

Mediation in Jewish & Contemporary Law & Practice

Read the following source with a study partner (havruta), and discuss:

1. What is the ethical question behind the disagreement between Rabbi Eliezer and Rabbi Yehoshua? With whom do you agree and why?
2. How can Rabbi Eliezer hold that it is a prohibition to arbitrate a compromise and at the same time, mention that Aaron would bring peace between people?

**Babylonian Talmud, Sanhedrin 6b**

**Rabbi Eliezer the son of Rabbi Yose the Galilean** says:

It is forbidden to arbitrate a compromise, and whoever arbitrates a compromise is a sinner, and whoever praises one who arbitrates a compromise blasphemes G-d. And about such a person, the verse states [Psalms 10:3]: "He who praises an arbitrator blasphemes G-d." Rather, 'let the law cut through the mountain,' as it is said [Deut. 1:17]: "Do not be afraid of any man, for the judgment is G-d's."

And similarly Moses, would say 'Let the law cut through the mountain.' But Aaron loved peace and pursued peace, and caused peace to reign between man and his fellow. As the verse (which is understood as referring to Aaron) states [Malakhi 2:6] "The Torah of truth was in his mouth, and iniquity was not to be found on his lips; he walked with me in peace and uprightness, and turned many away from iniquity."

**Rabbi Yehoshua ben Korha** says:

It is a mitzvah – a meritorious deed – to arbitrate a compromise, As the verse states [Zechariah 8:16]: "Execute truth and the judgment of peace in your gates", for surely where there is judgement there is no peace, and where there is peace there is no judgment, how then can there be a judgment which attains peace? You must say that this verse refers to compromise.

And similarly, regarding King David, the verse states [II Samuel 8:15]: "And David executed judgement and charity to all his people." But surely where there is judgement there is no charity, and where there is charity there is no judgement, how then can there be a judgement which involves charity? You must say that this verse refers to compromise.

**בבלי, סנהדרין ו ע"ב**

**רבי אליעזר בנו של רבי יוסי הגלילי אומר:**

אסור לבצוע, וכל הבוצע - הרי זה חוטא, וכל המברך את הבוצע - הרי זה מנאץ, ועל זה נאמר (תהילים יג) "כי הלל רשע על תאות נפשו [בוצע ברכ נאץ ה"]; אלא יקוב הדין את ההר, שנאמר (דברים א:יז) "לא תכירו פנים במשפט כקטן כגדל תשמעון לא תגורו מפני איש" כי המשפט לאלהים הוא [והדבר אשר יקשה מכם תקרבון אלי ושמעתיו]; וכן משה היה אומר: יקוב הדין את ההר; אבל אהרן אוהב שלום ורודף שלום ומשים שלום בין אדם לחבירו, שנאמר (מלאכי ב:ו) "תורת אמת היתה בפיהו ועולה לא נמצא בשפתיו בשלום ובמישור הלך אתי ורבים השיב מעון."

**רבי יהושע בן קרחה אומר:**

מצוה לבצוע, שנאמר (זכריה ח:טז) "אלה הדברים אשר תעשו דברו אמת איש את רעהו" אמת ומשפט שלום שפטו בשעריכם"; והלא במקום שיש משפט אין שלום, ובמקום שיש שלום אין משפט! אלא איזהו משפט שיש בו שלום? - הוי אומר זה ביצוע;

וכן בדוד הוא אומר (שמואל ב, ח:טו) "וימלך דוד על כל ישראל" ויהי דוד עושה משפט וצדקה [לכל עמו], והלא כל מקום שיש משפט אין צדקה וצדקה אין משפט? אלא איזהו משפט שיש בו צדקה? - הוי אומר זה ביצוע.

[Additional Background Sources]

1. The Benefits and Limitations of Mediation and ADR

a. What are the benefits and limitations of 'compromise' according to the following midrashic texts?

