

Capital Losses: Can There Be a Death Penalty without a Sanhedrin? Part II

Adapted from the writings of Dayan Yitzhak Grossman

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In our previous article, we cited the Chasam Sofer, who flatly maintains that ...There are certainly no circumstances in the world in which a Jew would be (halachically) liable for execution under their laws (i.e., those of non-Jewish governments) without witnesses (*eidim*) and warning (*hasra'ah*) and a court of twenty-three expert (*mumchim*) judges, and accordingly all their executions (of Jews) are against Torah law...

But the Gemara's accounts of R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi serving as governmental investigators, in which capacity they facilitated the execution of Jewish criminals, and the Rashba's citing of these accounts as justification for his decision to recommend to the government the execution of a Jewish criminal, imply that non-Jewish governments do indeed have the authority to execute Jews.[1]

R' Moshe (Maharam) Shick endorses this latter perspective in a *teshuvah* discussing a remarkably sensational and lurid case. A man had died suddenly, and his widow was suspected of having poisoned him in collaboration with her suspected paramour. Some prominent rabbinic authorities apparently insisted that the putative murderers be brought to justice via the civil authorities, so the brother of the deceased—the Maharam Shick's *mechutan*—consulted him as to the course of action he should take.

The Maharam Shick argues that the clear implication of the aforementioned accounts in the Gemara, as understood by the Rashba as well as some other *Rishonim*, is that non-Jewish governments do indeed have the authority to execute Jewish criminals, and Jews may participate in this process. He is unsure, however, whether the Rambam agrees with this position (it is striking that he does not acknowledge that this position is explicitly rejected by his great *rebbe* the Chasam Sofer), because the Rambam's language suggests that the prerogative of extralegal execution may be limited to Jewish kings:

When a Jewish king wishes to slay any of these murderers (those who have killed by indirect act or via agents) and the like—who are not liable for execution by the court—by virtue of his royal authority, in order to perfect society, he has the license to do so.

Similarly, if the court desires to execute them as a one-off measure, because this was required at the time, they have the license to do as they see fit.

If the king did not execute them, nor did the court deem the times to require strengthening the strictures against murder, the court should nevertheless have the murderer beaten with severe blows—so that he is on the verge of death—and imprisoned, deprived, and afflicted with all types of discomfort, in order to strike fear and awe into the hearts of other wicked men, so that this death should not be a stumbling

block and a snag for them, causing them to say: "Let me arrange to have my enemies killed the way so-and-so did, and I will not suffer the consequences." [2]

The Maharam Shick ultimately concludes that while we should not object to those who choose to cooperate with the civil authorities in this affair, as they are acting in accordance with halacha since they have many *poskim* upon whom to rely, [3] *gedolei* Yisrael should not involve themselves in such efforts. As we discussed in the previous article, R' Yehoshua ben Karcha and Eliyahu Hanavi criticized the conduct of R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi, calling them "vinegar son of wine," which the Rashba explains to mean that *gedolei* Yisrael and pious people like R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi are held to a higher standard: "Due to their piety, they should have refrained from killing those for whom the Torah does not decree the death penalty." [4]

The Maharam Shick's conclusion that *gedolei* Yisrael should not participate in such efforts would seem in need of qualification, however, because as we have seen, the Rashba himself seems to have done exactly that and helped facilitate the capital punishment of a Jew, despite his aforementioned explanation of the "vinegar son of wine" critique! Perhaps the objections only apply to aiding the authorities in situations where the accused will be convicted and executed based solely upon circumstantial evidence, as opposed to the Rashba's case where there was eyewitness testimony. [5] Or perhaps in the Rashba's case he perceived a pressing societal need to punish and eliminate the miscreant, and this need trumped the pietistic ideal of not punishing Jewish criminals via non-Jewish legal systems. In any event, it is clear from the Rashba's *teshuvah* that at least in certain cases, it is indeed appropriate for even *gedolei* Yisrael to send a Jewish criminal to his death via a non-Jewish legal system.

A somewhat similar case had been discussed two centuries earlier by R' Ya'ir Chaim Bacharach (the Chavos Ya'ir). In the heat of a quarrel, a young Jewish man had committed murder. He was not arrested for the murder, but he subsequently fell in with criminals and was arrested and sentenced to death for theft. A friend of the criminal wanted to intercede on his behalf to save his life, but a certain distinguished Torah scholar argued that it was prohibited to do so, and on the contrary, it would even be permitted for a relative of the murdered man, in his capacity as a blood avenger (*go'el hadam*), to turn the murderer in to the authorities.

