypt. In 1553 he returned to Palestine. One of his most important work is his collection of *responsa*, *Teshuvot ha-Radba"z*, 1882.
[377] הִתְקוֹשְׁשׁוּ, וְקוֹשֹׁשׁוּ, "Gather yourselves together, gather together".

● Another reason is based on the fact that the president as the head of the academy, and since he sinned intentionally, he is not deemed fit to teach *torah*[378].

### 3.4.3 -- Community Leader-Administrator:

After the high priest, after the king and the president[379], we now turn to another category.
We have seen above that there is a distinction to be made between the high priest, who is not dismissed from his position after he sinned, and between the president who is not reinstated to his office he held before his sin. So the question is raised with regard to other official positions: to whom the analogy is to be made as far as community leaders or people holding a public office are concerned? To the priest or to the president?
We saw that the core principle behind the reinstatement of the *kohen* was the sanctity attached to the anointed oil. At first sight, then, we would be inclined to see it as a exception rule and as such, not applicable to other type of offices not benefiting from the sanctity imparted by the anointing oil.
But we also saw that there was an alternative explanation, viewing the case of the *kohen* in the perspective of ordinary cases, and that the phrase "even the *kohen*" was to be understood as saying: for all his sanctity, the *kohen* does not distinguish itself from the general case -- that is, that the offender returns to his position. We would therefore be inclined, along this line of reasoning, to think that it would be the case for any public position.

A guiding principle could well be the commentary brought by the Radbaz according to which the president stands in the place of Moshe Rabbenu, teaching the right and good to the people, and then, that it would not be fit for him to still have the authority to teach the right norms of behaviour -- on the principle *qashet atsmekha ve-aḥar kakh qashet aḥerim* ("beautify yourself, and [only] then, beautify the others").
Two important principles can be learned in this matter from R. Moshe Isserlein (c. 1390 – 1460)[380]: first, one who is invalidated to officiate as a *dayyan* ("rabbinical judge") is

[378] This approach is developed by R. Moshe Feinstein. Cf. N. Raqover, p. 210-11.
[379] The *Talmud* also extensively deals with the *av ben din* and the Sages in general – for which the general ruling is that they are demanded to leave their office and go home –with deference, add the *sugiyot* dealing with the subject – again, we here skip the details of these developments through lack of space.
[380] Rabbi Israel Isserlein ben Petachia, Talmudist and halakhist, born in Maribor (Styria) from a well-known scholarly family, is considered as the last great rabbi of medieval Austria. His family was a victim of Viennese

invalidated as a leader appointed to the public. Second, if he did repentance, his repentance authorizes him to go back to his position[381].
Thus he ruled in a case that was brought to him, where he was asked about someone who had lied in his testimony, and if this man could be brought back to his position among the *tovey ha-'ir* ("leaders of the congregation")[382]. R. Isserlein refused this possibility since the man in question had not made repentance, but added that it could well be considered if the man made repentance[383].

Nevertheless, apparently, not every one agrees on this extensive possibility of repentance, for in a similar case, the Ḥatam Sofer (1762-1839)[384] ruled that even if repentance took place, a *messader qiddushin* ("conductor of the marriage ceremony") who had married a man with his cousin's wife, could not be reinstalled in his position.
A first reason given was that *ve-ra'uy yoter lifsulo mi-kol davar ha-noge'a le dat- yisra'el u-lehanhig tsibbur klal, ve-ḥote bal yitga'eh*[385], "it is fit to invalidate him regarding all matter pertaining to the Jewish tradition and the general public, for the sinner shall not take pride of his deeds."

That would be the first reason, but what about if this man makes repentance? What would be the reason then, according to the Ḥatam sofer, for not reinstating him? Bringing the Sages expounding on the verse *va-yehi bimey shefot ha-shoftim* ("In the days when the judges ruled")[386], he concludes that even if an man has made repentance, one has to take into account the difficulty this man would have in being a true leader for the public, leading him and remonstrate him if needed, because human weakness being what it is, there would then be a

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Gzerah in 1421. He moved to Neustadt around 1450, where he opened a *yeshivah* until 1460, when he died. He often served as an arbitrator between different communities and his decision was considered final. *Terumat ha-Deshen*, his most well-known work, is a collection of 354 *responsa – deshen*, i.e. the ashes that were removed every day from the altar in the Temple, it should be noted, has the numerical value of 354. Apparently, R. Israel Isserlein did not answer questions posed to him, but rather wrote the questions and answers himself. *Terumat Ha-Deshen* served as one source for the *Mappah*, the commentary on the *Shulḥan Arukh* by R. Moses Isserles (1520-1572).
[381] Cf. N. Raqover, p. 235.
[382] See note 338, p. 95.
[383] *Terumat ha-Deshen*, *Pesaqim u-Khatavim*, § 214 ; cf. N. Raqover, p. 235-36.
[384] Moses Sofer (also called the Ḥatam Sofer): Born in Frankfort, he first served as rabbi in Dresnitz (Moravia) and in 1806 Rabbi of Pressburg, at the time the most important community in Hungary, where he remained the rest of his life. He founded there the largest *yeshivah* since the *Babylonian yeshivot*, and made it the centre of its struggle against the reform movement and modernity. He contributed to form the idea the fundamental doctrines of orthodoxy as complete obedience to the *Shulkhan Arukh*. His writings comprise seven volumes of *responsa* (Ḥatam Sofer, 1855-1912).
[385] Cf. N. Raqover, p. 236.
[386] Cf. Ruth 1:1.

possibility that they would say to him: "*Tol qorah mi-beyn eynekha*!", "put out the beam from your eyes!", or else, "*mi-shum she-lo yishme'u devarav*", "[for fear] that they would not listen to him".[387]

In other words, we see pointing here another *criterion* of reflection: the general human nature of the public, one might even the *weaknesses* of the public, and this has to be taken into account along with the other classical criteria, namely the nature of the position.

### 3.4.4 – Nomination from the Start:

So far we have dealt with the question of the returning of an offender who committed a sin, be it a *kohen gadol*, a president of the *Sanhedrin* or a public community leader or holder of some public office, but we still have to clear the question of the offender who served his sentence and would like to be nominated to any office.

On one hand, we could say that invalidating someone who previously held office entails a greater amount negating his rights and humiliation from invalidating someone from the start, before the latter never was nominated. On the other hand, it might seem reasonable to be more stringent with the holder of any high position who transgressed than with a man holding a lesser position, and for whom the question in this latter case would simply be: is it worth to nominate him?

Though -- again through lack of space -- we won't bring all the sources here and duly present their full exposition, we can fairly sum up the issue by stating that what is to be found in this discussion are the same lines of reasoning as in the case of the *kohen gadol* and the president of the *Sanhedrin*.

Regarding the first case, and in the same way that the *Yerushalmi* tends to justify the returning of the High Priest for the sake of the sanctity of the anointing oil, in the same way does R. Moshe Feinstein allows a *kohen* candidate who has sinned to be nominated from the start -- on the same justifications used for the case of the returning offender, that is to say: the case of the *kohen* is no different than for any man.

The same parallel ruling prevails regarding the question of the nomination for the President of the *sanhedrin*[2], still with the same reasons: since we fear that a returning *nassi* would be reinstated in a position to avenge himself, there is a similar fear toward a man who would

[387] Cf. *Sh"ut Ḥatam Sofer*, *Ḥ. M.*, § 160; cf. N. Raqover, p. 237.

simply seek such an office: his newly gained position might allow him to unduly misuse his appointment.

Regarding the other reasons that were given, though, for example the fact that a sin committed by the president is like a sin committed in public, it is obvious that no such justification can be pleaded of someone who simply seeks the office for the first time. But still, according to the Radbaz, the operating reason for not letting him get the job, here, is that someone who serves as a public officer has to be a *mofet le-aḥerim*, an example for the others, and this also applies to candidates…
What can be said here is that no new criteria is brought here in this situation of a new nomination, and that the reasoning has to start, not by the definition and the nature of the office that the offender has in mind, but with an analogy drawn from the justifications of the "returning to one's previous office" situation.
Strangely enough, as thorough-going a researcher as N. Raqover confessed not having found any discussions on the subject in the sources[388].

### 3.4.5 – *Shaliaḥ Tzibbur* :

The hesitations between conflicting values appear nowhere else more blatantly than in the case of *shaliaḥ tzibbur* ("the delegate of the congregation" as regards to prayers).
On the one hand, as an individual, the Rabbis were careful to apply the universal principle saying that nothing stands before repentance and, after an offender has made repentance he is like a *tzaddiq gamur*, a "accomplished just". But on the other hand, he is the delegate of the community and as such, one has necessarily to take into account the individual's past, not only according to *criteria* of perfection, but also according to the weaknesses of human beings, who are not easily oblivious of the sinful past of someone, and are prone to remind it…

And though the *tannaim* took into account the specificity of the post, many other aspects were thought as placing it in the same perspective as other public offices.

[388] Cf. N. Raqover, p. 243.

It is thus said in the *Mishnah* that the *shaliaḥ tsibbur* must be *zaken ve-ragil, ve-yesh lo banim, u-beyto reyqam kedey she-yehe libo shalem ba-tefillah*, "wise and experienced, he has children, and his house is empty[389], so that he his heart is entirely devoted to the prayer".
A *barayta* adds other criteria in the name of Rabbi Judah:

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> *"He is burdened[390], and he labours in the fields, and his house is empty, and he is a respectful person (pirqo na'eh)[391], and he is humble, and pleasing to the people, and he is of an agreeable nature, as well is his voice, and he is an expert in teaching the three parts of the Tana"kh, and in teaching midrash, and the halakhot and the aggadot, and he is knowledgeable in all the benedictions."*

It is interesting that, though *pirqo na'eh*'s most probable adequate translation would rather tend towards spreading some praise regarding the erudition of the so-called *shaliah tzibbur* (as such, fitting the translation of *pereq / pirqo* as "chapter", "lesson", and by extension, "knowledge of the tradition"), it was precisely interpreted by the Rabbis in another direction, basing its meaning on *pereq / pirqo* as referring to the "age of maturity" as in the phrase *samukh le-pirqo*, "near to puberty". The Sages, then, precisely expounded the criteria of *pirqo na'eh* as meaning *zeh she-lo yatza lo she ra' be-yalduto*, "someone against whom no defamation was made on his childhood", meaning, "someone with a clean past".

Regarding the question of how stringent the Rabbis were in effect, and if indeed a *shaliaḥ tzibbur* had really to meet all these requirements, the *responsum* of the *Or Zaru'a*, R. Isaac b.

[389] The *Talmud* interpreted this as meaning "from transgression".
[390] Meaning, "with family cares", in others words, he is responsible with a family.
[391] We discuss this translation in the following lines.

Moses of Vienna (*c.* 1180 – *c.* 1250)[392], to his colleague R. Jacob b. Isaac[393] will serve us as a foundation stone.

Indeed, he had to deal with the case of someone who committed murder and made repentance: was he authorized to get back to his position as a *shaliaḥ tsibbur*? The *Or Zaru'a*, mentioning that the prayers were instituted as a replacement for the sacrifices, rules that everyone who is fit to accomplish the service in the sanctuary is also fit to act as a *shaliaḥ tzibbur*. And since a priest who committed murder unintentionally is fit to bring a sacrifice in the *beyt ha-miqdash*, so is someone who committed a crime unintentionally (*be-shogeg*), and he can then act as a s*haliaḥ tzibbur*.

In another development, he even adds that such is the case for someone who killed somebody intentionally, on grounds of the famous principle that *bi-meqom she-ba'aley teshuvah omdim, eyn tzaddiqim gemurim yekholim la'amod*, "Where the repentant stands, [even] the accomplished just canot stand", that he is preferable to a just from the principal[394].

Here are the words of the *Or Zaru'a*[395]:

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> *« There is no difference between one who committed a crime intentionally or unintentionally, and we must prevent ourselves from him, if he did not make repentance. But if he made repentance, he then immediately becomes a accomplished just, even though he did not yet received any trial".*

[392] Also named the *Or Zaru'a* after his main work. Halakhic authority of Germany and France. Born in Bohemia, he studied in Regensburg, in Wuerzburg and also in France with Samson of Coucy. His monumental work, *Or Zaru'a* suffered the fate of similar halakhic works which were not sufficient copied, and was only discovered and published 600 years later after his death (1862). It constitutes a valuable collection of the halakhic rulings of the German and French scholars, as well as being of great value for the history of Jews during the Middle Ages.

[393] We did not find any information on him.

[394] *Or Zaru'a* alludes here to the phrase according to which "where a *baal teshuvah* ["repentant"] stands even a *tsaddiq gamur* [an "accomplished" just"] cannot stand."

[395] *Or Zaru'a*, Part 1, *responsum* § 112.

The Maharshal (1510-1574)[396] conformed to this ruling, saying that indeed a repentant was preferable for the public prayers, since the prayer of the repentant was more serious regarding the confession of sins.
Of course, the *Or Zaru'a* does not dismiss the requirement that such a person should not lend himself to criticism towards his past; his answer to this possible objection is that this requirement only applies in the case of someone who acted intentionally and was warned before of his act.
This leniency was attacked by many, among them the *Rema*, who restricted the leniency in his commentary of the *Shulkhan Arukh*[397].
Another distinction was also made between the everyday *shaliaḥ tzibbur* and the shat"z for the Days of Fast, for whom the requirement of *pirqo na'eh* was thought as having to be as stringent as possible.

We can also say that except for the principle of being close to the repentants, the Sages also tried to make place to the opinion of the community towards someone with a murky past. They were fearful that in some cases it could lead to *ḥillul ha-Shem* ("desecration of the Holy Name") or cause a blow to the honour of the community (*kevod ha-tzibbur*). Consideration was also given to the fact that if the past was known to all, then such fears were not justified.

Another interesting problem was asked to M. Samson Bacharach (Shasaz, 1607-1670)[398]: the case of the *shaliaḥ tzibbur* who had committed apostasy, and then regretted, and separated himself from the non-Jews, and then went to another country, told his story and finally was accepted as a *ḥazan* ("precentor").
After a long reasoning and a certain number of analogies, first with the apostate priest and then with the law regarding the going up to the *Torah* of a *kohen* that desecrated his sanctity, R. Samson arrives to the conclusion that, although it is difficult not to try to oppose the requirement of *pirqo na'eh*, that this very requirement be narrowed and restricted in two ways:

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[396] R. Solomon Luria: one of the great decisor and teachers of his time. Born in Posen, he later served as Rabbi in Brisk and various Lithuanian communities for 15 years, and later was appointed as head of the famed Lublin *yeshivah*, which attracted students from all over Europe. Due to various internal problems, he opened his own *yeshivah*. His major work of *halakhah*, *Yam shel Shlomo* ["Solomon's Sea"] was written on sixteen tractates of the *Talmud*. An abridged version appears in nearly all editions of the *Talmud* today, at the end of each tractate.
[397] *Hagahot ha-Rema*, O. Ḥ. 53:5.
[398] Educated in Prague, he was compelled to accept a rabbinical position in Göding, Moravia, in 1629, after the Thirty Year's War broke out. He then became rabbi of Leipnik, Moravia, and remained there until the capture of the city by the Swedish army in 1643, went back to Prague and still later accepted the rabbinate in Worms up to the time of his death. Among his work is a collection of his *responsa* published by his son in Frankfurt in 1679 and also some religious poems.

it only applies to a fixed *shaliah tzibbur*. And even in this case, if there is no one preferable, even someone whose *pirqo* is not so *na'eh* is fit to the office.

We thus see that in this as well as in the previous cases, the rabbis tried to apply as much as possible the principle of *taqqanat ha-shavim*, restricting the impossibility to get brought back to office in most severe cases and in definite situations,

### 3.4.6 – Conclusion:

We have dealt in the previous chapter with the idea that the gravity of the sin could be an impediment to the unchecked implementation of the *taqqanat ha-shavim* principle. Our discussion in this chapter has dealt with the question if it could be sufficient to reinstate someone to his job on the sole account of the nature of his crime, and on the sole nature of his personal process of *teshuvah*.

In other words, is it possible to take into consideration only elements that are "on the wrongdoer's side", his past, his deed, his internal process of *teshuvah*? Or must it be given some weight to more external, societal, relational aspects dealing with the office, its function, its definition in the eyes of the public? And also, the quality of the ties existing between a given job and the general public, the influence that could possibly stem from a given nomination on the general state of mind of the public, not mentioning the general message displayed in terms of values?

Beyond the technicalities of each case and of the different categories of jobs we reviewed, which gave us different rulings, we saw that considerations of *ḥillul ha-Shem* and respect for the community could be weighty enough to prevent a person's returning to his position. Great care was given to the likelihood that reinstatement will cause *ḥillul ha-Shem* or disrespect for the community.

In other terms, we have been witness to a very interesting approach when seen in the perspective of modern philosophy of legal thinking. Neither was it a retributive approach -- mainly mindful on the moral deserts of the offender in connection with its sin, nor did it

operate in a utilitarian mode. What we saw here was the emergence of a third *criterion*, namely the psychological capacity of acceptance from the general public[399].

This means that the concern the *posqim* had in mind is not only the case in its proper parameters -- be it the nature of the offense, or the character of the sin--, but also the case as it can be received in the broader context of society. We have here a good example, according to us, of the relationship-oriented thinking of the rabbis[400].

[399] One could of course argue that taking into account the possible reaction to a ruling *as part of the ruling* is just a broader, more elaborate kind of utilitarian calculation, but we will demonstrate in our "final" conclusion that this concern is no relevant at all as concerns the Rabbi's view of tings.

[400] We mean by « relationship-oriented » thinking a line of reasoning which does not necessarily rules according to what can be rationally said about the nature of a notion or a situation, what could be called a "substantive" thinking as has accustomed us Greek-based western philosophy. But instead -- leaving aside, in a kind of husserlian *epochê*, the question of the right description or definition – a thinking that seeks a practical procedure by bringing into the scope of reflection, if not as a primary *criterion*, the anticipated reaction of the receiver. Another outstanding piece of "relational thinking" in our eyes is the entire *sugya* of the beginning of tractate *Bava Metzia*, where the just ruling is not reached by operating an individuation of a some general and rational notion of what is just, but by merely calculating, so to speak, the differential space between the claims of both defendants.

# 3.5 -- Limits on the Reinstatement of Offenders – Restoration of Confidence in an Offender:

After we have seen two main aspects tending to limit in some way the far-reaching principle of *taqqanat ha-shavim* – these aspects were the nature of the offense and the nature of the office -- we must now be talking about a different kind of preoccupation, nevertheless crucial for the understanding of the overall "envelope" of *taqqanat ha-shavim*: the restoration of confidence in the offender.

The main questions at hand, here, are the following: how do we know that someone has made duly sincere repentance? Are there objective *criteria* for this kind of evaluation? Is there a period of time at the end of which we can say that someone has turned a new page in his life? One thing is sure at this stage: restoration of the confidence can only prompted and channelled through a process of repentance, and only be a result of repentance. We will then have to examine again how repentance is expressed and estimated.

On a more practical perspective, numerous questions also arise, which we will have to deal with. For instance: what would be the ways to reinstate an offender to a position, if he was disqualified because of his sin? Apparently, if the disqualification was only part of the punishment, it is sufficient for him to serve his sentence. But if the disqualification was caused by a profound distrust in him, then, how can confidence be restored?

The link between the deprivation of office and the loss of confidence is well exemplified in the story of the loss of kingdom by Saul following his sin, in comparison with David, who despite his sinning, was not deprived of his kingdom and not removed form the king's chair.

According to R. Joseph Albo (1380-1444)[401], Saul was deprived of his kingdom because his sin was precisely committed in the frame of his office as a king, and he then deserved to loose his crown; whereas David's sin was not linked to his acting as a king, and was considered as having been committed in another field of values.

[401] Born in Aragon, he studied with Hasday Crescas (c. 1340-c. 1410) in Saragossa, and suffered, like his master, from the riots that swept the whole territory of Spain in 1391. He was a central actor in the Dispute of Tortosa that took place between 1413 an 1414, a traumatic experience that undoubtedly was the source of his only one book and masterpiece, the *Sefer ha-Iqqarim*, a polemic but also a true theoretical reflection on the principles of Judaism (achieved in 1425).

The restoration of confidence, as we will see, must be a result of the process of repentance of the offender. Nevertheless, repentance is a personal, internal act. How can we delve into the depths of a person's heart? Even if a person's external behaviour seems to reflect a change of values, this may be no more than a façade, a feigned repentance.
It will therefore be our interest to see how the rabbis pondered and refined different *criteria* in order to objectify the process of repentance. We will then see what becomes of repentance when the stolen property is not returned (Part 3.5.2), the case when repentance occurs without confession or without expiation (Part 3.5.3), the concrete proofs for repentance (Part 3.5.4), and repentance as linked with the flogging punishment (Part 3.5.5).

Before doing that, nevertheless, we have to present a notion that will be of importance in our discussion, the key concept of *hirhur teshuvah*. We will have to study it first in a slightly different context than the different cases of offenders that will be brought in our further developments: that of the law of marriage and witnesses (part 3.5.1).
Then only will come the time to ask ourselves if the principles at work in this context appear to be workable in the broader contexts of any transgression.

## 3.5.1 -- Validating the Witnesses through Repentance:

One of the most basic and foundational ruling for our subject in this part of the *exposé*, and one we have to start with, is the ruling regarding the possible invalidation of witnesses in a marriage, which brings forth the concept of *hirhur teshuvah*, "intended" repentance".
The question at hand is the following: can the law of the witnesses, as far as "intended repentance" is concerned, be projected, extended and applied to the cases of any offender?
Let us keep in mind this question for the moment, for it will constitute the "continuous bass" of our chapter here. But beforehand, we must now turn to the *Talmudic sugyah* regarding the law of the witnesses[402].

What is really the power of "intended repentance" (*hirhut teshuvah*)[403]?

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[402] At both stages of its overall process, namely *qiddushin* and *nissu'in*. We will elaborate further on the legal meaning of the witnesses in this process.
[403] We found it difficult to know exactly what *hirhur teshuvah* is. Literal translation would have it as « meditative repentance », or « consideration to repent ». In some places we also find in the Rambam's *Hilkhot Ishut* the expression *teshuvah be-libo*, « repentance in one's heart », meaning that someone has the intention of making repentance though all the external signs have not yet been given. As this notion of intention seems to match the general give-and-take of the questioning, as well as further developments, we translated by « intended repentance » and will stick to the expression.

The *Talmud* in Tractate *Qiddushin* says that one who consecrates a woman on conditions of being a "just" (*al menat she-hu tzaddiq*))[404], the woman is consecrated out of doubt (*mi-safeq*)[405].
Here are the words of the Talmud[406]:

על מנת שאני צדיק אפילו רשע גמור מקודשת שמא הרהר תשובה בדעתו

*"[If a man consecrated a woman by saying] "on condition that I be a just", even if he is an accomplished wicked person she is consecrated for may be he has in his mind the intention of making repentance."*

It is clear that the woman is only consecrated out of doubt (*safeq mequdeshet*) precisely because of the uncertainty of the process of repentance; and if we were certain about it, she then would be consecrated with certainty (*mequdeshet vaday*).
What we have here is an illuminating source on the power of intention, which turns a man from the category of "wicked" to the category of a "just"; the declared intention of our "consecrator" is here being considered as a step towards the process, and in fact even integrated as being an intrinsic part of the process. Why? Because he could *possibly* consider making repentance.
In other terms, this far-reaching lesson tells us that a possible "intended repentance" is sufficient to turn a complete "wicked" person into the realm of a "just".

Now, is it possible to use this case, and project its import on situations where people were invalidated from being witnesses because of their wrong deeds?[407] Would we consider also in

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[404] The question of conditional marriage is a complicated one. In principle, a couple may celebrate conditional *qiddushin* so that, provided all the rules applicable to the conditions are observed, and the condition itself fulfilled, the *qiddushin* will be valid from the start, and invalid if the conditions are not met. However, on account of the possible complications that might arise, and the stringencies of the laws concerning a married woman, no conditions are permitted in *qiddushin* and *nissu'in*. Cf. *Sh. Ar.*, EH 38; Ben-Zion Schereschewsky, art. « Marriage », in M. Elon, *Principles of Jewish Law*, Transactions Publishers, New Brunswick, New-Jersey, 1975, p. 358.
[405] The doubt « works » in the direction of validating the marriage, which for that matter is considered a stringent position. For the rationale behind the stringency, see below, note 8.
[406] *Kid.* 49b.
[407] The presence of two competent witnesses at both stages of the marriage ceremony is mandatory; as they do not merely serve as eyewitnesses but their presence is an essential part of the legal act, their absence would invalidate both the *qiddushin* and the *nissu'in*. This crucial part played by the witnesses can been seen from the two following examples: if a man and a woman acknowledge that there were not two witnesses present at their marriage, their acknowledgement (*hoda'ah*) that they are married will not serve as a basis for determining that this was the case (*Kid.* 65a; M.T., *H. Ishut* 4:6; *Sh. Ar.* E.H. 42:2). Conversely, if two competent witnesses testify

their case that since they could possibly make repentance we could validate their testimony? According to Rashi, the answer is yes[408].

But then, if there is place to estimate that they could make repentance, why does the *Talmud* say that one who consecrates [a woman] before non-valid witnesses, his *qiddushin** are non-valid? Why don't we say that they [the witnesses] might also have the intention of repentance, and then validate their testifying and consider the *qiddushin* valid out of doubt?