<p><b>Mechilta DeRebbi Yishmael 20 (2<sup>nd</sup> cen.)</b> (2<sup>nd</sup> Century, Land of Israel) "And I judged between man and man" (Exodus 18:16)– This is referring to law that has no <i>pesharah</i> (compromise) in it. "Between a man and his friend" - This is referring to judgment that contains <i>pesharah</i> in it, [because] both parties leave as friends.</p>	<p><b>מכילתא דר"י יתרו - מס' דעמלק</b> <b>יתרו פרשה ב' ושפטתי בין איש"</b> (שמות יח:טז)- זה הדין שאין בו פשרה.  "בין רעהו"- זה הדין שיש בו פשרה, ששניהם נפטרין זה מזה כרעים.</p>
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<p><b>Sifre Devarim 17</b> (2<sup>nd</sup> Century, Land of Israel) "Execute the judgment of truth and peace in your gates (and let none of you devise evil in your hearts against his neighbour) [Zech. 8:16]." What type of peace contains true justice? I shall say it is <i>bozea</i>. Rabban Shimon ben Gamliel says: He who rises up the small to the place of the great, and [lowers] the great to the place of the small, this is <i>bozea</i>. And the Rabbis say: anyone who does <i>bozea</i> (compromise) is a sinner, as it is written, "He that blesseth a <i>bozea</i>, condemneth the Lord [Ps. 10:3]." For this one will praise the judge, and this one will condemn his Creator.</p>	<p><b>ספרי דברים פ' יז</b> ואלה הדברים אשר תעשו דברו אמת איש לרעהו אמת ומשפט שלום [זכריה ח:טז],  איזה הוא שלום שיש בו משפט אמת? הוי אומר זה ביצוע. רבן שמעון בן גמליאל אומר המעלה את הקטן למקום גדול והגדול למקום קטן זה ביצוע.  וחכמים אומרים כל המבצע הרי זה חוטא שנאמר ובוצע ברך נאץ ה', נמצא זה משבח את הדיין וזה מנאץ את יוצרו.</p>
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b. Which position is accepted in Jewish law?

<p><b>Rambam, Introduction to the Mishnah</b> (1138 – 1204, Spain, Egypt) A (judge) should not like the power, and should not jump to a verdict in order that he should not be suspected. And he should practice in the majority of cases in the way of compromise. And if the judge is able to make compromises between the opposing parties always, and never has to rule on the case, he is praiseworthy. And if it is impossible to come to a compromise, then he should rule on the case.</p>	<p><b>הקדמת הרמב"ם למשנה</b> <b>ד"ה וכאשר השלים</b> ולא יאהב את השררה ולא יקפוץ להורות כדי שלא ייחשד, וינהג ברוב דיניו בדרך הפשרה, ואם יוכל הדיין לפשר בין היריבים תמיד ולא יפסוק דין כלל הרי זה משובח. ואם אי אפשר לפשר יפסוק את הדין.</p>
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## Mediation in Jewish & Contemporary Law & Practice

c. How did Rabbi Soloveitchik explain the ethical rationale behind Jewish law?

### **Rabbi Joseph B. Soloveitchik (1903 – 1993, USA), Reflections of the Rav vol I. The Torah Way of Justice p.55-57**

The Talmud [Sanhedren 6b] justifies the institution of *pesharah* on the basis of two Biblical verses. Both verses are needed because each contributes a different consideration.... The first verse reads: "Execute the judgment of truth and peace in your gates" [Zecharia 8:16]. The Talmud explains: "Surely where there is strict justice [*mishpat*] there is no peace. And where there is peace, there is no strict justice! But when do justice and peace coincide? Only in *pesharah*..." Where there is strict adherence to *din*, there is justice but no *shalom*, because one of the parties is humiliated and antagonized. The immediate issue is resolved but the conflict persists, with ensuing social discord. The secular judge is seemingly indifferent to this failure since justice, not harmony, was his objective. *Shalom* is for social workers and psychologists to attain; it is beyond his jurisdiction. The Torah, however, wants the *dayyan* [judge] to be not a magistrate but a teacher and a healer. He should seek to persuade both parties to retreat from their presumed points of advantage, and he should preach to them about the corrosive personal and social effects of sustained rancor. His responsibility is primarily to enlighten, rather than to render decisions on points of law. The first verse, therefore projects the social welfare of society and the happiness of individuals as primary ideals, as being truly a higher form of justice. *Pesharah*, is socially and morally preferred, even if the strict *din* is neutralized. In its highest sense, justice is obtained when people are reconciled. The second verse states: "And David executed justice and righteousness toward his people" [II Samuel 8:15]. The Talmud explains: "Surely, where there is strict justice [*mishpat*] there is no righteousness [*tzedek*], and where there is righteousness there is no justice. But when do justice and righteousness coincide? Only in *pesharah*!" This verse is concerned with the attainment of *tzedek*. In Aristotelian logic, there is a law of contradiction which states that theses and its antitheses cannot both be valid... It follows from this logic that, when two litigants present opposing claims, only one can be right. Strict logic demands the application of *din* whereby the claim of the righteous party will be vindicated while the other party will be discredited. The *halakhah*, however, believes that absolute right and wrong can be realized only in heaven. In dealing with imperfect man, we posit that no man is totally wrong or right and that, in a case of the litigants, both are partially right and wrong. The application of *din* can only take account of obvious surface conditions; it fails to perceive subtleties underneath, which dilute our certainty about the right and the wrong of the litigants. Each has some responsibility for the situation and is partially guilty of the misunderstanding, for misleading innuendoes, and for contributing indirectly to a climate in society which places others at a disadvantage. Strict justice deals with plain facts and salient reality; real responsibility however goes much deeper and is obscured from the scrutiny of the court. Metaphysically, no one is entirely absolved in situations of conflict. *Tzedek*, therefore, is truly realized only through *peshara*, which declares the parties both winners and losers. Thus, *Pesharah* is not only socially desirable, as the first verse claims, but it is also morally just. The principle of *tzedek* demands that *mishpat* reflect the existential condition of man's inevitable imperfection.



