

# The Debate Over Compromise and the Goals of the Judicial Process

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## Introduction

Talmudic literature documents a sharp debate among the tannaim regarding the legitimacy of the process of compromise or, to be more precise, of the process of *bitsu'á*. This dispute appears in a well-known passage in *Tosefta Sanhedrin*, chapter 1, and in both Talmuds (*y.Sanh.* 1:1 [18b], *b.Sanh.* 6b), and is also mentioned briefly in *Sifre Deuteronomy* §17.<sup>1</sup> Even upon first glance it can be seen that the debate assumes a principled character, relating to goals and values that lie at the very basis of the judicial process: truth, peace, and justice. Examination of the toseftan passage reveals that it is a well-fashioned and well-edited unit that not only presents positions but also discussion of the legal questions relating to compromise and the goal of the judicial process. However, this passage requires clarification and interpretation. First of all, concerning what kind of compromise, precisely, is there disagreement? Does it refer to every process of compromise or only to a particular kind of compromise? Second, what are the reasons underlying the controversy, and what are the different understandings of the judicial process that find expression therein?

The question of the nature of compromise in the talmudic sources has been discussed by scholars on a number of occasions, but I think

1 Louis Finkelstein, ed., *Sifre on Deuteronomy* (New York: JTS Press, 2001), 28-29.

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that we have not yet attained an adequate analysis of this institution. In particular, the special nature of the process of *bitsu'a* that stands at the heart of the tannaitic dispute has not yet been clarified. Hence, I will begin this paper with a fundamental analysis of compromise; thereafter, in the second section, I will examine what kinds of compromise are discussed in the tannaitic sources. This discussion will enable us to define the precise meaning of *bitsu'a*, that type of compromise concerning which the tannaim disagreed. The third section will be devoted to a textual and literary analysis of the unit within which the tannaitic controversy is located. The fourth section will be concerned with a theoretical analysis of that debate. I will show that the talmudic debate presents a principled, jurisprudential dispute relating to the nature and goals of the judicial process. For this purpose, I shall make use of insights which have emerged in the course of discussion of compromise in contemporary legal literature. As I shall show, notwithstanding the great differences in time and culture, it is possible to make use of these insights in order to shed light upon the ancient texts.

### I. Compromise: Conceptual Observations

Compromise is generally defined as a process in which two or more disputing sides arrive at an agreement involving mutual concessions in order to resolve the dispute between them.<sup>2</sup> This definition involves two principal elements: one relating to the **process**, whose essence is agreement between the sides; the second pertaining to the **result**, whose essence is the resolution of the dispute by means of mutual concessions, that is, by finding a “middle way.” Both conditions are vital for the existence of a compromise. The resolution of the dispute

2 M. Golding, “The Nature of Compromise: A Preliminary Inquiry,” in *Compromise in Ethics, Law and Politics*, eds. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1979), 3-25; J. P. Day, “Compromise,” *Philosophy* 67 (1992): 399-406; A. Hassid, “Ethical Compromise – Two Justifications” (Hebrew), *Iyyun* 50 (2001): 107.

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by means of agreement, in which one side accepts the demands of the other in full, is not considered a compromise, as the result does not reflect mutual concessions. A solution in which an authoritative third-party imposes upon both sides a “middle-of-the-road” solution is sometimes referred to as a compromise, but in fact only the result is a compromise. In the absence of agreement, there is no true process of compromise here.

The process of attaining compromise may be done in a variety of ways. One way is by means of direct **negotiation** between the parties, at whose end they agree upon an agreement for resolving the dispute. In this method there is a direct relationship between the parties and the result of compromise attained at the end. A second method is by means of **mediation**, in which the parties find it difficult to conduct the negotiation between themselves directly, and resort to the assistance of a third-party who mediates between them, and who may even present various suggestions for compromise that might be acceptable to them. In this case, the mediator’s suggestions are not binding, and each party retains the right to agree to the solution proposed or to reject it. This method, too, reflects an explicit agreement between the parties for the compromise suggested. However, the involvement of a third-party is likely to exert influence upon the parties to agree to things about which they originally would not have agreed.<sup>3</sup> A third way of attaining compromise is by means of **arbitration**. If both parties turn to this method, it is generally in a case where they are unable to arrive at a compromise by themselves or by means of mediation; therefore, they

3 The modern doctrine of mediation seeks to create a neutral mechanism of mediation that allows the sides to express their opinion and to realize their interests in the best way. See Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1983). On various kinds of mediation, see L. L. Riskin, “Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed, 1,” *Harvard Negotiation Law Review* 1 (1996): 7-51. For a discussion of the theory of mediation, see M. Alberstein, *The Jurisprudence of Mediation* (Hebrew) (Jerusalem: Magnes, 2007).

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seek a decision from an outside party. Unlike the situation of mediation, in which the suggestions of the mediator are not obligatory, the decisions of the arbitrator are binding. However, not all arbitration ends in compromise. If the parties ask the arbitrator to decide in a dispute on the basis of what seems to him to be just, and he decides in favor of one party against the other, the result is not compromise. If, on the other hand, the parties ask the arbitrator to decide following the path of compromise, and he indeed issues a ruling of “the middle way,” then what has been accomplished is a compromise. That is to say, even in a case of arbitration both elements need to be present – agreement and result – in order to be considered a compromise. Yet, in the case of arbitration, the element of agreement assumes a different guise. One is no longer speaking of a concrete agreement involving the resolution of the dispute, but rather of a principled agreement between the parties involved to enter into a process of compromise and to accept upon themselves the decision of the arbitrator. These three methods were already known in ancient legal systems such as Greek and Roman law, and are to a large extent accepted to this day.<sup>4</sup> As we shall see, they were also known to Jewish law and to the talmudic sources.

Processes of compromise by means of negotiation, mediation, and arbitration are frequently conducted outside the courtroom and without its involvement. The parties can turn to these methods after the dispute has arisen in order to resolve the matter before it reaches the stage of litigation. On occasion, appeal to them may be done during the course of legal proceedings, after a lawsuit has already been presented. In such cases, the court is likely to be involved in the process of compromise. Its degree of involvement can take place on various levels, beginning with postponing litigation until the sides reach an agreement between themselves, pointing the parties towards a process of compromise,

4 Derek Roebuck, *Ancient Greek Arbitration* (Oxford: Holo, 2001), 17; Derek Roebuck and Bruno de Loynes de Fumichon, *Roman Arbitration* (Oxford: Holo, 2004), 11-15; S. Goldberg, F. Sander, and N. Rogers, *Dispute Resolution* (Boston-Toronto-London: Aspen Publishers, 1992).

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using mediation in attaining a compromise, and even issuing a ruling of compromise.

Processes of compromise made outside of court do not generally raise any special problems of legitimacy or legality. One is speaking of agreements that belong to the private realm; so long as one is not speaking of illegal agreements, the law has no special reason to oppose them. Indeed, it would appear that all legal systems recognize the legality of such procedures. Of course, there is room to discuss the benefits and drawbacks of compromise as opposed to judicial proceedings, both in terms of efficiency or effectiveness and in terms of the level of justice and other social considerations.<sup>5</sup> But the very legitimacy of this procedure is not disputable. As against this, the issue of the involvement of the court in proceedings of compromise is more problematic. Such involvement is perceived as liable to obscure the boundary between a decision required by the law and a solution made by the agreement of the sides. And indeed, not all legal systems allow the court to become involved in processes of compromise and, even where the court is permitted to do so, the degree of involvement tolerated varies from one system to another. In ancient times there was usually a relatively clear separation between legal proceedings and extra-legal proceedings. According to Roman law, the judge was required to rule according to law and was not permitted to become involved in making a compromise. If the parties were interested in compromise after the proceedings had begun, they were allowed to withdraw their suit and to arrive at a compromise. The question that arose in Roman legal writings is whether the judge is permitted to

5 Such questions have already been discussed in ancient literature, mostly regarding the comparison between arbitration and a judicial proceeding. Cf. the two works mentioned above (n. 3). In modern literature, the question of compromise agreements is also discussed. Generally speaking, there is a consensus among the authors as to their legitimacy, even though they may give different justifications. On this matter, see the literature cited in n. 1. On questions of justice discussed in this context, see below, section 4 of this paper.

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advance the process of compromise by suspending litigation and encouraging the sides to enter into a process of compromise. In any event, it was clear to all that he was himself not permitted to offer suggestions for compromise.<sup>6</sup> Other systems that recognized the authority of the court to become involved in the process of attaining compromise did not recognize its authority to issue a ruling based on compromise, even if the sides agreed to do so. In Western legal systems, such authority was only recognized at the end of the twentieth century.<sup>7</sup>

## II. Compromise in Tannaitic Sources: *Pesharah* and *Bitsu'a*

Processes of compromise appear in tannaitic and amoraic sources in various contexts, and are also referred to by different terminology. In this section I wish to demonstrate that the tannaitic sources are familiar with the different forms of making compromise, and even distinguish between them. The most striking distinction finds expression in two terms used in the sources: *pesharah*, translated here as “compromise,” which is the more widely-used term; and *bitsu'a* (lit., “dividing”), which is less frequently used, and around which is conducted the tannaitic dispute. As we shall see below, even the term *pesharah* includes various methods of making compromise. But before discussing this, I need to say some words about the history of the interpretation and research relating to compromise, which has thus far not taken note of these distinctions. At first blush, the terminological distinction clearly indicates a distinction between two different kinds of compromise. However, already in the amoraic sources this distinction is somewhat obscured. Both the Babylonian and the Palestinian Talmud identify

6 J. M. Kelly, *Roman Litigation* (Oxford: Oxford University Press, 1966), 132-52.

7 Such authority was first recognized in Israel in 1993: Law of Courts, §79a (Amendment 15).

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*bitsu'a* with *pesharah*, and see them as one and the same thing. The two terms appear alongside one another and are seemingly interchangeable.<sup>8</sup> In the wake of this, all the traditional commentators and almost all of the modern scholars identified them with one another.<sup>9</sup> In their eyes, the controversy regarding *bitsu'a* is a controversy over *pesharah*. But even if one accepts this identity, one must ask: What *kind* of compromise is *bitsu'a*? Does it refer to an agreement between the parties or to a judicial ruling of compromise? This question is not explicitly discussed in the Talmud, nor did the medieval commentators provide a single, unequivocal answer.<sup>10</sup>

In scholarship as well, different opinions have been expressed. Asher Gulak, who seems to have been the first scholar to deal with this subject in a systematic way, was also the only one who attempted to

