

The Relation between Rashba and Maharam.

Rashba and Capital Punishment.

The responsa of Rabbi Shimon bar Zema (Rashbaz)¹ were gathered in three parts under the name *Tashbez* (*Tshuvot Shimon bar Zema*). A fourth part, entitled *ha-Hut ha-Meshulash* including the responsa of three rabbis of Algiers of the 16th century, descents of Rashbaz, Solomon ben Zema Duran, Solomon Zeror and Abraham ibn Tawa² was added to the three first parts and the whole was printed for the first time, in Amsterdam in 1738. The last responsum of the 35 responsa of Rabbi Abraham ibn Tawa gained a certain reputation. It dealt with the divorce of a man from his wife, the daughter of a Rabbi, disgusted by her husband's behavior after he had committed himself to marry a second wife whom he had seduced and after he had refused to deliver her the *get* although he had taken an oath to do so. This responsum is a thorough treatment of the problems related to the free delivery of the *get*. This responsum is quoted in *Pithei Tshuva* on *Shulhan Arukh Even ha-Ezer* 134 n° 10 (at the very end). In this responsum, R. Abraham ibn Tawa quoted extensively his ancestor Rashbaz and Rashba,³ Rabbi Solomon ben Abraham Adret. He wrote:

ומ"מ ראיתי להעתיק מה שכתב הרשב"א ז"ל בתשובה וז"ל, ומה שאמרתם שכתב בעל ה"ג ז"ל שהנשבע לגרש את אשתו ילקה על שבועתו ויקיים את אשתו, לא סבירא לן הכי ודברים בטלים הם ואין לחוש להם אלא חייב לגרש אשתו לקיים שבועתו ולא יחלל שם שמים בפרהסיא אלא יגרשנה לאלתר ויתן כתובה. ולא אמרין בזה לשום שלום בין איש לאשתו. ואי קשיא ממאי דאמרין בסוטה, אמרה תורה שמי שנכתב בקדושה ימחה, לשום שלום בין איש לאשתו, הא לא קשיא מידי דהתם לברר הספק להוציא מידי איסור עריות. ועוד דבשבוע' חמורה טפי דרחמנה אמר לא תשא וכתוב כי לא ינקה, הילכך יוציא ויתן כתובה ואין בזה משום שימת שלום בין איש לאשתו ע"כ.

Anyhow, I found it useful to transcribe what Rashba wrote in a responsum: What you said about all that R. Shimon Kaira wrote in his Great Legal composition,⁵ that we beat someone who took an oath to divorce his wife and we force him to behold her, we don't follow this opinion. It is in fact a stupid opinion and one should not care about it. On the contrary this man must divorce his wife in order to fulfill his oath and not desacralize the divine name in public. He must divorce her immediately and pay her Ketubah. And we don't say in such an issue that there is an obligation to put peace between a man and his wife. And if you may object the quotation in Sotah: The Torah said that one should obliterate my name written with sanctity in order to reestablish peace between a man and his wife! This is not a valid objection because in Sotah we describe a procedure in order to clarify a doubt so that we extricate the man from the interdiction of an illicit union. More, an oath is a very severe obligation about which the Torah wrote (in the Ten Commandments) "you won't take a false oath". It is further written that there is no forgiveness if he does not fulfill his oath. Therefore he must divorce

¹ Majorca 1361 – Algiers 1444.

² Rabbinical authority in Algiers in the second half of the 16th century.

³ Barcelona, 1235 – 1310.

⁴ בעל הלכות גדולות

⁵ *Hilkhot Gedolot*.

his wife and pay the ketubah and in that case there is no obligation to put peace between a man and his wife.

Thanks to the Bar Ilan project, it is easy to find this quotation. The quotation of Rashba belongs to the responsum I, 854 of the first part of the responsa of Rashba. It was copied from a manuscript or more likely from one of the first printed editions of the first part of Rashba's responsa. Indeed the first part of Rashba's responsa was edited and printed as early as 1539 in Bologna and six years later in 1545 in Venice by Marco Antonio Justinian.⁶ It is likely that R. Abraham Ibn Tawa used one of these editions of the responsa. When we examine the complete text of this responsum, we note that R. Ibn Tawa omitted an essential detail. This responsum is not signed by Rashba, as we would expect but by Rabbi Meir ben Barukh⁷ known as Maharam of Rothenburg. This omission is comprehensible because this long responsum deals with different subjects and the signature appears only at the end of the last item. This signature which appears in the manuscript and in the editio princeps is certainly not the result of a scribal error or a misprint. Indeed we find a very similar but longer and more detailed responsum, ascribed to Maharam of Rothenburg in Mordekhai on *massekhet Shevuot*, chapter 3, n° 758. The question is now whether this responsum was addressed to Rashba who voluntarily introduced it, as it was, without any transformation or adaptation, into his responsa. He presented thus this responsum as his own position as R. Abraham ibn Tawa contended it. Or maybe this responsum was introduced without Rashba's will in his responsa and it doesn't, in no way, represent Rashba's position. We don't find in the responsum any element answering our question. The only thing that we can conclude after the reading of the introduction of the responsum is that Maharam was writing to a scholar whom he much respected and appreciated.