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## Mediation in Jewish & Contemporary Law & Practice

d. *What are some of the ethical advantages and disadvantages of ADR ?*

<http://www.beyondintractability.org/essay/adr/>

**University of Colorado, Boulder. Posted: June 2003**

### **General Advantages and Disadvantages of ADR**

For many reasons, advocates of ADR believe that it is superior to lawsuits and litigation. First, ADR is generally faster and less expensive. It is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the state. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached. Most ADR processes are based on an integrative approach. They are more cooperative and less competitive than adversarial court-based methods like litigation. For this reason, ADR tends to generate less escalation and ill will between parties. In fact, participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties. This is a key advantage in situations where the parties must continue to interact after settlement is reached, such as in child custody or labor management cases. ADR does have many potential advantages, but there are also some possible drawbacks and criticisms of pursuing alternatives to court-based adjudication. Some critics have concerns about the legitimacy of ADR outcomes, charging that ADR provides "second-class justice." It is argued that people who cannot afford to go to court are those most likely to use ADR procedures. As a result, these people are less likely to truly "win" a case because of the cooperative nature of ADR. Similarly, critics believe that ADR encourages compromise. Compromise can be a good way to settle some disputes, but it is not appropriate for others. In serious justice conflicts and cases of intolerable moral difference, compromise is simply not an option because the issues mean too much to the disputants. Another concern is that ADR settlements are private and are not in the public record or exposed to public scrutiny. This could be cause for concern in some cases. For example, using ADR to settle out of court could allow a company to resolve many instances of a defective product harming consumers, without the issue getting any public exposure. On the other hand, a court ruling could force the company to fix all problems associated with the bad product or even to remove it from the market.



## Mediation in Jewish & Contemporary Law & Practice

### 2. Mediation and ADR

#### a. What is Alternative Dispute Resolution?

##### **University of Colorado, Boulder. Posted: June 2003**

"Alternative dispute resolution" (ADR) is a term generally used to refer to informal dispute resolution processes in which the parties meet with a professional third party who helps them resolve their dispute in a way that is less formal and often more consensual than is done in the courts. While the most common forms of ADR are mediation and arbitration, there are many other forms: judicial settlement conferences, fact-finding, ombudsmen, special masters, etc. Though often voluntary, ADR is sometimes mandated by the courts, which require that disputants try mediation before they take their case to court.

#### b. How do the following commentaries explain the difference between arbitrating a compromise and pursuing peace? What is the ethical question behind the various commentaries?

##### **(1.) Rashi Sanhedrin 6b**

(1040-1105, France)

As soon as Aaron would hear of a dispute, before they would come to court for a ruling, he would run after them and make peace between them.

##### **רש"י סנהדרין ו"ע"ב**

וכיון שהיה שומע מחלוקת ביניהם, קודם שיבואו לפניו לדין, היה רודף אחריהן ומטיל שלום ביניהן.