- 8 See, e.g., *b.Sanh.* 6b-7a. The Talmud cites there the ruling of Rav: “The law follows R. Joshua b. Korḥah” (who said that “it is a mitzvah to divide [perform *bitsu'a*]”), contrasting this with the practice of Rav Huna to inquire of the litigants: “Do you prefer [a decision by] law or by compromise.” Similarly in the conclusion of the discussion: “What mitzvah is involved here also? As R. Joshua b. Korḥah said: It is a mitzvah to say to them: Do you prefer [a decision by] law or by compromise?” The Palestinian Talmud (*y.Sanh.* 1.1 [18b]) incorporates within the *baraita* concerning *bitsu'a* the words of Rav Matanyah: “Even compromise requires a mental decision.”
- 9 See, e.g., Rashi, *b.Sanh.* 6a, s.v. *bitsu'a – pesharah*, and all the other Talmud commentators there. For the modern scholars, see below.
- 10 Many of the commentators did not relate to this at all. Among those who did refer to the issue, one should mention in particular the author of *Halakhot Gedolot*, who interpreted *pesharah* as a process of mediation by which people who are not judges bring the litigants to an agreement (*Sefer Halakhot Gedolot, Hil. Dayyanim*, ed. Hildesheimer [Jerusalem: Mekize Nirdamim Publishers, 1987], part III, 14-15). Rashi and *tosafot* did not give an exact definition of the process of *pesharah* but it follows from what they said that, according to them, it refers to a process performed in court (see, e.g., Rashi on *b.Sanh.* 6b, s.v. *asur livtso'a; aval aḥaron*; and *tserikhah kinyan*). Another explicit definition was given by Isaiah di Trani (the Younger), according to whom one is speaking of a ruling of compromise issued by the court (*Piskei Ria”z ‘al Masekhet Sanhedrin* (Jerusalem: Makhon ha-Talmud ha-Yisraeli ha-Shalem, 1994), 19).

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distinguish between *pesharah* and *bitsu'a*. In his opinion, *bitsu'a* is a process similar to that accepted in Roman law, in which an official or judge who is authorized to do so brings the dispute to mediation.<sup>11</sup> Thus, the tannaitic dispute over *bitsu'a* relates to the question as to whether or not the judge is allowed to transfer the resolution of the dispute to decision before a mediator. However, this suggestion has no real basis in the sources, and failed to convince subsequent scholars. From that point on, scholars abandoned the attempt to distinguish between *pesharah* and *bitsu'a*, and all assumed that they represent one and the same institution. Boaz Cohen, who wrote a comprehensive study of arbitration in Jewish law, saw *pesharah* as a process of arbitration. He noted that in a number of tannaitic sources *pesharah* refers to a private agreement between the parties, but in his view the developed legal institution of *pesharah* means mediation or arbitration.<sup>12</sup> In recent years this matter has been studied anew, but scholars continue to adhere to the opinion that *pesharah* and *bitsu'a* represent a single institution. Berachyahu Lifshitz has suggested an original interpretation, according to which *pesharah* is a judicial process whereby the parties agree to have their case adjudicated before a court of law. It differs from *din*, a regular judicial process, in its source of authority. While *din* is based on the law, *pesharah* is based on agreement between the parties. In practice, the court would judge in both procedures according to identical legal principles, and thus the result of *pesharah* would not be different from that of *din* ("law").<sup>13</sup> According to Lifshitz, *pesharah* and *bitsu'a* refer to the same procedure. Itay Lifshitz comprehensively discusses the idea of *pesharah* in tannaitic and amoraic sources and in the medieval commentaries. He likewise arrives at the conclusion that *bitsu'a* is to be

11 A. Gulak, "Bitsu'a in Talmudic Sources" (Hebrew), *Yavneh* 3 (1943): 19-34.

12 Boaz Cohen, "Arbitration in Jewish Law," in *Jewish and Roman Law II* (New York: United Synagogue Book Service, 1966), 651-709.

13 Berachyahu Lifshitz, "Pesharah" (Hebrew), in *Kovets Mishpete Eretz* (Ofrah: Mekhon Mishpete Eretz, Bet Midrash Gavoah la-Halakhah u-Mishpat, 2002), 137-51.



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identified with *pesharah*, and sees both as indicating a process of compromise made in court. But he rejects the position of Berachyahu Lifshitz, and thinks that the process of *pesharah* brings about a real compromise between the sides.<sup>14</sup> These two scholars interpret the talmudic sources in a homogeneous way (each consistent with his approach), assuming that the term *pesharah* signifies a single legal institution that appears in the same manner in all the sources, even those which speak of *bitsu'a*. As we mentioned, the only attempt to distinguish between *pesharah* and *bitsu'a* was that of Gulak, which failed. Nevertheless, the fact that the interpretation he proposed did not meet the test of criticism does not mean that the distinction per se is not correct. To the contrary, the distinction between *pesharah* and *bitsu'a* in tannaitic sources is quite clear. One who examines the tannaitic sources in a manner distinct from the amoraic sources will see that the two terms appear there in a manner distinct from one another. To begin with, they appear in different contexts. In those places where *pesharah* is mentioned, *bitsu'a* is not mentioned, and vice versa. Moreover, the attitude towards them is completely different. *Pesharah* is not subject to controversy, while *bitsu'a* stands at the heart of a tannaitic dispute. True, the talmuds identified the two with each other, as there is a certain proximity between them, but the point of departure for the historical interpretation of the tannaitic sources must be based upon a distinction between them.

In what follows, we shall see that the term *pesharah* designates a compromise that has been obtained through various means. It seems likely that its fundamental meaning was that of a private settlement made between the sides in order to resolve a dispute. Nevertheless, it also appears in the context of an arrangement made in the court and through its good offices. It likewise indicates an initiated procedure, similar to arbitration, in which the two sides turn from the outset to a

14 A. A. Lifshitz, "Compromise in Jewish Law" (Hebrew) (PhD diss., Bar-Ilan University, 2004), 47-63, and cf. 65-101.

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procedure of compromise. One is therefore speaking about three accepted ways of arriving at a compromise. As against this, the term *bitsu'a* appears in a specific context, and indicates a process whereby the judge makes a compromise ruling in the context of a judicial decision.

### II. 1. *Pesharah* as an Agreement Between Litigants

In the Mishnah and the Tosefta, *pesharah* is mentioned as a solution to a particular kind of problem, to which the law does not offer a legal solution due to the conflict of equal claims between which it is impossible to decide, or due to a difficulty involving evidence. The solution proposed in these sources is to conclude the dispute by a compromise agreement obtained by negotiation between the sides.

In *m.Ketub.* 10:6 we read:

One who was married to two women and sold his field: [if] the first wife wrote [to the purchaser], "I do not have any claims on you," the second one takes it [the field] from the hand of the purchaser, and the first [wife] from the second, and the purchaser from the first one – and so it continues around and around until they make a compromise (*pesharah*) among themselves; and similarly with a creditor.<sup>15</sup>

The first wife promised the purchaser that she would not attempt to collect the land, which had been liened to the money specified in her marriage contract (*ketubbah*). The second wife did not make any such commitment and therefore, when the time comes, is able to collect her *ketubbah* money from the purchaser. The first wife, whose claim preceded that of the second, can then collect the land from the second wife. The purchaser, whose claim takes precedence to that of the first wife, can in turn collect it from her – and matters can continue thus indefinitely; the claims thus pass from one to another in an endless

15 The text of the mishnah is brought here according to MS Kaufmann. In another printing it is written: וכן אשה בעלת חוב.

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circle. The law does not provide any solution to this problem; hence, it can only be resolved by means of *pesharah*, “compromise” – that is to say, an arrangement among the various parties that resolves the dispute.

To whom are the instructions of the mishnah addressed: to the litigants or to the court? Or, to put it differently: upon whom is the obligation to make the compromise incumbent?<sup>16</sup> From a linguistic and formal viewpoint, the mishnah does not propose any obligatory solution to the dispute. It does not state how one ought to behave, but merely says that the rights will continue to pass from hand to hand in an endless circle “until they make a compromise among themselves.”<sup>17</sup> Thus, one cannot assume that it instructs the court to rule on this dispute by way of compromise; rather, the suggestion is one addressed to the litigants, that they arrive among themselves at a compromise solution – that is to say, a “peaceful agreement.”<sup>18</sup> Hence, one is speaking here of a private agreement among the parties to the dispute.<sup>19</sup>

16 The Talmuds do not discuss this problem, nor do the traditional commentators on the Mishnah. Maimonides, and in his wake the *Tur* and *Shulhan Arukh*, interpreted the statement literally: “until they make a compromise between them,” and did not elaborate (Maimonides, *Mishneh Torah*, Hil. *Ishut* 17:12; *Tur* and *Sh.Ar. EH* 100:4, and ad loc. in *Ḥelkat Meḥokek*: “The manner in which they made compromise is not explained in the *gemara*”; and see below).

17 If this mishnah were prescriptive, it would have read, “and they make a compromise between them,” or, more explicitly, “the court makes a compromise between them.”

18 Maimonides, *Perush ha-Mishnah* to *m.Ketub.* 10:6, according to the translation of Rabbi Kapah.

19 In practice, an agreement between any two of the three sides can stop the circle and resolve the dispute. There are three possible coalitions: between the first wife and the purchaser, between the second wife and the purchaser, and between the two wives. Hanokh Albeck, in his commentary on the mishnah, explains that the compromise must be between the second wife and the purchaser, but does not explain why specifically those two. The language of the mishnah, “and it continues around and around,” can be read so as to suggest that the compromise needs to be made specifically between the two wives. However, as one is speaking of a voluntary

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A similar problem is discussed in *t.B. Qam. 2:10*.<sup>20</sup>

If one of them [i.e., donkeys] was loaded and one of them was being ridden, the loaded one passes by before the one with a rider. If one was burdened and one was empty, one passes the empty one before the burdened one. If one had a rider and one was empty, one allows the empty one to pass before the one with a rider. If both were burdened, if both had riders, if both were empty, one makes a compromise between them. Similarly, two ships which were passing opposite one another, and one is unloaded and the other loaded, one allows the empty one to pass before the loaded one. If both were unloaded, or both were loaded, one makes a compromise between them.