Indeed, Rashi does not speak about any offender, but only about a compelled offender (*anuss*), and also about one whom we know he made repentance after his testimony. If so, may be Rashi's word are only applying in these precise cases.

In the same way that the words of the *Talmud* served to Rashi in order to fuel his thought on the subject of the validation of witnesses, in the same manner Rabbenu Tam (1100-1171)[409] used this very *sugya*, but for a slightly different subject: the validation of witnesses for the *get** ("divorce").

According to Rabbenu Tam – and this is the core of his different approach, there is no place for the question of a possible contradiction between the case of *meqaddesh ha-isha* and the validation of witnesses. Why is that? Rabbenu Tam here raises the possibility that we don't have to take *hirhur teshuvah* into consideration at all times, but only at times when there is a real basis (*raglayim ledaber*) to think that repentance is really intended, for instance in the case of one who consecrated a woman on conditions that "he is a just" (*al menat she-hu tzaddiq*) – a condition, according to Rabbenu Tam, that really shows that he intends to become such a *tzaddiq*, or in the case of one who assented to return a stolen property.

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to the celebration of a marriage between a particular couple, they will be regarded as duly married notwithstanding their own denying of the fact.

[408] Let us note that this position, which at first sight seems a *qula* ("leniency") is in fact *le-ḥumra* ("adopting the stringent attitude"), for in matters of marriage the most "secure" conclusion (from the point of view of the reasoning), so to speak, is to consider the *qiddushin* as valid. Indeed, ruling "*le-qula*" that the *qiddushin* are not valid would run the risk – if they were valid -- of letting future children of the woman with another man be *mamzerim*, *i.e.* born out of a legitimate bond (as the woman could be still married). *Qiddushin* are very serious matter, as they affect the status of the parties by creating a legal-personal tie between which can only be dissolved upon divorce or the death of either party. The *arussah* ("affianced bride") is regarded as a married woman (*eshet ish*) for all purposes under the *de-oraita*-law (law "from the *Torah*"). Moreover, generally speaking, *"safeq de-oraita le-ḥumrah*", *i.e.* a doubt concerning a law from the *Torah* (as opposed to a law *mi-de-rabbanan*, "from the rabbis") is dealt with according to the stringent position.

[409] Jacob ben Meir Tam: Tosafist and leading French scholar. He was the grandson of Rashi. He lived in Ramerupt, where he engaged in money lending and viticulture, which brought him into contact with the nobility and the authorities. Tam was recognized by all contemporary scholars, and pupils came to his *beyt midrash* from as far as Bohemia and Russia. Although he did not refrain either from abolishing several customs which did not appeal to him or from introducing important *taqqanot* ("ordinances"), he was in principle extremely conservative on questions of custom. The *tosafot* of the Babylonian Talmud are based on Tam's explanations. In addition to this, his main work is the *Sefer ha-Yashar* ("The Book of Rectitude", Vienna, 1811) which consists of two parts, the one, *responsa*, and the second, his *novellae (ḥiddushim*) on the Talmud.

What is interesting in this approach, according to us, is that we witness here a attempt to supplement and enrich an internal, psychological and therefore totally subjective phenomena (*hirhur teshuvah*) with a kind of objective background, "a good reason to" (*raglayim ledaber*); in other terms, a pragmatic *criterion*[410] of the situation which could be said objectively motivating the claim of *hirur teshuvah*.

A third approach is that of the Radbaz, who cannot resolve himself to leave out the repentance in its external, public-act aspect. He considers that the re-validation of witnesses that had been invalidated is only done – by means of other fit witnesses – if the former witnesses have done repentance *in effect*, and for that matter intention is not enough.
But in the case of someone who consecrated a woman, he adds, the question is not one of validating or not, but a question of truth, so to speak, a question of "is he really a "just"?"…
And thus, if there is *raglayim ledaber* that this man intended to make repentance, only then we sense that he may be a *tzaddiq*.

## 3.5.2 -- Repentance Without Returning the Stolen Property:

We saw the "projective efficiency" of the concept of *hirhur teshuvah* in the case of one who consecrates a woman. Our question, now, is the following: would this concept be as effective in the case of a robber?
As we saw previously, according to Rabbenu Tam, as long as he agreed to bring the stolen property back, he is called a "just" (*tzaddiq*). Nevertheless, according to the Rosh[411], he does not benefit of such an epithet until he really brings back the property, and intended repentance is not enough:

S 18

[410] "Pragmatic" in the linguistic meaning of the term, *i.e.* the material and objective parameters of a given communication situation.
[411] Asher ben Jehiel (also know as Asheri and Rosh, c. 1250-1327), Talmudist. He spent some time in France and then lived in Cologne and Coblenz, and then to Worms to study with Meir b. Baruch of Rothenburg. After the imprisonment of his master, Asher became the acknowledged leader of Germany Jewry. After the *Rindfleisch* massacres (1298) he left Germany in 1303 for Barcelona. He is regarded as one of the outstanding halakhic authorities who put the final seal to the work of the German and French codifiers, joining to it the Spanish *halakhah*. His two main works are *Piskey ha-Rosh* [The "Chapters of the Rosh"], a summing up of the decisions of the earlier codifiers and commentators, and a Collection of *responsa* (Constantinople, 1517) numbering more than 1000 *responsa* arranged in 108 chapters.

*"Regarding property, if it came into his possession in a criminal way and he wants to make repentance, he must get out the property out of his possession, as was ruled in the "tereyfah case"*[412]*, for which we don't accept his repentance until it is clearly done by way of monetary solution after he returned out of a complete repentance, all the more so with illegally acquired property, he must give it back and get it out of his possession".*

Further distinctions were later introduced in the debate, and some are of the opinion that only for one who is wicked against his fellow-men, like the robber, does the insufficiency of the intention applies, and he must therefore do a concrete act and return the stolen property; whereas in the case of the apostate, for example, whose sin was committed in the frame of "between man and his creator" (*beyn adam la-maqom*), everybody agrees that there is no need in any act to call him "just".

Without any further development -- which we unfortunately we cannot allow ourselves to provide due to lack of space --, let us summarize the issue by pointing to a fundamental divide in the different approaches: a tension between two cognitive perspectives towards certifying the process of *teshuvah*.
On one hand, an internal view that spots intention as its core value and puts it in the centre of its reflection -- even to the point of deeming it sufficient, and forbidding itself to posit external demands on the repentant offender; on the other hand, a more external approach, based on public acts as the only means to express, bring testimony and proof to a psychological phenomena.

This tension between internal and external aspects, between an approach that favours mind and another for which the body must take precedence, is of course not an exclusivity of our subject, and indeed pervades all of the legal reflections of the rabbinical literature, as well as in modern scholarship numerous efforts to try to characterize Judaism's philosophy of *halakhah*. A further development would here certainly be most untimely, but let it be said in an word that it probably bears testimony to Judaism's fundamental vision of man as a psycho-

[412] The Rosh here alludes to the case of a butcher who sold *tereyfah* meat pretending that it was *kosher*.

physic creature, both aspects bearing equal importance, an unresolved -- and certainly meant to stay unresolved, dynamic tension…

### 3.5.3 -- Repentance without Confession, and Repentance without Expiation:

The law regarding the *messader qiddushin* on conditions that he'd be a "just" also inspired the *Or Zaru'a*, who made a point of saying that the law demonstrated that even though the offender needs expiation, the lack of expiation does not prevent him to be called *tzaddiq*:

S 19

> *"The law is the same for one who transgressed a negative or a positive commandment, or is liable to karet*[413] *or to death, whether he [committed his sin] intentionally or unintentionally, from the moment he considered making repentance, he is considered as a perfect just in the entire Torah, and he just has to inflict himself some grievance and to afflict his body in order to gain expiation on his deeds. Proof of the matter is what we say in the passage of one who consecrates a woman: "on conditions that I'd be a just, even if he is a complete wicked person, she is consecrated, because of his possible intended repentance". So, even though we know him as a complete wicked person, even here, if he intended to make repentance, she is consecrated, and [we consider him] to be a just, even though he did not undergo any trial*[414]*."*[415]

[413] "Divine punishment by premature death". We will stick in this chapter to the place-saving word *karet*.
[414] Meaning, no punishment was yet put on him that would permit him to make expiation.
[415] *Or Zaru'a*, Part 1, *responsum* §112

And thus, the *Minhat Ḥinukh* (R. Joseph Babad, 1800-1875)[416] derives out of this source that intended repentance (*hirhur teshuvah*) is sufficient in order for him to be called *tzaddiq*, even if the offender did not properly expressed his confession. According to him, the question of determining if a man falls in the category of "wicked" or "*tzaddiq*" does not depend from expiation or confession, and even without them the offender who made repentance is called a *tzaddiq*.

Of course, this opinion was contested but though we wont further elaborate, we just wanted to show another example oh how the rabbis "turned" around the subject and looked after every possible external *criterion* of repentance in order to grab the reality of the phenomenon. Let it be said that in this domain they also introduces many more distinction (like repentance out of love and repentance out of fear), but we will now turn to the question of how to express repentance.

## 3.5.4 -- Concrete Proof for the Repentance:

One of the foundational rulings for our subject, as we saw, was the law regarding the possible disqualification of witnesses in a marriage, which brought forth the concept of *hirhur teshuvah*, "intended" repentance". So we can go back to our question: can the law of the witnesses be applied to the cases of any offender? And more specifically: can such an offender return to his professional position?

It is possible that the legal context of a nomination would be totally different from that of the marriage and that tangible proofs of an offender's repentance be demanded.

Indeed, as we will see, the rabbis figured out a few *criteria* demanding some concrete proofs and some acts expressing the personal severance from one's previous sins.

The first source is the *Tosefta*, which deals with the validation of someone who was disqualified to bear testimony. A second course will then be brought from the *Talmud*, dealing with a *shoḥet* who was disqualified after he sold some *non-kosher* meat for consumption (*tereyfah*).

### 3.5.4.1 –Complete Severance from Sin – The Breaking of the Instruments of the Deed:

[416] Joseph ben Moses Babad, *poseq* and Talmudist, served as rabbi in several cities in Galicia, and in 1857 was appointed as the *av beyt din* of Tarnopol, where he served for the rest of his career. He is best known for the *Minḥat Ḥinukh*, a commentary on R. Aharon Halevi of Barcelona's *Sefer ha-Ḥinukh*.

Let us begin by our *Tosefta* in *Sanhedrin*; it deals with testimony and enumerates a certain number of people who are disqualified:

אלו הן הפסולין--המשחק בקוביה, והמלווה בריבית, ומפריחי יונים, וסוחרי שביעית.

*"These are invalid: dice-players, loan-sharks, pigeon-flyers, sellers of Sabbatical goods."*

Interesting is Rashi's commentary, who tries to find a kind of common measure between the different items of the enumeration:

S 20

*"All of them are kinds of robber. The scripture said: "You shall not join hands with the guilty to act as a witness". All the more so [do not make them act as] judges".*

Now, what do the sources say regarding the possibility that these disqualified people could be valid witnesses again? The *Tosefta* deals with the return to competence of certain individuals incompetent to testify. And here are its words[417]:

S 21

[417] T. *Sanh.* 5 :5, and quoted in B.T. *Sanh.* 25a.

This return to competence, it seems, requires "complete return" (*ḥazarah gemurah*) which would indicate repentance and abandonment of previous acts: one who gambled with dices must break his playing boards; an usurer must tear up his loan notes; one who engaged in pigeon racing must break his racing boards; and one who traded in produce of the sabbatical year must abstain from doing so in the next sabbatical year.
Additionally -- this was also thought as an exemplification of the notion of *ḥazarah gemurah*, all these offenders must take upon themselves to abstain even from permitted activity related to their offense. Going to the opposite extreme may bring them to leave their previous path permanently.

An interesting question is to try to characterize these offenders who are required to supply some tangible proof of repentance; what is their common element? Rabbenu Tam emphasizes the fact that their deeds were done publicly, involving much pleasure, and that they were deeds which people are not accustomed to abstain from. In Rabbenu Tam's opinion, only such offenses require special acts of repentance, whereas other offenders need only normal repentance in order to be competent again. Rabbenu Tam further restricts the rule of the *Tosefta*, saying that it is sufficient for the offender to take upon himself to abandon his ways and perform complete repentance in the future. He is not required to actually do so before he becomes competent to testify.

According to R. Josef Caro (1488-1575)[418], the special requirements in the *Tosefta* apply only to offenses that involve coveting money, while for other offenders, normal repentance suffices. The Rema (1525 or 1530 – 1572)[419] posits a different distinction: according to him, the *Tosefta* only applies to offenders who repeatedly commit offenses, and not to one-time offenders.

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[418] Joseph ben Ephraim Caro: one of the last great codifier of rabbinical Judaism, born in Spain or Portugal. After the expulsion of the Jews from Spain, in 1492, Caro went to Nicopolis where he received his first instruction from his father, then settled at Adrianople. He had fantastic dreams and visions, which he believed to be revelations from a higher being, and these mystical tendencies probably induced him to emigrate to Palestine, where he arrived about 1535. Involved in the restitution of ordination, which was finally abandoned, he wrote the *Shul ḥ an Arukh* [the "prepared table"] in his old age, for the benefit of those who did not possess the education necessary to understand the *Beyt Yosef,* his previous commentary of the Rosh's *Arba Turim* ["The Four Rows"]. This book, complemented by the Rema's Haggahot [The "Glosses"] became for centuries "the code" of rabbinical Judaism for all ritual and legal questions.
[419] R. Moses Isserles: Born in Cracow, he studied, besides the Talmud and the codes, philosophy, astronomy and history. He gained a worldwide reputation as an outstanding *poseq* and all the great scholars of the time addressed their problem to him. Considered by his contemporaries as the "Maimonides of Polish Jewry" his works were in the field of halakhah, philosophy, kabbalah, homiletics, and science. His grand oeuvre is the *Mappah* ("the tablecloth"), also called the *Haggahot* ("glosses"), a commentary on the *Shulkhan Arukh*, which contains explanations, supplements, additions, and includes the custom of the Ashkenazi scholars ignored by Caro.

### 3.5.4.2 – Complete Severance from Sin – Going to a Place Where one is Unknown:

Another example of a concrete expression bearing testimony on the repentant offender is still given by the *Talmud*, which tells of a *shoḥet* ("ritual slaughterer") who was disqualified for passing *non-kosher* meat as *kosher* meat. He thereupon went and let his hair and nails grow, as a sign of repentance;
R. Nachman thought to reinstate him, but Rava dissuaded R. Nachman, since the *shoḥet* might only be pretending. The solution was to adopt was as follow:

S 22

The course suggested here, it so appears, *"... requires the shoḥet to go to a place where he is unknown (some adding that he has to dress in black), and [have occasion] to return an article of considerable value that has been lost, or to discard meat of considerable value belonging to himself, that he found unkosher."*

What characterizes the case of the *shoḥet*, which can explain the especially strict requirements placed on him? Some commentators have singled out the aspect of coveting money, which requires that the offender prove that he has overcome his covetousness. This psychological reasoning seems to be Rashi's approach.

Another approach also explains the requirements placed on the *shoḥet* by the fact that he stole money by selling *unkosher* meat in lieu of kosher meat, and therefore he must actually return what he stole.
Still another approach is that the *shoḥet* is unique in that he was removed from his post and lost his income. We therefore suspect that his promise to act lawfully in the future is not sincere but was given only so that he will be returned to his livelihood.
Of course, the different reasons suggested for the special requirements placed on the *shoḥet* bring different conclusions with regard to applying those requirements to other transgressors; only those transgressions that involve the same severities as the *shoḥet's* acts would entail the same requirements.

### 3.5.4.3 – More on the Butcher's Case:

While the requirement for a creditor usurer to tear up his lend note seems reasonable, why would be the butcher compelled to go to a place where he is unknown to make repentance? Why would he be not able to demonstrate the sincerity of his repentance by doing the same as the creditor, like discarding meat to himself in his original place?

R. Joseph Caro says that in the case of the creditor and assimilated cases, we are accustomed to act "beyond the line of strict justice" (*lifney mi-shurat ha-din*) and just demand of him that he forbids himself things that are still permitted to him. But in the case of the butcher, that would not prove feasible, pleads Joseph Caro, for "*amrinan leih: "al tokhal basar, afilu kasher", im ken nir'eh de-adayn pasul hu*."
In other words, if the butcher would consent to the order of the tribunal not to eat his own meat, and indeed did so, from an external point of view, his behaviour could be interpreted as refraining from eating meat because it is still *non-kosher*!
The best way, therefore, for him to demonstrate his repentance is by going to a place where nobody knows him.

For all this explanation, though, Joseph Caro does not really demonstrate how exactly should proceed the butcher once he finds himself in a place where nobody knows him, in order to demonstrate his full repentance. With this deals R. Mordecai Yaffe (1535-1612)[420] in his book *Levush 'Ir Shushan*[421].
According to his explanation[422], regarding the person who is suspected in his oaths -- in the same way the false witness, he has no way to demonstrate his repentance in the place he lives, because the rabbinical court in his own town know that he is suspected; therefore they won't let him swear[423], and anyway he would not have any occasion to abandon his oath.

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[420] Mordecai ben Abraham: Talmudist, kabbalist, and communal leader. Born in Prague, he was sent to Poland to study, and then returned to Prague in 1553 to be appointed head of the *yeshivah*. As the Jews were expelled from Bohemia in 1561, he left Prague and settled to Venice. After 10 years he returned to Poland, where he was very active in the Council of the Four Lands, being one of the chief signatories of its most important *takkanot*.
[421] Finding Joseph Caro's *Shulkhan Arukh* too long (and the Rema's commentaries too brief), he presented in the *Levuh 'Ir Shushan* the laws in abbreviated form (a "midway between two extreme"), taking as a basis the principle followed in the *Beyt Yosef* of reliance on the three "pillars of authority": Alfassi, Maimonides, and Asher ben Jehiel. He worked on this book almost 50 years. It contains ten "attires" (*levushim*); they were published between 1590 and 1604.
[422] Which makes an analogy between three cases: the person who is "suspected in his oaths" (*ḥashud al ha-shevu'ah*), the false witness (*'ed zomem*), and our beloved *shoḥet*…
[423] And even so before he has the time to warn them that he is suspected – that is to say: before the time he would be in a position to demonstrate his good will and honesty.

This would be the same for the *shohet*:

S 23

> *"The same applies to the butcher who sold tereyfah meat, we are dealing here with a case where he does it [having to get out tereyfah meat out of his possession] against his will, for if it was the other's meat, why would he bother? And since we deal with his meat, this he cannot do in his own place, because in his own place they [the beyt din] already removed him from his business and they don't let him deal with the business of butchery [and ritual slaughtering]. So how could he get out teryfah meat out of his possession?"*

We therefore see that since in his town one would not allow him to deal with ritual slaughtering, anyway he has no occasion to demonstrate his amended way, and for example, to discard *tereyfah* meat out of his possession[424].

Let us mention that this explanation did not satisfied all the commentators, and a lot of them brought their own explanation, building up a true monument of literature, only on the butcher's case ![425]

Among them lets us single out two pieces of "butcher stories", which we only bring here because they testify to a slightly different aspect of the question, and by directly address the question of the sincerity of the repentance, both introduce the social aspect of "deceit" or "deception".

The first is by the Rosh, who rejected for possible deceit the repentance of a *shoḥet* who had been found guilty of perjury and was debarred for five years from acting as *shoḥet* or prayer leader in the area or Rosh's jurisdiction. The *shoḥet* claimed reinstatement in his position, on the grounds that he had fasted for a whole year, on every Monday and Thursday. Repentance, said Rosh, must come from oneself, and not be undertaken because of the punishment

[424] *Levush 'Ir Shushan*, § 34, 35.
[425] Cf. N. Raqover, p. 404-408.

imposed, and it must be for the nature of the offense; with regard to the *shoḥet'*s acting as prayer leader, Rosh was more lenient, leaving it to the congregation[426].

Our second "butcher story" is from R. Moses Sofer, who explains the requirement of some real act of repentance in one of his response involving a charity trustee who committed an offense and was removed from office. Asked what manner of repentance was necessary, R. Moses Sofer replied that, in principle, mental regret and oral confession were enough, but to prevent deception, we require some real external manifestation, such as that mentioned in the *Talmud* in connection with the *shohet* found guilty of passing *unkosher* meat.

### 3.5.5 – The Flogging Punishment – Repentance without Flogging and Flogging without Repentance:

Another interesting question was raised with a slightly different angle on our subject: the relationship between the punishment and repentance.
Does repentance without punishment qualifies the offender for things that disqualified him after he committed a sin? And the other way round: does punishment without repentance qualifies again the offender?
This question, as we see, again deals and tries to balance between the tension of an objective approach, and a subjective approach prone to insist on the psychological efficacy of repentance.

Regarding one who received lashes, we saw in the *Mishnah*[427], in the name of R. Ḥaninah ben Gamliel that *"since he has been flogged, he is like your brother",* and therefore he is exempt from the punishment of *karet*.
This ruling raises a few questions. First, what is the significance of the passage from the status of "wicked" (*rasha'*) to the status of "your brother" (*aḥikha*) except for the fact that he is exempt from the punishment of *karet*? And still: can we learn from this that it is sufficient that he received his punishment in order to be considered as "your brother", even though he did not make repentance?

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[426] *Ibid.*
[427] *Mak.* 3 :15.

In order to be able to answer to those questions, we must distinguish between two questions: first, does the *Mishnah* talk about a flogging with repentance or without repentance? And second, can we infer from the flogging case on other punishment?
R. Ḥanina ben Gamaliel[428] did not say that additional things were needed in addition to flogging in order to be exempt from *karet*, but only this: "since he has been flogged, he is like your brother ».

Indeed, we can find different views among the *rishonim*; some said that it was sufficient that he receives flogging to be considered as being "your brother", with no further need for repentance[429], and that the flogging itself, and not the repentance has the power to expiate. In fact, this can be understood in two ways:
On one hand, one may consider that the flogging in itself provides the expiation, event he the offender did not make repentance. On the other hand, one can assume that the *Mishnah* only talks about the flogging, *precisely because* it assumes we are dealing with someone who already made repentance.

We can find support for the first opinion on behalf of Joseph Caro in his commentary on the *Tur*[430], who justifies the *ashkenazi minhag* of flogging in the synagogue on the eve of *Yom ha-Kippurim*, *"because thus he will really put attention to the sins he has in him"*.
A justification which draws this commentary by Joseph Caro:

S 24

[428] Ḥanina ben Gamaliel: Tanna of the 5th generation (135-170), son of Gamaliel of Yavneh. He differed on halakhah with R. Akiva (*Nid.* 8a) and with Yose ha-Gelili (*Men.* 5:8) and engaged in halakhic disputes with the disciples of Akiva. Many *aggadot* are also cited in his name.
[429] See *Ha-Maor ha-Gadol* (by R. Zecharia ha-Levi from Girona) on the Rif, cf. *Mak.* at the end of chapter 3 (4b); *Tossafot Hul.* 80a, *s.v. ha-rishon*.
[430] *Tur*, O.Ḥ. § 606. "*Tur*" refers to Jacob ben Asher, nicknamed after his master piece, the *Arba'a Turim* ("The Four Rows"). One of the main halakhic authority oh his time, Jacob ben Asher (1270? – 1340) studied with his father, Asher ben Jehiel (the "Rosh"), and followed him from Germany to Toledo, Spain. He lived there in great poverty, shunning all rabbinical office and devoting all his time to study. Jacob's enduring fame rests upon his major work, the *Arba'a Turim*, in which in compiles all the *halakhot* and customs incumbent upon the individual and the community. The arrangement of the book as well as its simple style made it a basic work in Jewish law, and started a new area in the realm of codification.

*"I was surprised that he did not write that the justification for the flogging is that it expiates sin. And even though we don't have authorized judges to provide flogging before them, and also [even though] the lack of witnesses to allow such a flogging prevents the possibility of flogging, it [nevertheless] provides expiation in some way"*

Example of the second approach is that of the Meiri (1249-1316)[431], who says that the reason for the sufficiency of the flogging is precisely because we assume beforehand that he made repentance.

S 25

*"It is perfectly clear for us that one who committed a transgression which disqualifies him from testimony, if it such a transgression for which [the punishment] is flogging, and that [indeed] he received lashes, it is clear that it is on the assumption that is fit and that he made repentance"*[432]

In a further development of this question, Rambam examines the question of qualification of a man for testimony and oath. From the verse *"Do not put thy hand with the wicked to be an unrighteous witness"*[433] – the Sages derive the rule that a wicked person is incompetent to give evidence[434].

Asking himself who is the "wicked person" (*rasha'*), the Rambam gives two possible definitions. One possible definition is "anyone who commits an offense for which the penalty is flogging (*meḥayyev malqut*) or "death by the [rabbinical] court" (*mitat beyt-din*)"[435]. The other possible case is one who stole property (*she-ḥamas mammon she eyno shelo*)[436].

