

Higher Authority: Defer or Demur?

Adapted from the writings of Dayan Yitzhak Grossman

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Congressional Republicans recently voted to oust Rep. Liz Cheney from her leadership post over her continued attacks on former president Donald Trump for his claims about election fraud and for the events of Jan. 6 at the U.S. Capitol.

In this article, we use this event as a springboard to discuss the question of whether a member of a deliberative body is expected to defer to the expressed opinion of a more senior or prominent member.

Lo sa'aneh al rav

A *braisa* declares that a king may not sit on the Sanhedrin. The Gemara explains that this is based on the *pasuk* “[ve]lo sa’aneh al riv,”[1] which it interprets homiletically to mean “do not answer to a great person (*rav*),” so one whose stature will make the other judges afraid to contradict him may not be appointed to the Sanhedrin.[2] Additionally, the Mishnah[3] rules that in capital cases, the least significant judges express their opinions first, and the Talmud explains that this, too, is derived from the imperative of “*lo sa’aneh al rav*”: were a greater judge to issue his opinion first, and he would say that the accused is liable, no other judge would acquit.[4]

The *Rishonim*

It is unclear whether this Talmudic interpretation of “*lo sa’aneh al rav*” is descriptive or prescriptive. Rashi, in his comments to the first passage, explains that “you are *not allowed* to contradict the words of the outstanding judge,” whereas in his comments to the Mishnah, he explains that we do not commence from the greatest judge lest he find the defendant guilty “and [his colleagues] *will not wish* to disagree with his words.” Rambam, in his commentary to the Mishnah, explains it to mean that “if the greatest one commences, it is prohibited for the remaining ones to disagree with him,”[5] whereas in his *Sefer Hamitzvos* and *Mishneh Torah*, he explains the *pasuk* to be saying precisely the opposite: It is one of the *taryag* mitzvos to refrain from deferring to other judges’ opinions without independent examination and analysis of the fundamental legal principles. “*Lo sa’aneh al riv lintos* (‘to follow’)” teaches that in a quarrel (*riv*), one should not follow the majority or the great ones and refrain from expressing his own opinion.[6]

Similarly, the Nimukei Yosef (citing “the commentaries”) categorically rejects the idea that the *pasuk* means that a judge is prohibited from contradicting his superior; on the contrary, if a judge believes him to be mistaken, “it is prohibited for him to stay silent.” He therefore explains that the imperative of “*lo sa’aneh al rav*” is to proceed in such a manner that there will be no occasion for a judge to have to contradict his superior. This is not due to the honor of the superior judge, but rather out of concern for the potential reluctance, born of embarrassment, of a disciple to challenge

his master.[7]

Civil litigation

Rambam (in his Sefer Hamitzvos and Mishneh Torah) seems to limit the prohibition against deferring to others to capital cases, and indeed, the Mechilta deRabi Shimon bar Yochai that he cites as a basis for this prohibition explicitly excludes civil cases.[8]

The Minchas Chinuch, however, finds such an idea abhorrent, insisting that a judge who defers to someone else is perverting justice and is a *rasha*, *shoteh*, and *gas ruach*. He therefore suggests that Rambam and the Mechilta merely mean that although deferring to others is always wrong, the formal prohibition is limited to capital cases. He concedes, however, that the Mechilta's language does not really support this reading.[9]

Tosafos (as explained by the Sma) understands that the prohibition is only against blunt contradiction, but it is permissible to challenge the great judge "in a questioning manner." They have two approaches as to whether even the prohibition against blunt contradiction is limited to capital cases or extends to civil cases as well.[10]

The Aruch Hashulchan explains that while it is never permitted to defer to another judge whose reasoning one does not follow and understand, in civil cases it is legitimate to defer to one whose reasoning appears plausible, and there is no obligation to engage in independent analysis. In capital cases, however, one must first analyze the case and arrive at an independent conclusion prior to engaging with the arguments of others.[11]

[1]Shemos 23:2.

[2]Sanhedrin 18b.

[3]Ibid. 32a.

[4]Ibid. 36a.

[5]Pirush Hamishnayos ibid. 4:2. Smag *lo sa'aseh* #195 uses similar language.

[6]Sefer Hamitzvos *lo sa'aseh* #283, *Hilchos Sanhedrin* 10:1 This is also the opinion of the Sefer Hachinuch mitzvah #77.

R' David Kochav assumes that Rambam changed his mind from his early position in the Pirush Hamishnayos that it is prohibited to *contradict* a great judge, to his position in his later writings that on the contrary, it is prohibited to *defer* to him, due to the fact that when he composed the former, he had not yet seen the Mechilta deRabi Shimon bar Yochai (see below), upon which he apparently based his position in the Sefer Hamitzvos.

[7]Nimukei Yosef ibid. 13b in Rif pagination s.v. *Vesu amrinan baGemara*.

[8]Mechilta deRabi Shimon bar Yochai 23:2.

[9]Minchas Chinuch ibid.

[10]Tosafos Sanhedrin 36a s.v. *Dinei nefashos*, *Sma siman* 18 s.k. 2.

[11]Aruch Hashulchan C.M. 18:9. Cf. Mishneh Torah, Shabsi Frankel edition, Sefer Hamafteiach ibid.