In a situation where there is a narrow passage, the halakhah establishes rules of priority, whose essence is that the donkey with a rider takes precedence, thereafter the one that has a burden, and finally the one that is empty. Similarly, in the case of ships, the one loaded takes precedence over the one that is empty.<sup>21</sup> However, when both of those passing were equal to one another, there is no general rule enabling one to decide which takes precedence; hence, the solution must be that “one makes a compromise between them.” Is this instruction addressed to the parties involved or to those charged with judgment? From the language of the tosefta in the case of the ships, in which the Hebrew uses the feminine pronoun, referring to ships, it is clear that the compromise is made between the parties involved and not by the court.<sup>22</sup> In other

agreement it is difficult to see what is would prevent the purchaser from making an agreement with either one of them. And indeed, later authorities thought that an agreement between any two sides is possible. See *Helkat Mehokek* on *EH 100:4*, §26.

20 Saul Lieberman, ed., *Tosefta ki-fshuta* (New York: JTS Press, 2002), 8. See the parallel *y.B. Qam. 3:4* (3d) and *b.Sanh. 32b*, with minor variants.

21 The Yerushalmi adds the case of wagons, where the law is similar to that of ships.

22 One ought to understand the wording of the Yerushalmi, “they shall make a compromise among themselves,” in a similar fashion.

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words, one is speaking here of a private compromise arrangement. In this case, too, the law does not give a solution. Hence, the resolution of the dispute requires that the parties involved arrive at an agreement between themselves.<sup>23</sup>

A similar problem is discussed in *t.B. Meṣi'a* 3:5:<sup>24</sup>

He said to two people: "I stole a *maneh* [coin worth 100 units] from one of you, and from one of you I stole 200, but I do not know from which one of you," he pays this one 200 and that one 200; otherwise, he ought to have kept his silence. This one says: "The 200 belongs to me," and this one says: "The 200 belongs to me," he gives each one a *maneh* [100],<sup>25</sup> and he does not give them the rest until they make a compromise between them.

The halakhah distinguishes here between two different cases. In the first case, the thief himself admitted that he had stolen 200, but does not know from whom he stole [that sum]; hence, he is required to pay 200 to each one.<sup>26</sup> In the second case, the two victims are both suing him, each one for 200 that was taken from them. As he admits that he owes no more than 200, the law requires him to pay 100 to each of them, and the remaining hundred need not be paid until the parties make a

23 In the Babylonian Talmud, the baraita concludes with the phrase "he imposes a compromise between them," implying that the compromise is made by the court. However, one ought not to infer from the language of the Talmud regarding the literal meaning of the baraita. Indeed, the Talmud assumes that the *pesharah* is done as a judicial ruling; see on this below in the discussion of the Babylonian Talmud.

24 Lieberman, *Tosefta ki-fshuta*, 73.

25 According to MS Erfurt: נותן לזה מנה ולזה מנה (and the sense is the same).

26 Something similar appears in *m.B. Meṣi'a* 3:3 and in *m.Yebam.* 15:7: "If he stole from one of five people, and does not know from which one he stole, and each one says, 'He stole from me,' he places the stolen object among them, and runs away: thus the words of R. Tarfon. But R. Akiva said: This way does not save him from transgression, until he pays each one of them." The mishnah in *Bava Meṣi'a* and the tosefta support R. Tarfon. Cf. Lieberman, *Tosefta ki-fshutah*, 171.

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compromise between them.<sup>27</sup> As one cannot know to whom to give the additional *maneh*, the matter hinges upon the agreement reached by the two claimants.

In all these cases, one is speaking of a dispute for which there is no solution under law. Therefore, the solution proposed by the halakhah is one of compromise, obtained by negotiation between the two sides. The concept of *pesharah* thus indicates a private agreement between the sides that does not involve the court. One may assume that, were the matter to come to the attention of the court, it would advise the sides to compromise between themselves, but in principle there is no need for involvement of the court – neither by means of mediation nor by judicial decision. The fact that a compromise of this type is mentioned in that case for which there is no other solution under law does not mean that compromise is illegitimate in other cases. One may assume that the parties could arrive at a compromise agreement in other cases as well, but in such cases there is no reason for the law to recommend this. The law recommends this path only in those cases in which there is no other legal remedy.

### II. 2. *Pesharah* in the Legal Process (Mediation)

The term *pesharah* is also used to indicate an arrangement obtained during the course of a discussion in court. *Mekilta de-Rabbi Yishmael* on the verse, “When they shall have some matter [i.e., dispute], they shall come to me, and I shall judge between a man and his fellow” (Exod. 18:16), comments as follows:

“I shall judge between a man” – this refers to judgment in which there is no *pesharah* [compromise]; “and his fellow” – this refers to

<sup>27</sup> For a similar law, see *m.B. Meṣi'a* 3:4 regarding one who loans money: “Two people who left money with one person: this one left one *maneh* (i.e., 100) and this left 200; this one says: the 200 is mine, and that one says, the 200 is mine – he gives this one 100 and that one 100, and the balance shall remain until Elijah comes.” See Lieberman, *Tosefta ki-fshutah*, 171.

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judgment in which there is compromise, in which the two of them part from one another as fellows.”<sup>28</sup>

In the verse expounded, Moses describes the manner in which he behaved when judging Israel. The midrash attempts to include within this verse compromise as well, saying that Moses judged not only according to the letter of the law, but also by way of compromise.<sup>29</sup> Both situations mentioned in the homily involve “judgment,” that is, judicial procedure. The one involves regular judicial procedure – “judgment in which there is no compromise (*pesharah*)” – while the other is “judgment in which there is compromise.” It is clear that the compromise mentioned here is not a private compromise agreement of the type mentioned in earlier sources, but rather an arrangement made in court when the parties come to clarify their matter before it. The compromise mentioned here is not limited to those cases in which there is no solution available in the law, but is appropriate to every kind of dispute between people and is intended to resolve it in such a manner that “the two of them part from one another as neighbors.” The concise language of the midrash does not specify the nature of the judicial activity, but it appears to refer to mediation in which the judge leads the parties to an agreement between themselves. The nature of this *pesharah* within the context of the legal process is clarified later in the midrash.

Further on in the same section of this midrash, in the course of a tannaitic dispute, a compromise of this type is mentioned: “Those who fear God’ [Exod. 18:21] – those who fear the Omnipresent when engaged in judgment... Thus says R. Joshua; but R. Eleazar the Modaite says... ‘Those who fear God’ – this refers to those who make a compromise

28 Horowitz, ed., “Masekhta de-Amalek, Parasha Bet,” in *Mekilta de-Rabbi Yishmael* (Jerusalem: Wahrman Books, 1970), 196, and see the similar language in the *Mekilta de-Rabbi Shimon bar Yoḥai*, *Yitro*, 18:16 (132).

29 This homily seems opposed to *t.Sanh.* 1:2 and parallels (ed. Zuckerman, 415), in which Moses is depicted as following the approach, “let the law pierce the mountain” – i.e., strict construction that does not deviate from the letter of the law.

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within judgment.”<sup>30</sup> The focus of the controversy between the two revolves around the interpretation of the word *elohim* [translated here as “God”]. According to R. Joshua, it ought to be interpreted in its literal sense: those who are informed by fear of “the Omnipresent” while sitting in judgment. As against that, according to R. Eleazar, it should be interpreted in the sense of judges: “Those who fear God” are those who are reluctant to sit in judgment – and therefore prefer performing compromises when sitting in judgment.<sup>31</sup> The making of compromise – that is, bringing the litigants to an agreement – enables the judge to resolve the dispute without having to make a ruling as such.

Does the exegetical dispute between R. Joshua and R. Eleazar also reflect a normative dispute regarding the legitimacy of compromise? It is clear that R. Eleazar praises compromise; does R. Joshua disagree with him on this point? There is no need to assume this, nor does it seem particularly likely. The two tannaim disagree in the *Mekilta* on a series of exegetical issues. As others have already noted, their dispute is systemic, R. Joshua tending more towards a literal interpretation and R. Eleazar the Modaite tending more towards allegorical interpretation.<sup>32</sup> According to the approach of the latter, the word *elohim* needs to be interpreted in the sense of judges – and, consequently, one may incorporate compromise within the framework of the verse. By doing so, one is not saying anything about R. Joshua’s attitude towards *pesharah*. It is quite likely – indeed, it seems to be the case – that R. Joshua views *pesharah* in a positive light, but simply does not see it as included within the rubric of the verse in question. A similar dispute appears in the

30 Horowitz, ed., “Masekhta de-Amalek, Parasha Bet,” in *Mekilta de-Rabbi Yishmael*, 198.

31 Unlike Horowitz (ibid.), who claimed that both of these tannaim interpreted *elohim* as referring to judges. But this is precisely the emphasis of R. Joshua when he says that “they fear the Omnipresent in judgment”; and see the next note.

32 See Menahem Kahana, *Two Mekhilot on the Amalek Portion: The Originality of the Version of the Mekhilta d’Rabbi Ishma’el with Respect to the Mekhilta of Rabbi Shim’on ben Yohay* (Hebrew) (Jerusalem: Magnes Press, 1999), 288.



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midrash near this same passage: “And the deed which shall be done’ [Exod. 18:20] – this refers to a good act, according to R. Joshua. R. Eleazar says: ... ‘the deed’ – that is the letter of the law; ‘which shall be done’ – that is going beyond the letter of the law.”<sup>33</sup> R. Eleazar the Modaite interprets the repetition of the language used as also including “beyond the letter of the law.” Should one assume that R. Joshua disagrees with the value of going “beyond the letter of the law”? There is no reason to assume so. According to R. Joshua’s exegetical system, the principle of “beyond the letter of the law” is not implied by this verse, but he certainly accepts the principle as such. The same would seem to be the case regarding our matter as well. R. Joshua does not take exception to the institution of *pesharah* as such, but does not see it as derived from Scripture.

### II. 3. *Pesharah* as Arbitration

Unlike the previous case, in which we spoke about mediation as bringing about a compromise within the framework of the judicial process, it is also possible to bring about a compromise through a process initiated by the litigants *ab initio*, in a process intended to resolve the dispute through compromise. The procedure involved is a kind of arbitration, in which the two sides initially choose an individual or group of people to resolve the dispute through compromise. In the tannaitic sources there is a debate regarding the composition required for such a move. According to one opinion, in *t.Sanh.* 1:2, “Just as judgment is performed by three, so ought compromise to be done by three.” According to this view, there is no difference between the process of *pesharah* and the regular judicial process. As against that, according to the opinion of R. Shimon b. Gamliel, “Judgment is with three and compromise with two. The power of compromise is stronger than that of judgment, for two people engaged in judgment can retract

<sup>33</sup> Ibid., in the previous and the adjacent homily.