Interesting enough, whereas the disqualification of the former is given by the Scripture with no justification (*gezerat ha-katuv*), simply calling him a "wicked person" (*rasha'*), the

[431] Menachem ben Solomon Meiri, scholar and commentator of the Talmud, was born in Perpignan (then part of the County of Barcelona) where he spent his whole life. He was one of the participants in S. ben Adret's polemic against Maimonides, siding with those in favour of philosophy and freedom of thought. His letters show his great interest in philosophy and secular sciences. His chief work is the *Beyt ha-Bekhirah* on the *Talmud*, which he wrote between 1287 and 1300.
[432] *Beyt ha-Beḥirah*, Sanh. 25a, *s.v. mi she-nitbarer*.
[433] *Ex.* 23 :1.
[434] *Sanh.* 27a.; M.T., *H. Edut* 10 :1.
[435] *Ibid.* 20 :2, 10 :4.
[436] Cf. N. Raqover, p. 444.

disqualification of the latter is justified by the Rambam by the fact that he stole property with violence. In any case, the law applying to one or to the other as for the re-qualification for testimony is the same in both cases:

כל מי שחטא ולקה, חוזר לכשרותו: שנאמר "ונקלה אחיך לעיניך"
כיון שלקה, הרי הוא אחיך. אף כל מחוייבי כרת בלבד שלקו, נפטרו מידי כרתן

*"Whenever a person sins and is lashed, he returns to his original state of acceptability, as implied by the verse: "And your brother will be degraded before your eyes."*[437] *Once he is lashed, he is "your brother." Similarly, all those obligated for karet who received lashes are absolved for karet."*[438]

We therefore find that the scope given by the Rambam to the word "your brother" (*aḥikha*) gives it an extensive effect: not only does it refer to the exemption of the offender regarding the punishment of *karet*, but is also considered relevant regarding the question of re-qualifying the offender as a possible witness.

And regarding our question of the relationship between punishment and repentance, the Rambam's words seem to imply that flogging is sufficient and that no external act of repentance is needed.

And in the same way that *Hilkhot Sanhedrin* says that one who has been flogged returns to his office, thus the Rambam says in *Hilkhot Edut* that receiving lashes is sufficient, event without repentance:

שניים שהעידו על אחד שהוא פסול בעבירה מאלו העבירות, ובאו שניים והעידו שעשה תשובה וחזר בו או שלקה--הרי זה כשר

S 26

*"When two people testify that a person is not acceptable as a witness because he committed one of these [abovementioned] transgressions, and two others come and testify that he repented and renounced [his improper conduct] or received lashes as punishment for the transgression, he is acceptable."*[439]

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[437] *Deut.* 25:3.
[438] M.T., *H. Sanhedrin ve-ha-Onshim ha-Mesurim Lahem*, 17 :7.
[439] M.T., *H. Edut* 12 :3.

*"Whenever a person is obligated to receive lashes, since he repented or since he received lashes in court, he is [considered as an] acceptable witness again."*[440]

It so appears from these words that a witness reintegrates his ability to testify out of two ways, either by receiving lashes either from repentance alone. Is it then sufficient for one who is liable to flogging to receive lashes in order to get back his admissibility? Not in all case, for the Rambam adds:

אבל שאר פסולי עדות, שהן פסולין משום הממון שחמסו או גזלו--אף על פי ששילמו, צריכין תשובה, והרי הן פסולין, עד שייוודע שחזרו בהן מדרכן הרעה

*"But other persons who were disqualified as witnesses because of money which they seized or stole must repent even if they made financial restitution. Instead, they are disqualified until it is known that they repented from their evil ways."*[441]

So, if we sum up the Rambam's reasoning on this question, it is interesting to see that he provides a different "mapping" of the question than what is usually done. Though he seems to enlarge the meaning of "your brother", positing it as a symmetrical opposite of the category of "wicked person", and as such, meaning that it exempts cases that were liable to *karet as well as* cases which simply involved a disqualification for testimony, and though it would seem to imply that one of the two existing ways, repentance or flogging, is sufficient to be re-instated in one's capacity, it is not so.

For the Rambam then makes a further distinction (indeed, he made it from the start) between those defined as liable to lashes and those who seized money; those in the latter category, he insists, cannot "get themselves out" just with flogging, but need to express a full, visible and acknowledgeable repentance.

### 3.5.6 – Conclusions:

As we have seen previously, the concept of *taqqanat ha-shavim* had been pushed very far by the rabbis in its early developments, a fact that accounts for a subsequent endeavour by the *rishonim* and the *aharonim* to somewhat restrict the potential infinite extension of the

[440] *Ibid.* 12 :4.
[441] *Idem.*

principle, and to try to insert him in real-life situation to make it workable at the level of society as it is.

In this perspective, we saw that two main horizons were figured out by the rabbis as potential limiting lines of reasoning: the nature of the offense, and the nature of the office coveted by the repentant. And now, we saw in this chapter that the Sages also gave all its importance to a third dimension of thinking – not necessarily limiting in its essence: the restoration of confidence in the offender.
In keeping with the general *ethos* of *taqqanat ha-shavim*, this restoration was but possible only in the frame of repentance, and as such, it raised numerous questions as to its feasible and practical implementation.
This brought us, along with very interesting and lively practical cases --which projected us towards the social, ethical and economical aspects of the question--, to a somewhat quasi-philosophical question: how can we figure out socially recognizable, objective, certain *criteria* of what is essentially a mental, internal and abstract phenomena – repentance?

And here we witnessed -- as we could certainly have witnessed in other fields of the Sage's legal thinking – the richness of the different cognitive approaches of the Rabbis. On the one hand, we saw the subjective approach, prone to give to the intentional element its entire share in the process, a full impact in terms of the social process so as to deem it, sometimes, sufficient even beyond the point of punishment. And on the other hand, we saw the objective approach, for which only public acts are of the right nature to express what repentance is.
And of course, we saw an intermediate view, that of Rabbenu Tam not being the least interesting: an attempt to combine internal and external, more precisely, to back up the subjective phenomena of "intended repentance" (*hirhur teshuvah*) by some objective background, *i.e.* a publicly recognizable "good reason to think" that repentance is the case (*raglayim ledaber*).
In this, *taqqanot ha-shavim*, as a fundamental and deeply-ingrained value of the Jewish *Weltanschauung*, undoubtedly echoes another fundamental vision of man as seen by the tradition: a psycho-physic creature[442], both aspects being divine and bearing equal care and importance in the eyes of God, a dynamic dualism whose only goal is striving for unity.

[442] Cf. Yeshayahu Leibowitz, *Corps et esprit : le problème psycho-physique* [*Guf va-Nefesh : ha-Beayah ha-Psikho-Phisit*], trad. Yann Boissière & Gérard Haddad, Cerf, Paris, 2010.

# 4 / *Taqqanat ha-shavim* in the Contemporary Period:

The major event in the development of contemporary Jewish legal thinking is the creation of the State of Israel.

The Jewish national awakening and the rise of Zionism had already totally changed the mental attitude of the Jewish people towards Jewish law. Soon after the Balfour declaration, for instance, the *Ha-Mishpat ha-Ivri* Society ["Society of Jewish Civil Law"][443] was founded in Moscow. Its members regarded the return of Jewish society to Jewish law as an aspect of national renaissance parallel to the building of the Jewish homeland and revival of the Hebrew language[444].

Among the goals set by the Society was the reparation of a suitable literature on Jewish law and the establishment in Jerusalem of an institute for research which would later lead to its incorporation in the future Jewish state. In 1909-10 on the initiative of the Palestine office of the Zionist organization, *Mishpat ha-Shalom ha-Ivri* was established in Jaffa as a judicial institution for the adjudication of disputes between Jews in Eretz Israel. However, its main activities were confined to the years 1920-30 and after this date the number of cases brought before it began to wane. *Mishpat ha-Shalom ha-Ivri*, one could say, did not achieve its goals; nevertheless, it was a first attempt of reviving Jewish law in the new frame of a (pre-)nation-state, paving the way for future generations.

On the establishment of the State of Israel, Jewish law continued to occupy the same official position in the legal structure of the state as it has done in the pre-state period. The *Law and Administration Ordinance* of 1948 prescribes that the law in existence on the eve of the establishment of the state should remain in force, with the practical result that officially Jewish law was incorporated in the area if personal status only[445].

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[443] We cannot deal here with the issue of how inaccurate is the translation of the expression *mishpat ha-ivri* by "jewish law", and even "jewish civil law" (a little more precise). This is a complex issue, inasmuch as the assumption of the *halakhah* and of a laic system, all be it jewish, and even where there is a semblance of similarity, are totally different ; even restricted to the area of civil law, the two domains do not fit exactly.

[444] Cf. M. Elon, *The Principles of Jewish Law*, Introduction, p. 35 ; 39.

[445] Assaf Likhovski, *The Invention of "Hebrew Law" in Mandatory Palestine*, p. 339, 1998); Amihai Radzyner, "Ha-Mishpat ha-Ivri Eyno Halakhah (u-ve-Khol Zot Yesh Bo Erekh)", ["Mishpat Ivri Is Not Halakhah (But It Still Has Value)"], 16 *Akdamot*, pps. 139, 141–43, 2005. For rabbinic objections to *Mishpat Ivri*, cf. Amihai Radzyner, "Between Scholar and Jurist: The Controversy Over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field", *J.L. & Relig.*, n° 23, 2007, p. 189. See also Avraham Tennenbaum, "Al Ma'amado Ha-ra'uy shel ha-Mishpat ha-Ivri" ["The Proper Status of Mishpat Ivri"], *Sha'arey Mishpat*,n°3, 2002, pps. 393, 409-10.

Assuming that we cannot afford ourselves to give an account of the subsequent development of the law within the State of Israel till nowadays, this leads us directly to the study of one particular law, fully relevant to our subject: the *Crime Register and Rehabilitation of Offenders Bill*[446] of 1981.
It is probably already clear from its very title that this law is a continuation, in our days, of the Rabbis' thousand year old thinking on the subject of *taqqanat ha-shavim*, and it will be particular interesting to see how an old – and revolutionary -- principle "resisted", or better, founds its way to our contemporary setting.

A presentation of this law will be our task in part 4.1. We will then see other contemporary developments and adaptation of the principle, sometimes not exactly defined as *taqqanat ha-shavim* in the strict sense of the term – but rather in a more analogous sense--, which attest to the vitality of these three little words in the *mishnah Gittin* 5:5… (Part 4.2)

## 4.1 – In Israel – *The Crime Register and Rehabilitation of Offenders Bill* of 1981:

Jewish law's basic approach – in the broader sense, that the past life of an offender who has been punished is to be forgotten – is the basis of the legislation of the *Rehabilitation of Offenders and Crime Register Law*, 5741 - 1981.
It imposes restrictions on divulging information from the Crime Register (*Mirsham ha-Pelili*) regarding crimes committed by an individual after the period of limitations has passed as well as ordering the deletion of such information from the Register after an additional period of time has passed.

As the law did not make its way overnight to the Israeli legislation, it will be interesting to share some historical account on the preliminary thinking by legal scholars, various attempts and discussions in the *Knesset* (Part 4.1.1) and then only to enter more in details into the law (4.1.2).
This part will be slightly different from the other parts, mainly because the story is more linear, by definition, than a millennial rabbinical *pesiqah** taking place in all sorts of countries

[446] In Hebrew: *Ḥoq ha-Mirsham ha-Pelili ve-Taqqanat ha-Shavim*.

and economic-political contexts; not to mention the particular "*maḥloqeting*" *eros* and *ethos* of the rabbinical discussion itself…
Another reason which accounts for maybe a little less variety here, is the fact that we will heavily – and gratefully – rely on fewer sources in this part of our *exposé*, mainly Menachem Elon's abundant literature on the 1981 law. We managed as much as we could to insert other sources, but the final arrangement of our matter, here, won't have the same "multi-angle" approach as our exposition of the rabbinical *pesiqah*.

One last think that should probably be said at this stage – and this applies to the entire Part 4.1 – is our awareness that in the course of our exposing the law, especially in the historical part, we will probably be exposed to some redundancy as regards the mention of traditional sources, which the legal scholars love to -- lavishly – quote in their discourse.
Nevertheless, we thought it was worth maintaining *verbatim* some mention of these sources for a variety of reasons. First because it gives a good perspective on how a piece of legislation, exposed by the best of its legal scholars, who are striving between the greatness of the heritage – even willing to give it a continuation -- and the tasks of the present, makes its way to the political level *through the perspective of Jewish law*.
The continuation in the tone and in the argumentation between the rabbis and the modern legal scholars, it should be said, is impressive. The "continuation argument" is all the more true, and vital to document, that the 1981 law was supposed to be one of the first law implementing the recommendations of the *Foundations of Law Act* (1980), precisely ruling on the share to be given to Jewish law in Israeli modern legislation.
Last but not least, these discourses, often vibrant, offer beautiful mini-pieces of literature; and we could even add: discourses through which sometimes blows the prophetical and ethical and obstinate *rouaḥ* of Judaism…

## 4.1.1 – The *Crime Register and Rehabilitation of Offenders Bill* of 1981 – A Short History:

### 4.1.1.1 – The 1970 *Knesset* Debates:

As we said above, the *Crime register and Rehabilitation of Offenders Law* did not appear overnight in the sky of Israeli legislation, and it is the final version of many bills that precede

it[447]. The fist bill was introduced into the *Knesset* under the name of the *Delinquency Registration Bill*, 1970. During the Knesset debates on the bill, Yaakov Shimshon Shapira, the then Minister of Justice[448], compared the principles set forth in the bill with the position of the Jewish law in the following manner[449]:

> *"… Under this theory [taqqanat ha-shavim], once an offender has accepted the punishment imposed on him by the court and served his sentenced, he is considered "your brother", and the conviction should be expunged. This is a extreme approach since, under this approach, a person who is released from jail no longer has any conviction on his record – no matter how serious the offence or how extensive the punishment.*
>
> *But Jewish law itself limits this line of thought … There is a difference between an offender who has [merely] accepted his punishment and one who has both accepted his punishment and repented. And there is a difference between the competence of a person … to give testimony and his fitness to accept a public office … A distinction can also be made between a minor crime and a serious crime. There is also an interesting distinction between two officeholders – the High Priest and the head of the Sanhedrin. The High Priest can return to his position once he has accepted his punishment. The rule is different in the case of the head of the Sanhedrin – a judge. If he commits an offense, he may not return to his position, even if he has accepted his punishment.*
>
> *It is understood that the term "repent" (ḥozer bi-teshuvah) is a moral one. If we translate it into modern legal language … the appropriate meaning is: How will a person act after completing his prison term – will he act properly and with integrity for a significant period, or not? …*
>
> *… Even in the Middle Ages, when philosophical matters were more deeply rooted in society, the great jurist Asheri, the Ashkenazi rabbi of Sephardic Jewry, stated that one must pay attention to how he behaves. That is how we will know whether or not he has repented … It is not sufficient that he states that he has repented …"*

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[447] Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *Jewish Law (Mishpat Ivri): Cases and Materials*, Matthew Bender, New York, 1999, p. 251.

[448] Born in the Russian Empire (now Ukraine) in 1902. After having been Israel's first Attorney General (from 1948 to 1950), he was the Minister of Justice from 1966 to 1973 – except from a short period in 1972 when he was replaced by Golda Meir.

[449] *Divrey ha-Knesset* (*DK*), pps. 31-32, 114 (1971).

In his historical exposé of the law, M. Elon then observes that the Minister of Justice referred to another case, *Anonymous v. Attorney General*[450], in which Justice Kister also cited some Jewish law sources on the subject. Here is a short passage taken out from Justice Kister' *exposé*:

> *"When a person has committed an offense, served the sentence imposed on him, paid for the damages, and fully repented –i.e., regretted his actions – and his behaviour indicates, in the view of the court, that his actions will improve event in the future, he should be welcomed and not reminded of his prior acts. In general, he is again qualified to fill the position in which he served during the period when he committed the offenses. The guiding principle is "lest your brother be degraded in your eyes – once he has been flogged, he is to be considered as your brother"*[451]*. With regard to those who have repented, it is forbidden even to remind them of their prior acts*[452]*.*
>
> *…*
>
> *"If we are speaking of a case in which they were removed because of an offense, we are particularly strict in determining whether their repentance was truly sincere…, or whether they are merely deceiving the court in their desire to be restored to their positions. It must become clear that they can be trusted in the future.*[453]
>
> *There are cases in which even a combination of punishment and repentance does not suffice to enable a person to return to his position. However, the examples that I will cite from the sources demonstrate that only in very extreme cases – based either on the nature of the crime or the type of position in which the offender served – will a combination of punishment and repentance not suffice to restore a person to his prior position…"*
>
> …

Justice Kisler, in an impressive display of knowledge on traditional sources, goes into much detail about the different reasons why the president of the *Sanhedrin* may not return to his position – no need to quote him here – and then concludes that it would be contrary to the spirit of Jewish law to close the door in the face of those who sincerely and truly repent:

> *"… To the contrary, in the absence of a weighty reason, we should enable them to return to their daily lives, to their occupations, and even to their positions."*

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[450] 22(i) *P.D.* 673 (1968).
[451] *Mak.* 23a.
[452] B.M. 58b.
[453] *Sh. Ar.* ḤM 34 :33 (end of the Rema's gloss) and 34 :34 ; *Bet Yosef* to *Tur* ḤM 34. The primary source is *Sanh.* 25.

### 4.1.1.2 – Pr. S. Z. Feller's Opinion on Rehabilitation:

At this stage, it will be interesting to introduce another point of view. In 1969, the legal scholar Professor S. Z. Feller – and very active in the promotion of a law implementing the *taqqanat ha-shavim* principle – expressed his opinion, which according to us does two very interesting things: first, he places *taqqanat ha-shavim* in the frame of the human right world-view -- which shows how modern in its approach was already the Sages' thinking; secondly he develops it in the perspective of the whole concept of rehabilitation as it appears in modern legislation[454].

Here are some of Pr. Feller's words:

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[454] In the United Kingdom, the *Rehabilitation of Offenders Act* of 1974 enables some criminal convictions to be ignored after a rehabilitation period. Its purpose is that people do not have a lifelong blot on their records because of a relatively minor offence in their past. The rehabilitation period is automatically determined by the sentence, and starts from the date of the conviction. After this period, if there has been no further conviction, the conviction is "spent" and, with certain exceptions, need not be disclosed by the ex-offender in any context such as when applying for a job, obtaining insurance or in civil proceedings.
In Germany, an ex-offender in Germany has a relatively strong formal legal position - the constitutionally guaranteed right to re-socialization with a strong emphasis on his personality right. This includes the right to be left alone once the sentence is executed and has implications less for the establishment of the criminal record as such than on the question of who can access the information recorded. Here, the possibilities for private parties, in particular private employers, are rather limited. A problem, however, arises from the fact that the system of keeping and removing entries in the register has been changed: Since 1998 not only the length of the sentence -- and thus the gravity of the offence -- but the character of the offence may be decisive; sexual offenders clearly being the target group of much harsher provisions. This is even more pronounced since the 2009 reform that created the 'extended certificate of conduct' and allows far-reaching access of employers to criminal records concerning anybody who might be involved in working with children.
The impact of criminal records on the chances of ex-offenders to gain ground in the regular labour market is significant because several important job sectors may be blocked depending on the nature of the offence that is included in the certificate of conduct. For further details, see Christine Morgenstern, Ernst Moritz Arndt, "Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions", *European Journal of Probation*, University of Bucharest, Vol. 3, No.1, 2011, pp 20 – 35 [p. 35].
In the USA, access to criminal records is largely public. The idea is to protect public security by warning people that their neighbour, employee, or new partner, was previously an offender. It is based on the assumption that if a person previously offended, that person is more at risk of offending again than a regular citizen with no so such background.
In France, tolerance for violations of privacy is very limited and this shows precisely in the domain of police records. Part of a general cultural conviction is also the "right to be forgotten": after having served his sentence, and particularly if he has led a normal life for a certain time, a person should be left in peace. A third factor needs to be understood: French law regarding prison release, probation, community sanctions and re-entry is consistently based on the ideal of resocialization, which roughly corresponds to the social elements of desistance: the goal of imprisonment should be to help people succeed in resocializing. For further details, see PPC (Penal Procedure Code), art. 707; Cf. V. Gautron, « La Prolifération incontrôlée des fichiers de police », *Actualité Juridique Pénal*, 2007, p. 57 ; and also : idem, « Usages et mésusages des fichiers de police: la sécurité contre la sûreté? », *Actualité Juridique Pénal*, 2010, p. 266-69 ; Danet J., Grunvald S., Herzog-Evans M., Legal Y., *Prescription, amnistie et grâce en France*, Dalloz, 2008, Paris. Cf. Martine Herzog-Evans, "Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance", *European Journal of Probation*, University of Bucharest, Vol. 3, No.1, 2011, pp. 4-19.

*"… Rehabilitation, as an act of re-socialization of the offender – after he has been tried, convicted, served his sentence, and demonstrated [his sincere rehabilitation] for a certain period of time – is a human right. Society and the offender are both equally interested in the realization of this right by every person with a criminal record."*[455]

In his development, Professor Feller then explains that a criminal conviction may have more severe collateral consequences than the mere punishment experienced, namely disqualifications than may be attached to the punishment. A conviction for a "crime involving moral turpitude", for example, gives rise to a formal disqualification from engaging in numerous professions. He then reviews the different questions that arise in this field of concern:

*"Can this requirement [acknowledging that one has a criminal record] be reconciled with the basic objective of punishment? Is it desirable to prevent someone permanently from becoming a public servant or … from returning to his profession, as a consequence of once having been convicted of a criminal offense? … Or is society interested in making it possible for all those with a criminal record – no matter how severe their crime -- … to give them the opportunity to free themselves from the criminal record that continually hovers over them…?"*

Professor Feller then goes on to make a far-reaching statement according to which he would personally be in favour of returning all those with a criminal record to their prior status[456], all the more so, according to his reasoning, since the absence of legal framework to achieve this objective naturally results in a continual increase in the number of those who are socially impaired by their criminal record, given the fact that "each year, the number of people with a new criminal record far exceeds the mortality in the same group."[457]

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[455] S. Z. Feller, "Ha-Rehabilitatziah, Mosad Mishpati Meyuḥad Meḥuyav ha-Metzi'ut" ["Rehabilitation : A Particularly Indispensible Legal Institution"], 1 *Mishpatim* 497, 1969 ; Feller and Kremnitzer, "Hatza'at Ḥoq ha-Onshin Ḥeleq Muqdami ve-Ḥeleq Klali le-Ḥoq Onshin Ḥadash" ["The Penal Law Bill as a Preliminary and General Part of a New Penal Law"], 14 *Mishpatim* 133, 192, 1984; S. Z. Feller, *Yesodot be-Diney Onshin* ["Principles of Penal Law"] 654 *sq.*, Harry Sacker Institute for Research and Comparative Law, vol. 2, 1987.

[456] Cited in M. Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *Jewish Law (Mishpat Ivri): Cases and Materials*, Matthew Bender, New York, 1999, p. 259.

[457] Let us admit that it sounds in our eyes a rather strange argument, if not a "comical" one. Would it mean that this particular category of people, namely the offenders, add to their daring capacity of committing an offense, the anthropological human trait of being more "resistant"?

As a conclusion of his thinking, and turning to Justice Kister[458] for illustration of this very matter of returning an offender to his prior position[459], Professor Zeller then makes his point which in a way express his dissatisfaction with the current state of the law[460]:

> *"From this we learn than event under the approach of Jewish law, the restoration of the accused to his prior status was not a matter of discretionary kindness. This approach is much closer to the modern approach to the legal institution of rehabilitation than is the approach that has developed in modern Israeli law."*[461]

### 4.1.1.3 – Ḥ. Zadok and M. Nissim – Towards the 1981 Legislation:

Several years later[462], the 1970 bill was reintroduced as the *Crime Register Bill*, 1975. Again, the then Minister of Justice, Hayyim Zadok[463], pointed to Jewish Law as the source of the bill:

> *"It is fitting to, point out that one of the foundations of Jewish law – and of Judaism – is the concept that repentance makes it possible for a person to turn away from his evil deeds and open a new page in his life, free from the stains of the past. [Nevertheless, Jewish law] does not adopt the concept that the past is completely erased. Rather, it retains limitations on the concept of repentance, which depend on the nature of the offense, the nature of the position sought, and the extent of trust required in the position that the one who has repented seeks to fill.*
>
> *Alongside the general principles whose purpose is to encourage and assist the offender to return to the right path, there are instances in which the nature of the offense, the nature of the position, or the extent of the trust required [for the position] forces us to place limitations on the general rule that the offense may be forgotten. While the general rule in Jewish law is that it is forbidden to remind the offender of his offense, the prohibition against mentioning the past does not apply in those instances where the fact the offender committed an offense retains significance.*

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[458] The same Justice Kisler we have already mentioned; cf. p. 140, et n. 450.
[459] The position of which is the following: "One should not close the door close the door in he face of those who sincerely and truly repent. To the contrary, in the absence of weighty factors, they should be permitted to return to their normal lives, their occupations, and their positions".
[460] S. Z. Feller, *op. cit.,* p. 260.

[462] Five years later, from what was said above, namely that the fist bill was introduced into the Knesset under the name of the *Delinquency Registration Bill* in 1970 ; cf. above, p. 139.
[463] 1913-2002. For a long time involved in the Labor Party, he held the position of Minister of Justice from 1974 to the 1977.

*… The spirit of the bill before you accords with the principles of Jewish law that I have mentioned before. On the one hand, it forbids one to use knowledge of a person's past when it can be established … On the other hand it permits use of a person's criminal record in cases where the protection of the public interest has greater significance that the rehabilitation of the offender…"*

The law, in fact, took its final shape in 1981; this time, the law was given the name *Ḥoq ha-Mirsham ha-Pelili ve-Taqqanat ha-Shavim* ["Crime Register and Rehabilitation of Offenders Law"].