##### **(2.) Tosephot Sanhedrin 6b**

(12<sup>th</sup> Century, France)

Since Aaron was not a judge, and the case did not come before him, like it did with Moshe, for him it was of course permitted.

##### **תוספות סנהדרין ו"ע"ב**

כיון שלא היה דיין ולא היה הדין בא לפניו אלא לפני משה ודאי לדידיה שרי [לו מותר].

##### **Avot deRabbi Natan version B chapter 25**

(6<sup>th</sup> Century, Land of Israel)

Regarding Moshe, what does it say "And the children of Israel wept for Moses in the plains of Moab thirty days" (Deut. 34:8). And regarding Aaron what does it say? "And when the entire congregation saw that Aaron was dead, they mourned for Aaron thirty days, even all the house of Israel." (Numbers 20:29). And why, for Aaron, did all of Israel cry and for Moshe only some cried? Rather, Moshe was a judge, and it is impossible for a judge to rule favorably to both litigants to the same manner, rather he must rule favorably to one and convict the other side. Aaron was not a judge rather a peacemaker between people, therefore all of Israel cried for Aaron and for Moshe only some cried.

##### **אבות דרבי נתן נ"ב פרק כה**

במשה מה הוא אומר ויבכו בני ישראל את משה (דברים ל"ד ח'). באהרן מהו אומר ויראו כל העדה כי גוע אהרן (במדבר כ' כ"ט). ומפני מה לאהרן בכו כל ישראל ומשה לא בכו [לו] אלא מקצתם. אלא משה היה דיין ואי אפשר לדיין לזכות שני בעלי דינין כאחת אלא לזכות את הזכאי ולחייב את החייב. אהרן לא היה דיין אלא מטיל שלום בין אדם לחבירו לפיכך אהרן בכו לו כל ישראל ומשה לא בכו לו אלא מקצתן

**(3.) Rabenu Yishayu b. Eliyah DeTrani  
(Italy 13<sup>th</sup> Cen.)**

And there is also an opinion that it is forbidden to compromise, since this compromise is made according to the judges. However, if it is made according to the opinion of the litigants, and they know the nature the content of the compromise and they are agree upon it themselves, even after the court has ruled on the matter, the (judges) can still reconcile (convince) the litigants that they should forgive one another. And this is what is meant by "Aaron lover and pursuer of peace (rodfei shalom), and makes peace between people." And according to the opinion that it is forbidden to compromise, meant to say, that even though it is forbidden to compromise, what is done in accordance to the will/opinion of the litigants is not considered "compromise", rather "making peace", that they make an effort and reconcile the litigants until they are reconciled with one another and there will be peace between them. And there is no mitzvah greater than this, and this is what Aaron used to do. Indeed it is not allowed to force them or coerce them rather to appease them and reconcile them, and the compromise that is forbidden is that which is placed upon them.

**רבינו ישעיה ב"ר אליה  
דטראני (קונרטס הראיות)**

...ואיכא נמי למ"ד אסור לבצוע כלל, לפי שפשרה זו מדעת הדיינין היא. אבל אם היא מדעת בעלי דינין והן יודעין ענין הפשרה ומתריצין בה, אפילו לאחר גמר דין נמי יכולין לפייס בעלי דינין שימחלו זה לזה. והיינו דקאמר 'אהרן אוהב שלום ורודף שלום ומשים שלום בין איש לחברו', ומ"ד אסור לבצוע קאמר הכי, דאע"ג דאסור לבצוע, מה שעושין מדעת בעלי דינין אין זה בצוע אלא הבאת שלום היא, שטורחין ומפייסין בעלי דינין עד שיתרצו ויהא שלום ביניהם. ואין לך מצוה גדולה מזו, וכך היה עושה אהרן. אמנם אין להכריחם ולעשותם אלא לרצותם ולפייסם, והבצוע שהוא אסור הוא הפשרה שמטילין עליהן ע"כ.

c. *What may we learn from the identity and methods of rodfei shalom (pursuers of peace) in Jewish history regarding the role of mediation today?*

