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THESIS SUMMARY

NUMBER OF CHAPTERS:

This thesis is comprised of five chapters.

Chapter I: Introduction

Chapter II: Mishnah and Tosefta

Chapter III: Babylonian and Palestinian Talmuds

Chapter IV: Codes – Shulchan Aruch and Mishneh Torah

Chapter V: Conclusion

CONTRIBUTION OF THIS THESIS:

It explores and analyzes a Jewish perspective to conflict resolution that was created by the rabbis.

THE GOAL OF THIS THESIS:

The Goal of this thesis is trace the development of the term פשרה; present specific ideas from פשרה that are useful in conflict resolution today; evaluate what makes פשרה unique; and explain how is it a distinctive Jewish approach to conflict resolution.

WHAT KIND OF MATERIAL WAS USED:

This thesis is a textual analysis of פשרה, therefore a majority of the materials are the primary texts themselves. There are a few citations to articles on פשרה, and books on modern conflict resolution when they enhance the interpretation of the text.

פְּשָׁרָה: A JEWISH APPROACH TO CONFLICT RESOLUTION

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**Thesis Submitted in Partial Fulfillment of
Requirements for Ordination**

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Graduate Rabbinic Program
New York, New York**

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Advisors: Dr. Nancy Wiener and Dr. Michael Chernick**

In Memory of Samuel E. Schlein

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CHAPTER I: INTRODUCTION

Nowhere is the dream of harmony more vigorously believed and hoped for than in religious groups. One of the highest values lived by in religious groups is the value of unity and togetherness.¹

The need for responsible and effective conflict resolution is desperately needed in synagogues. Today, synagogues are struggling to define how to handle conflict, not only in the most effective way, but even more important, in the most "Jewish" way. One recurring question of many congregants is: "How could this happen here? Certainly there is conflict and disagreement at my job, but why is it happening in my synagogue?" Such comments illustrate disappointment that congregations do not function differently from business or other organizations. Ideally, congregations should be our bastions of ethics and morals. Because congregations are "Houses of God," there is hope that they will provide a model for the way people should behave, by avoiding conflict, or if it is inevitable, by resolving it respectfully and without tension. As a result, feelings of disappointment are prevalent when a synagogue handles conflict poorly. Politically, conflict resolution has been a major struggle facing Israel and the Jewish people. Even so, when conflict is discussed, it is not necessarily within a Jewish context.

The study of conflict resolution has been profoundly influenced by a variety of factors, ranging from the founding of the UN to the authorship of such popular books as *Getting to Yes*. Conflict resolution has its tradition in three different areas: organizational development and management science; international relations and the peace movement; and alternative dispute resolution.²

Many well-respected institutions of higher learning now offer graduate programs in conflict resolution. It has also become a focus in some segments of the religious

¹ Loren B. Mead, foreword to *Moving Your Church Through Conflict* (Baltimore: The Alban Institute Inc, 1985), 5. For additional information, see www.Alban.org.

² Alan C. Tidwell, *Conflict Resolved? A Critical Assessment of Conflict Resolution*, (London: Pinter, 1998), 8.

world. Notably, the Alban Institute, an ecumenical, interfaith organization founded in 1974, has as its mission, to gather, generate and provide practical knowledge across denominational lines through action, research, books and periodicals, consulting and training services, and education seminars for those involved with congregations to handle conflict. The majority of its staff is Christian. Many of its publications deal with conflict resolution by integrating modern ideas with textual references to the New Testament and Christian Theology.

Regrettably, there are no organizations in the Reform Jewish world that devote comparable resources to the task of conflict resolution in our Jewish institutions. Recognizing this need, there are several major Jewish organizations that have begun to develop programs to assist with conflict. For example, the Ida and Howard Wilkoff Department of Synagogue Management at the Union of American Hebrew Congregations offers a handful of programs to assist congregations during board retreats. The Central Conference of American Rabbis, the professional organization serving rabbis in the Reform Movement offers the National Commission on Rabbinic Congregational Relations to assist clergy and congregations when they are facing irresolvable disputes. Recently, Synagogue 2000, although not solely affiliated with the Reform Movement, has begun to offer services for congregations that need assistance with conflict. Each of these organizations offers programs addressing conflict resolution, but such programs are only one small segment of their work.

This thesis was initially conceived as a means to determine if there is an existing textual concept or practice of conflict resolution in Judaism that could serve as a model for dealing with conflicts in our synagogues today. The first step is to understand the

basics of how Judaism views conflict resolution. After discussing the idea with Dr. Michael Chernick, he suggested analyzing the term פשרה, which is generally understood as compromise or mediation. After completing all of the textual analysis, a new goal was implemented: to analyze how the term פשרה developed and to determine if there are elements within פשרה that can function as valid forms of conflict resolution today.

Basic Overview of Conflict Resolution

Conflict, in its many forms, is part of the human condition. Any time that there is a difference of opinion, there will inevitably be conflict. Human beings naturally engage in conflict. Equally, human beings have also sought to handle conflict, by either containing or reducing its negative consequences.³ As such a prevalent part of the human design, it is essential to understand the nature of conflict to find the most effective ways to deal with it. Doing so enables societies, organizations, groups and individuals to function more effectively with one another. Thus, one is able to understand the people with whom they deal, their goals, their definitions and perspectives on issues at hand, and their values.

Resolving conflict is not a value-free activity; indeed as its name suggests, resolving conflict is held in high esteem over conflict continuance. The values that inform conflict resolution are largely Western, and may act to inhibit its useful application across cultural and political barriers.⁴

One of the greatest challenges in evaluating conflict resolution from a Jewish perspective is relating it to Western thinking and approaches. In more specific terms, how does פשרה relate to conflict resolution? On the most simplistic level, פשרה means compromise, resolution or arbitration.

³ Ibid., 1.

⁴ Ibid., 17.

The Tosefta passages analyzed in Chapter II teach us that פשרה can be either dyadic or triadic. If it is dyadic, then the two disputing parties can themselves work out a solution without the intervention of an outside party. If it is triadic, the disputing parties involved resolve the issue with the intervention of an expert who is by definition, an unbiased third party facilitator.

Another challenge in analyzing פשרה is the process of comparing a Jewish legal concept to modern human relations and understandings of conflict resolution.

First, compromise is customarily viewed as dyadic – involving negotiations between two parties. Litigation is triadic, involving two disputants and a third party. Thus, to compare compromise and litigation might be considered an apples – and – oranges problem. There is, however, a triadic form of compromise. That form is usually known as mediation.⁵

As Shapiro explains, compromise is not necessarily separate and distinct from the legal system. Litigation is often misunderstood because it is interpreted to mean that the winner takes all.⁶ In reality, rarely does a skilled judge approach issues as black or white. One person does not necessarily win and another lose. Rather, the goal of the judge is to find a reasonable, equitable compromise that follows the rules and requirements set forth by the laws of the state.

Charlie Gartman, a professional in the field of conflict resolution, does not follow procedures set forth by the legal system in order to resolve conflict.⁷ He also prefers not to use the term “compromise” when discussing the type of work that he does. In fact, his goal is to avoid compromise altogether. When working with businesses and organizations, Gartman relies on material published by the Harvard Negotiation Project,

⁵ Martin Shapiro, “Compromise and Litigation” in *Compromise in Ethics, Law and Politics*, (New York: New York University Press, 1979), 163.

⁶ Ibid., 164.

including the book *Getting to Yes*. As he states, it is based on an idea that people take positions and become fixed.⁸ The purpose of negotiation is not to reach a compromise but to understand the real issues behind it. The goal is to enable both sides to define and then achieve their goals, work cooperatively until they are able to find common ground without having to concede in the process.

פשרה in many ways contrasts with the forms of conflict resolution that are utilized by our courts and conflict resolution professionals. Those differences, however, can offer a variety of integral insights and ways to approach issues from a uniquely Jewish prospective.

The Structure of the Thesis

This thesis is divided into five chapters. Chapter I introduces how the topic was chosen, provides an overview of modern conflict resolution and presents the basic structure of analysis throughout the other chapters of the thesis. The next three chapters analyze different strata of Rabbinic Literature: Chapter II The Mishnah and Tosefta; Chapter III The Babylonian and Palestinian Talmuds; and Chapter IV The Mishneh Torah and Shulchan Aruch.

Each chapter contains an introduction explaining the unique focus of that particular chapter, a textual analysis that includes translations and an examination of each passage in relation to eight questions designed to frame פשרה in a modern perspective,

⁷ Charlie Gartman, phone interview by the author, Larchmont, NY, January 2001.

⁸ One example illustrating this ideal in *Getting to Yes* is a situation where two people argue over a lemon. Eventually one of them gets the lemon. What neither of them knew is that one needed the peel while the other needed the juice. The goal under this system is to achieve a win – win relationship by allowing both parties the ability to say what they really want. In most cases, to Gartman, the people's reasons for wanting a particular thing differ from one another. In those differences, there is often a solution.

and a conclusion which compares and contrasts all of the findings in each passage to one another emphasizing the most noteworthy.

The analysis of the translated texts will explore answers to the following questions:

- 1) What does the word פשרה means in this context?
- 2) Who performs the activity (including the number of people and their training)?
- 3) When does it happen?
- 4) How is it handled?
- 5) What types of issues are discussed in relation to פשרה?
- 6) When does it happen versus another form of conflict resolution?
- 7) Does this have any contemporary relevance?
- 8) What are the values that are implied?

By analyzing each text with these questions, the reader will be able to ascertain whether these questions were asked by the rabbis, which questions were repeated most often, which of these questions were not asked, and what the implications are of a particular passage.

Chapter V, The Conclusion discusses of the major changes and developments of פשרה, its relevance in relation to modern conflict resolution and finally, what makes פשרה uniquely Jewish.

CHAPTER II: MISHNAH AND TOSEFTA

Introduction

The Mishnah and Tosefta represent the first strata of rabbinic literature that utilize the term פשרה. Before immediately delving into these passages, it is appropriate to mention the biblical citation that the rabbis use to create their understanding of פשרה. According to the actual rabbinic texts, Ecclesiastes 8:1 serves as the primary source for understanding this term. This is not to say that this is the sole usage of the root פשר in the Tanach. In fact, there are thirty-one references in the Book of Daniel, but the rabbis did not utilize those citations. פשרה stems from פשר, a loan word from the Aramaic פשרא. It is generally understood as “solution” or “interpretation.”⁹ Menachem Elon, Renowned Jewish legal scholar and Israeli Supreme Court Judge, reinforces this understanding, “Pesharah apparently derives from the root פשר ‘solution.’”¹⁰ These next few pages will evaluate how the word is used in relation to the biblical proof-text and provide a springboard to understanding how the rabbis then apply this term in rabbinic texts. Following the Hebrew verse below, two different translations are provided.