Thanks to the Bar Ilan project, we were able to establish the following statistic⁸ of the mentions of authorities and contemporary rabbis, and the quotations of responsa of other authorities in his collections of responsa. Among the authorities we noted 26 mentions of Rambam and among his teachers we notes 20 mentions of Ramban,⁹ 8 mentions of R. Jonah ben Abraham Gerondi,¹⁰ 2 mentions of R. Isaac ben Abraham.¹¹ Among his contemporaries, we find a responsum I, 366 addressed to the Rosh, R. Asher ben Yehiel¹² to Germany and a responsum I, 571 to R. Hayim ben Isaac Or Zarua¹³ to Vienna. We find 6 mentions of R. Perez of Corbeil¹⁴ and we find 21 responsa, quoted *in extenso* of R. Meir ben Barukh. Twenty of these responsa are quoted as normal responsa of the collection but they begin or end with the name of R. Meir ben Barukh. The 21st is included in a query¹⁵ quoted in detail from R. Eliezer ben Joseph of Chinon,¹⁶ a pupil of the deceased R. Perez.¹⁷

⁶ Marco Antonio Giustiniani was an important printer of Jewish books in Venice active during the period of 1543 – 1552. He was in competition with the other important printer Aloise Bragadani. The latter had more success and flourished. He published the splendid edition of the Mishneh Torah in 1574.

⁷ Worms, about 1215 – stronghold of Ensisheim 1293. Urbach, A. in *Ba'alei ha-Tossafot* pp. 407 – 408 discusses the date of birth of Maharam and justifies a date of about 1213 – 1215.

⁸ This statistic is indicative and must be considered with caution. Indeed the same person can be represented by different denominations and one of them could have been omitted. The purpose is to appreciate the importance of Maharam in the responsa of Rashba.

⁹ R. Moses ben Nahman, Gerona 1194 – Acre 1270. Rashba referred to him as "my teacher".

¹⁰ Also called R. Jonah ha-Hassid, Gerona, about 1200 – Toledo 1263. Rashba referred to him as "my teacher".

¹¹ R. Isaac ben Abraham Narboni, dayan of Barcelona. Rashba referred to him as "my teacher".

¹² Rosh, Germany, about 1250 – Toledo 1327.

¹³ R. Isaac Or Zarua (the name of his opus magnum) was the teacher of R. Meir ben Barukh of Rothenburg.

¹⁴ Town on the river Seine, at a distance of 40 km from Versailles.

¹⁵ Responsum IV, 152.

These figures must challenge us and require a deeper examination of these responsa which do not belong to the collections of the responsa of Maharam, i.e. Cremona 1557, Prague 1608 and Lemberg 1860. By contrast with other authorities quoted in the Responsa of Rashba, these 20 responsa of Maharam, bearing his signature, Meir ben Barukh, are quoted *in extenso* and are presented, as Rashba's responsa, with an own number. We note in some of them a very polite and laudatory formulation addressed to his correspondent, as:

ושלום רב לתורתך
ואתה שלום ותורתך שלום וכל ביתך וכל ישיבתך.....
ושלום לך ולכל תורתך

We have all the reasons to consider that these responsa were addressed to Rashba in answer to queries addressed by him to Maharam, whom he considered, after the disappearing of his teachers, as the foremost rabbinic authority.

Apparently Rashba considered them to be an integral part of his responsa. He did not try to adapt them in order to include them in his own responsa. By contrast he introduced them in his responsa as they were with the signature of Maharam. It conferred them certainly more authority. We can assume that with the time Maharam paid more and more respect to this young scholar whose reputation was increasing. This can explain why his pupils Rosh and R. Hayim Or Zarua addressed queries to Rashba when Maharam was not available (Rosh) or not more in life (R. Hayim Or Zarua). Apparently the epistolary relations between Maharam and Rashba extend to a long period, probably from about 1267¹⁸ – 1270¹⁹ or even earlier, at the beginning of his rabbinical career, when Maharam's father was still alive²⁰ until about 1290 – 1293 when Maharam was imprisoned in a stronghold. In this respect, the responsum IV, 152 could be the last responsum addressed to Rashba by Maharam. It was sent from one of the two strongholds where he was imprisoned between 1286 and 1293. He had been arrested in Lombardy in 1286, when he was on his way to Israel, after a denunciation by an apostate informer. He was then put in prison in Wasserburg and later in Ensisheim near Mulhouse, The following quotation is particularly moving:

ושלום אליכם כנפש העני הנשכח מכל טובה, אסקופה הנדרסת הנקרא בשכבר מאיר בן ברוך זלה"ה.

And best regards to you from this poor man, forgotten from any good thing, a dwarfed threshold, which once was called Meir ben Barukh zal.

¹⁶ A little town at a distance of 46 km of Tours.

¹⁷ After the decease of R. Perez in about 1298, R. Eliezer ben Joseph of Chinon, his brother-in-law, sent a few queries to Rashba (see Urbach, A. *Ba'alei ha-Tossafot*, Mossad ha-Rav Kook. 1968, p. 453). This date marks the end of the period of the Tossafists in France. The beginning of its end happened when after the burning of the Talmud in 1242, many Tossafist decided to immigrate to Palestine. R. Solomon ben Abraham of Barcelona had in his own novellae developed a method of analysis similar to that of Tossafot and in this regard he was their heir. The expulsion of the Jews of France in 1306 will mark the end of the epoch of the Jews in France.