When the Minister of Justice, Moshe Nissim[464], brought the bill for its first reading in the *Knesset*, he dealt at length with the law's origin in the principles of Jewish law:[465]

*When the lack of knowledge of a person's criminal past is likely to result in great damage, the halakhah requires one to inform others of his criminal past. See Hafetz Hayyim by Rabbi Israel Meir ha-Kohen of Radin, II, 9:1. This bill strengthens this approach. It does not provide for the physical erasure of the record, but rather takes the approach of limiting the disclosure of details contained in the record.*

*… The bill before you is the product of a compromise. As I have stated, it is derived from Jewish law but goes off on its own path …*

*In sum, when time comes for the courts to interpret this law, they will be required to resort, in a particular great measure, to what the Jewish legal system has to say on this important subject. This obligation is particularly significant in light of the Foundations of Law Act, 1980, which establishes the principles of the Jewish heritage … as complementary legal sources to the Israeli legal system.*

## 4.1.2 – The *Crime Register and Rehabilitation of Offenders Bill* of 1981 – A Presentation:

In is certainly interesting to put the *Crime Register and Rehabilitation of Offenders Law* in the perspective of the 1980 *Foundations of Law Act*[466]. M. Elon, in his discussion of its promising

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[464] Born in 1935. A member of Likud, he was Minister of Justice from 1980 to 1986, when he became Minister of Finance.

[465] 91 *D.K.* 1892 (1981).

[466] *Ḥoq yesodot ha-Mishpat*, 1980. Its first articles so declare: *"Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage"*. In 1980, the connection between Jewish law and the law of the modern State of Israel was mandated with the passage of the *Foundations of Law Act*. The

perspectives for the future, precisely comes up with the *Crime Register and Rehabilitation of Offenders Law*[467] as a particular good and successful example of integration and revival of the spirit of Jewish law in the modern legislation[468]:

> *"This statute regulates the recording of convictions, sentences and other dispositions of criminal cases, and the procedure for disclosing such information. In addition, the statute includes provisions having "a social purpose of encouraging rehabilitation of penitents[469]" ... This possibility of expunction, "as if the conviction had ever occurred"[470], is based on the Jewish concept of repentance, as indicated in the Hebrew title of the statute, taqqanat ha-shavim, which comes straight from the halakhah."*

On this point, the Explanatory Notes to the bill stated[471]:

> *"Many citizens once convinced, however long ago and for whatever crime, major or minor, can neither obtain certain permits and licences nor return to their occupations and take part in certain work and cannot even travel to certain foreign countries... The basic principle upon which this bill rests is that, with certain exceptions, one should not be stigmatized all one's life because of a transgression but should be given the opportunity to turn over a new leaf; rehabilitation and full integration into society should be encouraged.*
> *The bill adopts the approach of the halakhah expressed in the Enactment for the Encouragement of Penitents (taqqanat ha-shavim), first referred to in Mishnah Gittin 5:5, and later extended to other legislative and judicial measures to facilitate the offender's*

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enactment of this statute was a major change in the Israeli legal system, which ended the formal dependence of Israeli law upon English law, and stipulated that wherever prior Israeli law offers no solution to a particular legal question at issue, the court is directed to render the decision on the basis of the "principles of freedom, justice, equity, and peace in the Jewish tradition." The Law was passed by the Knesset on the 10th Av, 5740 (23rd July, 1980) and published in *Sefer ha-Ḥukkim* No. 978 of the 18th Av, 5740 (31st July, 1980), p. 163; the Bill and an Explanatory Note were published in *Hatza'ot Ḥok* No. 1361 of 5738, p. 307.

[467] Cf. Menachem Elon, *Jewish Law. History, Sources, Principles,* p. 1707.

[468] It should be said, though, that Israeli judges generally disagree over how this statute really affects the use of Jewish law. Cf. Leon Sheleff, "When a Minority Becomes a Majority -- Jewish Law and Tradition in the State of Israel", *Tel Aviv University Studies in Law*, n° 13, 1997, p. 115; Arye Edrei, "Madu'a Lanu Mishpat Ivri" ["Why Teach Jewish Law"], *Iyyuney Mishpat* (Tel Aviv U.), n° 25, 2001, pps. 467, 480–81 (obligation to look to Jewish law is for comparative purposes, but not for binding precedent or for investigating the extent to which one should adopt the advice of Jewish law); Hanina Ben Menachem, "Ḥoq Yesodot ha-Mishpat ha-Ivri -- Ḥovat Tsu'it o-Ḥovat Hiva'atsut ["The Foundations of Law Act -- How Much of a Duty?"], *Shenaton ha-Mishpat ha-Ivri*, n° 13, 1988, p. 257 (stating there is a duty to consult Jewish heritage). Menachem Elon, "Od le-Inyan Ḥoq Yesodot ha-Mishpat ["More about the Foundations of Law Act"], *Shenaton ha-Mishpat ha-Ivri*, n°13, 1987, pps. 243–50.

[469] *Crime Register and Rehabilitation of Offenders Bill*, 1981 (Bill N° 1514), p. 216.

[470] *Ibid.*, sec. 21.

[471] *Explanatory Notes to the Crime Register and Rehabilitation of Offenders Bill*, 1981, p. 216-17.

*repentance and return to society. In this connection, Hai Gaon, the head of the yeshivah in Pumbedita approximately a thousand years ago, wrote in one his responsa…* [472]*:*

*… On the other hand -- and too is consistent with halakhic principles -- the bill includes a number of limitations on the right of the offender to confidentiality of information concerning his crimes. These limitations are based on considerations such as the seriousness of the offense, whether the information is needed to assess fitness for a position whose occupant should exemplify high personal standards, and whether confidence in a person occupying a position of trust would be impaired by reason of the crime..."*[473]

And in another passage of Moshe Nissim's presentation of the law in the *Knesset* which we have already quoted[474], is also very well reflected the tension between two cognitive approaches by the Sages, as we can see from the following passage:

*"… I could quote many … halakhic sources … that exemplify the lofty ethical approach which views the criminal as a human being and sees the need to rehabilitate him and turn him into an upstanding member of society … At the same time, I must emphasize the difficult challenge this legislation puts before us, namely, achieving the correct balance between the requirements of the rehabilitative approach, which is based on the needs of the individual, and the protection of the public interest, which demands the setting of limits, harsh by their very nature, that to a certain extent are inconsistent with the approach which stresses the needs of the individual. The bill before you is a result of a compromise. As I said, it draws from, and follows the path of, Jewish law."*[475]

These speeches bear impressive testimony of how ground-rooted, how vital to Jewish ethical thinking was the *taqqanat-ha-shavim* principle, so make its way to the Israeli legislation under its proper name. And now, we will turn to concrete cases to see how it was applied to modern situations.

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[472] The text goes on citing Hai Gaon; we abridged.
[473] Cf. M. Elon, *Jewish Law. History, Sources, Principles*, p. 1708.
[474] Cf. Part 4.1.1.3, p. 143-44.
[475] Cf. Menachem Elon, *Jewish Law. History, Sources, Principles*, p. 1709, n. 342.

### 4.1.3 – The *Crime Register and Rehabilitation of Offenders Bill* in Action – Two Cases:

We found interesting not to limit ourselves to the exposition of the law but also to give some concrete examples of its practice by the judges, perspective in which we find two virtues: on the one hand, it shows us the constant adequacy and living force of our old principle; on the other hand, as the judges generally justify their judgement by a detailed appeal to the traditional sources, what will be put before us is a continuation, a kind of ever-resumed broidery motive endlessly woven by the generations around the fundamental theme of *taqqanat ha-shavim*.

#### 4.1.3.1 – The "Carmi v. State's Attorney" Case:

In the Carmi case[476], the issue of the interpretation of the *Crime Register and Rehabilitation of Offenders Law* was raised before the Israeli Supreme Court in the wake of an appeal submitted by a lawyer who, long after he had been found guilty of criminal activity, was suspended by the disciplinary court of the Israel Bar Association.
The court conducted an extensive study of the sources of the law, which for that matter, as we already know, are none other than the Jewish traditional sources.
Here are some passages of the official formulation of the sentence:

> *Deputy president Elon[477]:*
>
> *1. "Appellant was convicted of a criminal offence. As a result, the disciplinary court of the israël Bar association found appellant guilty of a disciplinary offence … and imposed a suspension from membership in the bar Association for four years … Appellant appeals to us from this decision …[478]"*
>
> *3. "As a result of the complaint, a criminal proceeding was brought against appellant, and he was convicted by the district court of theft by an agent and forgery with*

[476] ABA 18/84, Carmi v. Attorney General of the State of Israel, 44(1) PD 53); Before Deputy president Elon and Justices Halima and Malz – Judgment.
[477] Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *Jewish Law (Mishpat Ivri): Cases and Materials*, Matthew Bender, New York, 1999, p. 247.
[478] We skip this part because our interest, here, will be less the case itself as the use of *taqqanat ha-shavim* in the rendering of the judgment. We nevertheless retain some of the "syntax" of the judgement and as much details as is necessary to fully understand the reasoning and keep its "life" to the case.

*aggravating circumstances ... The court sentenced appellant to twelve moths' imprisonment, with three months to be served and the remainder suspended…"*

*4. "... On December 25, 1983, the District Disciplinary Court of the bar Association ruled that appellant had been convicted of a criminal offense involving moral turpitude, and suspended him from the bar Association for five years. Both appellant's appeal of the decision ... were rejected by the National Disciplinary Court, but ... the suspension was reduced to four years."*

*5. "The decision of the National Disciplinary Court was issued on July 18, 1984. After more than a year ... the President of israël ... commuted the length of the limitations period relating to the conviction of appellant, so that it ended on june 1, 1985."*

The text of the sentencing then goes on to give some background light on the appellant's argument[479], stating that inasmuch as the limitations period with respect to his conviction ended on June 1, 1985, he could no longer be subject to disciplinary sanctions.
This is where the court's opinion comes to deal with the argument by appealing to the *Crime Register and Rehabilitation Law* of 1981 and its basis in Jewish law[480]:

*25. ... "This important principle of the rehabilitation of offenders ... by resuming participation in society as an equal has not yet been realized in most contemporary legal systems – even the most enlightened ones. Jurists and scholars have had much to say on this subject.*[481]
*In Jewish law, this principle is fundamental to penal law, and it is rooted in the world of Judaism – in its thought and practice – from the earliest time. The instructive words of Hai Gaon, quoted above*[482]*, have been condensed to a short phrase which perfectly express the ideal of rehabilitation: "Once he has been flogged, he is to be considered, he is to be considered as your brother"*[483] *...*

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[479] Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *op. cit.*, p. 248.
[480] *Ibid.*, p. 249.
[481] M. Elon here adds a bibliographical note : Feller, *Ha-Rehabilitatzah… (already mentioned)*; *Living it Down: The problem of Old Convictions – The report of the Committee Set Up by Justice*, The Howard League for Penal Reform, The National Association for the Care and Resettlement of Offenders 36-38, 44-46 (1970); *Annulment of a Conviction of Crime, A Model Act, national Council on Crime and Delinquency*, 8 Crime and Delinquency 97 (1962).
[482] Which are part of the extract cited p. 146 -- we don't quote it again.
[483] M. *Mak.* 3 :15.

*… We similarly learn in Sifrey[484]: R. Ḥanania b. Gamaliel says: "All day long, the Torah refers to him as a "wicked person", as it is stated: "If the wicked one is to be flogged."[485] However, once he has been flogged, the Torah refers to him as "your brother", as it is stated: "Lest your brother be degraded."*

*…*

*"Based on this important principle, Jewish law established a series of laws whose purpose is to rehabilitate offenders who have borne their punishment and to safeguard their rights as a person, brother, and neighbour … The far-reaching effect of the Enactment for the Encouragement of Penitents (taqqanat ha-shavim) can be seen from the Mishnah in Gittin 5:5, mentioned in the explanatory Notes to the bill which became the Crime Register and Rehabilitation of Offenders Law, 1981[486] …*

*… The power of repentance, which rehabilitates the offender, erases the past, and opens a new page in life, is set forth in the Torah … The "Great Eagle", Maimonides, devoted a separate section of his work Mishneh Torah to the topic of repentance.*

*"How great is the power of repentance!"[487] Not only does the transgressor thereby erase the stain of his transgression, but once he has atoned for his offense, repented from his transgressions, and mended his ways, he has earned a special status in society by means of his own willpower[488] …"*

M. Elon then, with much flowery style, goes on to elaborate on the power of repentance, but also on the necessity of some restrictions:

*"… This is the rule, but there are exceptions. If we are dealing with a extremely offense, or a sensitive position which must be filled by one in whom a high level of trust may be reposed, the offender may not serve in such a position, even if he has served his sentence and repented …*

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[484] *Sifrei*, Deuteronomy, Ki Tetze, sec. 286 (ed. Finkelstein, at 304).
[485] *Deut.* 25 :2.
[486] M. Elon here quotes, and not only quotes but devotes himself to a very detailed analysis of R. Johanan b. Gudgada's sayings in *Mishnah Mak.* 5:5., followed by a no-less detailed account of the divergences between Beyt Hillel and Beyt Shammay.
[487] Maimonides, M.T., *H. Teshuvah* 7 :7.
[488] M. Elon extensively quotes here Maimonides' M.T., *H. Teshuvah* 7 :4, quoting *Ber.* 34b.

*… The same applies with regard to the crime of killing a person. In the Mishnah, the Sages disagree as to the status of the prisoner who has been exiled to the cities of refuge, after he returns from his exile, having served his sentence*[489] *…"*

M. Elon then completes his extensive analysis by quoting some *rishonim*:

*" … The comments of Yom Tov Ishbili, a great Spanish fourteenth-century halakhic authority, on his difference of opinion are interesting:*

> *"Perhaps R. Judah disagreed only in the case of a murderer, or one who has sold and became a servant of others, for these involve very serious and despicable crimes. But when other crimes are involved, whoever has completely repented may be appointed – even in the fist instance – to any appropriate position and, needless to say, he may return to a position which he or his ancestors have an established claim…"*

*26. "This approach of Jewish law … served as a guiding light for the legislature in enacting the Crime register and Rehabilitation of Offenders Law …"*

M. Elon then closes the argumentation to formulate his sentencing:

*27. " … This law deals with two disparate subjects – first, the criminal record itself, and second, the establishment of limitations periods for criminal offenses and the effect of these limitation. The first subject is technical and administrative in nature, while the second subject – limitations – is substantive, with its purpose being to restore the prior legal and social status of the offender …"*

*" … The court the applied the various provisions of the Crime register and rehabilitation of Offenders law to the various contentions raised by appellant. It concluded that the Disciplinary Court had the right to consider appellant's conviction and to suspend appellant from membership in the bar. However, in light of the long period of time that has elapsed since the crime was committed, and in the view of the fact that the President of Israel had decided to shorten the limitations period with respect to appellant's criminal conviction, the Supreme Court reduced the period of appellant's suspension to two years."*

With this sentence ends the "Carmi v. State's Attorney" case.

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[489] M. Elon then goes on quoting M. *Mak.* 2 :8, and the whole reformulation of R. Judah's ruling by Maimonides in M.T., *H. Rotzeaḥ u-shemirat ha-nefesh* 7 :13-14. Indeed, a true rabbinical thesis!

The striking feature of the argumentation is not only the fact that it entirely bases itself on the *taqqanat ha-shavim* ruling as the Sages intended it over the generations, but perhaps even more, that what can be found here is a kind of exhilaration, at every stage of the reasoning, in using and quoting – probably more than is strictly needed to make his point – the halakhic sources, and even to indulge oneself in exhaustive historic summaries[490].
This shows, of course, the quality of M. Elon's master knowledge in *halakhah* – a well-know fact, and one which could not really surprise us, given his extensive formation in *halakhah* at the *Hebron Yeshivah* – but what is more interesting is that it bears testimony, in the most touching way, of a kind of general enthusiasm by legal scholars following the *Foundations of Law Act* as to the possibility to retrieve and apply the glorious heritage of the past in the legal Israeli system of today.
A second case will no doubt further this impression, though in a slightly different manner.

### 4.1.3.2 – The "Maḥfoud v. Minister of Religion" Case:

The case at hand in this part of the *exposé*, which occurred in 1994, opposes the plaintiff Maḥfud against the Minister of Religion[491]; it will be interesting inasmuch as, unlike our previous case, it rather works this time on the side of the reservations of the *taqqanat ha-shavim* ruling rather than on the "sunny" endlessly open way of repentance. As we will see, the conclusion will rather be expressed on a stringent mode. In other terms, another facet of the Jewish-Israeli law will be revealed.

The case can be summarized as follows: Shlomo Maḥfud served on the Religious Council of Netanyah, but the Sephardic Rabbi of Netanyah objected to his reappointment on the ground that he had been convicted of criminal offenses "involving moral turpitude"[492]. The local government of Netanyah nevertheless appointed him.
A Council of Ministers was appointed to resolve the conflict between the local government and the rabbi; they concluded that in view of the fact that Maḥfud had been convicted of several offenses involving breach of trust while serving in the government, he was unfit to

[490] A fact that is not even obvious from our exposition of the case, given the amount of huge quantities of quotations we felt ourselves obliged to cut…
[491] Maḥfoud v. Minister of Religions – Supreme Court of Israel, 1994 – 48(i) P.D. 752 – before Deputy President Elon and Justice Barak and Bach – Judgement. Cf. Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *op. cit.*, p. 256.
[492] *Idem*.

serve on the Religious Council, despite the fact that nine years had elapsed since the dates of these offenses.

As the rendering of the judgement carries the same amount of flowery considerations on repentance, and about the lofty ethical ideas of the Rabbis, in other words, rather lengthy quotations and demonstrations of knowledge of Jewish traditional sources, we will abridge the account of the judgement to the utmost of our capacity -- but no more than legibility requires – and shall directly skip to the end of the legal reasoning.

We then turn to part 8 of the judgement, where Deputy President Elon expresses his belief that there is no basis for the Supreme Court to intervene in the decision of the Council of ministers and to approve the appointment of the petitioner.
The reasoning, here, is that although Jewish Law gives great importance to offering offenders the opportunity to repent from their offenses and permitting complete rehabilitation, it is very strict when it comes to allowing an offender, even though he has repented, to serve in a position of public trust.
Here are M. Elon's words:

> *" Various public functionaries ... who fail to perform their assigned tasks properly "may be removed without prior warning, for they are continuously warned as they go about performing their tasks, since the community appointed them as public officials[493]." With regard with to the offender's returning to his former position, he adds: "If we are speaking of a case in which they were removed because of an offense, we are particularly strict in determining whether they are merely deceiving the court in their desire to be restored to their positions. It must become clear that they can be trusted in the future"[494].*

M. Elon then goes on citing Justice Kister:

> *"It must be remembered that a person who has sinned, or, to use the terminology of the Torah, hursha [has done a wicked act], loses the trust of the public. Under the Halakhah, another consequence is that he is disqualified from testifying. Besides the disqualification from testifying, he is also disqualified from professions which require trust ... is this trust restored immediately once he has served his sentence?*

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[493] Maimonides, M.T., *H. Sekhirut* 10 :7 ; *B.M.* 109 ; *Sh. Ar.* Ḥ 306.
[494] *Sh. Ar.* Ḥ 34 :33 and 34 :34 ; *Beyt Yossef* to *Tur* Ḥ 34. The primary source is *Sanh.* 25.

*True, it would seem that once there is any indication that the sinner has repented, one may not harm him, embarrass him, or remind him of his past misdeeds … But these indications do not always suffice for him to be given a position of trust, to be entrusted with funds, to be relied on in matters of kashrut, or to be restored to a position whose occupant is expected to be respected by society and to reject ill-gotten gain. There are instances when even after we see that he has repented, we cannot restore him to his position."*[495]

And as M. Elon points out, Justice Kister then introduced in his development a polarity of the same kind that we saw in the traditional sources:

*"… There is a difference between the attitude of Heaven and the attitude of society. As far as heaven is concerned, it may well be that the sinner's repentance is sincere …, but as far as society s concerned, a judge may be guided only by what his own eyes see. Indeed, in general, a person may return to his [prior] position and even enjoy [a position of] trust once he has served his sentence, or once the judge … is convinced that the sinner's repentance is sincere. But the nature of the appropriate repentance is determined by the nature of the offense that he committed and the trust that is required for that particular position*[496]*."*[497]

Point 9 of the judgment then enters in a rather complicated issue, linking the subject of repentance with the topic of human dignity and freedom, which has been an object of a Basic Law by the State of Israel; we won't engage in that direction, though, giving our preference to legibility of our case's line of reasoning.
Elon -- and ourselves, for that matter – thus proceeds to point 12 and point 13, expressing his final decision, of which the following will give the core substance:

*12. … The Crime register and rehabilitation of Offenders law brought a significant improvement to the law of rehabilitation, and it relies extensively, in its spirit and approach, on the position of Jewish Law… but the work of the legislature on this subject has not been completed, and it is far from complete…*[498]

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[495] Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *op. cit.*, p. 257.
[496] Emphasis added by the court.
[497] Menachem Elon, Bernard Auerbach, Daniel D. Chazin, Melvin J. Sykes, *op. cit.*, p. 257.-58.
[498] M. Elon here advocates for a further development of the law within the frame of the provisions of the "Basic Law: Human Dignity and Freedom".

*… "Beloved is man, for he was created in the image of God"[499] – This is a fundamental principle in the Torah and in the world of repentance and rehabilitation; the rest is merely explanation, which we must go out and study[500].*

*13. Returning to the facts of our case, for the reason stated in our discussion above we have dismissed the appeal, and have not deemed it appropriate to award costs.*

In other terms, following, this time, the restricting line of thought of the *taqqanat ha-shavim* ruling, namely, the gravity of the offense -- of which we saw numerous examples in the traditional *pesiqah*, the Supreme Court refused here to disturb the judgment of the appointed Council of Members: Shlomo Maḥfoud was not reinstated in his post in the Religious Council of Natanyah.

### 4.1.4 – Some Remarks:

As we already said, a remarkable feature of the *Crime Register and Rehabilitation of Offenders Bill* is the continuity it embodies regarding the whole previous *corpus juris* of the rabbinical legal thinking on the question of repentance, and on the concrete issues of reinstating an offender into society.
A most touching point, in addition to the impressive halakhic knowledge of the judges – which bears testimony on how the Jewish tradition still retains its intellectual power on the Israeli legal elite – is the fact that it seemed important to justify a modern decision by appealing to an abundant traditional literature. In that respect, the *Foundations of Law Act* is the more general expression, and proof that the ancient legal thinking of the rabbis is still alive, and accurate to be applied in current real-life cases.

As regards the two cases that were brought here in this section, it was interesting to notice that they reproduced, "in miniature", so to speak, on a micro scale, the macro-scale mapping of divergent opinions and approaches, namely the delicate and sensitive balance between the requirements of a rehabilitative perspective, based on the needs of the individual and more of

[499] M. *Avot* 3 :14.
[500] It cannot be sufficiently emphasized how literate in biblical and Talmudic culture most of the Judges we are quoting in this work are ; perhaps even more interesting, as we already mentioned, is the leniency they allow themselves – and the obvious pleasure – they have in citing and expounding their *pitgamey de orayta*, in the veery corpus of their *psiqa*.

internal and psychological kind, and the more objective, social concern for the protection of the public interest, which demands the setting of limits, and apparently rather verges on an utilitarian approach.

We will of course return to this issue.

## 4.2 – *Taqqanat ha-shavim* -- Broadening the Issue:

We have dealt so far with very clear, self-defined examples of *taqqanat ha-shavim*, more or less directly issued from the seminal *mishnah* of *Gittin* 5:5. This is clearly the case for all the classical rabbinical literature that has come under our examination all along the course of this *exposé*, and this can also be said, all be it in a very renewed spirit, for the Israeli legislation, if only for its title formulation.

What we want to do here is to go a little beyond the frame designed by classical literature; we will see, indeed, that the "repentance principle" has sometimes been called as a ruling principle in cases very far from its usual field of application – mainly, the sphere of professional activity and its related "reinstatement problem"--, and with a clear inflexion of its usual meaning. We don't want to say more about it here, but beyond the particularities of the cases which will be brought to our attention in the present development, the "big picture", in this chapter, will serve as additional proof to the extraordinary flexibility of the *taqqanat ha-shavim* principle.

We will then see successively a case applying to *kasherut* (Part 4.1.1), and a second case dealing with the field of *taharat ha-mishpaḥah* ("family purity laws") in part 4.2.1, both cases having the common feature of being worked out in an orthodox context.
A third example will take us a little further back in time in the domain of *diney ishut* (family laws) – Part 4.2.3 ; we will then end our quick survey of uncommon applications of *taqqanat ha-shavim* with Moshe Zemer's interpretation (Part 4.3.4).

### 4.2.1 -- T*aqqanat ha-shavim*, the Set of China Dishes, and M. Feinstein…:

The case we will bring here is all the more interesting that it takes place in a strict orthodox context. Though *taqqanat ha-shavim* would seem prone to promote a kind of lenient philosophy in itself, and as such, rather be likely to appear –at first sight -- in conservative or liberal settings, it is fascinating how the principle is worked out here with a totally different inflexion as is expected, and precisely meant to be tactically enforced in the direction of strengthening the orthodox approach.

The case is brought by Rabbi Barry Gelman[501], who recounts a personal experience he had with a couple who gradually was on its way to adopt an orthodox-observant lifestyle, and asked to meet him to share some of their doubts on this issue[502].
During the course of their conversation the couple mentioned that they had a set of china dishes which were given to them by a family member who did not keep *kosher*, and told R. Gelman that they had the feeling that the dishes could not be "koshered." They told him that this china set had important sentimental value to them, and that they were saddened by the notion of not being able to use them.