The Chavos Ya'ir vehemently rejects, on various grounds, the latter assertion that the law of *go'el hadam* allows the killing of the murderer in contemporary times, but he is uncertain about the former argument that we should not intervene to forestall the punishment of the murderer by the authorities. He repeatedly notes that we cannot just determine to err on the side of caution and save the murderer's life, as siding with a murderer and helping him avoid punishment goes against the interest of his victim, because the common belief that the soul of a murder victim will not find peace until vengeance is meted out to his murderer is actually supported by "incidents that have occurred" as well as the teachings of Chazal regarding

Kayin, the blood of Navos, and the blood of Zechariah.[6]

He ultimately concludes that in general, if a murderer's life is in danger, even if he has been sentenced to death but for a crime other than the murder itself, it is still a mitzvah to save him. But if he was sentenced to death for the murder itself, the Chavos Ya'ir declares that he is unable to decide whether saving him is a mitzvah, a permitted act (*reshus*), or a prohibited act.[7]

The Chavos Ya'ir does not mention the Gemara's accounts of R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi acting as government investigators and sending Jews to their deaths; perhaps he assumes that the condoning of the execution of Jewish criminals by non-Jewish authorities is only applicable to governments and their agents (or to those consulted by governments, as in the case of the Rashba), but does not imply the legitimacy of private citizens facilitating and enabling such execution. This is indeed the position of R' Moshe Feinstein, who forbids reporting a Jewish thief to the police, asserting that the conduct of R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi was permitted only because they were government appointees.[8]

The Maharam Shick, however, clearly does not accept this distinction. R' Asher Weiss raises the possibility of such a distinction, but ultimately concludes, based on various precedents (including a ruling of R' Yosef Shalom Elyashiv, who, contrary to R' Moshe Feinstein, does allow the reporting of a thief to the police, at least if this will not cause a chillul Hashem),[9] that reporting criminals to the civil authorities is indeed permitted ("and *kal vachomer ben beno shel kal vachomer*" in the case he is discussing, that of sexual abusers of children).[10] To be clear, Rav Feinstein, Rav Elyashiv, and Rav Weiss are not discussing death penalty cases; their relevance to our discussion is only to the general question of whether the conduct of R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi can serve as precedent to justify the cooperation of private citizens with non-Jewish criminal justice systems in the punishment of Jewish criminals.[11]

[1]For further discussion of the Gemara's accounts and their interpretations by the *Rishonim*, see R' Avraham No'ach Taplin. *Be'inyan Hatzalas Nefashos Le'avaryan Hanishpat Lemaves Al Yedei Hashiltonos*. Nehora'i 5767. *Osios* 10-12 pp. 822-23.

[2]Hilchos *Rotzeiach Ushmiras Hanefesh* 2:4-5.

[3]See Rav Taplin's critique of this conclusion in *ibid.* os 24 pp. 829-31.

[4]Shu"t Maharam Shick C.M. *siman* 50.

[5]The Rashba in his *teshuvah* indeed argues that killing the criminal in his case would have been justified even under the standard halachic rules of criminal procedure.

[6]See Yechezkel 24:7-8 and Rashi thereto.

[7]Shu"t Chavos Ya'ir *siman* 146.

[8]Shu"t Igros Moshe O.C. *cheilek* 5 *siman* 9 os 11.

[9]Kovetz Teshuvos *cheilek* 1 *siman* 198 p. 376.

[10]Yeshurun Vol. 15 pp. 656-58. For further discussion of the topic we

have considered in these two articles, see Shu"t Meoros Nasan *siman* 61 and the numerous sources cited therein, and Rav Taplin's article, and cf. David Lichtenstein, *Be'inyan Mitzvas Pidyon Shevuyim*. Hakirah. Vol. 11. [11]For further discussion of this general question, see the analyses of R' Tzvi Gartner, R' Shraga Feivel Cohen, R' Yosef Shalom Elyashiv, R' Moshe Halberstam, R' Zalman Nechemiah Goldberg, R' Asher Weiss, and R' Yehuda Silman in Yeshurun *ibid.* "*Kuntres Dam Reiecha*," pp. 634-64; Shu"t Sheivet Halevi *cheilek* 2 *siman* 58.