Ecclesiastes 8:1

קהלת ח:א

מי כהחכם ומי יודע פשר דבר חכמת אדם תאיר פניו ועז פניו ישנא

“Who is like the wise one (man), and who knows the *meaning* of the adage: ‘A man’s wisdom lights up his face, so that his deep discontent is dissembled?’”¹¹

“Who is like the wise man? And who knows the *interpretation* of a thing? A man’s wisdom makes his face to shine, and the boldness of his face is changed.”¹²

⁹ *A Hebrew and English Lexicon of the Old Testament* (1951), s.v. “פשר.”

¹⁰ Menachem Elon, *The Principles of Jewish Law* (Jerusalem: Keter Publishing House Ltd., 1975), 570.

¹¹ *Tanakh: A New Translation of The Holy Scriptures According to the Traditional Hebrew Text* (Philadelphia: 1985), 1450.

¹² *The Jerusalem Bible: The Holy Scriptures* (Jerusalem: Koren Publishers, 1992), 881.

According to *The Interpreter's Bible*, Kohelet defines a wise man as an individual who is able to solve a complicated problem. As in Elon's statement, פשרה can best be understood as "solution." *The Interpreter's Bible* also notes:

Williams' translation, 'insight into the meaning of each difficult matter before him' is too general. The particular meaning is, as Graetz points out, that the wise man knows a way out of a difficult situation. It is significant that פשר, though in this verse it has the sense of 'solution,' gains in rabbinical Hebrew the meaning 'compromise.' Wisdom makes his face shine: His face has a kind and gracious expression; the opposite of this is hardness, a word which conveys the idea of severity and the determination to have one's own way."¹³

Though the biblical term פשרה can be understood as "solution" or "interpretation." These two simple words do not exhaust the full meaning of the biblical text. In fact, the insights from *The Interpreter's Bible* enhance the depth of meaning. It is clear that פשרה, the solution, is complex and difficult to achieve. Thus, only a particular type of person is associated with it. The individual, who proposes the solutions, is usually able to do so in a peaceful manner. An issue may be perplexing, but there is no mention in the verse that the person presenting the פשרה finds it particularly complicated. By finding a solution such a person attains the status of one who is wise. This implies that anyone, whether of average or higher intelligence, can be elevated in status by performing the act of פשרה.

The exceedingly positive characteristics ascribed to פשרה by Kohelet offer insight into how the rabbis interpreted the term as well. The primary question is how did the rabbis make the transition from the biblical definition of "solution," "interpretation" or "meaning," to the rabbinic definition of פשרה, which is generally understood as "compromise" or "arbitration." This exploration is complicated by the abstract nature of the comparison between the act of a wise person to "the interpretation of a thing." In

¹³ George Arthur Buttrick, ed., *The Interpreter's Bible*, (New York: Abingdon Press, 1956), 5:68-69.

essence, the biblical concept of פשרה is difficult to understand because it is disconnected from specific scenarios, and therefore it is impossible to know the answers to some essential questions. Is פשרה a formal process? When can it be used? Who uses it? However, one thing is clear: this vague expression allows the rabbis to create their own usage that is full of meaning and possibilities.

Textual Analysis

1) Mishnah Ketubot 10:6

משנה מסכת כתובות פרק י משנה ו

מי שהיה נשוי שתי נשים ומכר את שדהו וכתבה ראשונה ללוקח דין ודברים אין לי עמך השניה מוציאה מהלוקח וראשונה מן השניה והלוקח מן הראשונה וחוזרות חלילה עד שיעשו פשרה ביניהם וכן בעל חוב וכן אשה בעלת חוב:

- Factors: 1) If someone was married to two women
2) And he sold his field
3) And the first (wife) wrote to the purchaser, "I have no claim against you."
- Result: 1) The second (wife) can remove (the field) from the purchaser.
2) And the first (wife) can remove (the field) from the second (wife)
3) And the purchaser (can remove the field) from the first wife.
4) And they go around and around until they make a פשרה between them.
- Applications 1) (And the same is true with) a creditor.
2) (And the same is true with) a woman who is her husband's creditor.

Pinhas Kahati's Commentary

- Factors: 1) "One who marries two women" – the time of their ketubot are different.¹⁴
2) "And sold his field" – that is obligated to the ketubot of both women, but there is not enough in it (not enough money) except for the ketubah of one woman (HaMeiri),
3A) "And the first one (wife) wrote to the purchaser" – this is the one whose Ketubah was written first and she has preferential rights to the purchaser:
3B) "Judgment and words I don't have with you" – that is to say that she

¹⁴ "According to Jewish law this second marriage (and any others) is valid and can therefore only be dissolved by death or divorce. According to biblical law, polygamy was practiced throughout the talmudic period and thereafter until the tenth century." Elon, 367.

throws out (rejects) what is due to her based on the collection of the ketubah. (If her husband dies or divorces her.)

- Result:
- 1) "The second wife went out to recover the purchase" the second wife can claim the field from the purchaser and not forgo her rights on the benefits to collect (what is due from the ketubah) from this field.
 - 2) "And the first from the second" the first can (collect the value of the field) from the second because she preceded her, and the first wife did not waive her rights to the second wife, but only to the buyer
 - 3) "And the purchaser from the first" -- the purchaser can turn to claim the field from the first wife who waived her rights to the field.
 - 4A) "And they go around" they go around in that the second returns and claims the field from the purchaser, the first (wife) from the second (wife) and the buyer from the first (wife) forever
 - 4B) "Until a פשרה - is made between them" until an agreement arises between them.

Application: And the woman is the creditor.

In order to fully understand this one pericope, it is helpful to refer to other resources including Pinhas Kahati's and Bartenura's commentaries that discuss some of the more vague elements. It is also helpful because the author uses legalistic terms understood by the audience of his time.

In this pericope פשרה is used in the context of a contract negotiation. The key factor is that each of the parties has both something to gain and something to lose. Plus, each has a legally valid claim, thereby recognizing the priority given to the woman whose ketubah is dated earlier (Kahati version). In the actual text of the Mishnah, this priority is noted by defining the wives as "first" and "second". Initially, it seems difficult to imagine any scenario in which the woman would willingly waive her right to the land. Contracts should not be entered into lightly because they can have profound significance in the future. Therefore it seems improbable that the first wife's contract with the purchaser was created on a whim. Perhaps there were extenuating circumstances. For example, the field's purchaser may have given her immediate, partial payment of her ketubah. If the

household was impoverished, this might have been a valid reason to abide by the buyer's condition.

The pericope makes it clear that the first wife may collect from the second wife because no waiver exists between them. Rather, she only waived her rights in relation to the purchaser. One important question is raised: did the first wife know that the second wife would share the profits of the land? It is feasible, with this knowledge, the first wife in turn knew that she could collect from the second wife since wife one had an earlier ketubah claim, she knew that her debts would be paid off first.

Bartenura's definition about פשרה is also helpful because it draws a correlation between פשרה with ביצוע. [However, he does not provide a rationale for this stance.]

בצוע. לא כולו לזה ולא כולו לזה ולשון פושרין הוא לא חמים ולא קרים.

פשרה (means) ביצוע (They are interchangeable in some way). (His definition) everything does not go to this one and everything does not go to that one. (Similar to) the term פושרין meaning not too hot and not too cold.

Bartenura is also instructive in the statement that in order for a resolution to be considered פשרה, it cannot award or reward one side more than the other. Both sides are required to give slightly in the process. This is further illustrated by Bartenura's play on words. He likens פשרה to the term פושרין, which means lukewarm. Therefore, when making a פשרה, it is recommended to act in a way that is lukewarm, not too hot and not too cold. It is a balanced resolution – not “too hot or cold.”

In this case, פשרה means “resolution,” or “solution.” Both of these words are reasonable due to the nature of how the case is handled. It is not easily resolved and there is a necessary process that must be utilized as stated, “They go around, and around until

they make a פשרה between them.” These parties, in the dispute, are the same parties that create the resolution. Unlike the biblical text that is completely vague about the context for פשרה, this Mishnah makes it clear that it follows a legal format that was created by a ketubah, a written document. פשרה is only used when the circumstances extend beyond: first, what was written in the ketubah; and second when all three parties have an equally valid claim. This is an example of all the parties seeking to mutually solve the problem. There are certain conditions where the law only goes so far, and it begs for interpretation. The key is how one understands and applies the law. In conclusion, several values are implied in this passage. First, there is a respect for the law and, in particular, for contract agreements. In turn, equity and due process are emphasized and held in high esteem.

2) Tosefta Bava Kamma 2:10

תוספתא מסכת בבא קמא פרק ב הלכה י

חמורים שרגליו של אחד מהם רעות אינן רשאים לעבור עליו נפל רשאים לעבור עליו היה אחד מהן טעון ואחד רכוב [מעבירין את טעון מפני הרכוב אחד טעון ואחד ריקן מעבירין את הריקן מפני הטעון אחד רכוב ואחד ריקן מעבירין את הריקן מפני הרכוב היו שניהן טעונות שניהן רכובות שניהן ריקנות עושין פשרה ביניהן וכן שתי ספינות שהיו באות זו כנגד זו אחת פרוקה ואחת טעונה מעבירין את הפרוקה מפני הטעונה שתיהם פרוקות ושתייהן טעונות עושות פשרה ביניהן.

- Case 1: (In the case of) donkeys, (if) the legs of one of them are bad/unsound,
- Result 1: They are not permitted to pass him.
- Case 2: (If) one of them fell,
- Result 2: They are permitted to pass him.
- Case 3: (If) one of them is loaded, and one is ridden,
- Result 3: The loaded (one) passes before the ridden (one)
- Case 4: One is loaded and one is empty,
- Result 4: The empty (one) passes before the loaded (one).
- Case 5: One is ridden and one is empty,
- Result 5: The empty (one) passes before the ridden (one).
- Case 6: There were two loaded, two ridden, two empty
- Result 6: Make a פשרה between them.
- Case 7: Thus it is with two ships that were coming towards one another, one was unloaded, and one loaded,

- Result 7: The unloaded one passes before the loaded (one).
Case 8: Two are unloaded, and two are loaded,
Result 8: Make a פשרה between them.

This passage deals with situations where there is no pre-existing contractual agreement. Perhaps it could most accurately be defined as an analysis of the "rules of the road." It clarifies who is given the right of way at an impasse in each of the situations when the two parties involved do not have the same basic outward signs. The first scenarios deal with the physical condition of the donkey traveling. For example, if there is a donkey that is hurt, the other party attempting to pass must wait and allow the donkey space. If the injury is so severe that the donkey has fallen, then another party is entitled to pass. The second stage of the piece deals with the additional factor of what is being carried.