As R. Barry Gelman himself mentions, he shared with them the view of Rabbi Moshe Feinstein who allowed *kashering* china in circumstances very similar to theirs and told them he thought that they, too, could *kasher* their dishes[503]. The couple, at that moment, seemed suddenly relieved from a heavy weight, and went on to tell how they had been bombarded with so many strict interpretations of Orthodox Judaism that the husband had begun to doubt whether or not they could pull off a total assimilation into Orthodoxy.
R. Gelman, in an after-analysis of his encounter, makes the following assessment:

> *" ... In hindsight, I could have tried to convince the couple that their attachment to the dishes should not serve as a barrier for further religious growth and counsel them how to best integrate themselves into orthodoxy -- just without the dishes! -- but instead, I simply removed the barrier. Removing barriers to religious growth can be a very effective tool towards increasing religious observance, and we see that this method has, in fact, been used by great poskim."*[504]

In an literate effort to justify his attitude, Rabbi B. Gelman then goes on to cite the source of *Gittin* 5:5 as being the core principle of his line of reasoning. He gives a detailed analysis of the case and of its further developments, and finally touches the issue of what he calls the "Feinstein's principle": a permissive ruling about china, based on *taqqanat ha-shavim.* In R. Gelman's view, the principal merit of Rabbi Feinstein was that he understood that the use of

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[501] An ordained rabbi from the Rabbi Isaac Elchanan Theological Seminary, Rabbi Barry Gelman, after serving as Rabbi of the congregation *Shaar ha-shamayim* in Montreal, Canada, is now Rabbi of *United Orthodox Synagogue* of Houston. He is the founding Director of *Me'orot*, a Modern Orthodox Rabbinic Training.
[502] Rabbi Barry Gelman, "*Mipnei Takanat Ha-Shavim* – מפני תקנת השבים. Outreach Considerations in *Pesak Halakhah*1", in Benjamin Shiller, Akiva Dovid Weiss (eds.), *Milin Ḥavivin (Beloved Words)*, vol. 3, December 2007 – Tevet 5768, Yeshivat Chovevei Torah Rabbinical School, p. 85-91 [p.85-86].
[503] *Responsa*, *Igerot Moshe*, *Yoreh De'ah,* 2: #46.
[504] Rabbi Barry Gelman, *op. cit.*, p.85.

lenient rulings in cases such as people wishing to embrace an Orthodox style of religious life, but not having removed a hundred percent of their doubts, would make the road to observance easier to fare.[505]

R. Gelman then moves to a more generic kind of statement, enhancing the status of *taqqanat ha-shavim* to a kind of a general *hashkafah* ("world-conception") on religious practice:

> *"There is another pitfall inherent when not taking this approach and that is the lost opportunity to help make a halakhic and permissible style of living accessible to as many Jews as possible. When discussing leniencies and stringencies, we should not focus on the spectrum of less stringent or more stringent, but rather on the strategic use of leniency to encourage greater observance.*
>
> *Put differently, when rendering halakhic decisions, rabbis should not focus on whether or not a decision is in line with the most stringent approach or is in accord with as many opinions as possible, but rather on the long term affects the particular decision will have on an individual's level of observance. The case of our mishnah and its application by Rabbi Feinstein are examples of the use of halakhic leniencies to make the road easier for ba'aley teshuvah …"*

The interesting feature of this narrative, as we see it, lies in a dual upgrading of the principle of *taqqanat ha-shavim* from the point we were used to see it applied in the former classical rabbinical literature.

On the one side, and though the assumptions behind the case are clearly belonging to a strict orthodox approach of religious life (*i.e.* the scrupulous keeping of the laws of *kasherut*, the fear of a non-*kosher* type of behaviour by the member of the family[506], the very fact that they address their rabbi on this issue, and the style of the interview), *taqqanat ha-shavim* appears here as a principle detached from any particular ideological background[507], and whatever the "closure" we might assess about the general approach of religious life that is put before our eyes, the principle still appears and functions as an "opening" principle.

On the other hand, and this is a remarkable *ḥiddush* ("new analysis") -- we might even say "rebound" of the usual meaning --, *taqqanat ha-shavim*, through the reformulation of

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[505] *Idem*.

[506] We skipped the lively description of all the transgressions their beloved relative was secretly suspected to have committed…

[507] We hold that orthodox thinking and liberal thinking's difference is not so much in terms of the law, but in terms of a different « theory of law"; that is to say: a different set of meta-principles that makes the law work in a certain way. For convenience here, that's what we call here "ideology".

*teshuvah* as meaning "return to religion", as in the sense of "*ba'al teshuvah*", is "enrolled" as an ideological slogan advocating for an ever more orthodox observance.

### 4.2.2 – Analysis of the Principle *Taqqanat ha-shavim* in the Field of *Taharat ha-mishpaḥah*:

Our present case will also take place in an orthodox context but operates, this time, in the field of *taharat ha-mishpaḥah**. For the same reason as in the previous case, it will be interesting to observe how the *taqqanat- ha-shavim* principle works out in a frame where leniency is most of the times thought as a borderline not to be approached.

The case is still recounted by Rabbi Gelman, who opens his account by quoting a collection of responsa entitled *Reshut Ha-Yahid* by Rabbi Yuval Sherlow[508], who addresses the issue of applying leniencies regarding the laws of *taharat ha-mishpaḥah* -- the laws concerning *nidah,* or menstrual impurity -- for newly observant women.
A general concern, apparently, was voiced by a growing part of newly observant women according to which the full abiding of the laws of t*aharat ha-mishpaḥah* might be too much to bear. Rabbi Sherlow, mentions R. Gelman, permitted a woman who was beginning to observe the laws of t*aharat ha-mishpaḥah* to only observe the biblical laws of *nidah* -- without the added rabbinic stringencies -- so long as she was on a "path" towards full observance of the laws of menstrual purity[509]. He issued his permissive ruling recognizing that it may be the very stringencies that are imposed on newly observant women that cause them not to observe more important *halakhot*.

Rabbi Gelman further addresses the issue of women who were uncomfortable with the *mikveh* attendant doing a full body check before immersion[510] and, after a lengthy and detailed of the traditional *pesiqah* on the subject, proposes a personal suggestion to work towards a solution:

> *"... Perhaps even more can be done to raise the comfort level of women in order that they be more inclined to use the mikveh. Rabbi Josef Caro ... quotes a number of authorities*

[508] Born in Hertzliyah in 1957 to United-State-born parents, educated in *Yeshivat Har Etzion*, Rabbi Yuval Sherlow is a modern orthodox rabbi and *poseq*. He is *Rosh yeshivah* of *Yeshivat Hesder Petah Tikvah*, and was one of the founders of *Tzohar*, an organization of modern orthodox rabbis in Israel. He is noted for his willingness to deal with sensitive social and religious issues. His relatively liberal positions have made him a controversial figure in the eyes of the more conservative currents of Orthodox Judaism in Israel.
[509] Responsa, *Reshut Ha-Yahid,* pp. 209-210.
[510] *Ibid*. pp. 211-213.

*who allow a woman's husband to serve as her own mikveh attendant*[511]*. In his responsum Nodah Be-Yehuda, Rabbi Ezekiel Landau also allows a woman's husband to serve as her own mikveh attendant when there is no one else around to do so*[512] *... I have personally counselled a woman, who found the idea of her husband acting as the mikveh attendant very appealing to her, to do so, which then helped her move toward greater mikveh use. Though neither of these ideas serve as the best option to make sure that all of a woman's hair goes under the water during immersion, they certainly are better than the alternative, which is, for many women, not using the mikveh at all. It is reasonable to suggest that if a woman is able to get comfortable using the mikveh in general, then she may also be able to overcome the specific hesitancy or discomfort of using the mikveh attendant ..."*

R. Gelman then expands on the ever-possible fear that lenient rulings could lead to a "slippery slope", which would lead people to seek out ways in other areas "to cut corners and not conform with halakhah in general".
He then evokes the case that we have seen before:

*"... Rabbis have no right to add stringencies in matters where clear halakhic permission exists*[513]*. As we have seen in the mishnah dealing with taqqanat ha-shavim and the writings of Rabbi Feinstein and Rabbi Sherlow, the application of halakhic leniencies is the very tool used by rabbis to increase observance. This is especially so when dealing with individuals who have expressed an interest in coming closer to a traditional lifestyle ..."*

R. Gelman then goes to seek some extra help on the side of R. Abraham Isaac Kook, quoting his general conception according to which if rabbis were to permit what was permitted in accordance with *halakhah*, then people would likewise accept that which the rabbis prohibit as really prohibited by the Torah. This principle was even pushed to the point of stating that where rabbis were ruling stringently on matters that may be deemed permissible, without concern for the hardship that such rulings may cause an individual, a great desecration of God's Name (*hilul Hashem*) would result[514].
R. Gelman then draws the tactical lesson of this conception:

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[511] *Beit Yosef, Yoreh De'ah* 198:40, s.v. *katvu ha-kol bo*.
[512] Responsa, *Noda Be-Yehudah Mahadurah Tanina, Yoreh De'ah* 122.
[513] Rabbi Barry Gelman, *op. cit.*, p. 90.
[514] *Mishpat Kohen*, Responsum #76; Responsum *Orah Mishpat, Orah Hayim* 112.

*"… Rabbi Kook realized that permissive rulings, when appropriate, increase the public's trust in rabbinic leadership, and with increased trust will come increased levels of observance from a trusting public. Conversely, needless, stringent rulings can lead to distrust, less observance, and a breakdown in rabbinic authority …"*

In other words, as in the previous case, *taqqanat ha-shavim* is not seen so much as having to do with the problem of repentance, or with the social-ethical problem of how to re-integrate an offender in the normal of society – and as such, as an ethical and halakhic *value* --, but as a *tool*, a tactical device.

This fully utilitarian instrument seems itself based on psychological assumptions and human "laws", so to speak, pertaining to the difficulties, doubts, resistance and inertia proper to the field of a strict observance – at least for those who are on the way of such an observance. Used properly, as R. Gelman constantly tries to convince his audience, *taqqanat ha-shavim* can be an effective tool in bolstering an individual towards a more orthodox observance of Jewish law.

The final word, here, belongs to R. Gelman, who wraps up his reasoning by this "reason-why" and "reassurance" praising-product kind of statement:

*"… I have seen the benefits of such an approach with my own eyes, and the results never cease to amaze me …"*

### 4.2.3 - *Taqqanat ha-shavim* in the Context of *Hora'at ha-sha'ah*:

Our third development on original contexts in which *taqqanat ha-shavim* has been applied will have us, this time, examine the frame of *hora'at ha-sha'ah* (the "time of emergency" doctrine); our case at hand is brought by Rabbi Benzion Uziel[515] in a *responsum* addressed in 1943 to Rabbi Raphael Chaim Sabban[516], Chief Rabbi of Istanbul, where R. Uziel ruled in

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[515] Born in Jerusalem, Ben-Zion Meir Hai Uziel (1880-1953) became a *yeshivah* teacher at the age of twenty, and in 1911 was appointed *Ḥakham Bashi* (chief rabbi in the Ottoman Empire) of Jaffa. After having been very active during World War One to defend persecuted Jews beside the Ottoman government, he was appointed chief rabbi of Salonika in 1921, and upon returning to Israel, chief rabbi of Tel Aviv in 1923, and chief rabbi of Palestine in 1939. He extensively contributed to newspapers and periodicals on religious, communal, and national topics as well as *Torah novellae* and Jewish philosophy. His chef works include a volume of *responsa*, *Mishpetey Uziel* (3 vols., 1935–60 – 2nd ed., 4 vols., 1947–64) and *Sha'arey Uziel* (1944-46), consisting of *halakhah*, general topics, and a selection of his letters, and other writings.

[516] Chief rabbi of Turkey between 1940 and 1960. *Mishpetei Uzziel Eben ha-Ezer* 18 and *Pisqei Uzziel*, n. 59-67. For an explanation of Uzziel's method and mind in general, see Marc D. Angel, *Loving Truth and Peace: The Grand Religious Worldview of Rabbi Benzion Uzziel* (Northvale, NJ: Jason Aronson, Northvale, NJ, 1999. See

favor of conversion performed for the sake of marriage of a non-jewish woman who lives with a *kohen*[517].

But before we report the case, it will no doubt appear fruitful to throw here some backlight on how *hor'at ha-sha'ah* is to be defined. Its most complete formulation is to be found by Maimonides[518]:

ויש לבית דין לעקור אף דברים אלו לפי שעה, אף על פי שהוא קטן מן הראשונים--שלא יהיו גזירות אלו חמורין מדברי תורה עצמה: שאפילו דברי תורה--יש לכל בית דין לעקור אותן, הוראת שעה.

כיצד: בית דין שראו לחזק הדת ולעשות סייג, כדי שלא יעברו העם על התורה--מכין שלא כדין, ועונשין שלא כדין; אבל אין קובעין הדבר לדורות, ואומרין שהלכה כך היא.

וכן אם ראו לפי שעה לבטל מצות עשה, או לעבור על מצות לא תעשה, כדי להחזיר רבים לדת, או להציל רבים מישראל מלהיכשל בדברים אחרים--עושין לפי מה שהשעה צריכה.

כשם שהרופא חותך ידו או רגלו של זה, כדי שיחיה כולו: כך בית דין מורין בזמן מן הזמנים לעבור על מקצת מצוות לפי שעה, כדי שיתקיימו כולן--כדרך שאמרו חכמים הראשונים, חלל עליו שבת אחת כדי שישמור שבתות הרבה

*"The court has the power to suspend even these rules[519] for a term even if it is lesser than the earlier court[520], for these [rabbinic] decrees must not be more rigorous [in*

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also Marc Angel, "Another Halakhic Approach to Conversions," *Tradition* 12 (Spring/Summer 1972), p. 107-113, for a study of Uzziel's treatment of this issue.

[517] Alan J. Yuter, Hora'at Sha'ah: The Emergency Principle in Jewish Law and a Contemporary Application, *Jewish Political Studies Review 13:3-4 (Fall 2001)*.

[518] *Hilkhot Mamrim* 2:4.

[519] Normally, a court may not overrule a restrictive fence around the law enacted by a previous court if that court's decree was (a) preventative and (b) accepted by all Israel (M.T., *Hilkhot Mamrim* 2:3). And these otherwise non-reversible laws may, in case of emergency, be suspended.

[520] Meaning: "Less" in number or in learning than the earlier court. It is clear from this sentence that Maimonides did not accept the theory of *yeridat ha-dorot* ("degradation of the generations"). Cf. Jose Faur, *Golden Doves with Silver Dots*, Indiana University Press, Bloomington, 1986, pp. 146-147; Menachem Kellner, *Maimonides on the Decline of the Generations*, SUNY Press, Albany, 1996; and Norman Lamm, *Torah u-Madda: The Encounter between Religious Learning and Worldly Knowledge in the Jewish Tradition*, Jason Aronson, Northvale, NJ, 1990), pp. 86-87.

*their application] than Torah law. Any court has the authority to suspend the law[36] in an emergency[521]. How so? A court that determines that to strengthen the law/religion and to make a fence so that the masses do not violate Torah law, has the authority to flog [offenders] without warrant authorized by positive law. But they do not establish this [deflection] from positive statute in permanence and do not declare that such and such is the law. And similarly, if they [the members of the court] determine to nullify [le-batel] a positive commandment or to transgress a negative commandment in order to cause the masses to return to law/religion or to prevent the majority of Israel from stumbling [i.e., sinning] in other [similarly serious] matters, [the court] does so [suspend the positive law]. For just as the doctor amputates a limb or foot in order that a patient survive, similarly, the court rules at any time to transgress a few commandments for a term in order that the masses may one day return and fulfill [all] the commandments. Thus, any court may rule, at any time, to violate some commandments temporarily, in order to sustain them all [i.e., all of the commandments], as was commanded by the early sages, violate one Sabbath so that one may observe many Sabbaths[522]."*

We can now go back to our case, where Rabbi Benzion Uziel, in his *responsum* to Rabbi Raphael Chaim Sabban[523], as said previously, addressed the issue – and ruled in favour – of conversion performed for the sake of marriage[524].

His ruling bases itself on a previous jurisprudence by Maimonides involving an improper union between a Jewish man and a non-Jewish woman he had hired to be his maid[525], where the Rambam precisely mentioned the notion of *taqqanat ha-shavim* while openly stating that he was conscious that he was contradicting an explicit Talmudic teaching[526].

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[521] Maimonides uses the idiom *la'aqor* here to indicate that the principle is valid and powerful, but adds the words *hora'at sha'ah*, for the moment, so that the abrogation be taken as temporary and not as an undermining of Torah law.

[522] As in *Yoma* 85b and *Sanh.* 74a.

[523] *Mishpetei Uzziel Eben ha-Ezer* 18 and *Pisqei Uzziel*, n. 59-67. Cf. also Marc Angel, "Another Halakhic Approach to Conversions," *Tradition* 12 (Spring/Summer 1972), p. 107-113, for a study of Uzziel's treatment of this issue.

[524] Rabbi Barry Gelman, *op. cit.*, p. 85-91. For an orthodox conception on conversion, see J. David Bleich, "The Conversion Crisis," in his *Contemporary Halakhic Problems*, KTAV, vol. 1, New York, 1977, vol. 1, pp. 270-298.

[525] See quotation p. 164-65.

[526] Maimonides*, Responsa "Pe'er Ha-Dor",* 132.

The case involved a Jewish man who had "hired" a non-Jewish maid who was attractive (*yefat to'ar*) and he “did with her as he pleases” (*ha-yashar be-'enav ya'aseh*)[527]. Maimonides rules that the ideal law requires that the women be immediately expelled[528].
Nevertheless, Maimonides then adds that the *Torah* is addressing human passion (*ki lo dibberah Torah ella ke-neged ha-yetser*)[529]. Recognizing that this situation is not ideal, the court must coercively intervene, says the Rambam, to the extent that it is empowered to enforce the consort's expulsion[530], or failing that end, that the woman must be manumitted (liberated from slavery) in order that a *halakhic* marriage may be arranged.
This ruling is based on the *Mishnah*[531] according to which the separated couple is forbidden to marry, but if a marriage does take place, the couple, now united as husband and wife, is not in halakhic violation and need not be separated[532].

The reason invoked by Maimonides for is lenient ruling is none other than *taqqanat ha-shavim*… Quoting the Scripture, *"it is a time to take action for the Lord, that Your Torah [law] [ought to be] be nullified”*[533] -- implying that in some emergency situations the law must be suspended so that the community may survive, Maimonides explicitly invokes the *hor’at ha-sha’ah* doctrine and applies it, indicating that preventing an intermarriage of an individual provides sufficient warrant for such invocation.

In other words, the consequences of intermarriage according to the Rambam are so terrible that the minor infraction of an “imperfect” conversion takes precedence in order to avoid the

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[527] It is alluded here to the biblical rule of the captive non-Jewish woman whose presence elicits illicit lust on the part of the Jewish warrior, and the Torah, recognizing the realities of passion, reluctantly allows the woman to be converted and married to her conqueror (*Deut.* 21:11). The idiom *yashar be-'enav ya'asseh* appears in Deut. 12:8, describing the state of prevailing lawlessness before there was a monarchy in Israel (*Judg.* 17:6 and 21:25).
[528] *Tsarikh legaresha mi-yad*. Since the women is not Jewish, there is no *qiddushin*, and therefore no need for a *get*, divorce, or *gerushin*.
[529] *Kid.* 21b.
[530] Maimonides' idiom *le-garesh ’et ha-ammah ha-zot*, alludes to Sarah's demand that the Egyptian woman, not mentioned here by name, be expelled (*Gen.* 21:10).
[531] *Yev.* 24b.
[532] When living together *derekh ḥatnut*, as man and wife, as Jew and non-Jew, the living together is a continuous act of sin. The rabbinic violation of marrying after their separation and conversion of the woman remains a forbidden act, but, once done, will not bring the court to separate the violating couple because the couple is no longer in continuous public violation of Torah norms.
[533] *Ps*. 119:126. The rabbinic *drashah* of this phrase is to be found in *Ber.* 54a, 63a, 69a, *Gittin* 69a, *Tem.* 14b, and *Tam.* 27b.

intermarriage scenario[534]. And then, after ruling that the intermarriage infraction is not the occasional liaison but living together as if married[535], Maimonides then adds:

> *"Even though this crime is not a capital crime punished by the court, it should not be light in your eyes, because this [infraction] has greater deleterious consequences [hefsed] that are not present in all of the other forbidden liaisons. The male offspring from incest is still a Jew, even if he is illegitimate, while the male offspring from a non-Jewish woman is not his [Jewish] son. This issue [of intermarriage] brings us to cleave to the pagans whom the Holy One blessed be He has separated us from them and [by engaging in this infraction of intermarriage] we turn from the Lord and are unfaithful to Him."*[536]

Thus, basing himself on the Rambam's ruling, Rabbi Benzion Uziel in his own *responsum* ruled in favour of conversion performed for the sake of marriage[537], arguing, despite the general disapprobation, that when the non-Jewish partner in intermarriage wishes to convert, rabbis *should perform* such conversions. Doing so, he claims, frees the couple from the sin of intermarriage and saves the couple and their children from being estranged from Judaism entirely.

Rabbi Uziel then urges rabbis to allow such conversions in order to make Jewish living accessible to these couples, rejecting the very common notion of *hal'iteihu la-rasha vayimot* ("Let the wicked stuff themselves with it until they die") that teaches that sinners should be left to sin and suffer the consequences[538]…

As we thus see with this "double" Rambam – Uziel case, *taqqanat ha-shavim* could also be used with some creativity to make its way towards other-than-usual fields of the law.

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[534] *Deut.* 7:3 and *A.Z.* 36b.
[535] Maimonides, M.T., *H. Issurey Bi'ah* 12:2. This union is not a marriage, *ishut*, but akin to marriage, *derekh ishut*.
[536] *Hilkhot Issurei Bi'ah* 12:7-8.
[537] Responsa *Mishpetei Uzi'el,* Vol. 2, *Yoreh De'ah* 48.
[538] *Bava Kama* 69a. The *gemara* there discusses the procedures for adequately marking one's field during the year of *shemitah* to allow passersby to know which fields, orchards, and vineyards are permissible to eat from, without concern for either the biblical prohibition of *orlah* or *kerem rev'ay*, for in the seventh year of the Septennate cycle, the land is rendered ownerless and all may partake of its yield. Regarding the rest of the years in the *shemitah* cycle however, the *gemara*, in explanation of Rabbi Shimon ben Gamliel, states that there is no rabbinic requirement to mark one's field appropriately to warn of any inherent prohibitions when taking fruit because to do so would be stealing and counsels to, "let the wicked stuff themselves with it till they die." For a full treatment of "*Hal'iteihu la-rasha va-yimot"* see *Techumin*, Vol. 9, 156 – 170, and *Entzyclopediyah Talmudit*, Volume 9, columns 444-448 (cf. also Gelman, note 6 p. 87).

Using *taqqanat ha-shavim* in matters pertaining to personal status indeed represents a bold willingness to open the way to any kind of repentance, here understood as a very wide concept; in other words, a benevolent tool to ease people's life when they seem entangled in difficult halakhic situations, to assist them in their attempt of doing better.

### 4.2.4 Moshe Zemer's Interpretation the Principle of *Taqqanat ha-shavim*:

Our last example will take us a little further. We have seen than some uses of the *taqqanat ha-shavim* principle led to a far-reaching flexibility as to the fields of law concerned, not only the laws of (stolen) property, nor the laws of the reinstatement of an offender to his post, but also the field of *taharat ha-mishpaḥah*, and through the general concept of *hora'at ha-sha'ah*, the domain of personal status and family law.
In our last example, we will even skip a degree of logical category; we will find *taqqanat ha-shavim* used in an even more metaphorical sense: more than just a ruling principle, but one elevated and gaining a status of "hermeneutic principle"[539].

As R. Moshe Zemer does not dedicate, in fact, much place to the exposition of the principle of *taqqanat ha-shavim*[540], we will be reduced to some kind of acrobatic "data mining" exercise on a very small *corpus* – still sufficient, we hope, to identity and record at least a distinct direction, a distinct voice from previous literature on the subject.
M. Zemer first starts with the accounting of the *maḥloquet* between Beyt Hillel and Beyt Shammay on the stolen beam, then moves to Maimonides' rendering of the dispute[541] and then, closes his exposition of the principle with the Rambam's ruling on the Jewish maid – the very case we just saw in our previous sub-part.

True, R. Moshe Zemer does not bring any fresh material in his exposition of the principle. But his distinct approach, in our eyes, rather lies in the spirit of his accounting, an insistence on

[539] As is implied by Moseh Zemer's title itself.
[540] Rabbi Dr. Moshe Zemer, *Evolving Halakhah. A Progressive Approach to Traditional Jewish Law*, Jewish Lights, Woodstock, Vermont, 2003.
[541] His quoted passage is M.T., *H. gezelah ve-Avedah* 1:5 – which we won't cite again.

different points than had done the classical rabbinical literature. A distinct "voice" which we could map in three perspectives, indeed not even "perspectives", but rather delicate "tendencies", three "*qolot demamah daqot*":

a/ First, his rendering of the Rambam's case include some parallels or additions that don't appear elsewhere.