¹⁸ The date of the departure of Ramban to Palestine

¹⁹ These dates are compatible with the signature of Maharam שיחיה מאיר בן ברוך on his first responsa to Rashba. See Urbach, A. *Ba'alei ha-Tossafot*, 1968, p. 407 where he fixes the date of decease of R. Barukh of Worms in 1276. He must be above 80.

²⁰ In the earliest responsa addressed to Rashba he signed: מאיר בן ברוך שיחיה.

It expressed his despair. He was now a poor man fallen into oblivion who once had been called Meir ben Barukh. However he remained connected to the world. Queries were still addressed to him and his memory and his lucidity remained unimpaired.

Now if these elements are not sufficient to prove that the responsa of Maharam were addressed to Rashba, let us consider the two responsa n° 345 and 346 of the new collection of the responsa of Rashba. They are responsa recently published which had remained in manuscript. Responsum n° 345 is in fact a long memorandum addressed to many rabbis. We will analyze it below. Responsum 346 is the answer of Maharam. We have here the proof that Rashba considered Maharam as the foremost authority during his rabbinical career. We can assume that Rashba received more than one answer to his letter, but it is Maharam's answer that he included in his responsa.

The analysis of these two responsa presents, beside the information about the connection between Rashba and Maharam, a real historical interest. In the *Encyclopedia Judaica* vol 2, p. 306, it writes about Rashba: *Pedro III of Aragon submitted to him (Rashba) a number of complicated cases that had arisen between Jews of different communities. Against his will the case of an informer belonging to an aristocratic family was assigned to him for trial by order of the king. He sentenced the man to death. Three years later the relatives of the condemned man appealed the verdict. Adret referred the case to Meir ben Barukh of Rothenburg, the foremost rabbinic authority in Germany, who sustained the verdict.* We find exactly the same text, word by word but in Hebrew in the *Encyclopedia le Toldot Gedolei Yisra'el*²¹ p. 1258. One of these texts was thus copied from the other and this other was inspired by the book of Yitzhak Baer.²² The latter knew these two responsa published by David Kaufmann²³ in JQR.²⁴ This information is derived from the responsum n° 345 of the new collection of responsa of Rashba originated in the manuscript Oxford 2218. This responsum is in fact a long document established by Rashba relating all the details of the case of an informer condemned to death and executed. It was sent to rabbis of France (and probably also Germany, included in the word France) in order to receive their endorsement and support. The responsum n° 346 is the answer and the endorsement of Rabbi Meir ben Barukh. We don't know how many answers he received but the only answer included in his responsa and now published is the answer of Maharam. It gives evidence of how highly Rashba thought of Maharam of Rothenburg. It is clear that R. Meir ben Barukh of Rothenburg played a particular role and represented for Rashba, after the decease of his teachers, the foremost rabbinic authority. It is thus practically certain that all the responsa of Maharam included among Rashba's responsa were addressed by Maharam to Rashba in answer of queries which Rashba did not consider useful to reproduce. These responsa of Maharam are thus an

²¹ Published by Joshua Sisik in Jerusalem without date.

²² A history of Jews in Christian Spain, 2 vol, Yitzhak Baer, 1966. The summary of the events from Rashba's responsum n° 345: see vol 1, pp. 168 – 170. The reference to the responsum of Rashba in JQR: see vol 1, p. 411 note 56.

²³ Kaufman David, Kojetein, 1852 – Budapest 1899. Professor at the rabbinical seminary of Budapest, produced in his short live an astonishing large number of works.

²⁴ Jewish Quarterly Review, vol VIII 1896 pp. 217 – 238. This reference was mentioned by Ishak Baer, see note 22. S.J. Halberstam published corrections and variants in the same review, 1896 p. 528. In fact in *Otsar Yisra'el*, editor J.D. Eisenstein, New York 1907 – 1913, vol 6, p. 230, entry *malshinut*, this reference is already mentioned (deficiently, the n° of the volume of JQR is lacking) and refers to the responsum of Rashba.

integral part of Rashba's responsa. Despite the lack of precision,²⁵ R. Abraham ben Tawa was still correct when he wrote that this was the thesis of Rashba.