As the scenarios continue they become increasingly more difficult to determine because the two parties appear equal. As the outward signs become more difficult to detect, the generally understood rules cannot be applied. Rather a פשרה must be made between them. This pericope is applicable not only to donkeys, but also to other modes of transportation, such as ships. In the context of this Tosefta passage, פשרה takes on the meaning of "agreement." An agreement can be made between the two actors, without the need for a third party intermediary and without an entire process accompanying the actual exchange between the parties. Whereas an English term such as "resolution" must involve a deeper process, it is not explicitly stated that there should be a give and take. The key is the decision. Thus, this provides an example where the parties involved reach an agreement without the intervention of any third party.

Practically speaking, on the road it would be exceedingly difficult to find a third party to assist. On a substantive level, the nature of the issue is one that can reasonably be handled by the individuals affected. Most of all, it is clear that both parties are equal in relation to the issue at hand. It also appears that פשרה happens in the moment when the two parties realize that their situation is completely equal. For example, today when walking down the street if a person is carrying heavy bags, this person is able to pass a person with no bags. However, two people pushing baby carriages must make an agreement whether by a nod or a gesture or a simple movement to the side since both parties are affected by the same factors.

In this pericope the פשרה happens immediately, enabling the two parties to continue on to their destinations. What is unclear is how the agreement is made. There are no defined standards that one must follow. In addition, a number of values are presented such as health, burden and timing. It will be interesting to see if the same protocol for producing agreements is handled by the rabbis as it relates to issues outside of travel.

תוספתא מסכת בבא מציעא פרק ג הלכה ה 3) Tosefta Bava Metzia 3:5

האומ' מנה אני חייב וראיני יודע אם לפלני אם לפלני נותן לזה מנה ולזה מנה שחורדה מפי עצמו אומ' לשנים גזלתי את אחד מכם מנה ואחד מכם מאתים ואיני יודע אי זה מכם נותן לזה מאתים ולזה מאתים ואם לאו היה לו לשתוק זה אומ' מאתים שלי וזה אומ' מאתים שלי נותן להם מנה והשאר לא יתן להם עד שיעשה ביניהן פשרה.

- Case 1: One who says that I owe one hundred (coins), and I do not know if (I owe) it to Creditor A, or to Creditor B,
 Result 1: He gives one hundred (coins) to one and one hundred (coins) to the other, because he admitted the obligation by himself.
 Case 2: One says to two (people) I stole one hundred (coins) from one of you, and

- I stole two hundred (coins) from one of you, and I do not know which one (was which)
- Result 2: He gives two hundred (coins) to one, and two hundred (coins) to another, (if he did not wish to pay them both) it is better for him to be silent.
- Case 3: One says, this is my two hundred (coins), and the other says, this is my two hundred (coins),
- Result 3: Give them one hundred (coins), and do not give the remainder to them until they make a פשרה between them.

This Tosefta pericope deals with money owed by one party to others, whether by a sanctioned debt or by theft. In the first case, the individual cannot remember to whom he owes the money. Under this circumstance the recommendation is to give the money to both parties, eliminating any concern that the money was not repaid. Certainly, it is a financial burden, but this burden is less important than paying off a debt to the party owed.

In the second situation, a person stole different amounts of money from two separate parties. Two results are possible. The first uses the same type of reasoning as that utilized in the previous case, that it is better to err on the side of giving too much money than giving the incorrect amount of money. The second result highlights the risk involved if a person does not choose to pay back the individuals. The Tosefta cautions one not to discuss the issue at all, for if the dilemma is brought to the attention of both parties involved (in what appears to be an attempt to save one hundred coins), there is a risk that an argument will arise. Since the thief cannot recall how much he took from each party, both of the claimants could make claims against him or her, but only if the claimants are willing to lie or steal in order to recover the larger amount.

In the third situation, the two parties claim ownership of two hundred coins. There are no witnesses or documents to suggest one party's claim over the other. As a result, there is only one way to resolve the deadlock: פשרה. This conflict is resolved by

dividing the coins between them and forcing them to work out the dispute over the other one hundred coins among themselves.

In this passage, פשרה has a slightly different meaning from the two previous text because there is an interchange that illustrates the disagreement between the parties. As a result, פשרה has the meaning of "resolution" because there is an actual conflict that must be resolved.

There are a variety of issues that are touched upon in this Tosefta including loans, theft, how repayment should ideally happen, and the merit of being correct versus fulfilling a greater obligation. It is not apparent from the text if another method could be used in order to resolve the conflict. This Tosefta is exceedingly relevant today. Certainly there are cases when a friend borrows money from several others. There is a tendency and a desire to be accurate and to only pay as much money as necessary. Furthermore, this Tosefta cautions that it is more important to be respectful to those to whom money is owed, rather than be accurate. In cases where claims cannot be resolved, the Tosefta suggests that it is worthwhile to create a compromise for the sake of peace.

4) Tosefta Sanhedrin 1:2

תוספתא מסכת סנהדרין פרק א הלכה ב

טענת ממון בשלשה טענות נפשות בעשרים ושלשה וכשם שהדין בשלשה כך
הפשרה בשלשה נגמר הדין אין רשאי לבצוע ר' אלעזר בנו של ר' יוסי הגלילי
אומ' כל המבצע חרי זה חוטא והמברך את המבצע חרי זה מנאץ לפני המקום
על זה נאמר ובוצע בדרך נאץ י"י אלא יקוב הדין את החר שכן משה היה אומ'
יקוב הדין את החר אבל אהרן היה עושה שלום בין אדם לחבירו שני בשלום
ובמישור הלך וגו' ר' אליעז' בן יעקב אומ' מח תלי' לומר ובוצע בדרך נאץ י"י
משלו משל למה הדבר דומה לאחד שגנב סאה של חיטין טחנן ואפאן והפריש
מהם חלה והאכיל לבניו היאך זה מברך אין זה מברך אלא מנאץ על זה נאמר
ובוצע בדרך נאץ י"י:

Rule 1: A monetary case is (judged) by three.

Rule 2: A capital punishment case is (judged) by twenty-three.

- Rule 3: Just as the דין is judged by three, so is פשרה by three.
- Rule 4: Once the verdict is reached (דין is completed), you are not permitted to do ביצוע.
- Statement 1: Rabbi Eliezer ben R. Yose HaGlili [5th Generation Tanna] says, המבצע is a blasphemer before God. About this person it is said, "One who blesses a בצוע has blasphemed God." [Psalm 10:3]
- Statement 2: Let justice pierce the mountain (be tough no matter what). And so Moses would say, "Let Justice pierce the mountains." [Deuteronomy 1:17]
- Statement 3: But Aaron made peace between one man and another. As it says, "He walked with me in peace and uprightness." [Malachi 2:6]
- Question: R. Eliezer ben Yaakov [3rd – 4th Generation Tanna] says, "Why does Scripture say, 'He who praises a בצוע blasphemes God.'"
- Answer: They made an analogy. To what is this similar? To someone who stole a measure of wheat, ground it into wheat, baked it into bread and separated a dough offering from the bread, and then fed the bread to his children. How is such a person to say a blessing? It is no blessing but a curse. And concerning such a person it is stated, a thief who recited a blessing has blasphemed God.

This Tosefta can be divided into three parts. The first is a means to understand פשרה in terms of a known entity, דין. Not solely because the number of people needed for both are equal, but because פשרה should be considered part of the legal system. Therefore, the process of פשרה should also happen in the context of the courts and needs three judges. The next statement claims that once the verdict is reached, performing ביצוע is not permitted. Even if both are part of the legal system, once one method is begun and chosen over the other, it cannot be changed midstream. In addition, there is an implied connection between פשרה and ביצוע. This is most clearly illustrated because there is no separate reference that compares ביצוע to דין. It is as if the writer of the text assumes that we know the two can be used interchangeably.

The second section, a series of statements, includes a debate over the merits of ביצוע/פשרה. The overall tone is negative. One who performs ביצוע and one who blesses those who do ביצוע are viewed as nothing short of sinners. However, the only one positive mention compares one who does ביצוע to our ancestor Aaron who loved and pursued

peace. In the third section, a question and an answer, states that not only is ביצוע negative, it is comparable to blasphemy. To enhance the reader's understanding of how negative it is to blaspheme God, this Tosefta provides an example illustrating its severity. One of the possible reasons for the exceedingly negative reaction to ביצוע could result from its comparison to דין. Based on these statements it appears that there are people who did not approve of the comparison between דין and ביצוע/פשרה.

What exactly does the term פשרה mean in the context of this Tosefta? Actually, it is not feasible to give one response that captures the essence of its meaning here. On a simple level, it is clear that פשרה is part of the legal process and, therefore, comparable to דין. Due to the relationship with דין, פשרה must be handled by a court of three. Reinforcing the authority of such courts, this Tosefta states that פשרה must occur before a legal verdict is reached. This is the first time that פשרה has moved into the realm of the courts. Therefore, there is a higher standard and level of training needed for one to facilitate פשרה. In the other cases (which do not appear in Sanhedrin), פשרה seems to involve only the parties to a dispute or problematic situation. Now that there are these courts, making פשרה becomes at least somewhat external to the parties involved. In addition, the reader is given insight into valid and in-valid uses of פשרה.

The statements about פשרה and ביצוע, which appear to be used interchangeably, read more as an introduction to the term rather than a guideline for using the process. The controversy over its merit arises out of the disputed value of being "peaceful" like Aaron; or "just" like Moses. Those who are just use the more well-established process of דין, while those who are peaceful use ביצוע/פשרה. There is no mention of the types of issues that are best handled through the process of פשרה or if there is some other form of

resolution that is available. Clearly, the strongest value that is presented in all of this work, is the strength and merit of דין. One of the main comparisons to look for in other strata of Jewish law will be the relationship between פשרה and דין.

5) Tosefta Sanhedrin 1:9

תוספתא מסכת סנהדרין פרק א הלכה ט

רבן שמע' בן גמל' אומ' כשם שהדין בשלשה כך פשרה בשלשה יפה כח פשרה
מכח הדין כיזה צד שנים שדנו יכולין לחזור בהם ושנים שפישרו אין יכולין
לחזור בהם:

Statement 1: Rabban Shimeon ben Gamliel [2nd Generation Tanna] says, "Just as judgment is with three (judges), so is פשרה with three.

Statement 2: The strength of פשרה is greater then the strength of דין.