M. Zemer begins by mentioning another case found in the documents of the Cairo *Genizah* published by Mordechai Akiba Friedman[542], where the daughter of a Nubian slave had been purchased in Ashkelon by a certain Eli ben Yefet – this takes place in 1093. As he was summoned to appear before the rabbinical court of the Exilarch, David ben Daniel, in Fostat, to clarify the status of his daughter Malah, described as the "beauty of beauties", it was found that Eli had previously freed his Nubian slave and then married her. Thus, their daughter was born after her mother had fully become Jewish.

Here, M. Zemer jubilantly quotes the 1093 document on the daughter's status: *"her birth was in holiness and she is permitted to marry in the Congregation of the Lord"*[543]

This strikes us, indeed, as a very contemporary story, with very contemporary feelings. But the insistence on the psychological import of these rulings is even much more obvious in his conclusion about The Rambam's case:

> *"Maimonides was not content with giving the couple his radically lenient responsum, which allowed them to be married; he related to the pair with tenderness, evincing a warm and human understanding of their predicament and hurt feelings. This is illustrated by the obiter dictum with which he ends the responsum: "Gently and with tenderness we help him marry her".*

b/ A second distinct orientation of R. Moshe Zemer accounting of *taqqanat ha-shavim* stems from the context in which it is introduced. Instructive, in this regard, are the other headings among which *taqqanat ha-shavim* appears, heading which are formulated as general principles: *"It is better for him to eat the gravy and not the fat itself"*[544], or else, *"It is time to act for the lord; they have violated your Torah"*[545].

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[542] Mordechai Akiba Friedman, *Jewish Polygamy in the Middle Ages*, Jerusalem, 1986.
[543] M. A. Friedman, *op. cit.*, 314-19.
[544] M. Zemer, *op. cit.*, p. 26.
[545] *Ibid.*, p. 27.

Again, this strikes us as an attempt to completely decontextualize the principle of *taqqanat ha-shavim*, to give it the status of some fundamental wisdom, possibly inherited from the Romans or from the Greeks. The level of characterization, here, has lost its halakhical nature, to become purely ethical and psychological.

c/ Last but not least -- we understand it as M. Zelmer's real pursued goal in his exposition of the principle, *taqqanat ha-shavim* is finally presented and subsumed under the arch-principle of "the lesser of two evils"[546]. More precisely: "The lesser of two evils as a hermeneutic principle", of which *taqqanat* is thought to be an equivalent.
We witness here the last *gilgul* ("reincarnation") of *taqqanat ha-shavim*: its recycling as an arch-principle with a hermeneutical value; M. Zemer goes to some length in order to categorize it as an "ancient rule of interpretation", at the same level as the hermeneutic principles of Hillel.
Setting for himself the goal of searching for a Greek or Roman influence, he finally admits to its late first explicit reference in rabbinic literature: in the works of Rabbi Isaac ben Sheshet Perfet, and of Rabi David ben Zimra, i.e., only in the 14th and the 16th centuries…
Unconvincing as this "demonstration" may sounds, what is interesting here is the insistence displayed in trying to equate the *taqqanat ha-shavim* principle with the universal maxim of "the lesser of two evil".

Moshe Zemer's approach thus testifies how flexible our time-honoured principle is – or how creative the rabbis are. For, we must admit, this last apprehension of the concept goes in a totally opposite direction from the two first rulings we saw. Whereas in the first cases *taqqanat ha-shavim* was assessed as the paragon tool for strengthening an orthodox way of life, our principle is here displayed as the fundamental vector of a liberal approach to the law, as the true halakhic principle law of evolution…

We thus see again, here, an ideological use of the principle, and a change in the degree of logical categorization. Even though our principle, in the orthodox cases, was already seriously deflected toward a tactical, purely utilitarian tool to further a smoother enrolment into the orthodox frame of living, it still remained in the line of a halakhical approach, a ruling principle.

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[546] *Ibid.*, p. 34.

Here, in R. Moshe Zemer's account, *taqqanat ha-shavim* is given a more abstract status, practically the status of a "law of history" – is this a Hegelian remnant of Liberal Judaism's history in 19th century Germany?
This law, apparently, would be endlessly working in an underhand manner for the benefit of an "ever-evolving" conception of *halakhah*…

## 4.3 – *Taqqanat ha-shavim* in the Contemporary Period – an Assessment:

This little survey of modern developments in the field of *taqqanat ha-shavim* left us with some continuations, and also a few evolutions.
The most striking and telling feature as regards the resilience and the accuracy of Jewish legal thinking in our modern times is certainly the fact that the whole "envelope" of the legal thinking of the rabbis on the subject of *taqqanat ha-shavim*, from the *Mishnah* itself but also including the subsequent rabbinical *pesiqah* over a course of more than a thousand years, could make its way, almost untouched, towards the Israeli modern legislation, and still be relevant when dealing with a contemporary reality.
This extraordinary fact surely gives a striking expression to one of the Rambam's most constant assessment about the nature of the *Torah*, whose adaptative character, in his view, was not so much to be found in a correspondence with the *phusis* of the universe, as philosophy would probably claim to have it, but about the *phusis* of human nature:

> *"… Most of the Torah's laws are nothing other than "counsels given from distance" from "He Who is of great counsel" to improve one's character and make one's conduct upright. And so it is written in Proverbs 22:20-21: "Behold, I have written for you in the Torah prominent matters, to inform you of the veracity of the words of truth, so that you will respond truthfully to those who send to you"."*[547]

[547] M.T., *H. Temurah* 1:13. We dealt with this issue in one of our Master thesis on the rabbinical background of the Rambam's philosophical approach in the *Guide of the Perplexed*; we particularly mentioned, for this idea, Remi Brague's study on the relationships between law and nature in the *Guide*, a relationship labelled, according to him, by the recurrent word *mavo'* ["door", "entry", *ar. madhal*]. Which "door" would it be? Starting with the idea that a law, as a kind of language, always completes a preceding language [given by the same donator, here: God], we then have the [Sinai] Law completing, correcting the "language" of nature. Which nature? Not so

This inclusion, and transformation of an ancient communal kind of regulation into a modern Nation-State kind of legislation was not only the hobby of a few judges and *yod'ey torah* piously and scholarly recording it some corner of the Explanatory Notes of the 1981 Law but, as we saw from the example of real court cases, played an active role in the process of the court reasoning and in the formation of the judgement.
These case, as we also noted, echoed the *pesiqah* of their predecessors in their constant seeking of a equilibrium point between the requirements of a rehabilitative position, one which is rather based on the understanding of the internal, psychological and spiritual issues of the individual, and a more objective, society-oriented concern for the protection of the public interest, which tends to the setting of limits, and more easily gives expression to an utilitarian approach.

But we were also witness, in this contemporary period, to a whole renewing in the meaning itself of the "repentance principle", which most of the times brought it relatively far from its usual field of application – which in the traditional *pesiqah*, all be it a large area, was mainly confined to the sphere of professional activity and the returning of an offender to his previous position. This renewal could as well consist 1/ in the novelty of the domain it was brought in to be applied, like *taharat ha-mishpaḥah*, or in matters of *diney ishut*, or also 2/ consist in the way the principle was apprehended, not necessarily any more as a halakhic principle.

The first kind of "upgrading", taking the meaning of "*teshuvah*" in current modern sense of a "return to religion" -- mostly in an orthodox understanding of the process --, gave the principle such an inflexion that it could pursue two objectives: on the one hand, *taqqanat ha-shavim* was seen as retaining a purely halakhic dimension, and as such, functioned in the legal system as an "opening" principle regarding precise issues; on the other hand, the principle took on a wide-scope meta-halakhical value, and with the backlight of some psychological assumptions about human nature as regards observance in general, was transformed in an ideological tool towards enforcing a more orthodox observance.

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much nature in general, but *human nature*; the *mitzvah* is then a "door" opening on human nature, which accounts for man's perfectibility. Cf. Rémi Brague, « La porte de la nature. Note sur la nature et la loi selon Maïmonide », in LEVY, Tony, RASHED, Roshdi (eds.), *Maïmonide philosophe et savant (1138-1204)*, Peeters, Leuven, 2004, p. 193-208 [p. 193] ; Cf. Y. Boissière, « Esotérisme, tradition rabbinique et messianisme dans le *Guide des egarés* de Maïmonide (1135-1204) », Master 2 « Mémoire » for Pierre Bouretz' seminary, EHESS, « Le philosophe dans un âge de croyance ».

Not without a certain irony, and for totally opposed concerns, this is what we also witnessed in a liberal frame of thinking. Instead of being the wondrous and strengthening vector towards a true orthodox way of life, *taqqanat ha-shavim*, by the same kind of meta-halakhical diversion, ended up this time enrolled in the forces of the liberal *Weltanschauung*.

In this latter setting we were also able to discern the second kind of upgrading: a decontextualization of the principle of *taqqanat ha-shavim*, then becoming an ethical and psychological universal maxim of the same kind as the "lesser of two evils" maxim.
In this we saw a skip towards a new degree of logical category. T*aqqanat ha-shavim,* in this kind of thinking, is definitely used in a metaphorical sense, and more than logical ruling principle, takes on the status of a "hermeneutic principle": the status, in fact, of an historical law, *the* fundamental law of development in the field of *halakhah*[548].

[548] Many meanings can be assigned to the word "hermeneutics", possibly referring to many different stages of its long history. Let us briefly say that in our view, the meaning which M. Zemer seems to adopt is not the one of Schleiermacher's theory of literary interpretation, but rather the broader perspective of Dilthey referring to a general process of meaning in man's life, and even, Heidegger's approach of the notion as *the* process itself of comprehension of existence.

# 5 / *Taqqanat ha-shavim* -- Conclusions:

We are now at the end of our *exposé*. And we stay with the feeling that much more could have been done. Indeed, we consciously left aside a lot of *teshuvot*, a lot of important new angles brought by the rabbis on the questions dealt with; we consciously ignored a lot of refinements, distinctions, and also connected questions raised by the communities, and dealt with by the *posqim*, all of them about which we know that only a fair treatment of them would allow ourselves to seriously propose any kind of conclusion. As this is not the case, we don't want, nevertheless, to close this *exposé* without a rough assessment on the course taken. This will be the goal of this "conclusive" part.

The matter that will be brought here won't be new, as we shall for a major part rely on the partial conclusions we already formulated at the end of each part. What will be tempted here is simply to try to take some more distance from the subject in order to deliver a more general assessment on what we did on this exposé.
This assessment will take two paths: first a brief summary of all the matter, and of the different stations we came across; then, we will try to propose an assessment proper by distinguishing different themes, different angles, the dimensions that struck us as the more recurrent or remarkable in this huge rabbinical enterprise elaborating on these tree little words of taqqanat ha-shavim.

## 5.1 – Summary – Reversibility and Social Order:

The most fundamental vantage point from which the rabbis talked, which kicked off the whole subject of *taqqanat ha-shavim*, and from which they never deviated in their subsequent development is the Biblical and prophetic value according to which the right attitude toward sinners who wish to repent is the principle of following the ways of the Almighty. The Talmudic sages ruled that we should always accept penitent sinners, precisely in the same way that the Lord addressed the sinners among His people: *"Return, my sons"*.
The tendency "not to close the door in the face of the penitent" thus served as the basis of many rulings intended to facilitate repentance in all sorts of contexts, and found its expression

in the legal attitude ruling the laws pertaining to stolen property, and was further extended to how all criminals in general should to encouraged and assisted in their will to repentance.
Starting with the technical laws on flogging and retrenchment (*karet*), and with the principle that once the offender has been flogged he is no longer liable for *karet* and is even considered as "your brother", we came to study the particular relationship between punishment and repentance, a relationship very far from the retributive approach which would insist on the full-fledged implementation of the sentence.
Penitence, as we saw, can change the status of the person. His offense is expunged, and he can turn a new page, start a new life. Nobody has the right to remind him his murky past; after being dubbed an evil doer, he is now to be called "our brother".
As he now must be welcomed back into the main stream of society. Hence there is nothing to prevent him from resuming his previous position, and equally no justification for supplying anyone with information on his transgressions that could damage his road to improvement. It is in fact considered a great wrong to recall the earlier wrongful acts of a penitent, and doing so is to be severely punished.

For all the truth of the lofty ideas expressed above, there is nevertheless a turning point in the rabbis' thinking. Another side to the coin of "illimited *ḥesed*", a counterpart to the theological reversibility of things, situations and persons, namely their deep concern of the acceptability of religious values when impacting the real world of real people – more than often characterized by real human weaknesses.
And thus, as the concept of *taqqanat ha-shavim* had been pushed very far by the Sages in its early developments, a significant endeavour was made by the *rishonim* and the *aharonim* to somewhat restrict the potential infinite extension of the principle, and implement it while respecting the complex and various issues of communal life.
In other words, social order was posited as the other face of the coin, as the counterpart side of human reversibility.

With this concern in mind, we saw that two main horizons were pondered by the Rabbis as possessing the right definition to function as limiting principles: the gravity of the offense committed by the now-repentant person, and the nature of the office coveted by the latter. A connected problem was added as a third important dimension of thinking: what would be the practical measures adopted to be sure of the repentance, and to restore confidence in the offender?

As to the reinstatement of the criminal to his previous post, we saw a wide range of opinions, all them expounding on the initial and formative tannaitic dispute between R. Meir and R. Judah, with a general trend to rule along the lines of R. Judah, *i.e.* not letting an offender to return to his previous post, or letting him inherit of the honour and authority of a traditional *serarah* held by his father.
Maimonides was one of the most vocal on the issue of the gravity of the offense, especially when it came to crimes, underlining the gravity of the consequences for society.

The issue of the *nature* of the office involved bore the whole issue of the trust being vested in the office holder by the public. All the different status were reviewed by the ongoing halakhic discussion, and if we were to single out one of them, particularly well underlining the profoundly realistic social reasoning of the rabbis, we would undoubtedly choose the case of the president of the Sanhedrin: he is not be restored, because he might use his power to take revenge against those who deposed him!
Another concern was also that reinstatement of a person who has slipped might also offend the honour of the community. Thus, taking communal public decisions, beyond stating theological values, also implies reckoning with the probable reaction of the society, reactions possibly based on human weaknesses that can pose a challenge for a "pure" application of the principle.

As for the question of how can it be proven that a given offender has indeed returned to the straight path, the rabbi's thinking was based on a keen analysis of human nature and behaviour. A person accustomed to sinning, for example, is required to do things that will uproot his habit or his weakness. Some others will have to break he instruments through which their malevolent passion expressed itself and led them to sin. Some criminal will be required to perform a "complete return", taking upon themselves to abstain even from permitted activity in the area in which they sinned. And some offenders will be required to show a far reaching expression of repentance: to go to a place where they are unknown, and have occasion to return an article of considerable value, that has been lost.

The last *gilgul* of *taqqanat ha-shavim*, certainly not the less spectacular, was its inclusion in modern Israeli legislation, practically unchanged from what it was in the rabbinic literature. We came to give a close look on how cherished was this rabbinical heritage in the eyes of the

modern legal scholars – most of them participated to the formulation on the 1980 Law – and how resilient, how accurate was this venerably old Jewish legal thinking, that could, with no significantly new concept, function in the frame of a contemporary court, in the reasoning as well as in the decision process of the judgement.

## 5.2 – Themes:

We will not proceed here by giving authoritative conclusions that would wrap up the subject and enclose it in the limited quantity of a few well-chosen words, but rather by setting three themes underlining the different dimensions, the multi-faceted richness of *taqqanat ha-shavim*.

### 5.2.1 -- From a Ruling Principle to a Basic Social Value:

All along the thousand years of the rabbinical *pesiqah*, and even though it never was a simple disposition of the law or a well-defined specialized area of ruling, *taqqanat ha-shavim* was nevertheless always considered as a halakhic principle, operating in a determined situation to confirm or to reverse, according to the basic halakhical categories of *lehaqel* ("be lenient") or *lehaḥmir* ("be stringent"), a particular ruling.

We witnessed in the contemporary period a whole renewing in the meaning of the "repentance principle", which followed the general tendency of using the concept of repentance in a totally different manner than before, that is to say, from the challenging times of emancipation onwards, a tendency to take it as meaning a return to religious practice, most of times to orthodox practice.
This brought the principle of *taqqanat ha-shavim* to new directions, one of them being its application to new domains of the law (like *taharat ha-mishpaḥah*, or matters of *diney ishut*), another one being new ways of understanding the principle itself, generally beyond the strict function of a halakhic principle.

One of first new inflexion was the following: although remaining an halakhic principle operating in the legal system along with other similar principles such as *lifney mi-shurat ha-din* ("not with the full stringency of the law"), *haqalah* (leniency), *zman la'assot la-Shem*

*heferu toratekha* ("it is time to act on behalf of God, they annulled your *Torah*"[549]) or *hora'at ha-sh'aah* ("time of emergency"), and as such functioning as an "opening" principle, on the other hand, *taqqanat ha-shavim* took on a broader meta-halakhical scope and became a ideological value.
As we saw from a few cases, the "repentance" principle was infused with a kind of "wait and see" value, a tactical means which, together with a general assessment on human nature as regards the difficulties of a high-degree of observance, became utilized to enforce and develop a certain conception of religious life. All be it with some important nuances, we saw this approach functioning in the frame of an orthodox agenda as well as in a liberal agenda.

We also witnessed a second kind of evolution: *taqqanat ha-shavim*, decontextualized from its formal halakhic frame, also took on the value of an ethical and psychological universal maxim of the same kind as the "lesser of two evils" maxim.
In this shift towards a new logical category, *taqqanat ha-shavim* definitely takes on a metaphorical sense, this time operating as a "hermeneutic principle"; even, as it appeared in a liberal setting, with the status of a fundamental law of development of the *halakhah*.

## 5.2.2 – Various Cognitive Approaches:

We saw the crucial part taken by intention in the rabbi's discussion of *taqqanat ha-shavim*. As we know, it plays an essential role in *any* area of God's worship, inasmuch as required actions, *mitzvot* in general must be performed with a full integrity of intention in order to respond to the moral requirements and ethical standards of God.
Intention, thus, could be an essential factor in the reversibility of legal situations (such as when penitence, or "intended penitence" could change the status of a person – turning him from an evil doer to becoming "our brother"). This brought us to quasi-philosophical observations as to the nature of the law itself.

These questions were pivoting around one the following philosophical areas: 1/ how can we figure out socially recognizable, objective, certain *criteria* of what is essentially a mental, internal and abstract phenomena – repentance? 2/ what is exactly the status of legal categories?

[549] A principle generally invoked to introduce some consequent change in a particular ruling or area of the law.

The complexity of the first question is that *taqqanat ha-shavim* stands at the crossroads of two paradigms: internal *vs.* external, and individual *vs.* social. It addresses the question of the *nature* of repentance: is it purely a psychological phenomenon, a mental event that has to be externalized, "dressed" in acts? If it is such a thing, what do public acts really add to the mental phenomena? Related to these questions was also the issue of the *efficiency* of repentance: Which one between the two aspects, internal seriousness or social expression, gets the atoning power? And else, if this "atoning power" is not "located" in repentance -- internal or external, does this "power" belong to punishment? Or is it a combination of both that really is effective?
Let us be conscious that, of course, there are no definite answers to these questions, in the first place because they depend on the cognitive approach adopted. Basically, the "playground" is polarized by the following possibilities:

● The subjective approach, prone to give to intention all its share in the process of repentance, and a full impact in terms of the social process.

● The objective approach, for which only public acts, visible expressions are of the right nature to express what repentance is.

● We also examined a very interesting intermediate view, Rabbenu Tam' view, which attempted to combine the internal and external approach, by providing a grounding to the subjective phenomena of "intended repentance" (*hirhur teshuvah*) with some kind of objective support, namely a publicly recognizable "good reason to think" that repentance is the case (*raglayim ledaber*).

As to the question of the status of legal categories, if they point to something "real" out there in reality, or if they are just nominalistic devices, short-cuts intended to ease our way of talking, one of the most interesting sources we brought was Maimonides', stating his insight that the "business" of the law is not so much to refer to any "true" nature (*phusis*) of any given part of reality. Rather, its proper "genius" would be to point, "to open a door", as the Rambam's Arabic original formulation has it, on the nature of man.
This new equilibrium between *nomos* and *phusis* is certainly an interesting idea contributing to the understanding of this puzzling "reversibility" of legal situations.

### 5.2.3 – Substantive Thinking *vs.* Relational Thinking:

Another legal-philosophical question, closely related to the nominalistic *vs.* realistic issue which was brought about by the whole discussion of *taqqanat ha-shavim* is the opposition between "substantive" thinking and "relational" thinking".
Substantive thinking would rather be, in this debate, close to the realistic position we saw in the previous discussion: assuming that something is "out there", and that any legal process, such as repentance, is by definition fully adequate with what is going on in reality, that it has its efficacy, and that in the end of the process the "real" problem is "really" solved by a "real" solution.

Again, because tradition does not much address the question of the *phusis* of beings or situations as such, the way favoured by the rabbis was what we called "relational thinking", a way of dealing with things by applying, of course, certain values and categories to reality, but also including as part of these values and categories, not only their direct result when applied to reality, but also the human and societal reaction to the "value-applying" action.

In the field of *taqqanat ha-shavim*, this found its expression in the constant concern by the Rabbis, not only about the logical parameters of a case (such as the nature of the offense or the nature of the post), but also about possible reactions based on human weaknesses.
This line of reasoning is well exemplified in the case of the community leader, seen in contrast with the case of the *kohen gadol*. The latter, indeed, presents us a solid piece of substantive thinking: the mere fact that the *kohen* is anointed makes irrelevant any other considerations about his personal psychology, or any functional factors like the *kohen's* task -- the "anointing quality", like an objective reality standing detached against any other related fact, "saves" the *kohen*, who is to be reinstated.
The community leader case, on the contrary, switches to pure relational thinking; he is not reinstated, not because of any substantive objection regarding his public status, as we might think, but on the grounds of all the possible negative reactions that his re-instatement could entail. The approach here is conditional, projective, and relationship-oriented.

## 5.2.4 –Modern Legal Categories and Jewish Social Ethics:

We have seen that Jewish *halakhah* shares several of the features of a Restorative Justice system, such as an interest in the criminal's repentance, direct confrontation between litigants, and avoidance of punitive incarceration. Categorizing it unambiguously as a restorative system would be a mistake, though, for a good reason: the judicial aspects of the *halakhah* are inseparable parts of a religious structure that fully integrates legal, moral, and spiritual matters. To project individual features onto a secular-liberal legal system would alter their purpose.

We saw in fact that *taqqanat ha-shavim*, as a religious value, constantly oscillated between two fundamentals requisites of any theory of punishment: retributive justice that gives the offender his deserts, and at the same time gives a thoughtful sign towards the victim, something more external that satisfies the need of society.
But at second thought, we found that Jewish legal thinking was not so much bent on "sanctuarizing" the status of the victim as such. Remarkable is the fact, indeed, that to the victim is also demanded to have an ethical conduct, as we saw in the case of the possible returning of the value of the stolen property, with the sages "not being pleased" if the victim accepted the money from the repentant.

This is certainly quite surprising to contemporary mind, which gives such weight on the individual's rights and feelings; deepening this issue led us to the conviction that this was understandable only if we go beyond the point of view of the individual, and raise ourselves to the level of a general view of society.
What makes the demand -- even on the victim! – of the Sages rational, indeed, only appears if we think about repentance's social benefit.

And we have to be careful not to understand this expression, "social benefit", with a utilitarian connotation, as if the rabbis took it as a good strategy, a calculation in order to give themselves some more margin in an otherwise too much retributive system.
*Taqqanat ha-shavim*'s social benefit is not a utilitarian vector of any general theory of society welfare; it is a category in itself which directly draws its value from the primary theological pursuit consisting in imitating God's ways.
This theological principle undercuts any conception that could derive, as in modern liberal society theories, from a pact between human beings, namely, from the autonomous will of the human species, or from a shared interest in order to get out of any "state of nature"; in other

words, it is totally unrelated to the idea that repentance, and its whole "*taqqanat ha-shavim* system" could have a secondary, relative, derived value stemming from a more primary one.

Jewish social ethics, then, as it is not some autonomous area of political thinking, is directly a part of the grand scheme of imitating God's feature, or God's manifestation in the world. As God is said to favour repentance, and indeed, has based His world on the precedence of repentance, repentance is a value which not limits, no rational collective thinking could restrict. It is to be accomplished as such, it is a commandment, and even if the Rabbis invested a great deal of realistic thinking to see it implemented in the tumultuous waters of society, none of the value of repentance is due to any result it could achieve – and indeed it does so also – on the social arena.

This radical systemic link with a primary meta-physical reality is definitely the number-one feature of Jewish social ethics. As such, it totally undercuts any classification formulated in terms of retributive, utilitarian, or restorative justice. Punctually, it can have and assume such or such effect. But these are just side-effect, after-the-fact effects, and it cannot be said a/ that one among them totally matches the whole picture of such an ethics, nor can it be said b/ that this was the driving motive behind the rabbinical *pesiqah*.

Victims and offenders alike, rulers and other members of the communal setting of the Jewish people are supposed to seek and play the same game of implementing divine values in the constant *massa u-matan* of social life. Their fundamental relationship vis-à-vis this big picture is defined by the motto *kol yisrael arevim zeh ba-zeh* ("every Jew is responsible for the other").
*Taqqanat ha-shavim*, as such, is the fundamental value that creates the space to redefine things when then gets tied up in conflicts, in social disorders caused by offences and crimes. The free space created by everybody's patience, and loving-kindness, and comprehension of the other – save for the fact that one might well be wanting to benefit from it one day for oneself – thus appears as the fundamental, absolute in its value, principle for *tiqqun ha-olam*, the "reparation of the world."