Let us come back to the contents of the responsum n° 345 of the new collection of Rashba's responsa, which had remained in manuscript. Rashba provided in this document all the information about the case of an informer during the beginning of the reign of King Pedro III. In fact the events began towards the end of the reign of the former king, James I the Conqueror, king of Aragon from 1213 to 1276. Towards the end of his long reign a Jewish informer appeared at the royal Court and became mighty and influential. He descended from a wealthy and respected family but he had lost his possessions. This seems to explain his unscrupulous ambition. He had the ambition to gain might by fair means or foul. He did not hesitate to create and spread false information endangering the Jewish communities of Catalonia, Aragon and Valencia. The Jewish communities sent him warnings and threats. King James I died in 1276 and his son Pedro III ascended the throne of Aragon; it included also Catalonia and Valencia. The Jewish communities of Aragon, Catalonia and Valencia conjured the informer in several occasions to cease. On the contrary, he went on and became more go-ahead than ever and he found favor with the authorities. Now there were also at the Royal Court two influential and mighty Jewish brothers, Joseph and Moses Abrabalia.²⁶ Joseph Abrabalia was the minister of finance to the king. They were both faithful leaders of the community and they had the ear of the king. They drew the attention of the king to the machinations and the lies of the informer who deserved the death. At the king's command, the informer was seized and proceedings were instituted against him. A royal judge was designated; he took the depositions and the complaints of the communities. However things were dragging on and even the family of the informer wanted to get the case over. In agreement with the communities the old Rabbi Jonah,²⁷ the rabbi Gerona and Rabbi Solomon Ben Abraham Adret, the Rabbi of Barcelona, were ordered to investigate the matter. The aged Rabbi Jonah II²⁸ of Gerona was the brother's son, thus the nephew to the former Rabbi Jonah ben Abraham Gerondi also called R. Jonah ha-Hassid. The latter had been the pupil of Ramban and the teacher of R. Solomon ben Abraham Adret. He had also been an opponent to Rambam's philosophical works. Rashba spoke in the most laudable terms of his elder²⁹ colleague.³⁰ Nevertheless it seems that the whole burden of the delicate situation in which the two rabbis got involved, rested on Rashba. Rashba was afraid of the course of the events and therefore he wanted an amicable arrangement in the matter; otherwise he feared the worst. The two rabbis dragged the matter on for a whole year but they were refused an audience of the king which they had wished. By contrast the delay of the proceedings incensed the king. From the confines of his kingdom where he was waging war, he gave orders that the two rabbis should be brought before him unless they at once communicate the Supreme Judge, their decision and allow the justice to run its course. The two

²⁵ The rabbis insisted on the importance to always report information in the name of the author: Megila 15a.

כל האומר דבר בשם אומרו מביא גאולה לעולם.

²⁶ According to the most recent publications, based on Spanish documents, they were called Ravaya.

²⁷ This Rabbi Jonah II seems to have been forgotten and ignored by historians. R. Hayyim Azulay in his Shem ha-Gedolim suspected the existence of a second R. Jonah but the argumentation remains unclear and inconclusive.

²⁸ In order to differentiate him from the former R. Jonah I Girondi 1200 – 1263.

²⁹ Rashba must be about 45, while Rabbi Jonah must approach eighty at the time of the execution of the informer.

³⁰ He wrote:

החכם הגדול ר' יונה בגירונדא, בן אחי אביו של מורי הרב ר' יונה זצ"ל. וזקן ויושב בישיבה הוא.....סוף דבר שלח אדוננו המלך יר"ה אחר החכם הגדול ר' יונה הנ"ז ובא בעמל גדול כי זקן האיש וכבד מאוד וצוה אותנו אדוננו לקבל עדויות.....

rabbis must then, reluctantly communicate their decision i.e. a death condemnation. In the meantime the decease of the Chief Judge could not save the situation. The king appointed a successor and the sentence was carried out at the entrance of the Jewish cemetery. The execution was performed by opening the veins of the two arms of the condemned. We can estimate that it happened in about 1280. Three years later, in about 1283, the minister of Finance, Joseph Abrabalia, who had been so influential in the solution of the case and had obtained the arrest and the condemnation of the informer, died. The Jewish communities were losing their advocate at the Royal Court. The family of the executed, which had kept silent, began to react. They contended that their brother had been innocently executed. The procedure, they contended, had been illegal and did not satisfy the requirements of the Jewish law. According to it a tribunal of twenty three judges was necessary for a capital condemnation. Additionally they argued that the evidence had not been taken in the presence of the accused or his advocate. Although the family of the executed brother was refused a hearing by the authorities and the matter would probably have calmed down by itself, R. Solomon ben Abraham Adret, felt the necessity to protect himself against the attacks of the family which had been spread within the community. At this stage there is no more question of his elder colleague R. Jonah of Gerona. Was he still alive? For this purpose Rashba established a long memorandum detailing all the circumstances of the events and including a long halakhic development justifying the death sentence of the informer. He wanted to submit this document to the rabbinical authorities of France. As the only answer that we know came from Germany, we may assume that the word France must be understood as extending to France and Germany. It is likely that Rashba received several answers. However the different answers were lost except the answer of Maharam. These are the only historical elements available and they result from the unilateral presentation of the events by Rashba. We know that King Pedro III reigned from 1276 to 1285. The events described above happened certainly during this period. If we place the execution in 1280, then the exchange of letters between Rashba (n° 345) and Maharam (n° 346) was somewhere in 1283, after the decease of R. Joseph Abrabalia. David Kaufman in JQR adopted 1280³¹ for the execution of the informer and 1283 for the date of decease of Joseph Abrabalia. After the reading of the account of the facts we remain frustrated. We remain in the complete ignorance of the manoeuvres of the informer. What was exactly his fault? How did he endanger the community? The ardor of the king and of the judicial system proves that it was acknowledged that the accusations of the informer were false, as Rashba wrote it, and did not compromise the community with regard to the king and the civil administration. We assume that the informer was plotting to impose himself at the head of the community against its will or to become its representative and lobby at the Royal Court against its will and be in position of strength to extract money from it. But we still don't understand the situation. What were the false accusations which would have endangered the community if they had been accepted and had been found true? Further what was the connection between these accusations and his dark intentions? Maybe he falsely accused the community of financial irregularities and he contended that he was the only one able to bring an end to this situation. A more farfetched assumption would be that the informer was an egalitarian agitator denouncing the inequalities in the Jewish community. Indeed the Jewish community was certainly not a democratic society in the modern sense of the word. It was rather an oligarchy; the might belonged to a few rich and mighty families. An egalitarian agitator would certainly have been considered as dangerous informer endangering the community and deserving the death penalty. In