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their ruling, while two who have mediated cannot retract.”<sup>34</sup> According to this view, compromise differs from judgment in that it does not require a bench of three people. According to a third opinion, the process of compromise may be performed by a single judge or mediator.<sup>35</sup> These sources speak of a judicial move, intended from the outset to rule by way of compromise. One is not speaking here of a compromise ruling made during the course of a regular legal procedure, as in such a case the issue of composition of the bench would not have arisen. Are those making the compromise here acting as mediators between the parties, or as judges laying down the law? It appears that we are dealing here with a ruling made by way of *pesharah*, for were we speaking about mediation, the validity of the arrangement would depend upon the agreement of the parties and not upon the number of judges involved. It therefore seems clear that we are dealing here with a procedure similar to that of arbitration, in which the arbitrators are asked to make a ruling based upon compromise. According to the first opinion, such a group acts as a court, and therefore needs to include three judges, whereas according to R. Shimon b. Gamliel, such a unit differs from a court and may consist of two people; according to the third opinion, a single judge is sufficient.<sup>36</sup>

34 *t.Sanh.* 1:9, and also the Talmuds. I have cited the words of R. Shimon b. Gamliel according to the version of the Yerushalmi and the Bavli. But according to the version of the Tosefta, the first part of his statement is as follows: “Just as judgment requires three, so does compromise require three.” But this version contradicts the final clause, and it would appear that the text is corrupt.

35 *t.Sanh.* 1:1 and *b.Sanh.* 6a. It should be noted that this opinion relates to *bitsu’a*. The use of this term here is connected with the meaning of *bitsu’a* as a ruling of compromise (see below).

36 According to the Talmud’s conclusion in *b.Sanh.* 6a, there are not three different views, but only two, as the one who thinks that “compromise requires two” agrees that it is sufficient even to have an individual arbitrator, and requires two only for purposes of testimony to the procedure.

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### II. 4. *Bitsu'a* (ביצויע)

The term *bitsu'a* appears both as a noun and verb, and in various different declensions. The context is always that of judicial activity – that is, it is always the judge who performs *bitsu'a*. This would suggest that it does not refer to a compromise reached between the litigants, but rather to a judicial decision issued by the judge. The meaning of the term must be understood against the background of its original use in the context of breaking bread (ביציעת הפת); it follows from this that its meaning is of a ruling that gives a certain portion to one litigant and another portion to the other.<sup>37</sup> In other words, *bitsu'a* is a ruling of compromise that divides the rights between the parties and does not rule unilaterally on behalf of one side or the other.

The nature of *bitsu'a* may be inferred from a passage in the Tosefta which quotes the following statement of R. Shimon b. Menasya:

Sometimes a person should divide (יבצע), and sometimes he should not divide. How so? Two people come before him for judgment; before he has heard their words, or if he has heard their words but does not yet know in which direction the law tends, he is allowed to say to them: Go and divide (צאו וביצעו). But once he has heard their words, and knows whence the law tends, he is not allowed to say to them: Go and divide.

We are initially told that *bitsu'a* is performed by the judge during the course of the judicial process. At the beginning of the passage, the subject of the verb *yevatse'a* is the judge, but further on the subject of the verb *bitsu'u* is the litigants – albeit the act is performed at the behest

<sup>37</sup> This association follows explicitly from the *t.Sanh.* 1:3 in the words of R. Eliezer b. Ya'akov (in a section which I have skipped). See *Tosafot ha-Rosh, b.Sanh.* 6b: “*Bitsu'a* refers to compromise, as in ‘He places the broken piece within the whole one and divides it.’ So too is it the way of one making a compromise to break the matter and to divide it, giving a little bit to each one.”

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of the judge. The language used in the ruling, “go and divide,” suggests that the text refers to a technical division which the parties are able to conduct by themselves, an arrangement that resembles the method of *yaḥaloku*, “let them divide.” *Bitsu’a* is thus a judicial decision requiring the litigants to divide amongst themselves. It should be noted that nowhere does the judge address the parties to receive their consent to this procedure; hence, it would appear that *bitsu’a* does not require the agreement of the parties. The need for the parties’ agreement is first mentioned in the Talmud; it therefore seems that the tannaitic sources do not require their agreement. The Talmud asks: “If Rav ruled that the law is like R. Joshua b. Korḥah, who states that it is a mitzvah to perform *bitsu’a*, why then did his disciple Rav Huna ask the litigants: ‘Do you wish judgment or do you wish compromise?’” (*b.Sanh.* 6b). It follows that, at least in the initial understanding of the Talmud, if *bitsu’a* is considered to be a mitzvah, i.e., a positive act, then there is no need for the agreement of the parties and the judge may perform *bitsu’a* by himself. It was only in order to harmonize Rav’s ruling with the practice of Rav Huna that the Talmud added the phrase, “It is a mitzvah to perform *bitsu’a*,” meaning that one is required to ask the litigants whether they wish to make a compromise.

One needs to distinguish among the different circumstances in which the judge rules by *bitsu’a*. There are situations in which the judge is unable to arrive at any other solution and the choice of *bitsu’a* results from the absence of any other option. As against that, there are situations in which there is another solution – and in such cases the question arises as to whether the judge is permitted to perform *bitsu’a*. Situations in which there is no other option and in which there is an obligation to perform *bitsu’a* are mentioned in *Sifre Deuteronomy* §17.<sup>38</sup>

38 A parallel to this passage appears in a Genizah fragment; see M. Y. Kahana, *Genizah Fragments of the Halakhic Midrashim* (Hebrew) (Jerusalem: Magnes Press, 2005), 235. In the first section of the midrash, Finkelstein’s version is preferable, but in the second passage the version from the Genizah fragment seems preferable.

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“You shall fear no man” (Deut. 1:17). If two people come before you, before you hear their words you are allowed to be silent; once you hear their words, you are not allowed to be silent. Thus it says, “The beginning of strife is like letting out water; so quit before the quarrel breaks out” (Prov. 17:14). Before the law is revealed, you are allowed to be silent; once the law becomes revealed, you are not allowed to be silent.<sup>39</sup>

Once you have heard the litigants, but do not know whom to find deserving and whom to find culpable, you are required to divide (חייב לבצוע), as it says: “These are the things that you shall do: Speak the truth to one another, render in your gates judgments that are true and make for peace” (Zech. 8:16). What [kind of] judgment is it that makes for peace? We say: *bitsu’a*.<sup>40</sup>

In the first passage, the midrash states that, so long as the judge has not heard the litigants’ arguments he is allowed to be silent – that is, he may recuse himself from judging the case. But once he has heard the arguments of the parties he is no longer allowed to remain silent, but must rule on the case. In the second passage, the midrash discusses the question as to how a judge should behave once he has heard the arguments of the two sides and does not know how to rule. The answer is that he must perform *bitsu’a*, i.e., impose a compromise. The midrash

39 The following is the reading in the Genizah fragment: “If two people come before you for judgment, before you hear their words you are allowed to remain silent; once you have heard their words, you are not allowed to be silent, as the law has become apparent to you.” It is easy to see that, because of its similarity, the section containing the verse from Proverbs was omitted.

40 The wording of this passage in Finkelstein’s edition (and in the textual witnesses that it reflects) is corrupt. It reads as follows: “If you heard the discussion and do not know whom to find innocent and whom to find culpable you are allowed to be silent” (in the rabbinic midrash: “to abandon it”). This reading does not fit the continuation of the homily, which includes the verse from Zechariah, and the conclusion, “This is *bitsu’a*.” It is therefore clear that one ought to prefer here the version from the Genizah fragment.

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does not clarify why the judge does not know how to decide in this particular case: does the judge lack information as to the facts of the case or is he ignorant of the law? It seems more likely to assume that we are dealing with lack of knowledge of the facts and, evidently, with a situation in which it is impossible to determine them.<sup>41</sup> In any event, if the judge is unable to decide, he must perform *bitsu'a* – that is, he must rule by “division” (i.e., of the disputed sum). It should be stressed here that this ruling is given without the agreement of the sides. The litigants came in order to have their case judged; they did not agree to make a compromise between them, nor did they ask the judge to decide by way of compromise. They asked him to decide according to law; however, the judge was incapable of doing so, for which reason he must decide by way of *bitsu'a*. A decision arrived at in this manner is thus the result of a lack of alternatives and does not depend upon the consent of the litigating parties.

In the course of this discussion, we find the principled dispute concerning *bitsu'a*. The view according to which the judge is required to perform *bitsu'a* is explained by the verse from Zechariah: “Render in your gates judgments that are true and make for peace,” which is interpreted as a recommendation for “a peaceful judgment” – that is to say, the way of compromise (*bitsu'a*). Further on the opinion of the sages is brought, according to which “whoever performs *bitsu'a* is a sinner.” The former opinion concurs with that of R. Joshua b. Korḥah in the tosefta (below), whereas the latter opinion, that of the sages, corresponds to that of R. Eliezer b. R. Yose the Galilean, also in the tosefta (below). The flow of the argument seems to suggest that the dispute relates primarily to a scenario in which the judge does not know the

41 It would seem logical that, in a case in which the judge does not know the legal solution, it is incumbent upon him to clarify the law. It is difficult to assume that in such a case he is allowed to ignore the law. As against this, in a case where the facts cannot be clarified there is no other solution but “let them divide.” The later halakhah stated that, in such a case, the judge is allowed to impose a compromise ruling upon the parties (*Sh.Ar. HM 12:5*).

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law, in which case they disagree regarding the validity of the solution of *bitsu'a*. However, it is difficult to assume that this is really the case, as in such a context *bitsu'a* is the only possible option. How else can a judge rule, in a case in which he does not or cannot know the law, other than in that manner? It would therefore appear that the principled dispute about *bitsu'a* is transposed to that case in which the judge did not know the law; originally, this dispute related to other circumstances, in which the judge could have decided according to the law, but nevertheless preferred *bitsu'a*. Under such circumstances, the question as to whether or not the judge is permitted to perform *bitsu'a* arises in all its sharpness – for which reason the opinions differed so sharply. We shall now turn to the substance of this dispute.