Question: How so?

Answer: Two (judges) who sat in judgment (allow the litigants) the power to retract. When two (arbitrators) who made a פשרה, (the litigants) do not have the power to retract.

This Tosefta presents two opposing perspectives on פשרה. The first is that פשרה is valued equally to דין. As discussed in the previous Tosefta, it is considered within the same legal context because the identical number of judges is utilized. The second perspective is that פשרה is not comparable to דין. Rather, פשרה is stronger. According to the rabbis, since only two individuals must preside over the process, it is greater. By this logic, the more perplexing this issue, the greater the need for more skilled judges. This simple statement and the following proof text explain two important pieces about פשרה. First, it is not part of the legal category of דין because it only requires two judges or arbitrating parties. The second lesson it teaches about פשרה is that, in practical terms, פשרה is stronger then דין. Think about one of the examples given in the previous Tosefta where it states that 23 judges are needed to preside over a capital case. By the logic presented here, this means that the strongest case is one of פשרה, followed by דין and then

in turn followed by the capital case. By requiring fewer people to make a declaration and come to an agreement, it shows that the least difficult case to determine has the ability to stand on its own.

As with the previous Tosefta, it is not possible to ascribe a definition of פשרה. Rather, the emphasis is on the relationship between פשרה and דין, and, in turn who is responsible for פשרה. Although this Tosefta explains that judges are needed to supervise פשרה, it is unclear if the number of judges should be two or three. This passage also does not deal with the issue of when it is appropriate to institute פשרה. The greater issue, as mentioned, is whether it happens in the context of דין. It is also not apparent what types of issues can be handled by פשרה or if there is another method that can be viewed as comparable.

Conclusion

The Mishnah and Tosefta present פשרה in a variety of contexts resulting in the term having a wide range of meanings including: "resolution," "solution," "agreement" or as a specific legal term. Each of these is an expansion of the Biblical definition of פשרה as "meaning," "interpretation," or "solution." The overlapping definition between the two is "solution." Perhaps the process of finding a פשרה, in reality, is a search for meaning and interpretation, which can, in turn, create a solution.

In Mishnah Ketubot 10:6 it states, "They go around and around until they make a פשרה between them." In other words, all of the parties are able to present their reasons why they are entitled to the land, resulting in a standstill between three parties with equal claims. In the end, a solution must be created, perhaps because each has heard the other's arguments or out of pragmatic necessity to move on. There are no guidelines for the

length of time for this process or any intricate details of the discussions. In reality, this does not matter. What does matter is that the discussion continues until a resolution is made.

These texts provide information about who is able to do פשרה. There are two models. The first, Mishnah Ketubot 10:6 & Tosefta Bava Kamma 2:10, is that all of the parties that have equally valid claims according to the law can make the פשרה between themselves. The second option is that judges are the ones to handle this process. It is important to note that, under this option, the individuals who handle these cases must have specific training and experience in order to handle the matter. Therefore, פשרה can either be seen as an exchange handled by the affected parties or a formal legal proceeding that must be handled solely by professionals.

One of the most fascinating aspects of פשרה is that, in most of the cases presented, it happens when the disagreement is beyond the law. פשרה is used when contracts have been made, but the issue at hand is not covered by the contract. It is used when all of the parties are equal and there are no differentiating factors between them as in the case with the donkeys (Tosefta Bava Kamma 2:10). With all elements being equal, פשרה is the best way to create a solution. It can also be implemented when both parties are unequal, but evidence is lacking, as in the case where two parties argue over ownership of two hundred coins. Without proper evidence, the two parties must come to an arrangement on their own. There is one example that illustrates פשרה must happen according to the law and is not beyond it. It is not surprising that this is the Tosefta that compares פשרה to דין. Here there is a question as to the validity of considering פשרה as part of the legal process.

One of the questions not discussed at all is how פשרה is handled. The greatest detail is seen in the Mishnah Ketubot 10:6 that states that the parties go around and around until a פשרה is made between them. As mentioned before, this is not a detailed analysis, but a philosophical approach to פשרה. Here, each party has a say and a claim to what happens.

Although there is not a lot of detail given to the actual process, there is some discussion of the types of issues presented. The three specific areas given are documents related to ketubot claims, travel and repayment of items loaned or claimed. One of the key areas to look for in the later strata of text, are how these issues are either expanded upon or perhaps no longer discussed.

Thus far, פשרה is only related to one other form of conflict resolution: דין. The clearest illustration is in Tosefta Sanhedrin 1:2 which presents Aaron as a model of פשרה and Moses as a model of דין. By comparing פשרה and דין to two of our most prominent ancestors, the Tosefta emphasizes the need for elements and qualities of both forms of conflict resolution.

Several of these passages have relevance when it comes to contemporary situations. For example, the case of the donkeys provides a framework for understanding general rules of the road and the conflict over the coins speaks to the constantly present human desire to protect one's rights to his or her property. The pericopes that compare פשרה to דין deal with the ongoing struggle within the legal world to determine the legal basis for a variety of processes and to offer just solutions to difficult claims. Most of all, these five tannaitic texts illustrate a variety of considerations: health, burden, timing, and the merit and value of דין as well as the merit of פשרה.

CHAPTER III: BABYLONIAN AND PALESTINIAN TALMUDS

Introduction

In Chapter II, the Mishnah and Tosefta passages focused on defining the term פשרה. Of the five texts, three presented situations that were handled independently by the affected parties and two presented פשרה being handled in the court and compared to דין. Until now, the issues have related to cases that extend beyond the law or are in areas that are not handled within the realm of the courts.

The main question for this chapter is: How did פשרה change once handled by the Babylonian and Palestinian Talmuds? Even on the surface it is evident that significant changes were effected by the tractates in the Talmud that deal with the term פשרה. Six of the nine cases from the Tractate Sanhedrin indicate the courts, through formal legal proceedings, handle פשרה. In turn, the focus of the texts will move away from defining פשרה and towards declaring who is responsible for the process and when it should happen.

Textual Analysis

1) Berachot 10a

תלמוד בבלי מסכת ברכות דף י עמוד א

אמר רב המנונא: מאי דכתיב: [קחלת חן] מי כהחכם ומי יודע פשר דבר? מי כהקדוש ברוך הוא שיודע לעשות פשרה בין שני צדיקים, בין חזקיהו לישעיהו. חזקיהו אמר: ליתי ישעיהו גבאי, דהכי אשכחן באליהו דאזל לגבי אחאב (שנאמר: [מלכים א' י"ח] וילך אליהו להראות אל אחאב). ישעיהו אמר: ליתי חזקיהו גבאי, דהכי אשכחן ביהורם בן אחאב דאזל לגבי אלישע. מה עשה הקדוש ברוך הוא - הביא יסורים על חזקיהו, ואמר לו לישעיהו: לך ובקר את החולח: שנאמר: [מלכים ב' כ'] [ישעיהו ל"ח] בימים ההם חלה חזקיהו למות ויבא אליו ישעיהו בן אמוץ הנביא ויאמר אליו: כה אמר ה' (צבאות) צו לביתך כי מת אתה ולא תחיה וגו'. מאי כי מת אתה ולא תחיה - מת אתה - בעולם הזה, ולא תחיה - לעולם הבא. אמר ליה: מאי כולי האי? אמר ליה: משום דלא עסקת בפריה ורביה. אמר ליה: משום דחזאי לי ברוח הקדש דנפקי מינאי בנין דלא

מעלו. אמר ליה: בחדרי כבשי דרחמנא למה לך? מאי דמפקדת איבעי לך למעבר
 ומה דניחא קמיהקודשא בריך הוא - לעבד. אמר ליה: השתא הב לי ברכתך,
 אפשר דגדמא זכותא דידי ודידך ונפקי מנאי בנין דמעלו. אמר ליה: כבר נגזרה
 עליך גזירה. אמר ליה: בן אמוץ, כלה נבואתך וצא! כך מקובלני מבית אבי
 אבא - אפילו חרב חדה מונחת על צוארו של אדם אל ימנע עצמו מן הרחמים.
 אתמר גמי, רבי יוחנן ורבי (אליעזר) [מסורת הש"ס: [אלעזר]] דאמרי תרוייהו:
 אפילו חרב חדה מונחת על צוארו של אדם אל ימנע עצמו מן הרחמים, שנאמר:
 [איוב י"ג] הן יקטלני לו איחל.

Statement 1A: Rav Hamnuna [4th Century CE Amora] said: about the verse "Who is like the wise and who knows the פשר of a thing? [Ecclesiastes 8:1]

Statement 1B: Who is like the Holy Blessed One who knows how to make פשרה between two righteous (people), between Hezekiah and Isaiah?

Statement 2A: Hezekiah said, "Let Isaiah come to me! For thus do we find in Elijah who went to see Ahab (King of Israel). As it is said, "Elijah went to see Ahab." [I Kings 18:2]

Statement 2B: But Isaiah said, "Let Hezekiah come to me, for thus we find in the case of Yohoram, the son of Ahab, when he went to see Elisha. What did the Holy One do? God brought afflictions upon Hezekiah and he said to Isaiah: "Go and visit the sick one." For it says, "those days Hezekiah took sick unto death, and Isaiah the son of Amotz the prophet who came to him and said to him: So spoke God! Instruct your household, for you are dying, and you will not live." [II Kings 20:1 & Isaiah 38:1]

[An aside]

Question: What is (the reason it says) for you are dying, and you will not live?

Answer: You are dying in this world, and you will not live in the World to Come.
 [Return to the main body of the text]

Question: (Hezekiah asks Isaiah) What is all this (Why am I told that I will die)?

Answer: Because you did not engage (in the commandment) to be fruitful and multiply.

Question: (Hezekiah says the reason that I did not have children is) because I saw (through) Divine Inspiration that un-virtuous children would come from me.

Answer: (Isaiah) A decree of death has already been passed upon you.

Statement 1: (Hezekiah) Son of Amotz, end your prophecy and go! I have received this from the house of my father's father [from King David according to Rashi] even if a sharp sword rests on a person's neck – he should refrain from praying for mercy

Statement 2: Similarly, it has been stated that R. Yochanan [2nd Generation Amora] and R. Eliezar [3rd-4th Generation Tanna] both said, "Even if a sharp sword rests upon a person's neck, he should not refrain from (praying for) mercy, for it stated [Job 13:15] 'Although he kills me, I will pray to him (God).' "

This Gemara functions on several levels. First, it deals with the limited physical interaction between Isaiah and Hezekiah as portrayed in both Isaiah, I Kings and II Kings. In all of these biblical scenarios it is clear that these two great men existed and had some sort of power that overlapped in time. Yet, there is only one occasion where the two men are actually described together, the period prior to Hezekiah's death [See II Kings 20 and Isaiah 38:1.] The problem in this Gemara is that each man believes that he is superior and therefore should not be the one to initiate a visit to the other. The solution is created when God takes an active role.