³¹ According to Claude Denjean in *La loi du lucre : l'usure en procès dans la couronne d'Aragon à la fin du moyen-âge*, 2011, p- 378, the condemnation was in 1279.

other words we will never understand the matter fundamentally. It is not certain that we would have today the same appreciation of the culpability of this specific informer. In fact, from recent research,³² it appears that the informer was Vidalon de Porta, the son of Astrug³³ de Porta and the nephew of Benvenist de Porta.³⁴ Astrug and Benvenist being the sons of Vidal de Porta. The family was a rich and mighty family of tax farmers and Vidal had even been general farmer. We can thus imagine that the problem was extortion of the Jewish communities and collection of undue taxes threatening them with false accusations in order to allow him recovering his health at their expense.

Anyhow Maharam endorsed fully the position of Rashba and his ruling. Maharam was certainly aware of the calamity constituted by the informers in the different communities. He did not imagine that a few years later, he would also be denounced by an informer, when he was in 1286 on his way to Palestine. In his halakhic defense Rashba paid much attention and concentrated his argumentation on the two arguments of the family of the executed informer i.e. the absence of a court of 23 judges necessary for a valid death condemnation and the argument that the evidence had not been taken in the presence of the accused or his advocate. We note that Rashba did not quote the ruling of Maimonides in *Sefer Nezikin, Hilkhoh Hoveel u- Mazik VIII, 10 and 11*, which answers these arguments. Indeed the execution of the informers does not belong to the ordinary Jewish legislation. It is an emergency regulation valid even today.³⁵ The text of Maimonides is the following:

י. מותר להרוג המוסר בכל מקום ואפילו בזמן הזה שאין דנין דיני נפשות ומותר להרגו קודם שימסור, אלא כשאמר הריני מוסר פלוני בגופו או בממונו. ואפילו ממון קל התיר עצמו למיתה. ומתירין לו ואומרים לו אל תמסור. אם העיז פניו ואמר לא, כי אלא אמסרנו, מצוה להרגו. וכל הקודם להרגו זכה.

י"א. עשה המוסר אשר זמם ומסר, יראה לי³⁶ שאסור להרגו, אלא אם כן הוחזק למסור, הרי זה יענש שמא ימסור אחרים. ומעשים בכל זמן בערי המערב³⁷ לענוש המוסרים שהוחזקו למסור ממון בני אדם ולמסור המוסרים ביד העובדי כוכבים לענשם ולהכותם ולאסרם כפי רשעם.³⁸ וכן כל המיצר לציבור ומצערן, מותר

³² See the following references :

Barcelona and Beyond : The disputation of 1263 and its aftermath, Robert Chazan, 1992, p. 241.

La loi du lucre : l'usure en procès dans la couronne d'Aragon à la fin du moyen-âge, Claude Denjean, 2011, p. 378.

History of the Jews of Aragon, registers and documents 1213 – 1327, Jean Régny (1883 – 1954), 1978.

Medieval Jewish Civilization, ed. Norman Roth, 2003, pp. 336 – 337.

Responsa y Repertorios Documentales, Nuevos Detalles Sobre El Caso de Vidalon De Porta, David Romano, Sefarad 1966, vol 26, pp. 47 – 52. According to an official document of Barcelona's bailiff, dated June 14, reproduced in this paper, and in contradiction with Rashba's responsum, the name of the colleague of Rashba was R. Barukh ben Yona. But this seems unlikely; perhaps was he Yona ben Barukh. The date of the execution must have been included between June 14 (the date of the official notification of the condemnation by the bailiff of Barcelona) and July 11, 1280 (the date of the notification of the execution by the bailiff of Barcelona).

³³ Ytzhak Baer does not mention his father's name.

³⁴ See Ytzhak Baer, vol 1, p. 169. He found the name of Vidalon the Porta in official documents gathered by Jean Régny.

³⁵ However when Rambam was confronted to a similar situation when he arrived in Egypt, he could not put this emergency regulation into practice, probably because a lack of autonomy of the Jewish community, and it was after a long diplomatic struggle of influence that the community could get rid of the wicked Zuta. See Kraemer, Joel L. Maimonides pp. 7, 267 and 290 and Davidson Herbert A. Moses Maimonides pp. 46, 47 and 51.

³⁶ In the West i.e. in the towns of Morocco.

³⁷ Rambam wrote in a letter to R. Pinehas ha-Dayyan that he uses this expression when he gives a personal opinion not supported by a Talmudic reference.

³⁸ Now we don't deal anymore with an informer but with someone who is harming and harassing people.

למסרו ביד בעובדי כוכבים להכותו ולאסרו ולקנסו. אבל מפני צער יחיד אסור לאסרו. ואסור לאבד ממונו של מוסר, ואע"פ שמותר לענשו שהרי ממונו ליורשיו.

10. It is allowed to kill an informer anywhere and even today when we don't adjudicate capital punishment. It is allowed to kill him before he has the occasion to inform and commits his misdeed, as soon as he tells (or threatens) that he will inform against someone or his money. Even threatening to inform about a little amount removes the prohibition to kill him. But we warn him and we tell him: "don't inform". But if he answers disdainfully: "No I will denounce him" then it is an obligation to kill him and the first to kill him fulfilled the mitzvah.