### 3. The Controversy Concerning Compromise (*Bitsu'a*)

Our interest here shall be focused upon the tannaitic dispute as it appears in *t.Sanh.* 1 and as it is repeated in both Talmuds (*y.Sanh.* 1:1 [18b], *b.Sanh.* 6b). This is an extensive textual unit that includes, alongside the principal positions regarding the question of *bitsu'a*, other passages related to them through various literary and substantive connections. We shall begin by bringing the text in its entirety:

- I. R. Eliezer b. R. Yose the Galilean said: Whoever “divides” (הַבְּרִיעַ) is a sinner, and he who praises the one who divides blasphemes before the Omnipresent. Concerning this it says, “He who praises one who divides scorns the Lord (Ps. 10:3: “יֹבֵצֵעַ בְּרִיךְ נֹאֶץ ה'”). Rather, let the law pierce the mountain. And so said Moses: Let the law pierce the mountain.<sup>42</sup> But Aaron would make peace between man and his fellow, as is said, “He walked with Me in peace and uprightness” (Mal. 2:6).
- I. i. R. Eliezer b. Yaakov said: What does Scripture mean when it says, “He who praises a robber scorns the Lord”? To what may this be

<sup>42</sup> The version of the Babylonian Talmud here (according to MS Munich) reads: “As is said, ‘for the judgment belongs to God.’”

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compared? To one who stole a bushel (*se'ah*) of wheat: he ground the grain, and baked it, and separated the *hallah*, and gave it to his sons to eat. How can they make the blessing over it? Such a one is not blessing, but blaspheming! Concerning this they said: "He who praises a robber scorns the Lord."

- I. ii. Another matter: "He who praises one who gets unlawful benefit scorns the Lord." This refers to the brothers of Joseph, who said, "What profit (*betsa*) is there if we slay our brother?" (Gen. 37:26).
- II. R. Joshua b Korḥah said: It is a duty (*mitsvah*) to divide, as is said, "Execute a judgment of truth and peace in your gates" (Zech. 8:16). Now, is it not the case that wherever there is true justice there is no peace, and wherever there is peace there is no true justice? What kind of justice also contains peace? Let us say: *bitsu'a*. And so too does it say regarding David: "And David administered justice and charity to all his people" (2 Sam. 8:15). Now, is it not the case that wherever there is justice there is no charity, and wherever there is charity there is no justice? Rather, what kind of justice also contains charity? Let us say: this refers to *bitsu'a*.
- II.i. If one judges a case, declaring the guiltless to be innocent and imposing liability on the guilty party – if he found the poor liable, he should take payment from his own [pocket] and give it to him; we thus find that he performs charity with the one and justice with the other.
- II.ii. Rabbi says: If one judges a case, and acquitted the one who is innocent, and held liable the one who is guilty – he does charity with the one who is liable, for he removes stolen goods from his possession. And he does justice to the innocent one, for he restores that which belongs to him.
- III. R. Shimon b. Menasya said: Sometimes one should divide, and sometimes one should not divide. How so? Two people who came before someone to be judged: Before he heard their words, or once he heard their words but did not know which direction the



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judgment is tending, he is allowed to say to them: Go and divide. But once he has heard their words and knows which way the judgment is leaning, he is not allowed to say to them: Go and divide. Of this it is written: “The beginning of strife is like letting out water” (Prov. 17:14) – until it is revealed, you are allowed to abandon it; once the law has been revealed, you are not allowed to leave it.

- III.i. R. Judah b. Lakish said: Two who came before someone for judgment, one being strong and one being weak. Before you hear their words, or once you have heard their words but you do not know which way the judgment tends, you are allowed to say to them: I will not relate to this case, lest the strong one be found liable, and he will pursue him [i.e., the judge]. But once you hear their words and you know which direction the law tends, you are not permitted to say to them: I will not relate to your case. As is said: “Fear not any man, for the judgment belongs to God” (Deut. 1:17).
- III.ii. R. Joshua b. Korhah said: From whence do we know that if one is sitting before the judge, and knows some exculpatory argument on behalf of the poor man, or something critical holding the wealthy accountable, that he should not be silent? Scripture says: “Fear not any man” (Deut. 1:17) – do not withhold your words because of any man.
- IV. The judges should know whom they are judging, and before whom they are judging, and with whom they are judging and who judges together with them; and the witnesses should know about whom they are testifying, and before whom they are testifying, and who is testifying with them, as is said: “Let both parties to the dispute appear before the Lord” (Deut. 19:17), and it is said, “God stands in the congregation of God; in the midst of the judges [lit. gods] he judges” (Ps. 82:1); and it also says of Jehoshaphat: “And he said to the judges: Consider what you do, for you judge not for man, but for the Lord” (2 Chr. 19:6). And lest the judge say: Why do I need this trouble? It has already been said, “For He is with

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you in the matter of judgment” (ibid.). You have to take account only of what your eyes see.

The parameters of this unit are determined both by the subject matter and by the terminology. The subject of the unit is the issue of the legitimacy of *bitsu'a*, which is the exclusive subject of the discussion. Within these parameters, the *baraita* is brought in both Talmuds.<sup>43</sup> The question that lies at the center of our discussion is whether the judge is allowed to perform *bitsu'a* – that is, to impose a ruling based upon compromise. Three opinions are brought regarding this question: the first view, that of R. Eliezer b. R. Yose the Galilean (I) is that “One who performs *bitsu'a* is a sinner” – in other words, it is forbidden to impose *bitsu'a*. The second, diametrically opposed view, is that of R. Joshua b. Korḥah (II), according to which it is a duty (*mitsvah*) to perform *bitsu'a*. The third opinion, that of R. Shimon b. Menasya (III), is that the judge is “permitted to divide” – that is, *bitsu'a* falls under the rubric of legitimate options. At first glance, it would seem as if the principal opinions were incorporated within the text in an almost random and associative manner. However, upon deeper examination it becomes clear that the additional sections inserted between these positions and adjacent to them relate to the principal opinions and create a kind of dialogue or negotiation among the various opinions.<sup>44</sup> We are therefore dealing with a well-structured and edited unit, which must be interpreted in its entirety. We shall thus begin by offering an initial interpretation of the

43 In the Babylonian Talmud this unit is brought precisely within these parameters. In the Palestinian Talmud, it concludes with the verse from 2 Chronicles, and the final sentence, “Should the judge say – you have naught but that which your eyes see,” is missing. Both Talmuds incorporate within this unit various additions and exegetical comments that are not an integral part of the *baraita*.

44 The Talmud already took note of the back-and-forth play between the two passages in the text (see *b.Sanh.* 6b: “We have come to the [words of] the *tanna kamma*: He judged the judgment...” and also “this is difficult for Rabbi,” etc.). Several *rishonim* have observed further interconnections; see, e.g., *Yad Ramah* ad loc. On the structure of this chapter, see Y. Z. Dinnur, *Hiddushei ha-Ritsad*, III (Jerusalem: Mossad ha-Rav Kook, 1990), 243.

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unit as a whole and thereafter, in the subsequent section, delve more deeply into the significance of the various approaches.

I. According to the opinion of R. Eliezer b. R. Yose the Galilean, the judge who imposes a compromise ruling is a “sinner,” as he has not carried out his obligation to judge according to the law. He then adds, “He who praises one who divides scorns the Lord.” In this sentence, “He who praises” refers to one who praises the judge for his ruling, as if to say: The law as such is unjust, but the judge corrected it by ruling with wisdom and justice. One who praises the judge in such circumstances is as if he derides the law, and hence is tantamount to one who blasphemes. In *Sifre Deuteronomy* §17 this opinion is brought in the name of the sages: “And the sages say, whoever divides (*mevatse’a*) is a sinner, as is said, ‘He who praises one who divides scorns the Lord’ – i.e., this one praises the judge and blasphemes his Creator.”<sup>45</sup>

Immediately following in the same section, R. Eliezer’s position appears, formulated with the words, “let the law pierce the mountain” – an approach attributed to Moses. Opposed to that model is the figure of Aaron, who is portrayed as “making peace between man and his fellow.” The praise for Aaron creates a certain tension and opposition, not only against Moses’ approach, but also against R. Eliezer’s position opposing *bitsu’a*. This raises the question as to whether this passage belongs to the words of R. Eliezer or whether it is brought in opposition to it. Most traditional commentators assume that these are the words of R. Eliezer, in which case he is not entirely opposed to compromise: he agrees with the type of compromise made by Aaron, but is opposed to that performed by Moses. According to the conventional explanation, as expressed in the words of Rashi and *tosafot* [*ad loc.*], Moses represents the judge sitting in court, while Aaron corresponds to the person who acts outside of the judicial framework.<sup>46</sup> In this explanation, R. Eliezer

45 *Sifre Deut.* §17; Kahana, *Genizah Fragments of the Halakhic Midrashim*, 235. There is missing here the phrase “he who blesses one who divides, blasphemes,” which alludes to this verse.

46 There is, however, a slight difference between them. Rashi interprets thus:

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only objects to compromise made during the course of the judicial process, but he permits and may even praise those who make compromise outside of the courtroom. Another explanation of the distinction between Moses and Aaron appears in the words of R. Isaiah Trani the Younger, according to whom the distinction depends upon the nature of the compromise made: R. Eliezer b. R. Yose the Galilean opposes a *ruling* based upon compromise, but does not object to compromise arrived at by *agreement*. Should the judge mediate between the litigants by “appeasement and persuasion,” thereby bringing them to agreement, there is nothing objectionable about this; such was the way of Aaron.<sup>47</sup> This approach is consistent with the fact that the dispute focuses upon *bitsu’a*, in which case one could say that *bitsu’a* is forbidden, but *pesharah* (voluntarily-reached compromise) is permissible.

There are, however, those commentators who think that the introduction of the figure of Aaron does not reflect the view of R. Eliezer b. R. Yose the Galilean, but disagrees with him.<sup>48</sup> It should be noted that this passage, in which Moses is contrasted with Aaron, does not appear in the parallel in *Sifre Deuteronomy*. This may imply that it was added by the redactor of the Tosefta, who organized this chapter in the form of a dialectical halakhic discussion. On that basis, matters may be seen as a kind of protest against his approach: if R. Eliezer relies upon

“Once they came for purposes of judgment, the judges cannot impose a compromise” (*b.Sanh. 6b*, s.v. *asur livtso’a*) – that is to say, the matter depends upon the framework of the judicial hearing, but outside of this framework even the judges are permitted to make a compromise. As against this, *tosafot* see it as dependent upon the function: “As he was not a judge and the judgment did not come before him but before Moses, it is certainly permitted for him” (*tosafot*, ad loc., s.v. *aval Aharon*). According to this, the judge is not allowed to perform *bitsu’a* even outside of the judicial framework, but it is permitted to one who was not a judge.

47 *Piskei Ri”az, Sanhedrin* (Jerusalem: Makhon ha-Talmud, 1964). These views are brought in *Shiltei ha-Gibborim* on Rif.