This Gemara likens the act of bringing together Isaiah and Hezekiah to an act of פשרה. There are three major factors that differentiate this act of פשרה from others. First, פשרה is elevated because God is the one facilitating the process. פשרה is no simple task, it is significant and is worthy of the attention of the Holiest being of all. God is presented as an ideal mediator who sets the process in motion. As a result, the stalemate is broken, which allows the events to follow their normal course of action without any further intervention from God. Second, this act is performed between two righteous individuals, which displays that no one is above the need for פשרה. Even the most righteous of our ancestors encountered situations where guidance and assistance was needed from an outside party. Third, פשרה is elevated in importance, so much so, that God is willing to strike down Hezekiah to achieve it. Thus, פשרה is at least equal to, if not more important, than life itself.

Again, it is important to emphasize that neither Hezekiah nor Isaiah are seen as inferior or superior. Both have exhibited stubbornness. Both insist that the other man should be inconvenienced. Neither takes the initial step to approach the other.

Interestingly, although the text does not present one as superior, each of the individuals, Hezekiah and Isaiah, sees himself as superior. Their inflexible commitment to their own position in turn inhibits both of their abilities to reach out on their own.

The most disturbing aspect of this text is that only the imminent death of Hezekiah ultimately forces the two men to speak face to face with one another. There is no bargaining. There is no gradual development in process before the ultimate decree is issued. On the one hand, this teaches that often times it takes a strong, powerful recognition that an issue relates to a life and death matter in order for it to happen. On the other hand, are these really the only measures that could have enabled the two to interact face to face? And, was the interaction that finally took place worth the price of Hezekiah's life?

From this text it is clear that each party plays a particular role, and these roles are essential. God serves as a mediator intervening initially to get the interaction underway. Isaiah and Hezekiah are treated as equals who are significant and highly valued and yet, need assistance to meet with one another. Certainly one could argue they are not equal because Hezekiah is being told he will die. It is true, once he is stricken with illness, he is no longer equal in strength. But the equality between the two men is not based upon physical factors, rather, it is based upon their righteousness.

In this Gemara, it is most accurate to define פשרה as a bringing together. Here, there are two people who will not engage with each other. Therefore, the third party, God, must take action in order for them to connect with one another. It is important to note that this פשרה is against the will of Isaiah and Hezekiah. Most important, the פשרה occurs because God desires to bring these two separate righteous individuals together.

The פשרה does not happen after a conflict; rather it is a means of decreasing the distance between the two men. God, the third party, is the one who wants to draw them together.

The issue that differentiates this Gemara from any of the other rabbinic pieces read thus far, is the extreme measures used to create the פשרה. Without a doubt, one of the most important values implied in this piece is a de-emphasis on pride and an emphasis on bringing people together. However, God actually causes Hezekiah to become sick and then commands Isaiah to go see him. This raises interesting questions for leaders in our times. Ethically, are there appropriate times to force parties to come together even if it is not their desire? Can an entity use its power to create this coming together? If there is manipulation and force used, does this in any way negate the impact of the פשרה?

At the moment God is given as an example of one who engages in פשרה, it is elevated to one of the ultimate values in our religion. By engaging in פשרה, we are able to emulate God and one of God's skills. It is also evident that no one is above needing to use פשרה. If Hezekiah and Isaiah, two righteous individuals, need guidance, then we too will inevitably need to use assistance.

2) Sanhedrin 5b

תלמוד בבלי מסכת סנהדרין דף ה עמוד ב

גופא, אמר שמואל: שנים שדנו - דיניהם דין, אלא שנקרא בית דין חצוף. יתיב רב נחמן וקאמר להא שמעתא. איתיביה רבא לרב נחמן: אפילו שנים מזכין או שנים מחייבין ואחד אומר איני יודע - יוסיפו חרינין. ואי איתא - לחו כשנים שדנו! - שאני התם דמעיקרא אדעתא דתלתא יתיבי, הכא - לאו אדעתא דתלתא יתיבי. איתיביה: רבן שמעון בן גמליאל אומר: הדין - בשלשה, ופשרה - בשנים. ויפה כח פשרה מכח הדין. ששנים שדנו - בעלי דינין יכולין לחזור בהן, ושנים שעשו פשרה - אין בעלי דינין יכולין לחזור בהן.

- Statement 1: (In) The text (cited earlier) Shmuel [1st-2nd Generation Amora] said, "If two (judges) have judged (a loan dispute) their decision is a valid decision, but their court is called 'insolent' (because they've violated a rabbinic norm which demands three judges.)"
- Example: Rav Nachman [2nd Generation Amora, same time as Shmuel] was sitting and telling this ruling.
- Statement 2: Rava [3rd-4th Generation Amora] challenged Rav Nachman from a Mishnah [Sanhedrin 29a] – Even if two (judges) declare (him) not liable or two (judges) declare him liable and one says, "I don't know," they add judges (to make it three). Now if (there is a basis for Shmuel's ruling) – then let the two (deciding judges) be like two who adjudicate. (Two should be enough to determine a ruling) [But they are not sufficient, hence, Shmuel is wrong.]
- Response 1: [Now there is a challenge to Rava] It is different here for originally (the judges) convened with the intention of three (judges) [As explained in the Mishnah. - Shmuel speaks of a court originally consisting of two.]
- Response 2: (Rava) challenged (Rav Nachman) from a Braita – Rabban Shimon ben Gamliel [4th-5th Generation Tanna] says דין must be done by three, but פשרה may be done by two. And the strength of a פשרה is greater than the strength of a דין. For if two (judges) give a judgment (the litigants) may retract whereas, if two arbitrate a פשרה, (the litigants) may not retract.

This Gemara seeks to gain an understanding of two issues. The first is how many judges must agree in a case of דין. The second issue, at the end of this Gemara, attempts to compare דין to פשרה. There is an assumption that by comparing דין to פשרה it will clarify our understanding of both of these terms. Although, based on the conclusion of the Gemara, it appears that the analysis is more interested in creating clarity in terms of the latter.

At the outset, the Gemara presents a case where two judges preside over a דין. Although the decision is binding, the court is looked down upon and defined as insolent. Rav Nachman supports both of these points of view. Whereas, Rava makes it clear that no ruling is final if only two judges agree that the litigant is liable, or not liable. If one of the original three judges claims that he does not know how to rule, it is essential to add another judge to the court. In other words, three judges must agree to the ruling. The

Stam responds that Rava may be right when the original court consisted of three judges; but initially if there are two judges they could decide the דין. In fact, two agreeing positions can determine a דין. Rava then challenges R. Nachman from a Braita, questioning if two were good enough for דין, why distinguish between דין and פשרה?

The key question is what does this mean in terms of פשרה? According to this Gemara there is a difference in the number of people needed to determine a פשרה. Rava's opinion supports the claim that fewer judges are needed for a פשרה than a דין, but there is certainly disagreement. Nachman claims that the same amount of judges (two) is needed for both פשרה and דין. This argument leaves the reader with an overall perplexing question. Why would it be important to compare פשרה to דין?

Tosafot Sanhedrin 5b

תוספות מסכת סנהדרין דף ה עמוד ב

יפה כח פשרה כו' - תימה במאי יפה כח דין נמי דומיא דפשרה שהיה מדעת שנים שדנו אין בעלי דינין יכולין לחזור בהן כיון דקיבלו עליהו ונראה דמיירי כגון דאתו לבי תרי ואמרי להו דונו אותנו כמו שרגילים לעשות הדין או עשו לנו פשרה כמו שרגילין לעשותה דבכה"ג יפה.

The force of פשרה is stronger/better: Why is the force stronger? דין is similar to פשרה in a case where two judged, for (in such a case) the litigants cannot retract since they have accepted (two judges as adequate) for themselves. And it appears that this must be a case where litigants came before two (persons) and said to them, "Judge us as is regularly done in judgments or make us a פשרה as it is regularly done." In such a case, פשרה has greater force (since everyone agrees it can be done by two).

Through the insight added from the above Tosafot, it appears that the question being debated is whether פשרה is part of the judicial system or outside it. The issue is explained by asking the question, "Why is the force of פשרה stronger then דין?" The Gemara shows that if פשרה is part of the legal system, as Nachman explains, then פשרה will bind in the same way as a legal decision. If not, as Rava states, it will be subject to revocation by the parties involved. Tosafot explains that דין is compared to פשרה in cases

where the litigants accept two judges to adjudicate their case. In this particular scenario, not only is פשרה comparable to דין, by being held in the same regard, it is actually stronger because there is no debate whether two can oversee a פשרה.

Although there is a question over the number of people needed to create a פשרה, it is essential to state explicitly that judges, trained legal experts, perform this type of resolution. The focus of this entire Gemara is to determine the number of judges needed and the appropriate rationale for either two or three judges. Based on the final wording of the Gemara, it leans towards the need for only two people in order to complete a פשרה. Therefore, if only two people are needed, it is not part of the legal process in the same way as דין.

Another major issues this Gemara touches on, which is also important today, is the authenticity of the method used. The goal is to have a process that inspires trust and confidence, is reliable, authoritative, authentic, and therefore the resolution created can be binding. These desires are also values that are implied in the texts as well. It is clear that דין is not the only authentic or valid manner one can use to create a resolution.

3) Sanhedrin 5a

תלמוד בבלי מסכת סנהדרין דף ו עמוד א

לימא כתנאי. ביצוע בשלשה, דברי רבי מאיר, וחכמים אומרים: פשרה ביחיד. סברו: לכולי עלמא מקשינן פשרה לדין. מאי לאו בהא קמיפלגי, דמר סבר: דין בשלשה, ומר סבר: דין בשנים? - לא, דכולי עלמא דין בשלשה, והכא בהא קמיפלגי; דמר סבר: מקשינן פשרה לדין, ומר סבר: לא מקשינן פשרה לדין. לימא תלתא תנאי בפשרה, דמר סבר: בשלשה, ומר סבר: בשנים, ומר סבר ביחיד? אמר רב אחא בריה דרב איקא, ואיתימא רבי יימר בר שלמיא: מאן דאמר תרי אפילו חד נמי, וחאי דקאמר תרי - כי היכי דליהו עליה סהדי. אמר רב אשי: שמע מינה פשרה אינה צריכה קנין, דאי סלקא דעתך צריכה קנין - למאן דאמר צריכה, תלתא למה לי? תסגי בתרי, וליקני מיניה! - והלכתא: פשרה צריכה קנין.