11. If the informer went on to the end of his threat and committed his misdeed, it seems to me that we cannot anymore adjudicate capital punishment and it is forbidden to kill him. But if he is beyond any doubt an informer (because of his track record) he must be punished. Otherwise we must fear that he will inform against others. And it was always a common practice in the towns of the West to punish informers, who had been confirmed to inform against people's money and to deliver them in the hands of heathens in order to punish them, beat them and put them in prison according to their fault. More, all those who harm and harass the collectivity, may be delivered in the hands of heathens in order to punish them, to beat them and to impose a fine on them. But it is forbidden to put him in jail for harming and harassing an individual. Destroying the money of an informer is forbidden. Although we are allowed to punish him, his money belongs to his heirs.

Maimonides is thus very clear and he bases himself on Talmudic references. The capital sentence of an informer is not a punishment. It is an emergency regulation aiming at the protection of the community. It is like the exceptional regulation of the "*ben sorer u-morer*"³⁹; it must protect us in the future as soon as we have reason to fear such a danger. Therefore Maimonides compares the status of the informer to "*eidim zomemim*".⁴⁰ They are killed if we have evidence of the danger but after the perpetration of their misdeed they are punished by heathens according to the gravity of the facts but the emergency regulation allowing killing him is no more of application. We are back under the regular regulations (testimony, evidence, court).

The position of Rashba does not appear clearly in the present responsum n° 345. It is much clearer in another responsum I, 181.

שאלת הא דאמרין בהגוזל בתרא בהוא דבעי אחווי תיבנא דחבריה. ואתי לקמיה דרב ואמר ליה לא תחוי ואמר מחוינא ומחוינא. והוה יתיב רב כהנא קמיה דרב ושמטיה לקועיה. וקרא עליה בניך עולפו שכבו בראש כל חוצות כתוא מכמר וכו' כדאיתא התם. וקשיא לך וכי בשביל שאמר כן יהרג. והלא ספק היה אם היה עושה כן אם לא ואין יהרג מספק. ודילמא גזים ולא עביד כההיא דנקיט מגליא ותובילא ואמר איזיל ואגזריה לדיקלא דפלניא. זהו תורף שאלתך.

תשובה. המסור כנחש והקודם להרגו זכה. ומה שאמרת היאך הורגין אותו מספק. אם רגיל לעשות כן, כל שאומר לעשות כאילו עשה. והרי הוא בכלל הבא להרגך השכם להרגו כההיא דרב שילא דלא המתין לראות היעמדו דבריו. וכל שמוסר ואפילו ממון, הרי הוא כאילו ממיתו. ואין אומרים נמתין עד שימית ואחר שימית ימיתוהו ב"ד או יורשי המת. ואפי' מי שאינו רגיל בכך, אילו הכרנו בו שהוא רוצה לעשות כההיא דרב כהנא שאמר לו לא תחוי והוא העיז ואמר מחוינא מחוינא הרי הוא כאילו ידענו בבירור שיעשה ואף על ספק זה נהרג. ואפילו אחרים מצילין את זה בנפשו של מסור כרודף שניתן להציל את הנרדף בנפשו של רודף. ואין אומרים

³⁹ The libertine and rebellious son. Deut. 21; 18. He also is killed before he accomplished his misdeed.

⁴⁰ False witnesses whose testimony is invalidated by the special arguments resulting from another testimony: "you could not witness this event because you were not present".

אע"פ שהוא רודף שמא יחזור בו ולא יעשה אשר זמם לעשות. והיה דאמרין בפרק קמא דגיטין (דף ז' ע"א) דשלח ליה מר עוקבא לרבי אלעזר, בני אדם העומדים עלי ובידי למסרם למלכות מהו. ושלח ליה תו דמצערין ליה טובא. ואפילו הכי אמר לו דום לה' והתחולל לו.⁴¹ הנהו לא מסורות היו ולא היו מצערין אותו בכך אלא בדברים או בנזיקין אחרים. שאילו מסורות היו מותר היה להם ומצוה.

You asked the following query: We learn in B. Bava Kamma 117a (in the last chapter beginning with ha-Gozeel), the dictum of R. Judah: a man, who was desirous of showing another man's straw, appeared before Rav who said to him: "Don't show it! Don't show it!"⁴² He retorted: "I will show it! I will show it!" Rav Kahana was sitting before Rav and he tore that man's windpipe out of him.⁴³ Rav thereupon quoted the text of Isaiah 51; 20: Your sons have fainted; they lie at the heads of all the streets as a wild bull in a net.⁴⁴ Just as when a 'wild bull' falls into a 'net' no one has mercy upon it, so with the money of the Jew, as soon as it falls into the hands of the heathen oppressor, no mercy is exercised toward him.⁴⁵ Now you can hardly accept that an informer may be killed on the ground of this statement of Rav⁴⁶ because it remains a doubt whether the informer would finally perform his threat. How can we put to death an informer when we still doubt whether he will inform again the man he threatened. Maybe he exaggerates and he does not do what he threatens. For example in B. Bava Batra 36a we speak about a man who takes a knife and a rope and says: I am going to cut the fruits the date trees which I have bought from him.⁴⁷ Who knows if he will do it?⁴⁸

