

Courting Disaster: The Judge's Duty of Dauntlessness
Adapted from the writings of Dayan Yitzhak Grossman
July 29, 2020

On July 19, a man knocked at the door of the New Jersey home of U.S. District Judge Esther Salas. When the door was opened, he fired multiple shots, killing the judge's son and injuring her husband. The authorities have identified an attorney who had once appeared before Salas as the primary suspect, but the gunman's motive remains unclear. Judge Salas had received threats in the past, and the authorities are investigating whether there is any connection between those prior threats and the shooting. North Brunswick Mayor Francis "Mac" Womack, a family friend, said that "As a judge, she had threats from time to time, but everyone is saying that recently there had not been any." In this article we discuss a judge's responsibility to dispense justice even in the face of threats of violence.

Lo saguru

In *Parshas Devarim*, the Torah commands judges: "You shall not tremble (*lo saguru*) before any man, for the judgment is G-d's." [1] The translation (by ArtScroll) of *lo saguru* as "you shall not tremble" follows one interpretation of the *pasuk* by *Chazal*, accepted by the *poskim* as normative, that it is a prohibition against a judge refusing to hear a case out of fear of one of the litigants. [2] The Sifri goes so far as to assert that a judge is enjoined from saying "I am afraid of so-and-so, lest he kill my son, or lest he burn my heap [of grain], or lest he cut down my saplings." This demand of a judge to risk even his child's life in order to do his duty is accepted by most *poskim*, although the *Bach* rejects it as non-normative. [3]

The scope of the prohibition

Even some of the *poskim* who do accept the position of the Sifri as normative, however, limit its application to where the risk is uncertain. [4] The Shevus Yaakov goes even further and explains that Jewish litigants, even ones with an established character of general wickedness, are not suspected of being prepared to commit murder in reaction to a verdict of civil liability, but if a litigant does indeed have an established character of that sort, then the prohibition of *lo saguru* does not apply (although it would still apply if the anticipated harm is merely financial). [5] See below, however, for R' Aharon Walkin's dissenting view.

The Erech Shai aligns the position of the Sifri with the Talmudic principle that "those on the path to perform a mitzvah are not susceptible to harm (*sheluchei mitzvah einan nizokin*)," unless the "danger is commonplace (*sh'chiach hezeika*)." [6] He explains that the prohibition of *lo saguru* is based on the idea that the judge who is performing a mitzvah will not suffer harm thereby, [7] since *sheluchei mitzvah einan nizokin*, but insofar as the danger is *sh'chiach*, the principle of *sheluchei mitzvah einan nizokin* does not apply, and therefore neither does the prohibition of *lo saguru*, even where the anticipated harm is merely financial, since it is "utterly

unreasonable” to expect the judge to suffer a financial loss in order to protect the interests of the (rightful) litigant, due to the basic rule that one’s own interests take precedence over those of others.[8]

R’ Yaakov Gesundheit in Tiferes Yaakov arrives at a similar position based on an entirely different argument. A judge is prohibited from adjudicating a case in which he has any interest whatsoever (*nogeia badavar*), however remote.[9] How, then, can a judge be even allowed, let alone obligated, to adjudicate a case when his property or the life of his child is at stake? Rav Gesundheit therefore concludes that the Sifri’s demand is limited to cases of indefinite and uncertain danger, where the mitzvah of *lo saguru* orders the judge to disregard such unsubstantiated concerns, but where the danger is likely (“*karov*”) and the litigant has an established character of malevolence, the judge is certainly considered an interested party and is indeed prohibited from adjudicating the case![10]

Yeihareig v'al ya'avor?

Related to this issue of the extent of the prohibition according to the Sifri is the question of how to reconcile the Sifri’s apparent contention that the prohibition of *lo saguru* applies even in the face of a concern for human life with the general rule that one is not required to give up his life in order to fulfill a mitzvah (*ya'avor v'al yeihareig*):

- Some propose that (as above) the Sifri’s comments are limited to where the potential for harm is indefinite and uncertain, and in such circumstances one is indeed required to obey the commandment despite the possibility of harm.[11] Others, however, object that the rule of *ya'avor v'al yeihareig* should apply even in such a case.[12]
- R’ Zvi Hirsch Kalischer in *Moznayim Lemishpat* explains that the Sifri is referring not to the refusal to hear a case but to the issuance of a false ruling that will serve as a precedent for the future. This constitutes uprooting the law of the Torah, and one is indeed obligated to forfeit his life rather than do so (*yeihareig v'al ya'avor*).[13]
- R’ Aharon Walkin explains that since the very essence of the mitzvah of *lo saguru* is a prohibition against fear, this extends even to where the fear is for one’s life (or the life of one’s child), and is thus tantamount to an explicit exception to the general rule of *ya'avor v'al yeihareig*. He therefore challenges the Shevus Yaakov’s understanding that the Sifri is not referring to a case of serious danger to life.[14]

[1] *Devarim* 1:17.

[2] Sifri; *Sanhedrin* 6b; Rambam, *Sefer Hamitzvos*, *lo sa'aseh* #276, *Hilchos Sanhedrin* 22:1; *Shulchan Aruch C.M.* 12:1.

[3] *Bach* *ibid*.

[4] *Shu"t Maharashdam C.M. siman* 378.

[5] *Shu"t Shevus Yaakov* end of *cheilek* 1 *siman* 143.

[6]*Pesachim* 8a-b.

[7]A similar interpretation of the prohibition of *lo saguru* appears already in *Sha'arei Teshuvah* cheilek 3 siman 33.

[8]*Erech Shai* *ibid.* s.v. *uveShu"t Shevus Yaakov*.

[9]See Rambam *Hilchos Eidus* 16:4 and *Shulchan Aruch* *ibid.* 37:21.

[10]*Tiferes Yaakov C.M.* *ibid.* s.k. 2.

[11]See *Moznayim Lemishpat* *ibid.*

[12]*Choshen Aharon* *ibid.* and *Shu"t Zekan Aharon* cheilek 2 siman 126 s.v. *v'ein lomar*.

[13]*Moznayim Lemishpat* *ibid.* s.k. 2. Cf. *Yam Shel Shlomo Bava Kama perek 4 siman 9*; Mordechai Hillel Djavaheri, *Ziyuf Hatorah: Yehareig V'Al Ya'avor*.

[14]*Choshen Aharon* and *Zekan Aharon* *ibid.*