Statement 1: Let us say that there is an argument among the Tannaim: ביצוע is made by three - these are the words of R. Meir [5th Generation Tanna].

- Statement 2: The sages say פשרה is made by one.
- Statement 3: The anonymous commentators thought that according to everyone we compare פשרה to דין.
- Question: So, isn't it in the following that the (Tannaim) disagree?
- Answer 1: One master (R. Meir) thought דין requires three. While (another) master (sages) maintain דין requires two. Everyone (may agree) that three are needed for דין.
- Answer 2: And here is where they disagree, that a master (R. Meir) thinks we compare פשרה to דין. Whereas, one master (sage) thought that we do not compare פשרה to דין. [The argument is not about how many are needed for דין, the argument is if we should compare דין to פשרה.]
- Statement 4A: (Braita) Shall we say that there are three views of the Tannaim about judges needed in פשרה?
- A) Master (R. Meir) says three.
- B) Master [Shimon ben Gamliel - 4th-5th Generation Tanna] says two.
- C) Master (sage) taught one.
- Statement 4B: R. Acha ben R. Ika [4th Generation Amora, 380CE Babylonia] said and some say was R. Yaimar bar Shleima [6th – 7th Generation Amora] the one (Gamliel) who says two judges, even agrees that one is sufficient. And the reason he says two is so they (can function as) witnesses (one needs two witnesses for financial matters)
- Statement 5: Rav Ashi [5th Generation Amora] said" Learn from this (R. Meir's statement) that פשרה does not need קנין. For if it would arise in your mind that it does require קנין – then according to the one (R. Meir) who says that three are needed – why is it so? Two should be fine (to do פשרה) and let the litigants make an act of קנין.
- Statement 6: (Stam) But the halachah is that פשרה needs קנין.

Similar to the Gemara on Sanhedrin 5b, this passage struggles with the importance of comparing פשרה to דין. Initially, this passage attempts to determine if this is a feasible evaluation. Whereas this text on Sanhedrin 5b focuses primarily on determining how many judges are needed for דין, this Gemara focuses on how many judges are needed in order to make the פשרה.

A new term, ביצוע, is introduced at the outset. According to the following commentary by Rashi, "פשרה – (Should be understood as) ביצוע." Thus, ביצוע should be used interchangeably with פשרה. In the framework of how the text develops, Rashi's interchangeability seems to make the most sense. This becomes apparent because the

term ביצוע is not acknowledged or referred to separately during the remainder of the body of the text.

In this passage, there are two major disagreements. The first is a continuation of the debate raised in the previous Gemara: whether or not פשרה can be compared to דין. The second argument is how many individuals must be used during פשרה. When discussing how many are creating a דין it is clear that there are to be judges presiding over the matter.

In the discussion of פשרה, there are two opinions regarding the qualifications or status of the individuals hearing the proceeding. As the Gemara illustrates, none of the rabbis believe that a single judge is allowed to judge a case, whereas, פשרה can be done with one. If this is true, then פשרה is not comparable to דין. If this is the case, then the individuals presiding over a פשרה may not need to have the same qualifications as judges who preside over דין. This particular opinion leaves room for the possibility that the one individual does not need to be a judge. The second perspective raised by the Braita used in this Gemara suggests that judges should be used. It states explicitly that the argument is over how many judges must be present in the case.

The matter is complicated further by the introduction of קנין.¹⁵ This raises an important question. Can the decisions of these individuals rest solely on the interaction that occurs during the פשרה or must there be an additional measure of good faith? Must there be a supplementary tangible way to show that the agreement is binding? If the matter is comparable to דין, then it would not be a significant question. The Stam makes it clear that there must be a קנין. Rashi further supports this idea: “והלכתא פשרה צריכה קנין” –

¹⁵ קנין means acquisition, mode of acquisition. It is a formal procedure to render an agreement legally binding. Adin Steinsaltz, *The Talmud: A Reference Guide* (New York: Random House, 1989), 254.

(But the halachah is that פשרה needs קנין even if the פשרה is completed by three." Thus, even if there are three present for the פשרה they must use קנין. This suggests that no matter how many preside over a פשרה, it is a meta-legal process dependent on the good will and acceptance of the litigants. Only a קנין will ultimately bind them and force them to do whatever was agreed upon.

This Gemara, as with many in Sanhedrin, does not set out to define the term פשרה, but through negation, limits its possible range of meaning. פשרה is not דין, as discussed rather elaborately in the previous paragraphs. Although it is distinct from דין, it does occur in a similar venue. The process is handled by judges, and at the conclusion of the passage, it states that two are needed so that they can function as witnesses. The types of cases that can utilize פשרה are not specified, although there is an understanding that it can be used in financial cases. Whether or not it can be used in other cases remains to be seen. As there are more and more examples from Sanhedrin, it is becoming clearer that both פשרה and דין can be seen as methods for resolving conflict.

There are two areas where this text can be applied to contemporary values. First, a true פשרה is achieved when participants exchange קנין, something tangible as a means to acknowledge the significance of the terms of the agreement. Outside parties, aside from the litigants, recognize this sign as a means to show their commitment to the agreement. Second, there is a quest to achieve validity in the process. It must be consistent and worthy of respect, as within the previous Gemara.

תנו רבנן: כשם שהדין בשלשה כך ביצוע בשלשה, נגמר הדין - אי אתה רשאי לבצוע. (סרמ"ש בנק"ש סימן). רבי אליעזר בנו של רבי יוסי הגלילי אומר: אסור לבצוע, וכל הבוצע הרי זה חוטא, וכל המברך את הבצוע - הרי זה מנאץ, ועל זה נאמר [תהלים י'] בצע ברך נאץ ה', אלא: יקוב הדין את החר, שנאמר [דברים א'] כי המשפט לאלהים הוא, וכן משה היה אומר יקוב הדין את החר, אבל אחרן אוהב שלום ורודף שלום, ומשים שלום בין אדם לחבירו, שנאמר [מלאכי ב'] תורת אמת היתה בפיהו ועולה לא נמצא בשפתיו בשלום ובמישור הלך אתי ורבים השיב מעון. רבי אליעזר אומר: הרי שגזל סאה של חטים וטחנה ואפאה והפריש ממנה חלה, כיצד מברך? אין זה מברך אלא מנאץ, ועל זה נאמר: ובוצע ברך נאץ ה'. רבי מאיר אומר: לא נאמר בוצע אלא כנגד יהודה, שנאמר [בראשית ל"ז] ויאמר יהודה אל אחיו מה בצע כי נהרג את אחינו, וכל המברך את יהודה הרי זה מנאץ, ועל זה נאמר: ובצע ברך נאץ ה'. רבי יהושע בן קרח אומר: מצוה לבצוע, שנאמר: [זכריה ח'] אמת ומשפט שלום שפטו בשעריכם. והלא במקום שיש משפט - אין שלום, ובמקום שיש שלום - אין משפט. אלא איזהו משפט שיש בו שלום - הרי אומר: זה ביצוע. וכן בדוד הוא אומר [שמואל ב' ח'] ויהי דוד עושה משפט וצדקה, והלא כל מקום שיש משפט - אין צדקה, וצדקה - אין משפט, אלא איזהו משפט שיש בו צדקה - הרי אומר: זה ביצוע, אתאן לתנאקמא. דן את הדין, זיכה את הזכאי וחייב את החייב, וראה שנתחייב עני ממון ושלם לו מתוך ביתו - זה משפט וצדקה, משפט לזה, וצדקה - לזה, משפט לזה - שהחזיר לו ממון, וצדקה לזה ששילם לו מתוך ביתו. (וכן בדוד הוא אומר: ויהי דוד עשה משפט וצדקה לכל עמו, משפט לזה - שהחזיר לו את ממון, וצדקה לזה - ששילם לו מתוך ביתו). קשיא ליה לרבי: האי לכל עמו? לעניים מיבעי ליה! אלא (רבי אומר): אף על פי שלא שילם מתוך ביתו זהו משפט וצדקה, משפט לזה, וצדקה לזה. משפט לזה - שהחזיר לו ממון, וצדקה לזה - שהוציא גזילה מתחת ידו.

- Statement 1: The rabbis taught (in a Braitā) – Just as a דין is reached by three, so too is a ביצוע (reached) by three.
- Statement 2: (Once) the verdict is reached (judgment is finished) you are not permitted to do ביצוע. [Mnemonic Device]
- Statement 3: R. Eliezer ben R. Yose HaGlili [5th Generation Tanna] says, "It is forbidden for a (judge) to arbitrate a ביצוע!"
 A) Whoever arbitrates a ביצוע is a sinner.
 B) And anyone who blesses a (judge) who arbitrates a בוצע is a blasphemer. About this person it is stated "One who blesses a בצע has blasphemed God." [Psalm 10:3]
- Statement 4: A) Let justice pierce the mountain (be tough no matter what). As it is stated, "For Justice is God's." [Deuteronomy 1:17] And so Moses would say, "Let Justice pierce the mountain."
 B) (Counterpoint) But Aaron loved peace and pursued peace and made peace between one man and another. As it is stated: "The Torah of

- truth was on his mouth and iniquity was not found on his lips. He walked with me in peace and uprightness and turned many away from iniquity.” [Malachai 2:6]
- Aside: R. Eliezer [3rd-4th Generation Tanna] says one who stole a seah of wheat, ground it, baked it, and separated dough offering from it, how can he say a blessing? The person is not blessing God, but blaspheming him. And concerning such a person it is stated a thief who recited a blessing has blasphemed God.
- Statement 5: R. Meir [5th Generation Tanna] says בוצע was stated only in reference to Judah. As it is stated. “And Judah said to his brothers ‘What gain בוצע will there be if we kill our brother?’” [Genesis 37:26] And anyone who praises Judah is a blasphemer. And concerning such a person, it is stated: One who praises a בוצע has blasphemed God.
- Statement 6: R. Yehoshua ben Karchah [5th Generation Tanna] says it is a Mitzvah לבצוע and it says: “Execute truth and Judgment of Peace in your Gates.” [Zecharia 8:16]
- Statement 7: But where there is judgment, there is no peace, and where there is peace, there is no judgment.
- Question: What then is judgment that has within it peace?
- Answer: This is ביצוע
- Example: Likewise, in connection with David, it is stated, “And David rendered judgment and righteousness.” [II Samuel 8:15]
- Statement 8: Wherever there is judgment there is no righteousness and in righteousness there is no judgment.
- Question: What then is judgment that has within it righteousness?
- Answer: I would say this is ביצוע
- Statement 9: Return to Tanna Kamma [Eliezer ben R. Yose HaGlili 5th Generation Tanna] - If one would try a case דין הדין, acquitting the innocent and obligating the guilty, and see that a poor person was found liable (for) money he would pay the (claimant) with his own property.
- A) This is the (meaning of) Judgment and Righteousness - judgment to this one and righteousness to the other.
- B) Justice (to the claimant) that he restored (his) money to him, and righteousness to (the defendant) in that he paid him (the claimant) with his own property.
- C) Thus with David it is said (the above), “David made justice and righteousness to all of his people.” Justice to this one - that he restored his money to him, and righteousness to this one that he paid him (the claimant) with his own property.
- D) Rabbi R. Yehudah HaNasi [5th Generation Tanna] had a difficulty with this interpretation of the terms to “all of his people.” It should have said, “to poor people.”
- E) Rather Rabbi [Yehudah HaNasi 5th Generation] said, Even if one does not pay from his own property this is justice and righteousness, justice to this one and righteousness to the other. Justice to this one (claimant)

- that he restored his money to him, and righteousness to this one (the defendant) that he removed stolen property from his possession.

