

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

Adapted from the writings of Dayan Yitzhak Grossman

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The Yeshiva World Reports:

The vote on the [death penalty] bill [for terrorists] poses a dilemma for Chareidi MKs, who are opposed to the bill due to halachic issues... A Shas minister told *Kikar HaShabbos*: “Senior security officials warn that the bill will do more harm than good, because even if the court will use the law and sentence the terrorist to death, the terrorist will become a hero in the Arab world by the time the trial is over and it will only lead to further attacks. This law endangers lives and this is the position we will present to the Mo’etzet Chachmei HaTorah.”

The report also quoted an MK from Agudas Yisrael, who said: “Apart from the security issues, there’s also a halachic issue here. The Supreme Court can decide at any time that the law will also apply to Jews. Who are we to advance a law that will lead to imposing the death penalty on Jews? Is the Sanhedrin around?”

Chief Rabbi Yitzchak Yosef publicly opposed a death penalty law for terrorists in 2018, citing the same two reasons mentioned above. Firstly, the bill was opposed by Shin Bet officials at the time, who expressed concern that it could endanger the lives of Jews around the world who could be kidnapped as bargaining chips for terrorists on death row. Secondly, HaRav Yosef expressed concern that the bill could apply to Jewish terrorists—such as Amiram Ben-Uliel, who was indicted for the deaths of three Arabs in Duma—saying that only the Sanhedrin has the power to sentence a Jew to death.[1]

In this article and a subsequent one, we consider the halachic issue of enabling and facilitating the imposition of the death penalty upon a Jewish criminal in the absence of a Sanhedrin.

The most important unequivocal rejection of the legitimacy of a death penalty imposed upon a Jewish criminal by a contemporary government appears in passing in a *teshuvah* of the Chasam Sofer discussing the bribing of non-Jewish judges.[2] The Chasam Sofer maintains that it is without question prohibited (*les din veles dayan*) to do so in order to pervert the course of justice, but it is permitted to do so in order to prevent a miscarriage of justice that would otherwise occur, in which category he includes the execution of a Jew by a non-Jewish government:

And a fortiori...with regard to a Jew who is going to be executed under their laws, since there are certainly no circumstances in the world in which a Jew would be (halachically) liable for execution under their laws 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, and it is permitted to give a bribe in order to save his life.[3]

As R’ Nosson Nota Leiter has noted, however, it is difficult to reconcile this position of the Chasam Sofer with the numerous halachic precedents

condoning the enabling and facilitating of the application of the death penalty to Jewish criminals by the civil authorities in the post-Sanhedrin period, some of which we shall survey *iy"H* in this article and the next.[4] The Gemara relates that R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi served as officers of a non-Jewish government, in which capacity they sent Jewish criminals to their deaths:

R' Elazar son of R' Shimon came across a certain marshal (*parhagavna*) who was commissioned by the king to arrest thieves. He said to him, "...Perhaps you are mistakenly apprehending the innocent and leaving the guilty behind?" The marshal replied to him, "But what can I do? It is the king's order (*harmana*)! Therefore, I have to arrest someone." R' Elazar said to him: "Come, I will teach you how you should proceed." (R' Elazar taught the officer how to infer guilt from people's conduct.)...

This matter of R' Elazar's advice was heard in the palace. They declared, "The reader of the letter should be its deliverer (*parvanka*)," i.e., let R' Elazar put his own advice into practice. So they brought R' Elazar son of R' Shimon and authorized him, and he set about arresting thieves.

R' Yehoshua ben Karcha sent R' Elazar a message: "Vinegar son of wine! How long will you hand over the people of our G-d to their execution?" R' Elazar son of R' Shimon sent back to him: "I am ridding the vineyard of its thorns!" R' Yehoshua ben Karcha sent to him: "Let the Master of the vineyard come and get rid of His thorns Himself..."