# 6 / Glossaries :

## 6.1 -- Glossary n°1 -- Notions:

● It does not enter in our intention here to constitute an extensive glossary of all the Hebrew words and notions appearing in the course of this exposé, but to limit ourselves to those terms and concepts which are closely linked to the understanding of our subject, and which appear in the text on a fairly recurrent basis.

● It should also be reminded that the brief definitions given in the following lines should not be construed as seeking exhaustivity and full richness of content. They just stand as an "entry etiquette", putting themselves at the front of a whole subject and domain; if some information is here provided, they can only claim to be an invitation to properly further the study.

■ **Aḥaronim** (litt. « the latter ») : Jewish sages from the 16th century onwards. They follow the *rishonim*.

■ **Amora,** pl. **amoraim** (litt. « expounders »): Rabbinic sages, living from the middle of the third to the early sixth centuries in both Palestine and Babylonia, who appear throughout the *Talmud*, commenting on the discussion of the *tannaim* found in the *Mishnah* and the *Tosefta*.

■ **Av beyt din** : 1/ Chief justice. One of the two authorities and spiritual leaders, second to the *nassi* ("president") during the period of the *zugot* (« pairs » 2/ a presiding judge.

■ **Barayta**, pl. **baraytot** (litt. « external ») : A tannaitic legal ruling regarded as part of the Oral *Torah* but not included in R. Judah's compilation of the *Mishnah*. *Baraytot* are often quoted in the *Talmud* as evidence for or against amoraic interpretation of the *Mishnah*.

■ **Beyt din** : A jewish court of law, ruling according to *halakhah*. It usually consists in three or more recognized scholars, pronouncing a judicial opinion on any matter of civil or religious law submitted to their judgement.

■ ***Corpus Juris*** (« body of law ») : 1/ The entire set of laws of a given judicial system ; 2/ a code of law, authoritative vis-à-vis a particular judicial system.

■ **Dayyan** (« judge ») : A judge sitting in a rabbinical court of law, judging according to the *halakhah*.

■ **Gaon**, pl. **geonim** (litt. « outstanding ») : The title of the head of the two main academies in Sura and Pumbedita in Babylonia in the 6th – 11th centuries C.E.. More extensively, a title of rare excellence applied to an exceptional rabbinical scholar of great renown.

■ **Gemara** (litt. « completion ») : The six orders of the *Talmud* containing debates and decisions of the Sages following the completion of the *Mishnah*, which covers a period extending from 200 to 500 C.E.. The *gemara* primarily expounds, expands and elucidates the earlier laws of the *Mishnah*.

■ **Halakhah** (the): The general term for rabbinic law. *Halakhah* addresses religious and ritual matters as well as civil and criminal law. The roots of *halakhah* are found in the Hebrew Bible and developed by the rabbis in the *Talmud* and other legal documents.

■ **Halakhah** (a), pl. **halakhot** : 1/ An authoritative rabbinical decision in a given domain often putting a practical end to dispute ; 2/ a judicial ruling, not necessarily based on an Biblical verse, but asserted in a prescriptive way ; 3/ plural : a category of laws pertaining to the same domain.

■ **Ḥasidey Ashkenaz**: a social and ideological circle in medieval Germany, whose main centres of development and influence were Regensburg, Worms and Mainz on the Rhine. Its main literature was composed between the 12th and 13th centuries. *Kiddush ha-shem* (martyrdom) is a significant feature in their teaching and behaviour, and their theology, as well as their ethical values were also largely determined by their reaction against the pressures of Christianity.

■ **Ḥasidism**: A popular religious movement giving rise to a pattern of communal life and leadership a well as a particular social outlook which emerged in Judaism and Jewry in the second half of the 18th century. Ecstasy, mass enthusiasm, close-knit group cohesion, and charismatic leadership are the distinguished features of Ḥasidism.

■ **Ḥerem**, pl. **ḥaramim** (litt. « excommunication »): A state of a person or thing excluded from general use or social company by reason of an act of religious sacrilege, or one disregarding an order of the religious authorities.

■ **Ḥiddushim** (« nouveautés ») : *novellae*, i.e. a innovative legal interpretation revealing a new explanation or a new approach of a given subject.

■ **Karet** ("litt. "cutting off"): Though in a system of law based on divine revelation all punishment originally and ultimately derives from God, *karet* is thought as the direct divine punishment for certain transgressions removing the sinner from Divine grace. By Talmudic law, though interpreted as divine capital punishment, *karet* was absolved by human judicial punishment of flogging; having been flogged, the litigant is no longer liable for *karet*.

■ **Knas** : The Hebrew *knas* apparently derives from the Latin *census* in the sense of an extension of the Roman censor's authority over public morals. The Justinian's Code employs a classification very similar to that of Talmudic law: In Roman law, those legal actions that result in the restoration of property to its lawful owners are *rei gratia comparatae*, that is, reparative. Those that result in payments that are greater than the original damage or misappropriation are *poenae*, that is, punitive.

■ **Lifnim min-shurat ha-din**: Within the requirements of the law. A judgement involving a liberal concession by a litigant over and above what he is obliged to do according to the law. A particular good example of the conversion of a moral imperative into a legally sanctioned norm.

■ **Maḥloqet**: a conflict of opinion between Talmudic scholars. Rarely did a view in the *Talmud* go unchallenged since every Talmudic scholar was entitled to his own opinion. Nonetheless, there are certain rules determining which kinds of dissenting opinions are permitted

■ **Malqut** (litt. "flogging"): punishment by beating or whipping. In Biblical law it was the standard punishment for all offenses. Talmudic law not only made detailed provisions for the manner in which floggings were to be carried out, but also altered the concept of the biblical punishment. The offenses carrying the punishment of flogging are, firstly, all those for which the divine punishment of *karet* is prescribed; secondly, all violations by overt act of negative biblical injunction.

■ **Midrash**, pl. **midrashim**: the rabbinical mode of biblical commentary, composed both in Palestine and Babylonia by both *tannaim* and *amoraim*. Rabbinic *Midrash* comments on either legal or narrative portions of the biblical text (*Midrash hakakhah* and *Midrash aggadah* respectively). Palestinian *Midrash* can be found in various collections (e.g. *Genesis Rabbah* or *Pesikta de-Rav Kahana*). Both Palestinian and Babylonian *Midrash* appear in the *Talmud*.

■ **Mishnah** (the) : The earliest collection of tannaitic traditions, organized into six orders and sixty-three tractates. The contents are mostly legal in nature (with the notable exception of the *Pirqey Avot*, "The Maxims of the Fathers"). According to rabbinic tradition, Rabbi Judah ha-Nassi is responsible for the compilation of the *Mishnah*.

■ **Mishnah** (a), pl. **mishnayot** : the minimal unit of the *Mishnah*, constituting in a generally short legal statement, often followed by dissenting opinions and a short discussion.

■ **Miqveh**: a ritual bath, used for rites of purification from various sources of uncleanness that would limit a person's access to the Temple and its sacrifices. In post-Temple period, it is used most commonly at set times during a woman's menstrual cycle.

■ **Nidduy** -- *Nidduy* is to be distinguished from *ḥerem* (proscription), and refers in tannaitic literature to the punishment of an offender by his banishment from the community at large. The biblical precedent to the term is to be found in *Num.* 12:14. *Nidduy* differs mainly from *ḥerem* in that with the *menuddeh* social intercourse was permitted for purposes of study and of business, whereas the *muḥram* had to study alone.

■ **Pesaq**, pl. **pesaqim** : 1/ a rule of law ; 2 / a legal decision concluding a litigation in court.

■ **Pesiqah** : 1/ the entire set of rabbinical rulings in general, or regarding a given period, or a particular *poseq* ; 2/ the style, or the particular approach of a given *poseq* in his way of handling the law and ruling.

■ **Poseq** (plur. **posqim**): A legal scholar and decider of an issue. A recognized rabbinical legal authority who pronounces rulings on debated issues of *halakhah*, and/or a codifier who arrange compilations of Talmudic law.

■ **Qahal**: one of the terms designating a Jewish social units, the nucleus of Jewish local organisation and leadership in towns, villages or smaller settlements. Particularly after the

loss of independence, as the Jews became predominantly town dwellers, the community became more developed and central in Jewish society and history.

■ **Qiddushin** (approximately, "betrothal"): also called *erussin*, the first stage of a fully legal valid marriage. An act performed between a man and a woman which leads to a change of their personal status, *i.e.*, from bachelorhood to a status which remains unchanged until the death of either party or their divorce from one another. The *qiddushin* alone do not bring about the full legal consequences of this change of status, as it has to be followed by a further act from the parties, namely the *nissu'in*.

■ **Resh galuta**: Exilarch. The political leader of the Jewish people in Babylonia during and after the first Exile.

■ **Rishonim** (litt. « first »): The Early Authorities, those scholars who flourished between the 11th and 16th centuries C.E. The majority opinion is that the period of the *rishonim* has stopped with the publication of the *Shulkhan Arukh* (1565). They are followed by the *Aḥaronim*.

■ **Sanhedrin** : 1/ The Supreme Court, and highest council of rabbinical scholars consisting of 71 members, or a lesser court of 23 members. The *Sanhedrin*, located in Jerusalem, was empowered to originate or dispense all types of religious law ; 2/ name of a Talmudic tractate.

■ **Sabboraim**: A hypothetical group of rabbinic scholars falling chronologically between the *amoraim* and the *geonim*, often believed to have a crucial role in the editing of Talmudic *sugyot* in the century prior to 620 C.E.

■ **Serarah**: In small cities in Morocco, which did not possess rabbinical courts, a *rabbin délégué* ("delegate rabbi") was appointed who acted as a one-man court and a community representative before the government. Some families were reserved the dynastic right (*serarah*) to serve as rabbis and judges. By extension, the dynastic or family right pertaining to a certain activity

■ **Sifre** (or **Sifrey**): Either of two works of *Midrash halakhah* based on the biblical books of Numbers (*Sifre Bamidbar*) or Deuteronomy (*Sifre Devarim*). The *Sifre to Numbers* is a *midrash* originated in R. Simeon' school, and follows the same principles of exposition as does the *Mekilta*; the same group of tannaim appears, and the same technical terms are

employed. The haggadic portions likewise contain many parallel passages. The *Sifre to Deuteronomy* is of an entirely different nature. The main portion, halakhic in character, is preceded and followed by aggadic parts, and has all the characteristics of a *midrash* from the school of R. Akiva.

■ **Shohet**: A ritual slaughterer. A religious professional qualified to perform the slaughter of animals or fowls according to Jewish ritual.

■ **Taharat ha-mishpaḥah**: The laws concerning sexual separation, based upon the biblical laws in the Torah (Leviticus 18:19 and 20:18) that prohibit sexual relations between husband and wife during the woman's menstrual period. These laws involve a married couple's abstinence from sexual relations during the period of menstruation until the wife's immersion in the *miqveh*.

■ **Taqqanah**, pl. **taqqanot** (ordonnance") : Ordonnance législative édictée par une autorité halakhique communautaire. Elle est l'une des six sources de la loi juive, avec la tradition (*qabbalah*), l'interprétation (*midrash*), la coutume (*minhag*), le précédent factuel (*ma'asseh*) et le raisonnement (*sevarah*)[550].

■ **Talmud**: The *Talmud* is a lengthy commentary on the *Mishnah* composed in Hebrew and Aramaic. The earlier edition, most likely in Tiberias in the late fourth and/or early fifth centuries C.E., is known as the Jerusalem or Palestinian *Talmud* (*Yerushalmi*); the later and larger edition, mostly redacted in Persia between around the late fifth century C.E., is known as the Babylonian *Talmud* (*Bavli*). Like the *Mishnah*, the *Talmud* is organized into orders (*sedarim*) and within the orders into tractates (*masekhtot*).

■ **Tanna**, pl. **tannaim** (litt. « repeaters »): According to the Talmudic chronology, the period of the *tannaim* begins with the remnants of the Men of the Great Assembly, and continues through he generations of R. Judah ha-Nassi. They are responsible for the traditions included in the *Mishnah*, *Tosefta* and other early rabbinic literature.

■ **Tereyfah**: A animal torn by a wild beast, or suffering from a lesion leading to provoke the animal's death within period of twelve months. The term is to be distinguished from an animal that has died of its own accord, called *nevelah.* The Rabbinic understanding of these two terms is that any animal that has not been killed in the manner known as *shechitah*

[550] Cf. M. Elon, *Jewish Law. Cases and materials*, Casebook Series, Matthiew Bender, 1999, p. 62.

[kosher slaughtering] is treated as *nevelah,* and any animal that has serious defects in its vital organs is treated as a *tereyfah*, so that its meat is forbidden even if it has been killed in the proper manner. This applies to birds as well as to animals.

■ **Tiqqun**: generally appears in the phrase *tiqqun ha-olam* ("reparation of the world "). Having its origin in classical rabbinic literature and in Lurinaic *kabbalah*, the term has come to connote social action and the pursuit of social justice. The expression *mipney tikkun ha-olam* (which can be translated, in this context as "in the interest of public policy") is used in the *Mishnah*, referring to social policy legislation providing extra protection to those potentially at a disadvantage.

■ **Tosefta** : One of the early tannaitic compilations of rabbinic literature. Understood by most scholars to be a supplementary commentary on the *Mishnah*; it is also largely legal in character. The circumstances and purpose of its compilation are unknown, although it is traditionally attributed to R. Hiyya bar Abba.

## 6.2 -- Glossary n°2 – Rabbis and thinkers:

Some biographical information has been given in the footnotes, throughout this exposé, each time a new rabbi or thinker was mentioned. Although this glossary might therefore be somewhat redundant from a purely technical point of view, we thought it would be nevertheless interesting and handy to have all this biographical gathered in on place.
We will give it in two versions: by order of appearance, and by alphabetical order.

### 6.2.1 – By order of appearance:

Akiba ben Joseph – p. 17, 34, 60
Simon Ben Azzai – p. 17
Judah ben Tabbai – p. 22
R. Jonatan – p. 26, 34, 56, 64, 74
R. Abahu – p. 26
Saadiah ben Joseph Gaon – p. 27
Baḥya ibn Paquda – p. 27
Maimonides – p. 27, 60, 65, 66, 69, 78, 94, 96-97, 99, 102-103, 108, 132-33, 162-66
Hermann Cohen – p. 29
Franz Rosenzweig – p. 29-30.
Martin Buber – p. 29-30
Abraham Isaac Kook – p. 30, 95
Joseph B. Soloveitchik – p. 30
A. D. Gordon – p. 30
Isaac ben Solomon Luria – p. 29
Elazar ben Dordia – p. 32
Ezekiel ben Judah Landau – p. 33, 160
Judah b. Bava – p. 34
Rashi – p. 39, 93, 120, 125, 127
Eleazar ben Azaria – p. 42, 60
R. Tarfon – p. 42
Nissim ben Reuben Gerondi – p. 43
Joshuah ben Levi – p. 51
J. ben Gudgada – p. 60, 149 (n.)
Hillel – p. 63, 149 (n.), 166
Shammay – p. 63, 149 (n.), 166
Judah ha-Nassi – p. 64
Rav Nachman – p. 66, 67, 127
Rava – p. 67, 127
Ḥananiah b. Gamliel – p. 68, 149
Rabbenu Gershom – p. 71, 72, 73, 84, 85-86
Israel Meir Ha-Cohen of Radin – p. 79, 144
Rabbi Meir from Rotenburg – p. 83, 98-99
Rav Hai Gaon – p. 84, 146, 148
Abraham b. Isaac from Narbonne – p. 84
Binyamin Ze'ev of Arta – p. 85
Moses ben Joseph di Trani – p. 88
R. Judah – p. 90-91-92, 96, 98, 174
R. Meir – p. 90-91-92, 98, 174
Yom Tov ben Abraham Ishbili – p. 91, 93, 98

## 6.2.2 – By alphabetical order:

**Abba ben Joseph bar Ḥama** -- Exclusively referred to in the Talmud as **Rava** (רבא), was a Babylonian amora of the 4th generation (320-350, b. 270). He studied at the Academy at Pumbedita, where he became famous for his debates with his study-partner Abaye. The debates between Abba ben Joseph and Abaye are considered classic examples of Talmudic dialectical logic.

**R. Abbahu** -- Palestinian *amora* of the 3rd generation (290-320). He was the disciple of R. Johanan. He was the head of a group of scholars known as the "rabbis of Caesaria", where he lived.

**R. Abraham ben Moses ben Maimon** (1186-1237) – Leader of the Egyptian Jewish community (*nagid*) and religious philosopher; only son of Maimonides. Immediately after his father's death in 1204 he was appointed *nagid* despite his youth. His view of religion was a mystical one and he was close to the Sufis. In addition to his important halakhic activity, he was compelled all his life to come to the defence of is father's books.

**R. Salomon b. Abraham Adret** (1235-1310) -- Born in Barcelona, his principal teacher, all his life, was Jonah b. Abraham Gerondi and also studied under Naḥmanides.he became a successful banker and a leader of Spanish Jewry, serving as rabbi of the main Barcelona synagogue for 50 years. Possessing a remarkable command of Roman law and local Spanish legal practice, he played a vital role in providing the legal basis for the structure of the jewish community and its institution. He wrote more than 3,000 *responsa* covering the entire gamut of Jewish life, and constituting a source of information of the first order for the history of the Jews of his period.

**Abraham b. Isaac from Narbonne** (c. 1110-1179) -- Also named Ravad II, he was the Av Bet Din of Narbonne, in Provence. Author of the *Sefer ha-Eshkol* ["The Book of the Cluster"].

**R. Abraham ha-Levi** (c. 1650-1712) – Egyptian rabbi and author. He succeeded his father in 1684 as head of the Egyptian rabbinate. Though most of his works, consisting of Bible commentaries, sermons, and eulogies have remained in manuscript, a collection of his *responsa*, entitled *Ginat Veradim* ["The Rose Garden"] was published in 1716-17 in Constantinople by his son-in-law, the physician Ḥayyim b. Moses Tawil.

**Ahab** -- Son of Omri and king of Israel (*I Kgs.* 16:29 – 22:40), he reigned over the Israelite kingdom at Samaria for 22 years (c. 874-852) B.C.E.). He continued his father's policy in searching for peaceful relations with the kingdom of Judah and set up a triangular pact between Judah, Israel and Tyre. His foreign policy strengthened the Israelite economy and military establishment. Nevertheless the judgement of the *Book of Kings* is very harsh on him, because of the affair of Naboth the Jezreelite (*I Kgs.* 21) and the introduction of the cult of the Tyrian *Baal* in Samaria.

**R. Akiva ben Joseph** (c. 50 – 135) -- Most of the time simply named Rabbi Akiva, one of the foremost rabbi of 4th generation of the *tannaim* (110-130), patriot, and martyr, who exercised a decisive influence in the development of the *halakhah*. He participated in the Revolt of 132-135 C.E., greating Bar Kokhba as the *messiah*. He was tortured to death by the Romans.

**Joseph Albo** (1380-1444) -- Born in Aragon, he studied with Hasday Crescas (c. 1340-c. 1410) in Saragossa, and suffered, like his master, from the riots that swept the whole territory of Spain in 1391. He was a central actor in the Dispute of Tortosa that took place between 1413 an 1414, a traumatic experience that undoubtedly was the source of his only one book and masterpiece, the *Sefer ha-Iqqarim*, a polemic but also a true theoretical reflection on the principles of Judaism (achieved in 1425).

**Asher ben Jehiel** (also know as Asheri and Rosh, c. 1250-1327) – Talmudist. He spent some time in France and then lived in Cologne and Coblenz, and then to Worms to study with Meir b. Baruch of Rothenburg. After the imprisonment of his master, Asher became the acknowledged leader of Germany Jewry. After the *Rindfleisch* massacres (1298) he left Germany in 1303 for Barcelona. He is regarded as one of the outstanding halakhic authorities who put the final seal to the work of the German and French codifiers, joining to it the Spanish *halakhah*. His two main works are *Piskey ha-Rosh* [The "Chapters of the Rosh"], a

summing up of the decisions of the earlier codifiers and commentators, and a collection of *responsa* (Constantinople, 1517) numbering more than 1000 *responsa* arranged in 108 chapters.

**M. Samson Bacharach** (the Shasaz, 1607-1670) -- Educated in Prague, he was compelled to accept a rabbinical position in Göding, Moravia, in 1629, after the Thirty Year's War broke out. He then became rabbi of Leipnik, Moravia, and remained there until the capture of the city by the Swedish army in 1643, went back to Prague and still later accepted the rabbinate in Worms up to the time of his death. Among his work is a collection of his responsa published by his son in Frankfurt in 1679 and also some religious poems.

**Benjamin Ze'ev ben Mattathias of Arta** (early 16th century) -- *Dayyan* and halakhist. After living at Larissa (1528) and Corfu (1530), he settled in Venice and towards the end of life returned to Arta. His collection of responsa, entitled Binyamin Ze'ev, were published in Venice in 1534 and contains 450 legal decisions and responsa. He is often cited by R. Moshe Isserles.

**Martin Buber** (1878-1965) – In 1902, he became the editor of the weekly Die Welt, the central organ of the Zionist movement. In 1923 he wrote his famous essay on existence, *Ich und Du* ("I and Thou"), in which is developed a "philosophy of dialogue", a form of religious existentialism structured by the distinction between the "I-Thou" relationship and the "I-It" relationship. Deeply stirred by the religious message of Ḥasidism, he considered his duty to convey that message to the world. Teaching for some years at the University of Frankfort, he then settled to Palestine in 1938 where he taught at the Hebrew university of Jerusalem until his retirement in 1951.

**R. Joseph ben Ephraim Caro** (1488-1575) – One of the last great codifier of rabbinical Judaism, born in Spain or Portugal. After the expulsion of the Jews from Spain, in 1492, Caro went to Nicopolis where he received his first instruction from his father, then settled at Adrianople. He had fantastic dreams and visions, which he believed to be revelations from a higher being, and these mystical tendencies probably induced him to emigrate to Palestine, where he arrived about 1535. Involved in the restitution of ordination, which was finally abandoned, he wrote the *Shulḥan Arukh* [the "prepared table"] in his old age, for the benefit of those who did not possess the education necessary to understand the *Beyt Yosef,* his

previous commentary of the Rosh's *Arba Turim* ["The Four Rows"]. This book, complemented by the Rema's Haggahot [The "Glosses"] became for centuries "the code" of rabbinical Judaism for all ritual and legal questions.

**Hermann Cohen** (1842-1918) -- Though he studied at the Jewish Theological Seminary at Breslau, Hermann Cohen gave up his initial plans to become a rabbi and turned to philosophy. He was one of the founders of the Marburg School of Neo-Kantianism where he lectured from 1973 until 1912. He spent the last year of his life in Berlin where he taught at the Hochschule fuer dir Wissenschaft des Judentums. Cohen's most famous Jewish works is *Religion der Vernunft aus den Quellen des Judentums* ["Religion of Reason out of the Sources of Judaism", posthumously published in 1919), where his last attitude towards religion found its full expression.

**Elazar ben Dordia** – Not much is known about him, except that the Maharal of Prague says of his last name that it means "dregs" in Aramaic, pointing to his difficult position in society (he was apparently known for his lost for harlots, cf. *A.Z.* 17b).

**Eleazar ben Azariah** – *Tanna* of the 4th generation (110-135) and one of the sages of Yavneh. When Rabban ben Gamaliel was deposed as *nassi* because of his bad behaviour toward Joshuah b. Ḥananiah, Eleazar was chosen to succeed him., apparently because of his aristocratic lineage but also for his great wealth. He was both a halakhist and an aggadist; he was apparently alive at the time of the Jewish revolt under Trajan (115-117).

**R. Samuel Eliezer ben Judah Halevi Eidels** (the Maharsha, 1555-1631) – Born in Cracow, he later took up rabbinic positions in Chelm, in Lublin (1614) and in Ostrog (1625) where he founded a large *yeshivah*. In his master work, the *Ḥiddushey Halakhot* ["*Novellae* on the *Halakha*"], a commentary on the *Talmud*, he generally follows the position of Rashi and the Tosafists. He also had a command of *Qabbalah* and philosophy, and had a positive approach towards secular sciences. In 1590 he participated at a session of the *Council of the Four Lands* which pronounced a ban on those who purchased rabbinic office.

**Rabbi Eleazar ben Shammua** – *Tanna* of the 5th generation (135-170), generally referred to simply as "Eleazar". He was a *kohen* and one of the last pupils of R. Akiva. After the Bar Kokhba revolt Eleazar, among others, was ordained by Judah b. Bava, who

consequently suffered martyrdom at the hands of ther Romans (*Sanh.* 14a). Highly esteemed by the early *amoraim*, he was called by Rav "the happiest of the Sages" (*Ket.* 40a).

**R. Moshe Feinstein** (1895-1986) – Born near Minsk, he became a rabbi in 1921 in Luban, near Minsk, and emigrated to the United States in 1937, where he became one of the leading halakhic authorities of his time on a wide area of issues, especially on modern science and technology. His *responsa* are entitles *Iggerot Mosheh*, and follow the *Shulkhan Arukh* (1959-1963).

**Hai ben Sherira** – *Gaon* of Pumbedita, a position he held for 40 years. He occupies a prominent position in the history of the *halakhah*, measured by the fact that approximately a third of the extent gaonic *responsa* are his. He also was a mystic, who ascribed sanctity to the *Heikhalot* ("palaces") literature.