48 *Sefer Raba”n* (Jerusalem: Vagshal, 1984), *Even ha-Ezer, Hiddushim le-Sanhedrin*, §4; and, in another version, in *Hiddushei ha-Ritsad, Sanhedrin*, cited above, n. 44.

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the approach of Moses, who said “let the law pierce the mountain,” then he is opposed by Aaron, who “made peace between man and his fellow.”

Following the passage dealing with the words of R. Eliezer b. R. Yose the Galilean, two more homilies appear on the verse, “He who blesses...” (I.i; I.ii). According to the former, the verse refers to a person who stole wheat (i.e., *botse’a* – “takes”) and thereafter separates *hallah* (“blesses”) – that is, he blasphemes God. In brief, the verse is interpreted as referring to one who performs a (supposed) mitsvah while doing a transgression. According to the second homily, the verse refers to the brothers of Joseph, who said, “what profit (*betsa*) is it to us that we slay our brother; let us sell him to the Ishmaelites.” This homily is introduced to criticize Joseph’s brothers, saying that they ought not to be praised simply because they refused to kill him but sold him as a slave. These homilies seem to have been incorporated here on purely associative grounds since all interpret the same verse. But the purpose of citing them here was to show that the same verse may be expounded differently, and need not necessarily be interpreted as criticizing one who engages in compromise rulings (*bitsu’a*) or praising one who does so.<sup>49</sup> In other words, they disagree with R. Eliezer here. It follows that the unit we have designated as (I) is edited as a discussion of the words of R. Eliezer. The redactor may have already questioned the principle, “let the law pierce the mountain,” in the first passage, by means of the figure of Aaron. In any event, thereafter he brings two rebuttals of the use of the verse in Proverbs as a source for the principle that “one who performs division is a sinner.”

II. R. Joshua b. Korḥah thinks that “it is a mitsvah to perform *bitsu’a*,” basing his position on the verse in Zechariah, “Execute a judgment of truth and peace in your gates” (Zech. 8:16). As he explains it: “What kind of judgment also contains peace? Let us say: that is

49 This matter is similarly interpreted by the *Yad Ramah*, who noted that, according to these tannaim, “*bitsu’a* in judgment is preferable.”

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*bitsu'a*.<sup>50</sup> According to R. Joshua, the value of “peace” is preferable to that of “truth”; hence, he justifies issuing a ruling based upon compromise. Another justification for his words is brought on the basis of the verse, “And David administered justice and righteousness for all his people” (2 Sam. 8:15): “What kind of justice also contains righteousness? Let us say: that is *bitsu'a*.” The term *tsedaka* (righteousness) is no longer used here in the biblical sense of the word – i.e., in a manner analogous to *tsedek* (“justice”)<sup>51</sup> – but rather in the sense accepted in the rabbinic lexicon, in which it signifies charity, a voluntary action in which one assists one’s fellow man: “*tsedakah* [charity] with his money; *gemillut ḥasadim* [acts of kindness] with both his body and with his money.”<sup>52</sup> In issuing rulings based upon compromise there is a kind of charity to the one found culpable.<sup>53</sup> That is: the procedure of *bitsu'a* reflects compassion towards the one who is culpable and needs to pay. Nevertheless, there is a difference between the two reasons mentioned. The principle of peace is applicable to every dispute, whereas charity only applies when it is the weaker and poorer side that is found culpable. An opinion identical to that of R. Joshua b. Korḥah is brought anonymously in *Sifre Deuteronomy* §17, which only mentions the verse from Zechariah and the accompanying homily: “What is meant by justice in which there is peace? Let us say: This refers to *bitsu'a*.” The

50 As in MS Vienna, and also in the printed version. In MS Erfurt: “What is a true judgment? One in which there is peace” – and it is clear that the former reading is preferable.

51 In biblical Hebrew, *tsedakah* is etymologically related to *tsedek*, and the idiom, *mishpat u-tsedakah* refers to a social and royal conception of justice. See J. Licht, “Justice, Justice Shall You Pursue,” *Encyclopaedia Biblica* 6.685-687; M. Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East* (Jerusalem: Magnes Press, 1995), and in the biblical lexicons. See also A. Radzinger, “Justice, Justice Shall You Pursue: Different Conceptions of Judicial Justice in Tannaitic Teaching” (Hebrew); I wish to thank Radzinger for sharing this paper with me prior to its publication.

52 *t.Pe'ah* 4:19; *y.Pe'ah* 1:1 (15c).

53 It is interesting to note the relationship between the two reasons, as expressed in *m.Abot* 2:7: “He who increases *tsedakah* increases peace.”

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subject of *tsedakah* is not mentioned there at all.<sup>54</sup> It therefore appears that the mention of *tsedakah* in the tosefta is connected with the discussion thereafter, in the next two passages. In these passages, the necessity for *bitsu'a* by reason of *tsedakah* is challenged. The subsequent passage (II.i.) deals with the case in which the judge found a poor man culpable, and he proposes another solution other than *bitsu'a*. In that case, a decent judge will “take out [his money] and give him from his own.” And indeed, the Talmud already saw this as R. Eliezer b. R. Yose the Galilean’s answer to R. Joshua b. Korḥah.<sup>55</sup> By this reasoning, there is a distinction between law and righteousness. Law must be issued according to the letter of the law, but if the judge sees that the culpable party was a poor man, he gives him charity from his own pocket. The subsequent passage (II.ii) brings the opinion of Rabbi, which is even more severe. According to him, there is no contradiction whatsoever between law and *tsedakah*; every judgment involves an element of *tsedakah*, in that the judge “removes stolen goods from his hands.” According to this approach, justice is always determinative, and there is no room for *tsedakah* in the sense of charity at all.

III. The third opinion is that of R. Shimon b. Menasya, according to whom *bitsu'a* is an optional solution. At face value, the question treated by R. Shimon b. Menasya differs from that discussed by his predecessors. He does not relate to the legitimacy of *bitsu'a* per se, but only to the procedural question: at which stage is it permissible to perform

54 Nor does it appear in the parallel in the Palestinian Talmud, though according to the continuation of the *baraita* in the Yerushalmi, dealing with *tsedakah*, it would appear that the homily is part of this unit.

55 *b.Sanh.* 6b, Rashi ad loc., s.v. *atan letanna kamma*. But compare *Yad Ramah*, who thinks that this does not refer to R. Eliezer but rather to the tanna who said “once the hearing has been completed you are not allowed to perform *bitsu'a*,” who thought that *bitsu'a* is an optional matter. However, the approach of Rashi, namely that the discussion here involves the opinions mentioned in this unit, seems preferable. Another option is that the matters are stated here according to the view of R. Shimon b. Menasya. In any event, one is speaking here of an attack against the approach of R. Joshua b. Korḥah.

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*bitsu'a*? It is nevertheless clear that the citation of his position in the present context is intended to express a position regarding the legitimacy of *bitsu'a* as such. According to this, the focus of his words is his position that the judge is “permitted to perform *bitsu'a*,” and that “at times a person may issue a compromise ruling and at times he may not.” In other words: *bitsu'a* is seen as optional. Note that the tosefta does not develop here the procedural question and does not mention here the dissenting view, mentioned at the beginning of the chapter, according to which the judge may perform *bitsu'a* until the litigation has been completed (“once the trial was completed, he is not allowed to do *bitsu'a*”). And indeed, the Talmud likewise concludes that, according to the approach of R. Shimon b. Menasya, *bitsu'a* falls under the rubric of the permissible or optional.

R. Shimon b. Menasya's position is explained by the midrash on the verse in Prov. 17:14: “Quit before the quarrel breaks out' – that is, until the law is revealed [i.e., becomes evident], you are allowed to abandon it; once the law has been revealed, you are not allowed to leave it.” R. Shimon compares *bitsu'a* to abandoning the law: just as the judge, so long as he has not formulated a position on a given case, is allowed to leave the bench, so is he allowed at this stage to practice *bitsu'a*. Once he has formed an opinion he is no longer allowed to leave it; hence, at that stage he is no longer allowed to perform *bitsu'a*. However, we need to understand the analogy between performing *bitsu'a* and abandoning the case. Why does the same restriction apply in both cases? For this, we need to better understand the rule regarding abandoning the law.

Immediately thereafter, the text quotes the view of R. Judah b. Lakish (III. i) regarding the abandonment of judgment. His words imply that the background for the judge wishing to abandon the case is his fear of personal harm against him by one of the litigants: “Lest the strong one be found liable and he pursues him.” Consideration of this possibility may be understood in light of a situation in which the judicial process is based upon agreement between the litigants and the judge. The litigants must accept upon themselves the judge and he must



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also agree to judge them.<sup>56</sup> (In the situation of a fixed court that is required to judge the parties, as is customary today, he cannot refuse to judge those who come before him.) So long as the judge has not heard the arguments of the two sides and has not formulated an opinion, he may refuse to judge this particular dispute. Once he has heard the arguments and arrived at a position concerning them, he is no longer allowed to abandon the case. At this stage the prohibition, “You shall fear no man,” becomes applicable. It would appear that the distinction between the two situations is connected with the principle of honesty and fairness. The judge has the right not to rule on a case that has come before him, but must express this position at the beginning of the hearing or immediately after hearing the arguments of the parties. Once he has entered into the deliberations and formulated an opinion, it would be inequitable for him to leave the case simply out of concern that the losing side will harm him.

The principle of fairness likewise applies to the situation of *bitsu'a*. When the judge issues a compromise ruling, he does so in place of the parties themselves. Fundamentally, the right to make a compromise belongs to the litigating sides, who may do so on the basis of various considerations. One essential consideration relates to the opportunities and risks they perceive in the judicial process. The parties operate under a “veil of ignorance” with regard to the results of the procedure. At that point in time when they are considering the possibility of compromise, they calculate their chances of winning, the risks of losing, the expenses entailed by the legal procedure itself – and on this basis they agree to a certain compromise. The approach which gives the judge the authority to make a compromise is based upon the fact that he will act in the name of and in place of the litigating sides. This being the case, he must

56 This was evidently the widespread reality in talmudic Palestine, and it is reflected in *m.Sanh.* ch. 3. However, scholarly opinions on this matter are divided and it requires further clarification. In the meantime, see G. Allon, “*Illein Demitmanin Bikhsaf*” (Hebrew), in his *Studies in Jewish History* (Tel Aviv: Tel Aviv University Press, 1976), 15-57; S. Albeck, *Law Courts in Talmudic Times* (Hebrew) (Ramat Gan: Bar Ilan University Press, 1980).