Answer. The informer is like a snake and the first who kills him won the mitsva to suppress him. And about your question: how do we kill him as the issue is doubtful? If he is accustomed to behave so and to inform, as soon as he threatens, he must be considered as if he had performed his threatening. And it belongs to the general rule: if someone comes to kill you, rise and kill him before. This can be seen in the story of Rav Shila (Berakhot 58a) who did not wait for the issue and killed the informer. Anyone who informs, even about a money issue must be considered as if he was killing him. We don't say: let us wait until he kills,⁴⁹ and then the court or the dead's heirs will kill the informer. And even in the case of an informer who is not accustomed to do that, but if we notice that he wants really to inform as in the case of Rav Kahana, where they told him not to show and he retorted that he will, in such a case we can consider with confidence that he will indeed inform and despite the remaining doubt, he may be killed. And people may save the life of the person endangered by the informer, by killing this informer in the same way as we save the life of the pursued at the expenses of the life of the pursuer. And we don't say: although he is a pursuer, maybe he will change his mind and finally he won't act as

⁴¹ The text of the Gemara is shortened.

⁴² Showing someone, suspected of extorting people, the other man's straw was informing against the owner and opening the way to extortion.

⁴³ He broke the neck's articulation (Rashi).

⁴⁴ Thus Rav sustained and endorsed R. Kahana's conduct. This story must be understood literally; it is not an exaggeration or a hyperbola. Indeed the following of this quotation tells us that Rav said then to Rav Kahana to run away to Palestine under R. Johanan because he will certainly be accused of murder.

⁴⁵ Thus as soon as his money is in the hands of the heathen, the life of the Jew is endangered. Therefore even if the informer denounces the possession of money, the life of the Jew is endangered and therefore we are allowed to kill an informer who treats to inform the heathen even about money, even a little amount.

⁴⁶ Endorsing the behavior of Rav Kahana.

⁴⁷ Apparently the idea is: It is not certain that he will execute his threat. But it is difficult to understand. Rav Judah, the author of this dictum, contends that this man is a priori, believed to be the owner of these trees. No one bothers whether he will cut the fruits or not. Rav Judah tells alone that he is allowed to cut these fruits.

⁴⁸ This last sentence is only implied. It is also difficult to understand in the context of the quotation. Indeed it doesn't seem to be a threat, it is rather a statement.

⁴⁹ He causes the death of the man against whom he informed.

*he intended to do. Now in the case of the story mentioned in Gittin 7a about mar Zutra who sent the following message to Rabbi Elazar: There are people who rise up against me and I have the possibility to protect myself by delivering them to the civil authorities. What should I do? He sent him further: they are harming me and harassing me much. Nevertheless Rabi Elazar answered him: keep quiet and hope in God. The answer is that these people were indeed harming and harassing him on different manners but they did not threaten him to inform against him. If this were the case he would have been allowed to protect himself and it was even a mitzvah.*⁵⁰

In responsum 345 Rashba wrote an important point which completes the precedent responsum:

ומי שאינו מוחזק בכך, אין ממיתין אותו אלא אחר מעשה אבל מי שהוחזק בכך ממיתין אותו בין בשעת מעשה בין לאחר מעשה וכל הקודם זכה להרוג את המורגלים להזיק וכדנניא המינין והמסורות והמשומדין והאפיקורסין מורדין ולא מעלין, (עבודה זרה כ"ו ע"ב).

If the informer is not accustomed to act so, we are allowed to kill him only a posteriori after he informed. But if he is accustomed to inform we kill him whether during the process (when he was threatening) or after the process. The first to kill the informers, accustomed to denounce and damage, accomplished the mitzvah as we learned a braita: the minim, the informers and the apostates and the misbelievers, we drive them in the water and we don't pull them out of the water.

Apparently there is a fundamental difference between the position of Rambam and that of Rashba. According to Rambam the emergency legislation against the informer concerns a threatening informer and it aims at rescuing the threatened. This emergency legislation is similar to that applicable to the pursuer threatening the life of the pursued. By contrast after that the informer committed his misdeed there is no reason to still apply emergency regulations. We come back to the normal legislation (regular testimony, legal prevention, composition of the court).⁵¹ And therefore we normally cannot exert capital punishment because capital punishment cannot be adjudicated today. Even if there was a competent court for such punishments, the responsibility of the informer would be indirect and would not deserve capital punishment.⁵² Maimonides compared the legislation of the informer to that of "eidim zomemin" who are condemned to death only if no capital execution was applied on the basis of their testimony. In other words the emergency legislation is valid only if the intention of the false witnesses or of the informer was not yet materialized. *Shulhan Arukh Hoshen Mishpat* n° 358, 10 – 13 follows Maimonides. Now Rashba explained that in the case of a threatening informer with a bad track record, we consider him as if he had performed his threat. Therefore Rashba does not accept the position of Rambam restricting the emerging legislation of the informer to the threatening phase. Rashba writes that an established informer (beyond doubt = מוחזק) can thus be executed, even today, after he committed his misdeed, according to this emergency legislation. Anyhow in the case considered, the litigious informer was in prison for already

⁵⁰ Mar Zutra was an individual and he had not many means to protect himself. Only the collectivity is allowed to take active protective measures.

⁵¹ See Magid Mishneh ad locum.