And so too with R' Yishma'el son of R' Yosi, there once came his way a similar experience (the king appointed him a marshal, obliging him to arrest thieves). Eliyahu Hanavi encountered him. He said to him: "Until when will you hand over the people of our G-d to their execution?" He replied to him, "What can I do? It is the king's order!" He said to him: "Your father fled to Assia; you should flee to Ludkia." [5]

The Ritva explains:

And that which he judged without *eidim* and *hasra'ah*, and not during the era of the Sanhedrin, this is different because he was was an agent of the king, and it is among the laws of government to execute without *eidim* and *hasra'ah* to punish the world...and the agent of the king is like (the king) himself.[6]

Although R' Yehoshua ben Karcha and Eliyahu Hanavi opposed the conduct of R' Elazar ben R' Shimon and R' Yishma'el ben R' Yosi, many authorities, beginning with the Rashba, maintain that their conduct was actually permitted as a matter of halacha, albeit not consistent with the highest standards of piety (*chassidus*). The Rashba and another authority of his time once declared to the king that a certain Jewish criminal (a *moser*) was liable to the death penalty, and the king executed him. In a lengthy *teshuvah*, the Rashba justified his conduct on various grounds, including the following argument:

And greater than all these considerations, in our case there is nothing wrong with what we did, because we did not judge him ourselves, rather we were asked by the house of our master, the king, to examine his iniquity and to inform him of our counsel based on what he had done, and we said that he can execute him. For all these restrictions upon the courts' ability to convict and punish criminals were only said with regard to the laws of the Sanhedrin, as decrees of the Torah (*gzeiras hakasuv*). But regarding the laws of the king (*dina demalchusa*), we are not concerned with any of these, for their laws depend only on knowledge of the truth (and the halachic rules of testimony do not apply), and one may be executed under the laws of the government even based on the testimony of relatives, and based on self-incrimination, and without *hasra'ah*, and without twenty-three judges, for the law of the government hinges only upon knowledge of the truth. For if you do not say so, but you insist that all governmental criminal proceedings adhere to the law of the Torah, like the law of the Sanhedrin, then the world would be desolate, because murderers and their colleagues would proliferate...

(The Rashba adduces various proofs, then continues:) And even greater than this, R' Elazar ben R' Shimon arrested thieves per the king's edict, and he would punish and execute them, and so did R' Yishma'el ben R' Yosi. And even though R' Yehoshua ben Karcha said to him "You are vinegar son of wine," and so said Eliyahu to R' Yishma'el ben R' Yosi, nevertheless, we ought not consider them absolutely erroneous with respect to explicit laws; rather, due to their piety they should have refrained from killing those for whom the Torah does not decree the death penalty or similar (even though this is not strictly prohibited by halacha). And this is why they called them "vinegar son of wine," to say that they were not conducting themselves with piety as their fathers did. But had they been absolutely erroneous and had acted in violation of the *din*, they would have called them erroneous and absolute villains, *chalilah vechas* with regard to *gedolei* Yisrael and exalted pious individuals like them...[7]

The Rashba does not explain why he chose not to abide by the standard of piety articulated by R' Yehoshua ben Karcha and Eliyahu; perhaps the circumstances of his case involved considerations that overrode this ideal of piety. In the follow-up to this article, we will see that the Maharam Schick indeed maintains, based on this analysis of the Rashba, that although there is basis for cooperation with the civil authorities to bring about the punishment of a Jew suspected of murder, *gedolei* Yisrael should not involve themselves in the matter.

[1]"Halachic Issues:" Will The Chareidi Parties Vote For The Death Penalty Bill? The Yeshiva World.

<https://www.theyeshivaworld.com/news/headlines-breaking-stories/2169865/halachic-issues-will-the-chareidi-parties-vote-for-the-death-penalty-bill.html>.

[2]See Shu"t Chavos Yair *siman* 136; Urim Vetumim *siman* 9 Tumim s.k. 1;

Divrei Mishpat ibid. *os* 1; Pis'chei Teshuvah ibid. *s.k.* 3; Orach Mishpat ibid. *se'if* 1 s.v. Hanosno; Aruch Hashulchan ibid. *se'if* 1; Divrei Geonim *klal* 52 *os* 1.

[3]Shu"t Chasam Sofer *cheilek* 6 (*likutim*) *siman* 14 s.v. *Ach lif'amim*.

[4]Shu"t Meoros Nasan end of *siman* 61 s.v. *Umatzasi* beShu"t Chasam Sofer.

[5]Bava Metzia 83b-84a.

[6]Chidushei HaRitva ibid.

[7]Shu"t HaRashba, Teshuvos Hachadashos Miksav Yad, *siman* 345 (cited in Bais Yosef C.M. toward the end of *siman* 388).