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operate under the same conditions and in accordance with the same considerations as the two sides would have. So long as the judge has not formed an opinion, he is indeed acting under the same “veil of ignorance” and is able to arrive at results similar to those which the parties involved would have reached had they made the compromise themselves. Once he has formed an opinion and knows which side will win the case (i.e., by law), he is no longer able to arrive at an honest compromise. Had the two sides been in this situation, the side that knew it would win would likewise not have agreed to a compromise.

Against this background, we may sharpen the distinction between the approaches of R. Shimon b. Menasya and R. Joshua b. Korḥah. According to R. Joshua b. Korḥah, *bitsu'á* is based upon the principles of “peace” and “charity” – and therefore falls under the rubric of mitsvah. By contrast, according to R. Shimon b. Menasya, *bitsu'á* is not based upon a set of values, but rather upon the interests of the parties – and therefore is merely an option. These divergent approaches are likely to lead to different limitations upon the process of *bitsu'á*. According to the approach of R. Shimon b. Menasya, the judge is allowed to impose a compromise so long as he has not formed his own opinion about the case, as only then is he able to act honestly in the interests of both sides. According to R. Joshua b. Korḥah, it would seem that the performance of *bitsu'á* is not necessarily limited to this stage. If there is a mitsvah to rule on the basis of compromise, it may be justified to do so even after the judge knows that the law favors one or another of the sides, as the goal is to bring about peace between them. This being so, it follows that, according to the approach of R. Joshua b. Korḥah, one must adopt the other approach mentioned in the tosefta – namely, that the judge is allowed to perform *bitsu'á* so long as the trial has not yet been completed. Indeed, the post-talmudic halakhah determines, on the one hand, that “it is a mitsvah to perform *bitsu'á*” (like R. Joshua b. Korḥah), but, on the other hand, that the judge is allowed to impose a compromise ruling so long as the judicial proceedings have not been completed.<sup>57</sup>

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The next passage (III. ii), brought in the name of R. Joshua b. Korḥah, relates to the remarks of R. Judah b. Lakish, via its use of the verse, “You shall fear no man.” According to R. Joshua b. Korḥah, the verse is expounded differently: “Do not withhold your words before any man” (interpreting *לא תגורו* as *לא תאגורו*). According to R. Judah b. Lakish, the prohibition “You shall fear no man” applies to the judge, warning him not to fear the litigants. In contrast, according to R. Joshua b. Korḥah it applies to a student sitting before the judge, who is warned not to fear the judge. Offhand, this homily seems to have been brought simply because of the homily on the same verse, “Do not fear any man,” and has no special connection to the earlier-stated position of R. Joshua b. Korḥah that it is a mitzvah to perform *bitsu’á*. Nevertheless, it is worth noting that there is a connection on the structural level. R. Joshua b. Korḥah’s homily disagrees with that of Resh Lakish, which is consistent with that of R. Shimon b. Menasya – that is, R. Joshua b. Korḥah’s homily indicates a disagreement with the approach of R. Shimon b. Menasya.

IV. The next passage, “If the judges knew...,” elaborates the idea that “judgment belongs to God.” The connection between this and the preceding passage is based on the appearance of these two phrases next to one another in the Torah: “You shall fear no man, for judgment belongs to God” (Deut. 1:17). The source of the relationship is in the exegetical midrash on these phrases. And indeed, in *Sifre Deuteronomy* as well, the interpretation of “You shall fear no man” is immediately followed by that of “for judgment belongs to God,” followed by an allusion to 2 Chr. 19: “Judge not for man, but for the Lord; He is with you in giving judgment. Now then, let the fear of the Lord be upon you.” The next passage in the Tosefta is a full and comprehensive exposition of the idea of God’s presence in judgment.<sup>58</sup>

57 Rif, *b.Sanh.* 1b; Maimonides, *Mishneh Torah, Hil. Sanh.* 22:4; *Tur* and *Sh.Ar.* *ḤM* 12:2.

58 For a more extensive discussion of this matter, see my paper “For Judgment is God’s – On the Metaphysics of Judging in Jewish Law” (Hebrew), in *Bar-Ilan Law Studies* (forthcoming).

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The first part of this halakhah contains a series of “statements” directed to the judges and the witnesses, describing God’s multifaceted functions in judgment. In addition to God’s (expected) function as He before whom – that is, under whose aegis and supervision – judgment is conducted, He also serves as judge and even as the one being judged. This third function is quite surprising, and requires further explication. Thus, the Palestinian Talmud asks: “Can a person judge his Creator?” It answers: “Rather, the Holy One blessed be He says: I am the one who said that Reuben shall receive a hundred dinar and Shimon shall receive nothing, and you take from this one and give to that one contrary to law. Thus, I need to pay him and to take away from the other person.”<sup>59</sup> The disruption of the just order of the world requires that God restore the proper order. The Almighty needs to correct that which the judges have upset. However, there is also implicit here another meaning that goes beyond the concrete rectification of the judicial ruling.<sup>60</sup> As God is a participant in deciding the law, he bears shared responsibility for its consequences. If the judges err in judgment, whoever has judged together with them is also held accountable, and if they judge properly, He who judges with them enjoys the merit of this act. According to this logic, God is literally judged by the judges, whether in the positive sense – as a true judge – or to be held accountable – as one who has distorted judgment. In the second part of this halakhah, three biblical verses are invoked to provide a basis for the idea of God’s presence in judgment. Then, in the third part, there is a certain move balancing the

59 *y.Sanh.* 1:1 (18a), and in the Bavli as an independent statement: “R. Ḥama son of R. Ḥanina said: The Holy One blessed be He says: It is not enough for the wicked that they take money from this one and give it to that one unlawfully, but that they trouble me to return money to its rightful owners” (*b.Sanh.* 8a).

60 The Yerushalmi’s explanation does not require that the Divine presence be located in the courtroom, only that the judge serve as a delegate or emissary of God. If the judges stand in for God, then, when they distort justice, God is ultimately held accountable and must intervene to correct the judgment.

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two. The perception of the judicial process as one in which God is present and in which He participates as a partner imposes a very heavy responsibility upon the judges, liable to elicit fears that will ultimately result in their refraining from sitting in judgment. To this the halakhah responds: “Has it not already been said, ‘And He is with you in the matter of judgment’ – You have to take into account only that which your eyes see.”

The placing of this passage here indicates an expansion and elevation of the discussion. Until this point, the authority of the judge had been discussed in terms of the concrete goals of the legal procedure: a truthful judgment on the one hand, and achieving peace and charity, on the other. In this section, we turn to the metaphysical realm. The judge now fulfills not only a social function, but also a quasi-theological one, representing God. Nevertheless, this passage bears no direct relation to the question discussed in the chapter. The concept of God’s presence is not invoked here as supporting one or another of the opinions. In principle, it might fit both the principle of “the law pierces the mountain” as well as that approach which holds that “it is a mitsvah to pursue a compromise solution (i.e., perform *bitsu’a*).”<sup>61</sup> Rather, it is invoked here to lend an additional, metaphysical dimension to the discussion of the function of the legal procedure.

## 4. The Dispute Over the Goals of the Judicial Process – Jurisprudential Aspects

The positions of the tannaim regarding compromise rulings are quite clear. R. Eliezer b. R. Yose the Galilean holds that the function of the court is to implement the law; hence, the judge must be committed

<sup>61</sup> However, it is worth noting that, according to the version in the Bavli which explains the conviction that “let the law pierce the mountain” by the principle that “judgment is God’s,” a relationship is established between the last section and the stance of R. Eliezer b. R. Yose the Galilean.

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exclusively to the law, which is connected with the concept of truth. By contrast, R. Joshua b. Korḥah believes that the court ought to advance the values of peace and charity, giving them preference over those of law and truth. R. Shimon b. Menasya proposes an intermediate position, according to which the judge is not committed to any external values beyond the resolution of the dispute at hand. He is not required to be consistently loyal to the value of truth, on the one hand, nor to that of peace, on the other. He has discretionary judgment, allowing him to decide each dispute according to its particular circumstances. The judge is only limited by the principles of honesty and fairness, which require that he follow a suitable procedural framework. However, this dispute would seem to reflect a more fundamental dispute concerning the nature and goals of the judicial process.

### **Justice or Peace**

The rationales offered for and against *bitsu'a* reflect two fundamental approaches towards the judicial procedure. According to that view which favors *bitsu'a* as a way to advance peace between the parties, the judicial process is conceived as a mechanism for resolving disputes. As against that, according to the opinion opposed to *bitsu'a*, the judicial process is conceived of as a mechanism of social order aimed at implementing ideals of law and justice in society. These approaches have been discussed in contemporary legal literature with regard to dispute settlement; thus, a few words on the background of this discussion would be in place. From the 1970s on, there began to emerge in the United States a tendency to use alternative means of resolving disputes, expressed in the founding of a movement known as "Alternative Dispute Resolution." This movement advocated a model according to which there would be multiple ways of resolving disputes, primarily through solutions involving compromise and mediation. The influence of this trend expanded and spread to other countries, including Israel. Initially, the underlying motivation for this approach

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was related to efficiency and the need to alleviate the burden of courts faced with overcrowded dockets. Over the course of time, there developed other reasons, of a more value-oriented nature, related to a preference for solutions based upon agreement and peaceful resolution of disputes over judicial decisions. Other reasons were also introduced, connected with a more comprehensive way of dealing with disputes, including personal and emotional aspects not dealt with by the legal process. However, there were also those who were critical of this approach.<sup>62</sup> One of its harshest critics, Owen Fiss, articulated a theoretical, principled position in his well-known article, "Against Settlement."<sup>63</sup>

In his paper, Fiss presented a number of arguments against compromise, challenging the possibility of its providing decent and reasonable solutions to disputes. His most substantive and serious argument related to the preference for the value of peace over that of justice, "justice rather than peace."<sup>64</sup> In this context, Fiss noted two alternative conceptions of the judicial process. According to one conception, held by those supporting solutions based on compromise, the purpose of the legal process is to resolve disputes. From this viewpoint,

62 For an analysis of the rise of this movement, see Alberstein, *Jurisprudence of Mediation*, esp. chs. 3-4. On the criticism against this movement, see Alberstein, "The Opposition to Mediation: Between Rights, Legal Consciousness, and Multi-Culturalism" (Hebrew), *Bar-Ilan Law Studies* 24 (2008): 373.