This Gemara primarily begins with a comparison between דין, a defined entity, and ביצוע, which is an entity that needs definition. The initial questions it explores are: How many individuals are needed to determine a ביצוע? And when during the process can one utilize the process of ביצוע? This is the first Talmudic text that does not use the term פשרה at all when it discusses the concept of ביצוע.

There are two dramatic ways that Sanhedrin 6a-6b attempts to show that one who arbitrates a ביצוע has acted incorrectly. The specific language is strong. It does not simply present the perspective that one who arbitrates a ביצוע is wrong, rather it explains that this individual is a blasphemer. Another method that attempts to define פשרה is through the connection that many prominent Jewish figures have with ביצוע. The text immediately provides the example of Moses, who is often our quintessential model for leadership, as a pursuer of דין (justice) not ביצוע, and this pursuit is solid and well defined.

Immediately, the opposite perspective is presented through the model of Aaron. Aaron is well known for his dedication to the pursuit of peace. Through Aaron, the possibility that ביצוע is a positive method is introduced. This model of ביצוע is supported by Rabbi Meir who shows that it is preposterous to characterize one who performs ביצוע as a blasphemer. He bases this conclusion on a clever word play that shows Judah is the only individual whose sin is ביצוע.

At this point the tone shifts entirely. The text no longer attempts to prove that ביצוע is a valid and praiseworthy form of adjudication. Rather, it shows that it positively enhances the qualities of דין. When there is both justice and righteousness, and justice and

peace one can find ביצוע. This is so much the ideal that one who is able to adjudicate via ביצוע is compared to David.

The main question that this text does not fully resolve is how to understand the meaning of ביצוע. We are told that at the beginning of Sanhedrin 6a the term is interchangeable with פשרה. Yet, does this mean that this was true in the context of that Sugya alone? Here the two terms are not used interchangeably. Therefore, it does not imply that there should be a comparison between the two. It is true that the usage of ביצוע is similar to the usage of פשרה, because both terms tend to be compared to דין. Menachem Elon claims that in Talmudic literature the terms are synonymous and equivalent to one another.¹⁶ Although he cites another scholar who claims that they are slightly different entities.

Based partly on the fact that several talmudic sources indicate that פשרה and ביצוע were two distinct matters – that there was a difference of principle between the two. פשרה was carried out by the court itself and in the opinion of all the scholars, was something permitted, and even desirable, for restoring peace between the litigants. On the other hand the court before which the matter was brought in the case of ביצוע would refer investigation to other persons – knowledgeable and expert in the field of that particular matter – for its disposal by way of a compromise between the parties.¹⁷

One possibility is that the negative tone about ביצוע is not in response to ביצוע, but rather, reaction to a process occurring outside of the court. Certainly there is also a possibility that the differences in language merely represent terminology from various schools. Yet, it is important to note that there is a striking difference in the tone of the language used to describe both. The most notable difference is the intensely charged language applied to the term ביצוע in the Gemara.

¹⁶ Menachem Elon, 570.

¹⁷ Menachem Elon, 570-571.

Here, the question of focus is not on the number of judges involved, but rather, how it is handled. This Gemara, like others, raises the issue of authenticity of process, focusing on how authenticity relates to the litigants' responses. If everyone agrees to the process, there is a willingness to accept the end result. Without this acceptance, it is impossible to reach an outcome.

The other key pieces addressed in this passage are references to both peace and righteousness as part and parcel of the ideal legal process. Equity and fairness are the basic standards for דין and then the values of peace and righteousness bring ביצוע to a higher level. If peace is the ultimate goal, then a legal settlement (דין) may not be the best way to determine an issue. It may be more feasible to use a process other than דין, thus attaining a peaceful conclusion.

תלמוד בבלי מסכת סנהדרין דף ו עמוד ב - דף ז עמוד א 5) Sanhedrin 6b-7a

רבי שמעון בן מנסיא אומר: שנים שבאו לפניך לדין, עד שלא תשמע דבריהן, או משתשמע דבריהן ואי אתה יודע להיכן דין נוטה - אתה רשאי לומר להן: צאו ובצעו. משתשמע דבריהן ואתה יודע להיכן הדין נוטה - אי אתה רשאי לומר להן: צאו ובצעו. שנאמר [משלי יז] פוטר מים ראשית מדון ולפני התגלע הריב נטוש, קודם שנתגלע הריב - אתה יכול לנטשו, משנתגלע הריב - אי אתה יכול לנטשו.

אמר רב: הלכה כרבי יהושע בן קרחה. - אינני? והא רב הונא תלמידיה דרב הוה,

כי הוה אתו לקמיה דרב הונא, אמר להו: אי דינא בעיתו אי פשרה בעיתו. - מאי מצוה נמי דקאמר רבי יהושע בן קרחה - מצוה למימרא להו: אי דינא בעיתו, אי פשרה בעיתו. - היינו תנא קמא! - איכא בינייהו מצוה. רבי יהושע בן קרחה סבר: מצוה, תנא קמא סבר: רשות. - היינו דרבי שמעון בן מנסיא! - איכא בינייהו משתשמע דבריהן ואתה יודע להיכן הדין נוטה, אי אתה רשאי לומר להן צאו ובצעו.

Statement 1: R. Shimon ben Menasya [5th Generation Tanna, student of R. Meir] said:
Two come before you for דין.

- A) Before you have heard their words or even after you have heard their words, if you do not know how the judgment leans- you are permitted to say to them, "Go out and בצעו!"
- B) When you have heard their words and you know how the דין leans you are not permitted to say to them, "Go out and בצעו." As it says, "To start a quarrel is like letting out water: therefore before a dispute flares up drop it!" [Proverbs 17:14]
- C) Before a dispute is revealed - you can abandon it, once it is revealed you cannot abandon it.

[Please note: this translation excludes a large passage not directly related to ביצוע/פשרה.]

Statement 2: Rav [End of 1st Generation Amora] said the law is in accordance with R. Yehoshua ben Karcha [5th Generation Tanna] (it is always a mitzvah to do פשרה over other options).

Question 1: Is this so?

Answer 1: But Rav Huna [2nd Generation Amora, Babylonia] was a disciple of Rav [End of 1st Generation Amora], and when litigants came before R. Huna, he would say to them: "If you want דין (I will provide), If you want פשרה (I will provide)." [This response is counter to Rav's initial statement – his student R. Huna finds the מצוה is offering the option, not actually doing.]

Question 2: What is the מצוה of which R. Yehoshua ben Karchah [5th Generation Tanna] speaks?

- A) The mitzvah is for (the judge) to say to them (the litigants) "If you want justice (I will provide), if you want פשרה (I will provide). [I.e.: the mitzvah is offering the option and fulfilling the request of the litigants.]
- B) That is the same as the Tanna Kamma's (position before a judgment, is rendered it is permitted.)

Statement: There is a halachic difference between them (in terms of whether the offer) is the mitzvah.

- A) R. Yehoshua ben Karchah [5th Generation Tanna] reasons (the offer of a פשרה) is a mitzvah.
- B) The Tanna Kamma reasons that (the offer of פשרה) is optional.
- C) Then (the Tanna Kamma's view) is (same as) R. Shimon ben Manasya's [End of the 5th Generation Tanna student of R. Meir].
- D) There is a halachic difference between them: when you (the judge) have heard the litigants' statements and knows towards which side the judgment leans you are not permitted to say to them, "Go out and בצעו."

This Gemara deals with how judges approach their cases, and how the litigating parties need to respect the implications of what can happen during the legal process. The first question is: When is it the legitimate time to offer the option of ביצוע? According to this text, it is before the judge knows how the judgment leans. If judgment is known, the option of ביצוע is not presented. A judge is not able to offer this suggestion after hearing all of the facts and assessing which way the judgment will fall. Where the ruling is in doubt, the litigants have an opportunity to work out the situation themselves. Therefore, the judge must make this determination and not the litigants.

At the end of the sugya, the argument returns to the initial issue raised: One cannot offer the option of ביצוע after a דין is complete. The logical follow-up question is: When is a judgment complete? To which the Gemara responds, when the judge pronounces the verdict and states that the litigant is or is not liable for damages. Then the text shifts to using the term פשרה and questions if it is always a מצוה to do פשרה? Is it the actual act of פשרה, or simply offering the option that is considered a מצוה? In other words, is this an obligation or an option?

The final statement of the Gemara seeks to distinguish between what appears to be equivalent, hence redundant views. The Stam creates these distinctions between R. Yehoshua ben Karchah and Rav Shimon ben Menasya. The first thinks that it is good to offer ביצוע as an option (i.e. it is comparable to דין). The second considers such an offer optional when litigants come before a court, but not necessary. The court must use its intelligence to get the best result. ביצוע and דין are tools that the court can utilize to create orderly arrangements between litigants.

Again פשרה and ביצוע are discussed in comparison to דין during the context of a court proceeding. Although, it is not clear if this is the only circumstance either may be used. Which, in turn, raises another issue: How is one qualified to preside over a פשרה or a ביצוע? What happens when a judge asks the question if the parties would prefer פשרה or ביצוע? Does the same judge or court assist in the process? Is the case then passed along to another entity that deals entirely with these matters? In truth, it is uncertain if the focus of this text is to offer insight into the issues of פשרה and ביצוע, or into the process of דין.

