



Parashat Devarim

## **Maimonides on How a Judge Behaves on the Bench**

By Rabbi David Silverberg

In Parashat Devarim, Moshe recounts to the people a number of events that took place during their period of wandering in the wilderness, including the appointment of a judicial network. Upon appointing these judges, Moshe issued a series of instructions and warnings emphasizing the importance of integrity and complete impartiality in the judicial process (1:16-17).

The Talmud Yerushalmi in Masechet Sanhedrin (3:8) makes the following comment concerning the proper approach a judge should take when hearing the litigants' claims in a civil suit: "When Rav Huna would see a valid argument for one of the litigants, but he [the litigant] was unaware of it, he would present it on his behalf, as it is written, 'Open your mouth for the mute' (Mishlei 31:8)." According to the straightforward reading of this passage, the Talmud Yerushalmi requires the judge to assist a litigant who is unaware of the claims available to him, and offer legal counsel. Apparently, the judge is to ensure a "level playing field" by supplying the litigants with the knowledge they need to submit their claims convincingly. The judge certainly must not show predisposed favor to one litigant over the other, but he may – and in fact should – equip unprepared litigants with legal knowledge that will put them in the best position in the courtroom. This is, indeed, how the Rosh (Rabbenu Asher ben Yechiel, Germany-Spain, 1250-1327) understood the Yerushalmi's comment, and he ruled accordingly (see *Tur*, C.M. 17).

Maimonides, however, interpreted the Yerushalmi's comment differently, imposing a significant restriction on the judge's license to intervene to assist a litigant in presenting his claims:

From where [do we know] that a judge may not act as an advocate for his [the litigant's] words? As it says, "You must distance yourself from falsehood" (Shemot 23:7). Instead, he [the litigant] should say what he thinks, and he [the judge] should remain silent and not advise either litigant of any claim [that he could make]. Even if [one litigant] brought a single witness, he [the judge] should not say to [the other litigant], "We do not accept a single witness." He rather says to the defendant, "Behold, this person has testified against you," so hopefully he will confess and say, "He testified truthfully," unless he claims and says, "He is only a single witness, and I do not believe him"...

If the judge saw a valid claim for one of them, and the litigant wants to say it but he does not know how to put the words together, or if he saw him attempting to save himself with a truthful claim but because of the tension and anger he can't grasp it, or if he erred because of foolishness, then it is permissible to assist him somewhat to help him understand the beginning of the matter, because "Open your mouth to the mute." But he must first think very carefully about this, so that he does not become like an advocate.  
(Hilkhot Sanhedrin 21:10-11)

According to Maimonides, the *halakha* presented in the Yerushalmi applies only in the very specific case of a litigant who is aware of a claim he could present in his defense, but is unable to articulate it. In his view, a judge has no right to supply legal knowledge to help a litigant, as this would violate Yehuda ben Tabbar's famous exhortation to judges, "*Al ta'as atzmekha ke-orekhei ha-dayanim*" ("Do not make yourself like a legal advocate" – Avot 1:8). A judge is entitled to intervene only if the litigant suffers a handicap due to poor communication skills, but not if the litigant lacks legal knowledge. Maimonides' view is codified as *halakha* by the *Shulchan Arukh* (C.M. 17:8).

The rationale underlying Maimonides' position emerges from his introductory comments to this passage: "From where [do we know] that a judge may not act as an advocate for his [the litigant's] words? As it says, "You must distance yourself from falsehood" (Shemot 23:7). This comment is cited from the Talmud in Masekhet Shavuot (30b), but its meaning is subject to debate. Rashi, in his Talmud commentary, explains the Gemara as forbidding the judge from acting as an "advocate" for his own words. Meaning, a judge who has misgivings about a certain decision he rendered should not serve as his own advocate supporting the ruling. He must rather exercise pure honesty in reevaluating his decision, even if this means overturning his previous ruling and retrying the case. Attempting to defend his original decision against his own misgivings would constitute "falsehood" in that he accepts the ruling that he issued, and not the ruling that he honestly believes to be correct.

Maimonides, however, clearly understood the Gemara's comment differently, as referring to a judge's "advocacy" on behalf of one of the litigants. The judge's goal must be to arrive at the truth. Therefore, even though a litigant could defend himself with the claim that a single witness' testimony is not accepted in a Jewish court, a judge should not encourage a litigant to make such a claim. From the judge's perspective, it is preferable for the litigant to mistakenly view the witness' testimony as valid and thus confess, rather than sticking to his argument in light of the absence of a second witness. Encouraging litigants to make the claims that give them the best leverage does not help the judge achieve his goal of finding the truth, and hence it transgresses the Torah's admonition, "You shall distance yourself from falsehood." The judge must therefore offer no assistance to either party, except in the rare event that a litigant cannot properly express the argument he wishes to submit.