63 Owen M. Fiss, "Against Settlement," *Yale Law Journal* 93 (1984): 1073-90.

64 The other arguments are of a more procedural nature and relate to the limitations on compromise as a solution that can bring about just results. In this context three main arguments have been raised: 1. The process of compromise reflects the power relations between the two sides, and therefore in the case of lack of balance between them, the result of compromise will also not be just. 2. In many procedures involving compromise, there is no authorized figure who is allowed to make concessions in the name of the group that he represents. This refers to disputes involving groups of citizens who are not organized in any formal framework. 3. The compromise process does not allow for follow-up or ongoing handling of problems which may arise following the initial agreement.

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one is speaking of a fundamentally private procedure. The origin of this process, as described by some historians of law, lay in bringing the dispute between the parties to a disinterested third-party, who decided between them.

Over the course of time, the state assumed this role and established a judicial system, but the original purpose of the procedure – to resolve the dispute – remained intact. If this was the goal of the procedure, then it is clear that resolution of the dispute by agreement was preferable to a decision rendered by a stranger or an outside party. As against this approach, Fiss offers a totally different conception of the judicial process, according to which the state invests resources in order to appoint experts to judicial functions. The purpose of the judicial process and the function of the judges is thus not merely to resolve disputes, but rather to execute justice. The courts are the legislature's partners in performing justice. They need to determine the rules of suitable behavior and to bring society closer to the ideal which it envisions, accomplished by means of interpretation of the constitution and of the laws. The difference between the legislature and the courts is that the courts function in a reactive manner. They do not determine the rules of behavior from the outset, but rather respond to those cases that are referred to them. Cases adjudicated in the courts are an opportunity for them to interpret the constitution and laws and to determine suitable norms of behavior. Transferring disputes to private arrangements would deprive the courts of the opportunity to confront reality, to interpret the laws, and to establish new norms. The conclusion, therefore, is that one should not encourage compromise arrangements, but rather should allow the court to say its piece and shape the life of society.

Two approaches or models of the judicial process, similar to those presented here, would seem to underlie the talmudic dispute. According to the view of R. Eliezer b. R. Yose the Galilean, the judicial process is not intended simply to resolve disputes, but to perform justice. Consonant with this, the function of the judge is to implement the law. From this point of view, there is no room for a procedure of compromise, as



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such a process is not intended to do justice. By contrast, according to the approach of R. Joshua b. Korḥah, who sees compromise as a *mitsvah*, the judicial process is not primarily intended to execute justice, but to resolve the dispute between parties. This being the goal, the law does not enjoy any priority over other solutions. The law simply provides a default option for the resolution of the dispute; however, the litigants are permitted, at any given stage, to prefer some other solution. According to R. Joshua b. Korḥah, one must always grant preference to that solution which advances peace between the parties over one that leaves the enmity between them. R. Shimon b. Menasya likewise thinks that the purpose of the judicial process is to resolve disputes, and therefore does not impose any obligation upon the judge to rule consistently according to the letter of the law. On the other hand, he does not impose an obligation to always rule by way of compromise. He does not think that the solution of peace is always preferable. At times a solution which achieves justice for one of the parties is preferable. The choice as to which solution should be adopted in each case and in any given dispute is left to the discretion of the judge.

### Corrective Justice and Distributive Justice

Another aspect deserving of mention relates to the nature of the justice that operates within the framework of the judicial process. As we have seen, the dispute concerning the question of *bitsu'á* is connected to that of charity. One of the reasons offered by R. Joshua b. Korḥah in favor of ruling by compromise relates to the reason of *tsedakah*. "What is justice in which there is charity? Let us say: that is *bitsu'á*." *Tsedakah* is an important consideration in determining the law and is likely to lead to a ruling by way of compromise. As against that, two arguments are brought against the link between justice and *tsedakah*. First, one must draw a distinction between law and charity. The judge must rule in accordance with the law; if he wishes to perform a charitable act, he

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should take the money from his own pocket and give it to the poor man. “If he found the poor man culpable, he takes [from him] and gives him from his own; we find that that he does charity with this, and justice with that” (II.i). The judge must not give charity to the poor man at the expense of the one who has won the case, even if the latter is wealthy. A sharper argument is attributed to Rabbi: according to him, the performance of justice, requiring that the culpable party pay what is due, is the quintessential act of charity. “If one judges a case, and acquitted the one who is innocent, and held liable the one who is guilty – he turns out to do charity with the one who is liable, for he removes stolen goods from his possession, and justice to the innocent one, for he restores to him what belongs to him” (II.ii). Offhand, Rabbi would seem to be identifying the concept of justice with charity: if justice has been carried out, then charity has also been given. However, one may not assume that Rabbi rejects the concept of charity in extra-judicial contexts. One may assume that in such contexts, as well, Rabbi requires one to give charity to the poor and needy. His argument is that, within the framework of the judicial process, one must not take into account the consideration of charity, as within that framework justice is the only goal.

This tannaitic debate seems to reflect a dispute as to what concepts of justice are relevant in legal deliberations. In this context, one must introduce into the discussion the concepts of corrective justice and distributive justice, whose source lies in the legal philosophy of Aristotle. In the *Nicomachean Ethics* (book V, chapter 2), Aristotle draws a distinction between these two concepts. Distributive justice “is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution.”<sup>65</sup> The principle according to which these things are distributed is whether the person is “deserving of it.” This matter itself depends upon the

65 Aristotle, *The Nicomachean Ethics*, trans. W.D. Ross (Oxford: Oxford University Press, 1925).

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individual's contribution to the common wealth and upon his status. For example, within the framework of a partnership, distributive justice determines what a person deserves on the basis of his contribution to the partnership. One who has invested 50% of his wealth in the partnership and a similar proportion of labor will also be entitled to the same proportion of the profits of the partnership. In the framework of distributive justice, one takes into consideration the person's status and his contribution to society. Similarly, in this same framework one may also weigh a person's needs. A poor person is likely to be more deserving than a rich one. (This socialistic insight was not explicitly suggested by Aristotle, but is basically consistent with the framework which he outlined.) As against that is corrective justice, "which plays a rectifying part in transactions between man and man." In chapter 4, Aristotle defines and elaborates the principles of corrective justice:

The justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality; not according to that kind of proportion, however, but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.

When a person harms his fellow and causes him damage, he needs to compensate him and restore the situation as it had been previously. The person's status or contribution is irrelevant in such cases. Corrective justice examines only two parameters: 1. Was damage caused? 2. Was the act done in an illegal or unjust manner? If the answer to these two questions is positive, than the one causing the damage must be held accountable for the damage caused. This principle applies not only to the law of damages but also to contract law and all other branches of private law. A person who took a loan from his neighbor and did not return it in time is tantamount to one who caused him direct damage

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and, according to the principles of corrective justice, must return the debt to its rightful owner. According to Aristotle, the same principle holds true in criminal law. At the time of Aristotle, criminal law was not administered by the state; rather, the side that was harmed sued the other one. The commission of a crime was seen as similar to causing damage to one's fellow, and punishment was understood as correction and restoration of the status quo. In any event, in regard to all these matters the judge is required to relate to the two sides as if they were equal and to examine the matter in concrete terms. To this end, he must ignore all other aspects of the two sides – whether one is dealing with an honest man or a criminal, a poor man or a rich one.

The question that underlies the tannaitic dispute, which plays a role in jurisprudential discourse even today, is what considerations of justice need to be taken into account by the court. That position which finds expression in the words of the anonymous tanna who sought to separate between law and charity, as well as in the words of Rabbi, reflects an approach of corrective justice. According to their approach, the judge needs to rule according to the law alone and must ignore the status and needs of the litigants. The question to be examined by the judge is whether the defendant acted properly and whether he caused damage to the plaintiff. He must ignore the issue as to whether the plaintiff is deserving of something for any other reasons. As opposed to this, according to the approach of R. Joshua b. Korḥah, the judge's decision must incorporate considerations of distributive justice. The question as to whether the one found culpable under law is poor is thus relevant to his judgment, and may not be ignored by the judge. Nevertheless, it is important to emphasize that, even according to R. Joshua b. Korḥah, a decision based upon the letter of the law only takes into account considerations of corrective justice. In order to apply considerations of distributive justice, the judge must deviate from this and rule by way of compromise.<sup>66</sup>

66 In this respect, the modern discussion of the question is different. Those who argue that one must take into account considerations of distributive

## Debate Over Compromise

### Summary

Tannaitic sources were familiar with the different forms of compromise: negotiation, mediation, and arbitration. Those procedures based upon agreement of the litigants are generally seen as praiseworthy, and are not subject to controversy among the rabbis. The sharp controversy among the tannaim focuses upon the process known as *bitsu'á*, which is a compromise made by the ruling of a judge. The question at the core of the dispute is thus whether or not the judge is authorized to do so. This question relates to the boundaries of judicial discretion and to the extent of the judge's authority. Is the judge allowed, for various reasons, to depart from the law and to rule in the form of a compromise? Three opinions were expressed regarding this matter which, as I have shown, reflect fundamentally different approaches to the nature of the judicial process. According to the approach of R. Eliezer b. R. Yose the Galilean, the purpose of the judicial process is to perform justice on the basis of objective standards. A judicial decision inconsistent with these criteria is a sin, as he thereby betrays his obligation. Hence, it is forbidden for the judge to perform *bitsu'á*. According to the two other approaches, the aim of the judicial process is to resolve disputes among human beings. In this respect, the law is merely a default option. Just as the parties involved are permitted to agree upon some other solution to their dispute, so too the judge is permitted to rule in a manner that departs from the law, if it serves some positive value. The question as to whether this is to be treated

justice, for example, in the framework of economic analysis of law, say that the matter ought to influence the results of the litigation. According to this approach, one is not speaking of considerations of "charity" made in the framework of compromise and the like, but rather of considerations that determine the nature of justice and of law. For a discussion of this question, see, e.g., R. Posner, *The Problem of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1993), 313-52. As against that, see E. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

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merely as an option open to the judge or as a duty that he must actively pursue (i.e., mitsvah) is subject to dispute. According to R. Joshua b. Korḥah it is always preferable to make a compromise, as such a move is based upon agreement and brings about peace between the parties. As against that, R. Shimon b. Menasya does not automatically give preference to compromise. The decision as to what is the best approach in each case must be left to the judge. According to him, the only limitation that applies to the judge is in the procedural realm, so as to assure the equity of the procedure. As we have seen, the passage in which this dispute appears reflects an extended discussion of this question, incorporating back and forth debate between the various positions. The discussion concludes with a passage that explicates the idea that “judgment is God’s,” thereby elevating the discussion from the social plane to the metaphysical.