**Hillel ha-Zaken** ("the Elder") -- One of the last *zugot* (pair » of Sages) with Shammay. He is associated with the development of the Mishnah. Renowned within Judaism as a sage and scholar, he was the founder of the House of Hillel and the founder of a dynasty of Sages who stood at the head of the Jews living until roughly the fifth century C.E. His personality, in which scholarship, wisdom was combined with righteousness and humility, became a model of conduct for subsequent generations.

**R. Ḥanina ben Gamaliel** – *Tanna* of the 5th generation (135-170), son of Gamaliel of Yavneh. He differed on halakhah with R. Akiva (*Nid.* 8a) and with Yose ha-Gelili (*Men.* 5:8) and engaged in halakhic disputes with the disciples of Akiva. Many *aggadot* are also cited in his name.

**Rabban Gamliel from Yavneh** – *Tanna* of the 3rd generation (80-110). Grandson of the first Rabban Gamliel, his life was spared by the Roman conquerors at the request of R. Johanan b. Zakkai. He presided over the re-established yeshivah and Sanhedrin at Yavneh, but at one stage angered his colleagues who temporarily deposed him. On his reinstatement he was obliged to share the Presidency with R. Elazar ben Azaryah.

**Gershom ben Judah Me'or ha-Golah** (c. 960-1028) -- One of the first great German Talmudic scholars and a spiritual moulder of German Jewry. He was apparently born in Metz, but his home was in Mainz, where he conducted a *yeshivah*. His name is connected to many

*taqqanot* (“enactments”), most famous of which is his *ḥerem* (“ban”) against bigamy. His response and halakhic decisions are scattered throughout the works of the French and German scholars; his legal decisions were considered as authoritative.

**Aharon David Gordon** (1856-1922) -- Born in Troyanot, Russian empire, he was a Zionist ideologue of practical Zionism, and in 1904 settled in Eretz Israel, where he founded Ha-Poel ha-Tza’ir. His philosophy tries to promote physical labor and agriculture as a means of uplifting Jews spiritually. He spent his last years in Degayah, where he died in 1922.

**R. David ben Solomon Ibn Abi Zimra** (c. 1479-1576) -- Talmudic scholar, halakhic authority and kabbalist. Born in Spain, he found himself in Safed at the age of 13, then moved to Jerusalem and finally to Egypt, where he became the *naguid*, the official head of Egyptian Jewry. His library, containing rare books, was famous, and great was his influence through the numerous *taqqanot* (“ordinances”) he issued, making him known beyond the boundaries of Egypt. In 1553 he returned to Palestine. One of his most important work is his collection of *responsa*, *Teshuvot ha-Radbaz* (1882).

**Isaac ben Sheshet Barfat** (1326-1408) -- Born at Valencia, he settled early at Barcelona, where he acquired while still young a world-wide reputation as a Talmudic authority. Though he earned his livelihood in commerce, he was compelled to accept a position as rabbi at the age of fifty. He then became the rabbi of Saragossa, where he had to cope with the great persecutions of the Jews of Spain in 1391, and later moved to Algiers. He is the author of 417 *responsa*, of great historical importance as they reflect the conditions of Jewish life in the fourteenth century. He is generally considered as being very stringent in his halakhic decisions.

**R. Isaac b. Moses of Vienna** (c. 1180 – c. 1250) – Halakhic authority of Germany and France. Born in Bohemia, he studied in Regensburg, in Wuerzburg and also in France with Samson of Coucy. His monumental work, *Or Zaru’a* suffered the fate of similar halakhic works which were not sufficient copied, and was only discovered and published 600 years later after his death (1862). It constitutes a valuable collection of the halakhic rulings of the German and French scholars, as well as being of great value for the history of Jews during the Middle Ages.

**Rabbi Israel Isserlein ben Petachia** (c. 1390 – 1460) -- Talmudist and halakhist, born in Maribor (Styria) from a well-known scholarly family, is considered as the last great rabbi of medieval Austria. His family was a victim of the Viennese Gzerah in 1421. He moved to Neustadt around 1450, where he opened a *yeshivah* until 1460, when he died. He often served as an arbitrator between different communities and his decision was considered final. *Terumat ha-Deshen*, his most well-known work, is a collection of 354 *responsa* – *deshen*, i.e. the "ashes" that were removed every day from the altar in the Temple, it should be noted, has the numerical value of 354. Apparently, R. Israel Isserlein did not answer questions posed to him, but rather wrote the questions and answers himself. *Terumat Ha-Deshen* served as one source for the *Mappah*, the commentary on the *Shulḥan Arukh* by R. Moses Isserles.

**R. Moses Isserles** (1525 or 1530 – 1572) – Born in Cracow, he studied, besides the Talmud and the codes, philosophy, astronomy and history. He gained a worldwide reputation as an outstanding *poseq* and all the great scholars of the time addressed their problem to him. Considered by his contemporaries as the "Maimonides of Polish Jewry" his works were in the field of halakhah, philosophy, kabbalah, homiletics, and science. His grand oeuvre is the *Mappah* ("the tablecloth"), also called the *Haggahot* ("glosses"), a commentary on the *Shulkhan Arukh*, which contains explanations, supplements, additions, and includes the custom of the Ashkenazi scholars ignored by Caro.

**Jacob ben Asher** (1270?-1340) – also called the *Tur*, after his master piece, the *Arba'a Turim* ("The Four Rows"). One of the main halakhic authority oh his time, Jacob ben Asher (1270? – 1340) studied with his father, Asher ben Jehiel (the "Rosh"), and followed him from Germany to Toledo, Spain. He lived there in great poverty, shunning all rabbinical office and devoting all his time to study. Jacob's enduring fame rests upon his major work, the *Arba'a Turim*, in which in compiles all the *halakhot* and customs incumbent upon the individual and the community. The arrangement of the book as well as its simple style made it a basic work in Jewish law, and started a new area in the realm of codification.

**R. Mordecai ben Abraham Jaffe** (1535-1612) – Talmudist, kabbalist, and communal leader. Born in Prague, he was sent to Poland to study, and then returned to Prague in 1553 to be appointed head of the *yeshivah*. As the Jews were expelled from Bohemia in 1561, he left Prague and settled to Venice. After 10 years he returned to Poland, where he was very active in the Council of the Four Lands, being one of the chief signatories of its most important

*takkanot*. His main *opus* is the *Levush 'Ir Shushan*, where, finding Joseph Caro's Shulkhan Arukh too long (and the Rema's commentaries too brief), he presented the laws in abbreviated form (a "midway between two extreme"). He took as a basis the principle followed in the Beyt Yosef of reliance on the three "pillars of authority": Alfassi, Maimonides, and Asher ben Jehiel. He worked on this book almost 50 years. It contains ten "attires" (*levushim*); they were published between 1590 and 1604.

**Joseph ben Moses Babad** (1800-1875) -- *Poseq* and Talmudist, served as rabbi in several cities in Galicia, and in 1857 was appointed as the *av beyt din* of Tarnopol, where he served for the rest of his career. He is best known for the *Minḥat Ḥinukh*, a commentary on R. Aharon Halevi of Barcelona's *Sefer ha-Ḥinukh*.

**Jeroboam ben Nebat** -- First king of post-solomonic Israel, he reigned for 22 years, approximately from 928 to 907 B.C.E. Immediately on ascending the throne he endeavoured to reconquer the central and northern tribal territories at the expense of the kingdom of Judah and to widen the breach between the two kingdos. His activities in matters of ritual are described in *I Kgs.* 12:25-33. He made two golden-calves, one at Dan and the other at Beth-El in the south. He is said in the sources to have raised a "iron curtain" between the people and the temple (JT *A.Z.* 1:1., 39a : *Sanh.* 101b), and is frequently stigmatised in the Bible as having "sinned and caused Israel to sin".

**R. Johanan ben Nappaha** -- Palestinian *amora* of the 2nd generation (250-290). In his youth he studied with Judah ha-Nassi. He began teaching in his native city, Sepphoris and later opened his academy in Tiberias.

**R Johanan B. Gudgada** -- *Tanna* of the 3rd generation (80-110), he was a colleague of Joshua b. Ḥananiah. When young, he served as a Levite in the Temple. His children were death-mute, which throws some background on the content of our *mishnah*.

**R. Joseph ben Ḥayyim Ḥazan** (1741-1819) -- Born in Smyrna. At first rabbi in his native city, he went to Palestine in 1811, settling in Hebron, where he became rabbi. In 1813 he was elected chief rabbi of Jerusalem, which position he held until his death. His main work is *Ḥiqrey ha-Lev* ["The searching of the Heart"], a volume of his *responsa* (Salonica, 1787).

**Rabbi Joshuah** – *Tanna* of the 3rd generation (80-110). One of the five disciples of Johanan b. Zakkai's inner circle. His ordination by his master took place before the destruction of the Temple (J.T. *Sanh.* 19a). He later settled in Peki'in, establishing a *beyt din* which he headed. Despite his pre-eminence in academic circle, he lived in poverty and earned his living as a blacksmith (*Ber.* 28a).

**Joshuah ben Levi** – Palestinian *amora* of the first generation (220-2250). Native of Lydda, he apparently was in the company of Judah ha-Nassi in his youth. He taught in his native town, and occupied himself greatly with communal needs. He was also active in the relationships between the community and the Romans, and was a member of various missions to them in Caesaria and in Rome (JT *Ber.* 5:1, 9a ; *Gen. R.* 78:5). He was an halakhist whose opinions were always accepted, but he was especially renowned as an aggadist (*B.Q.* 55a).

**Rabbi Judah** -- Born about 135; died about 220. Judah devoted himself chiefly to the study of the traditional and of the written law. As he had close relations in his youth with most of the great pupils of Akiba, he laid the foundations of that wide scholarship which enabled him to undertake his life-work, the redaction of the *Mishnah*. On beginning his public activity, he moved the seat of the patriarchate and of the academy to Bet She'arim. Here he officiated for a long time. During the last seventeen years of his life he lived at Sepphoris, but it is with Bet She'arim that the memory of his activity as director of the academy and chief judge is principally associated.

**R. Judah b. Bava** -- *Tanna* of the 4th generation (110-35), martyr of the era of Yavneh.

**Judah ben Tabbai** (first century B.C.E.) -- Lived in the time of Alexander Yannai and was one of the *zugot* ("pairs"), the colleague of Simeon b. Shetah.

**Judah the Prince** -- Born *c.* 135; *d. c.* 220. Judah devoted himself chiefly to the study of the traditional and of the written law. As he had close relations in his youth with most of the great pupils of Akiba, he laid the foundations of that wide scholarship which enabled him to undertake his life-work, the redaction of the *Mishnah*. On beginning his public activity, he moved the seat of the patriarchate and of the academy to Bet She'arim. Here he officiated for a long time. During the last seventeen years of his life he lived at Sepphoris, but it is with Bet

She'arim that the memory of his activity as director of the academy and chief judge is principally associated.

**Abraham Isaac Kook** (1865-1935) -- Rabbinical authority and thinker, he was the fist ashkenazi chief rabbi of modern Eretz Israel. Born in Greiva (Latvia), he very soon developed his own views on Judaism, and in 1904, immigrating to Palestine and serving as the rabbi of Jaffa, actively contributed in the building of the religious Zionism movement. A prolific writer, he wrote, as far as our subject is concerned, *Orot ha-Teshuvah* (1955, trans. into English as "Rabbi Kook's Philosophy of Repentance", 1968).

**Ezekiel ben Judah Landau** (1713-1793) -- Halakhic authority. Born in Opatow, Poland, he was appointed *dayyan* in Brody in 1734 and rabbi of Yampol in 1745, where he tried to mediate in the famous "Emden – Eybeschütz Controversy". He later established a *yeshivah* in Prague. All his life, as he was esteemed in many different circles, he was able to intercede with the Austrian government on various occasions when anti-Semitic measures had been introduced. Though not opposed to secular knowledge, he objected to the *Haskalah* movement. He was one of the greatest writers of *responsa* in his time; His *Noda bi-Yehudah* (Prague, 1776, 1811) contains some 860 *responsa*.

**R. Isaac ben Solomon Luria** (1534-1572) -- Also referred to as *Ha-Ari* (*ha-Qadosh*) ["The (Sacred) Lion"]. A Jewish mystic in the community of Safed in Ottoman Galilee, he is considered as the father of modern expression of *Kabbalah*. His teachings were collected and assembled by Ḥayyim Vital his disciple.

**R. Solomon Luria** (Maharshal, 1510-1574) – One of the great decisor and teachers of his time. Born in Posen, he later served as Rabbi in Brisk and various Lithuanian communities for 15 years, and later was appointed as head of the famed Lublin *yeshivah*, which attracted students from all over Europe. Due to various internal problems, he opened his own *yeshivah*. His major work of *halakhah*, *Yam shel Shlomo* ["Solomon's Sea") was written on sixteen tractates of the *Talmud*. An abridged version appears in nearly all editions of the *Talmud* today, at the end of each tractate.

**Rabbi Mana** -- It is not always certain which is meant: Mana the Palestinian *amora* of the 2th generation (250-290), or Mana (also called Mani, or Mana II) the *amora* of the 5th

generation. It makes more sense here, as his saying is linked here with R. Eleazar, to assume that it is talked about the 3rd century *amora* – of whom little is known.

**Maimonides**, or **Moses ben Maimon** ("The Rambam", 1135-1204) -- The most illustrious figure in Judaism in the post-Talmudic era and the greatest Jewish philosopher of the medieval period. Born in Cordoba, he had to flee the Almohad persecutions of 1148, and after wandering from place to place, settled *c.* 167-68 in Fostat, the Old City of Cairo. The *Mishneh Torah*, his 14-volume compendium of Jewish law, established him as the leading rabbinic authority of his time and quite possibly of all time. His philosophic masterpiece, the *Guide of the Perplexed*, is a fully-developed treatment of Jewish thought and practice that seeks to resolve the conflict between religious knowledge and secular.

**Manasseh** – Judean king. He ascended the throne at the age of 12 and reigned for 55 years (*II Kgs*. 21:1). In those years Assyrian power reached its peak, to which Manasseh was submissive. The *Book of Kings* does not record any political events during his reign, but in *Chronicles* it is stated that, because he did what was displeasing to the lord (abolishing the religious reform of his father and re-introducing alien rites into the Temple – *II Kgs.* 21:3), God caused the Assyrian rulers to put him in chain, transporting him to Babylon, where he submitted to God's will and was returned to Jerusalem and his throne (*II Chron.* 33:10-13). The historical validity of this story being put to doubt by scholars.

**R. Meir** – *Tanna* of the 5th generation (135-170). One of the leaders of the post-Bar Kokhba generation. Essentially an halakhist, he took a decisive role in the development of the *Mishnah*. The persecutions led him to flee from Eretz Israel, and upon his return he was among the Sages who assembled in the valley of Rimmon to intercalate the year. Afterwards he was among those who convened at Usha for the assembly that led to the renewal of the office of *nassi* and of the *Sanhedrin*, which had been abolished during the revolt and the subsequent oppression.

**Rabbi Meir from Rothenburg** (1215-1293) – Scholar, tosafist, and supreme arbiter in ritual, legal and community matters in Germany. Born in Worms, he went to France to study under the great tosafists of this time, and then returned to Germany and settled in Rothenburg, where students flocked to his school. About a thousand of his *responsa* has survived, which he sent to the communities of Germany, Austria, Bohemia, Italy, France and even to Solomon

b. Aderet of Spain. Meir's peaceful life as a scholar and teacher was rudely interrupted when he was put to prison in 1286 due to a complex series of political events following the election of Rudolph I of Hapsburg as Emperor of Germany. Despite a great effort by the Jews to release him through a ransom he died in prison.

**R. Israel Meir Ha-Cohen of Radin** – Rabbi, ethical writer and Talmudist. He refused to make the rabbinate his calling, and after his marriage subsisted on a small grocery store which his wife managed. Nor did he intend to established a yeshivah; so many students, however, flocked to him that in 1869 his home had become "the Radun Yeshivah". In 1873 he anonymously published his first book, *Ḥafetz Ḥayyim*, in Vilna, then another book on the same subject in 1879 and a third in 1925. He was one of the founders of Agudat Israel and one of its spiritual leader.

**Menachem ben Solomon Meiri** (1249-1316) -- Scholar and commentator of the Talmud, was born in Perpignan (then part of the County of Barcelona) where he spent his whole life. He was one of the participants in S. ben Adret's polemic against Maimonides, siding with those in favour of philosophy and freedom of thought. His letters show his great interest in philosophy and secular sciences. His chief work is the *Beyt ha-Bekhirah* on the *Talmud*, which he wrote between 1287 and 1300.

**R. Moses ben Joseph di Trani** (1500-1580) -- Born in Salonika from a family of Spanish origin but orphaned as an early age, he was raised in Adrianople, and later emigrated to Safed where he studied under Jacob Berab. One of his four pupil to be ordained in the newly revived *semikhah*, he was very as a rabbi and *dayyan* for 54 years, but it was only after the death of Joseph Caro (in 1575), with whom he had many controversies, that he was appointed to the head of the community of Safed.

**R. Nachman ben Jacob** -- Babylonian *amora* of the 3rd generation (d. c. 320) and a leading personality of his time. Born in Nehardea, teaching and serving as a *dayyan* there, his name is one of the most frequently cited in the Babylonian *Talmud*. One of his aggadic saying is: "When a woman is talking, she is spinning" (meaning that she is dressing a web to capture the male): that can throw some background light on his attitude towards the old woman…

**Nissim ben Reuben Gerondi** ("The Ran", 1320-1376) -- One of the most important Spanish Talmudists. He never held any rabbinical post, even though he fulfilled all the functions of a rabbi and *dayyan* in his community. One of his main works is a commentary on the *halakhot* of R. Isaac Alfasi (1013-1103) to the *Talmud*.

**R. Obadiah ben Abraham di Bertinoro** (c. 1450 – before 1516) – Italian rabbi, Bible and Mishnah commentator. Leaving his home in 1485 towards Israel, he made a long journey that took him successively to Palermo, Rhodes, Alexandria, Cairo and finally to Jerusalem (1488), giving him the occasion to describe at length the Jewish communities of these places. He then became the leader of the Jerusalem Jewry. Bertinoro's fame rests on his commentary on the Mishnah which was published in Venice (1548-49).

**Rashi** (an acronym of **Rabbi Shlomo Itzḥaki**, 1040-1135) -- Born in Troyes, in northern France, he went to learn at the age of 17 in the *yeshivah* of Rabbi Yaakov ben Yakar in Worms, then moved to Mainz where he studied under Rabbi Isaac ben Judah, with Rabbenu Gershom and Rabbi Eliezer ha-Gadol, the leading Talmudists of the previous generation. Returning to Troyes at the age of 25, he joined the *beyt din* there and around 1070 founded a *yeshivah* which attracted many disciples. Famed as the author of the first comprehensive commentary on the *Talmud* (covering 30 tractates) as well, as for a comprehensive commentary on the Torah, he is particularly acclaimed for his ability to present the basic meaning of the text in a concise yet lucid fashion, a work which remains a centerpiece of contemporary Jewish study. His commentary on the *Talmud* has been included in every edition of the *Talmud* since its first printing in the Bomberg edition in the 1520s.

**Franz Rosenzweig** (1886-1929) -- Born in Kassel, Germany, his education was primarily secular, studying history and philosophy, and considered converting to Christianity. Just before doing so occurred his seminal spiritual experience while attending Yom Kippur services at a small Orthodox synagogue in Berlin, after which he remained within Judaism. His major work his *Der Stern des Erlösung* ("The Star of Redemption", 1921 for the first version), where is lied down his *Neue Denken* ("New thinking"), a very personal theological and philosophical theory of Judaism and Christianity.

**R. Joseph Rozin** (1858-1936) -- Polish Talmudist, called the "Rogatchover" after his birthplace Rogachov (now in Belarus). In 1889 he was appointed rabbi of the Hassidic

community of Dvinsk, and had to flee to St-Petersburg during World War I. He had an encyclopaedic knowledge of all rabbinic literature, and liked to link the philosophical ideas of Maimonides as well as the late discoveries of science to it. He died in Vienna. During his lifetime he published a commentary on Maimonides' *Mishneh Torah* and volumes of response which were expanded after his death. All his work appears the title of *Tzafenat Pane'aḥ* (the "Decipherer of Secrets"].

**Saadiah Ben Joseph Gaon** (882-942) -- The greatest scholar and author of the gaonic period and important leader of the Babylonian Jewry. The first to write extensively in Arabic, he is considered the founder of Judeo-Arabic literature, and through his ground-breaking formulation of a Jewish equivalent of the Arabic *Kalam*, the founder of Jewish medieval philosophy. His major work, *Kitab al-Amanat wa-al-l-tiqadat* (translated in Hebrew by Judah ibn Tibbon in 1186 under the title *Sefer ha-Emunot be-Deot*) represents the first systematic attempt to integrate Jewish theology with components of Greek philosophy.

**Shammay** – The colleague of Hillel. A jealous defender of the independence and authority of the *Sanhedrin*, Josephus reports that he had the courage to defy the tyrannical King Herod. Like his colleague Hillel, he founded an important *Torah* academy which in later generations was often in dispute with that of Hillel.

**Simeon ben Azzai** (early second century) -- Generally referred as Ben Azzai, 4th generation of the *tannaim*.

**Simeon ben Lakish** – Palestinian *amora* of the 2nd generation (250-290). He was active in Tiberias, and was the brother-in-law, disciple, colleague and disputant of R. Johanan. The difficult political and economic situation in the Jewish population forms the background of many of Resh Lakish's homilies.

**Moses Sofer** (Ḥatam Sofer, 1762-1839) – Born in Frankfort, he first served as rabbi in Dresnitz (Moravia) and in 1806 rabbi of Pressburg, at the time the most important community in Hungary, where he remained the rest of his life. He founded there the largest *yeshivah* since the *Babylonian yeshivot*, and made it the centre of its struggle against the reform movement and modernity. He contributed to form the idea the fundamental doctrines of orthodoxy as

complete obedience to the *Shulkhan Arukh*. His writings comprise seven volumes of *responsa* (Ḥatam Sofer, 1855-1912).

**Joseph B. Soloveitchik** (1903-1993) -- American orthodox rabbi, talmudist and philosopher, he is the descendant of the Lithuanian Jewish Soloveitchik rabbinic dynasty. As Rosh Yeshivah of Rabbi Isaac Elchanan Theological Seminary at Yeshivah University, New York, he ordained close to 2000 rabbis over the course of almost half a century. He advocated a synthesis between Torah scholarship and Western, secular scholarship as well as positive involvement with the broader community. His main publication is his essay *Ish ha-Halakhah* (1944, "The Halakhic Man") in which he states his vision of God and man living in "a covenantal community".

**Rabbenu Tam,** or **Jacob ben Meir Tam** (1100-1171) -- Tosafist and leading French scholar. He was the grandson of Rashi. He lived in Ramerupt, where he engaged in money lending and viticulture, which brought him into contact with the nobility and the authorities. Tam was recognized by all contemporary scholars, and pupils came to his *beyt midrash* from as far as Bohemia and Russia. Although he did not refrain either from abolishing several customs which did not appeal to him or from introducing important *taqqanot* ("ordinances"), he was in principle extremely conservative on questions of custom. The *tosafot* of the Babylonian Talmud are based on Tam's explanations. In addition to this, his main work is the *Sefer ha-Yashar* ("The Book of Rectitude", Vienna, 1811) which consists of two parts, the one, *responsa*, and the second, his *novellae (ḥiddushim*) on the Talmud.

**Rabbi Tarfon** – *Tanna* of the 3rd generation (80-115) -- One of the leading scholars at Yavneh, R. Tarfon was a priest. The Temple was still standing in his youth; His main disputant was R. Akiba and many halakhic discussions between them are recorded; in several matters he acted strictly in accordance with Beyt Shammay. He was particularly distinguished by his erudition. There is no information about is death, but according to one *aggadah* (*Lam.* R. 2:5) he was one of the ten martyrs.

**Ben-Zion Meir Hai Uziel** (1880-1953) – Born in Jerusalem, he became a *yeshivah* teacher at the age of twenty, and in 1911 was appointed *Ḥakham Bashi* of Jaffa. After having been very active during World War One to defend persecuted Jews beside the Ottoman government, he was appointed chief rabbi of Salonika in 1921, and upon returning to Israel,

chief rabbi of Tel Aviv in 1923, and chief rabbi of Palestine in 1939. He extensively contributed to newspapers and periodicals on religious, communal, and national topics as well as *Torah novellae* and Jewish philosophy. His chef works include a volume of *responsa*, *Mishpetey Uziel* (3 vols., 1935–60 – 2nd ed., 4 vols., 1947–64) and *Sha'arey Uziel* (1944-46), consisting of *halakhah*, general topics, and a selection of his letters, and other writings.

**Rabbi Yom Tov ben Abraham Ishbili** (The Ritba, 1250-1330) -- He was known from an early age as a *ḥakham* and *dayyan* in the community of Saragossa, and after the death of his teachers, among whom was R. Solomon b. Abraham Adret, was regarded by Spanish Jewry as its spiritual leader. In addition to his activity as a *poseq*, he devoted himself to the study of philosophy, in particular Maimonides' *Guide of the Perplexed*. Yom Tov's reputation rests upon hi *novellae* to the *Talmud*, known as the *Ḥiddushey ha-Ritba*.

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# Affidavit

*I hereby declare that this thesis has been written only by the undersigned and without any assistance from third parties. Furthermore, I confirm that no sources have been used in the preparation of this thesis other than those indicated in the thesis itself.*