<p>"And <i>rodfei shalom</i> entered in between them." (Spain, 11<sup>th</sup> Century)</p>	<p>"And I asked them to make peace, as is the way of the <i>rodfei shalom</i>." (Greece, 16<sup>th</sup> Century)</p>	
<p>"The honored, <i>rodfim shalom</i> and truth, pleaded, Chayim Chalfan..." (Italy, 15<sup>th</sup> Century)</p>		<p>"And people of truth, <i>rodfei shalom</i>, entered themselves (into the conflict) in order to try and make peace between you." (Prague, 15<sup>th</sup> Century)</p>
<p>"And <i>rodfei shalom</i> entered (into the conflict), Moshe Elbaz, and Shlomo ben Maimon...." (Morocco, 18<sup>th</sup> Century)</p>	<p>"And <i>metavchei shalom</i> entered in between them." (Egypt, 1950's)</p>	



## Mediation in Jewish & Contemporary Law & Practice

d. *Examples of failed attempts of pursuers of peace to make peace:*

1. *The agreement of the rodfei shalom was against the law*

**Rabbi Yoseph ben Meir ibn Miqash Halevi, (1077 – 1141 Sapin) Responsa of the R"Y Miqash [in Hebrew], responsum 101.**

[Question] Pursuers of peace (*rodfei shalom*) entered between them and [the husband] stayed with her in the rented home for another five years for twelve dinars a year.... And every day conflicts arise between them.....

[Response] And what the pursuers of peace (*rodfei shalom*) did to compromise between them, and he rented her a home, this should only be so if he [the husband] had already been renting a home with her mother-in-law, and it was indeed true that the mother-in-law was causing her suffering....

2. *The agreement of the rodfei shalom was not clear enough*

**Rabbi Israel of Bruno, (1400–1480, Germany) Shut Mahari Bruna (Responsa of Rabbi Israel of Bruno) [in Hebrew] (Jerusalem: 1960), responsum 78.**

And it has been over two years since this iniquity of yours began. And people of truth, pursuers of peace (*rodfei shalom*) entered themselves in to attempt to make peace between you. And they made between you a written [agreement] tied together strongly written with strong prohibitions [against transgressing the agreement].

3. *Claims that the agreement of the rodfei shalom was signed under coercion and testimony of a rodef shalom in court.*

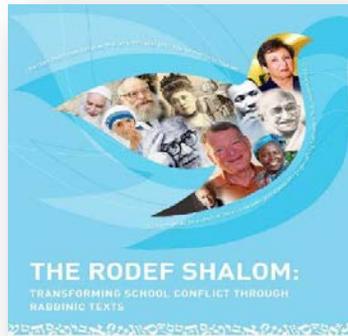
**Rabbi Joseph Colon Trabotto, (1420–1480, North Italy) Shut Maharik (Responsa of Rabbi Joseph Colon Trabotto) responsum 185.**

The response indicates that there was a conflict over inheritance, with the deceased's brother disputing the deceased's wife and her brother. A conflict between the sides was settled by "distinguished [individuals], pursuers of peace and truth." The agreement concluded that the deceased's brother would pay the full value of the marriage contract; however, the additional debts due to his brother-in-law were nullified. In addition to this, the widow and her brother agreed to swear that they would not harm the deceased's brother. After the agreement was reached, the deceased's brother attempted to appeal, claiming that what he gave was "beyond the base value of her marriage contract was given under duress, since the wife's brother had threatened to take him to non-Jewish courts." At this point, Rabbi Joseph Colon Trabotto responds to the question. He dismisses the deceased's brother's claim, ruling in favor of the widow. In part, this is due to a letter sent to him by one of the pursuers of peace, Chaim Chalfan, who appears to have been the treasurer of the community. Chalfan attests to the fact that the deceased's brother agreed to add on to the value of the marriage contract not as a result of threats, but rather because in exchange all the other debts he had to her were nullified.



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Jewish Day of  
Constructive Conflict  
[WWW.9ADAR.ORG](http://WWW.9ADAR.ORG)

The [Pardes Center for Judaism and Conflict Resolution](http://www.pcjcr.pardes.org/) (PCJCR) seeks to strengthen the Jewish culture of healthy and constructive conflict (machloket l'shem shemayim) and the pursuit of peace (redifat shalom) through the integration of Jewish texts and values along with contemporary conflict resolution theories and practices. To this end, PCJCR runs a variety of Rodfei Shalom programs which target specific audiences within the Jewish population as well as 9Adar: Jewish Day of Constructive Conflict.

For more information about the Pardes Center for Judaism and Conflict Resolution and 9Adar, please see <http://pcjcr.pardes.org/> and <http://9adar.org/>.