⁵² R. Yitzhak bar Sheshet Perfet (Rivash) (1325 – 1410) presents this argument in *Tshuvot bar Sheshet* n°328. He quoted Rambam (but not Rashba) and followed clearly the approach of Rambam. When we keep the informer prisoner we punish him according to the importance of the crime but capital punishment is excluded. Indeed besides the fact that today we have not competent courts, capital punishment is never applied when the responsibility is indirect or when the guilty did not kill himself. Rivash explains clearly that once the threat was accomplished, the emergency legislation does not apply anymore and the regular legislation (testimony, procedural rules) is applicable. See n° 328 and 329.

a year and did not, apparently, constitute a danger for the community anymore. His execution was thus a punishment for the past. Apparently, according to Maimonides, he did not deserve a capital punishment. The position of Rashba is not easy to understand. The Talmudic references seem to agree with Maimonides' analysis. The explanation of the position of Rashba could perhaps be found in the terms of a responsum of R. Asher ben Yehiel (Rosh) Klal 17, n° 1:

מסר ישראל או ממונם ביד אנשים, שמבקשים עצה ותחבולה לבערו מן העולם, משום מיגדר מילתא ושיוסורו האחרים ולא ירבו מוסרים בישראל, וגם להציל כל ישראל הנרדפים מתחת ידו. הילכך, בנידון זה, שהעידו העדים שהיה מוחזק מסור ומלשין, וגם היה בשעת מעשה, יפה עשו שדנהוהו לתלות. וכן יאבדו כל אויבי ה' ואוהביו כצאת השמש וגו'. נאום הכותב אשר בן יחיאל ז"ל.

If an informer delivered a Jew or his money to gangsters, and the community was looking for a solution and a stratagem to cut him off from this world. In order to build a protective fence against this thing i.e. against the plague of the informers and in order to cure other informers from their bad habit so that the number of informers will not increase in Israel. This will also help all the others who are pursued by him. Therefore in this issue, where witnesses testified that this man was beyond any doubt, an informer and denunciator and he was warned during the process, when he threatened to inform we can say that they took a good decision and handled correctly when they condemned him to death by hanging. So should your enemies perish and may his lovers flourish as the light of the sun grows stronger at sunrise. So are the words of the writer, Asher ben Yehiel zal.

Apparently the two rabbis stretched and adapted the emergency rules to the prevailing political and judicial system and allowed to punish and condemn to death the informer only after the informer had committed his misdeed, as a warning for all the candidate informers in order to eradicate this real pest from the Jewish people.

Indeed Maimonides ruled in this matter according to the conduct of Rabbi Shila,⁵³ Rav Kahana⁵⁴ and Mar Oukva⁵⁵ without taking into consideration the prevailing judicial system superseding the Jewish legislation. He did not worry in his ruling about the fact that according to Sassanid law, Rav Kahana was a murderer and was obliged to flee and even Rav could have been worried. Self defense is recognized in all the judicial systems, but delayed self defense in the case of a threat to endanger one's life and a fortiori in the case of a threat to endanger one's goods, as championed by Rambam, was indefensible by Rashba and Rosh. They were the leaders of their communities and the responsible of the Jewish Judicial system but they were also accountable to the king and the state for the good working of the Jewish jurisdiction and its compatibility with the state criminal law. Furthermore capital punishment was only exerted by the state and must be duly justified and approved by it. In the *Tor*, the legal compendium of Rosh's son, in *Hoshen Mishpat* 388, it speaks of punishment but not more of capital punishment and the Rambam's difference between the case of the informer, who threatened and the informer, who denounced and harmed his victim, is not mentioned. By contrast *Shulhan Arukh Hoshen Mishpat* 388. 10 – 13 follows completely the rulings of Rambam. However the verbs are at the imperfect tense. The meaning is thus: in ancient times, when Jewish law was binding, it was allowed to kill an informer who threatened to inform against

⁵³ Rabbi Shila, Amora of the first generation, older than Rav. He was Head of the yeshiva of Nehardea when Rav arrived in Babylonia around 220 C.E. Berakhot 58a.

⁵⁴ Rav Kahana II, was the disciple of Rav. After this sad event, he had to flee to Palestine, where he remained all his life. Bava Kamma 117a.

⁵⁵ Amora of the second generation. Gittin 7a.

someone. But today the criminal law of the state is prevailing. The legislation of *Shulhan Arukh* is thus only valid at the level of tort. This explains the compromise accepted by Rashba and Rosh between Jewish law and state criminal law. They accepted the capital punishment of informers beyond any doubt, after they had committed their misdeeds, without abiding by all the restrictive conditions imposed by Jewish law at the time when capital punishment was applicable. There was even a form of hypocrisy: each party, the rabbis and the state, would consider that the other had taken the responsibility of the condemnation. In the responsum of Rashba it writes:

“We were obliged to tell the king that he may proceed according to his law; that we have found him deserving of the death penalty, if he should wish to put him to death”⁵⁶

But don't forget, the struggle was uneven. Even at the best, times were hard.⁵⁷ The status of the Jews and the balance of powers were unstable and the hostile powers were always lying in wait.

⁵⁶ translation of Ytzhak Baer in *A History of the Jews in Christian Spain*, vol 1, p. 169 bottom.

⁵⁷ The disputation of Barcelona took place in July 1263, the anger of the Dominicans did not calm down and Ramban was obliged to leave Spain in 1267, the pressure of the Church on the King against the Jews was constant and the financial burden exerted by the King, because of his wars, on the Jewish communities was growing.