What is evident is that פשרה is significantly altered through its relation to mitzvah. This is a huge conceptual leap that is not solely semantic. No longer is the nature of the discussion over whether פשרה is legitimate in relation to דין, or if פשרה should be utilized at all. Instead, there is recognition that there is a religious obligation tied to this action. One does not perform פשרה because it is a legal option, but because God commands it. There is also another shift in focus from recent passages. The number of judges required is no longer important. Instead the way judges are involved is essential. Most significant, this Gemara provides information about when and how it happens, a detail that has not been discussed thus far. It offers two possible responses: 1) prior to hearing the case, and 2) before the judge knows how the ruling will lean during a דין. This issue is also relevant in courtrooms today, or in any formal process where both parties are able to choose what type of proceedings should be implemented. It is not the decision of the judge, rather the decision of the disputing parties. In conclusion, this Gemara supports a variety of values: honesty, fairness, and impartiality. By offering the possibility of several options, it shows respect to the individual facing the court. It also frames פשרה as a

mitzvah, which makes its implications more significant. פשרה is no longer seen solely as a positive beneficial action, it is a religious obligation.

6) Palestinian Talmud Sanhedrin 18b

תלמוד ירושלמי מסכת סנהדרין פרק א דף יח עמוד ב/ה"א

רבי אליעזר בן רבי יוסי הגלילי אומ' המבצע חוטא והמברך את המבצע הרי זה כמנאץ לפני המקור שנאמ' ובוצע ברך נאץ יי' אלאקוב הדין את ההר כשעשה משה י אבל אחרן משים שלום שנאמ' בשלום ובמישור הלך אתי תני רבי ליעזר בן יעקב אומ' מה תלמוד לומר ובוצע ברך נאץ יי' משלו משל למה הדבר דומה לאחד שגנב סאה חיטין והוליכה לנחתום והפריש חלתה והאכילה לבניו הרי זה מברך ואינו אלא מנאץ רבי מאיר אומר לומ' בוצע ברך נאץ יי' אילו אחי יוסף שנאמ' מה בצע כי נהרג את אחינו וגו' רבי יהושע בן קרחה אומר מצוה לבצע שנאמר אמת ומשפט שלום כל מקום שיש אמת אין משפט שלום יש שלום אין משפט אמת ואי זהו אמת שיש בו משפט שלום הוי אומר זה ביצוע דין את הדין זיכה לזכאי חייב לחייב מעלה עליו הכתוב כילו עשה צדקה עם הזכיי וכילו עשה צדקה עם החייב צדק' עם הזכיי שהחזיר לו ממונו ואם החייב שהוציא גזילו מתחת ידו אמ' ר' אבהו משפט משפט אמורין בפרשה אמ' ומשפט שלום שפטו בשעריכם רבי זכריה בעי קומי רבי אמי עבדין עובדא כההן תנייא תני רבי שמעון בן מנסיא אומר פעמים שאתה רשאי לבצע פעמים שאין אתה רשאי לבצוע כיצד שנים שבאו אל הדיין עד שלא שמע דבריהן או משמע דבריהן ואינו יודע היכן הדין נוטה רשאי לו' להן צאו ובצעו משתשמע דבריהן ויודע את' היכן הדין נוטה אין אתה רשאי לבצוע שני פוטר מים ראשית מדון ולפני התגלע הריב נטוש עד שלא נתגלע הריב אתה רשאי לנטוש משנתגלע הריב אין אתה רשאי לנטוש אמר ר' מתנייה אף הפרשה צריכה הכרע הדעת.

תני רבן שמעון בן גמליאל אומר הדין בשלשה ופשרה בשנים יפה כח הפשרה מכח הדין ששנים שדנו יכולין לחזור בהן ושני שפישרו אין יכולין לחזור בהן.

Statement 1: R. Eliezer ben R. Yose HaGlili [5th Generation Tanna] says,

A) One who arbitrates sins.

B) And one who blesses a (judge) who arbitrates a בוצע is like a blasphemer before God. As it says, "One who blesses a בוצע has blasphemed God." [Psalm 10:3]

C) Let justice pierce the mountain (be tough no matter what) like the actions of Moses.

D) (Counterpoint) But Aaron made peace. As it is stated: "He walked with me in peace and uprightness." [Malachai 2:6]

Aside:

R. Eliezer [3rd-4th Generation Tanna] asks, "Why does scripture say, "One who blesses a בוצע has blasphemed God?" They made an analogy. To what is the matter compared? To someone who stole a seah of wheat, ground it,

- baked it, and separated a dough offering from the bread, and then fed the bread to his children. How is such a person to say a blessing? It is only a curse."
- Question: R. Meir [5th Generation Tanna] says, "Why does scripture say, One who blesses a בצוע has blasphemed God?"
- Answer: These are the brothers of Joseph, as it is said, "What gain בצוע will there be if we kill our brother?" [Genesis 37:26]
- Statement 2: R. Yehoshua ben Karchah [5th Generation Tanna] says it is a Mitzvah לבצוע and it says: "Execute truth and Judgment of Peace in your Gates." [Zecharia 8:16]
- Statement 3: In every place that there is truth, there is no peaceful justice, where there is peace, there is no truthful justice.
- Question: What is truth that has within it peaceful justice?
- Answer: This is ביצוע.
- Statement 4: If one would try a case (דן ודין), acquitting the innocent and obligating the guilty, and imposing liability on the guilty party. "Scripture credits him for he has done charity with the one who is liable. For he removed the stolen goods from his possession. "And he does justice to the innocent party, for he restores to him what belongs to him."
- Statement 5: R. Abbahu [3rd Generation Amora] said, "Judgment, judgment" is said in the passage [Deuteronomy 1:17]. "Execute the judgment of truth and peace in your gates," [Zechariah 8:16]
- Statement 6: R. Zechariah [4th Generation Amora] asked before R. Ammi [2nd Generation Amora], "Do they carry out the law according to the opinion of this Tanna [i.e. that it is a mitzvah לבצוע]?"
- Statement 7: R. Shimon ben Menasya [5th Generation Tanna, student of R. Meir] Said, "Sometimes one should לבצוע. And sometimes, one should not לבצוע."
- Question: How so?
- Answer 1: Two that come before the judge, before you have heard their words or (even after) you have heard their words, but you do not know how the judgment leans- you are permitted to say to them, "Go out and לבצוע!"
- Answer 2: When you have heard their words and you know how the דין leans you are not permitted לבצוע." As it says, "To start a quarrel is like letting out water: therefore before a dispute flares up drop it!" [Proverbs 17:14]
- Answer 3: Before a dispute is revealed - you can abandon it, once it is revealed you cannot abandon it.
- Answer 4: R. Mattanaiah [5th Generation Amora] said, "Also פשרה requires (the judge) to make up his mind."

[Please note that this translation excludes a large passage of this Gemara that does not directly relate to the analysis of פשרה.]

- Statement 8: It was taught: R. Shimeon ben Gamliel [2nd Generation Tanna] says, "Just as דין is by three (judges), so פשרה is by two.

Statement 9: The strength of פשרה is greater than the strength of a דין.

Question: How so?

Answer: For if two (judges) give a דין (the litigants) may retract. Whereas if two arbitrate a פשרה, (the litigants) may not retract.

This Gemara shares the vast majority of its language in common with the three passages evaluated from the Babylonian Talmud in Sanhedrin 5a-7a. However, as is often true with the Palestinian Talmud, there are several places where the language is more terse and where it uses different proof texts. Nonetheless, the conclusions drawn in this Gemara are similar. Rather than review what has been discussed in the last three analyses of this chapter, this reflection will focus on the element that is different.

The Palestinian Talmud passage states that ביצוע contains both truth and peaceful justice, whereas the Babylonian Talmud states that ביצוע is judgment that has peace within it. This sheds new light on the subject of ביצוע and its function. Not only is it part of the justice system, it can be implemented in a peaceful manner. Perhaps more important, it contains truth. This is the first time in all of the rabbinic texts that there is mention of פשרה, דין, or ביצוע as a means to attain truth. If ביצוע is seen as a means to attain peaceful justice, then there is recognition that other methods of reaching justice are not peaceful, or necessarily truthful. In turn, this places a higher value on the process of ביצוע.

7) Sanhedrin 32b

תלמוד בבלי מסכת סנהדרין דף לב עמוד ב

רב אשי אמר: מתניתין כדשנין. קראי; אחד לדין ואחד לפשרה. כדתניא: צדק צדק תרדף - אחד לדין ואחד לפשרה. כיצד? שתי ספינות עוברות בנהר ופגעו זה בזה, אם עוברות שתיהן - שתיהן טובעות, בזה אחר זה - שתיהן עוברות. וכן שני גמלים שהיו עולים עלות בית חורון ופגעו זה בזה, אם עלו שניהן - שניהן נופלין, בזה אחר זה - שניהן עולין. הא כיצד? טעונה ושאינה טעונה - תידחה שאינה טעונה מפני טעונה. קרובה ושאינה קרובה - תידחה קרובה מפני שאינה

קרובה. היו שתיהן קרובות, שתיהן רחוקות - הטל פשרה ביניהן, ומעלות שכר
זו לזו.

- Statement: R. Ashi [5th Generation Amora] said, in the verse, “תדרוך צדק צדק” [Deuteronomy 16:20] one צדק refers to דין and one to פשרה. As we were taught in the Braita, “Justice, Justice shall you pursue” [Deuteronomy 16:20] – one justice is for דין and one is for פשרה.
- Question: How (do we define/exemplify פשרה)?
- Example 1: Two ships are passing in a river and they meet one another,
Scenario 1: If both pass (at the same moment) they will both sink.
Scenario 2: If one passes, after the other, both will pass (fine).
- Example 2: The same is true with two camels that were ascending the ascents of Beit Choron and they met one another.
Scenario 1: If both ascend (at the same time) both will fall.
Scenario 2: If one ascends after the other, they will both ascend.
- Question: How can this (also) be (applied)?
- Answer 1: If there is one that is loaded and one that is not loaded – the one that is not loaded, gives way before the one that is loaded.
- Answer 2: If there is one that is close (to the destination) and one that is not close – the one that is close should give way to the one who is not close.
- Answer 3: If both are close and both are far – arrange a פשרה between them – and let them compensate one another monetarily.

This Gemara provides a drash on why the word צדק is repeated twice in Deuteronomy 16:20 (“Justice, Justice shall you pursue”). Again the Gemara uses a comparison between פשרה and דין. In this case both are seen as צדק (righteous acts). Therefore, according to the interpretation of the verse, both are worthy pursuits. Then, two examples show how פשרה is utilized out of the courtroom. Note, that the two parties who institute the פשרה are the two involved in a possible conflict or dispute. In both cases, with the ships and the camels, unless a resolution is found they will both either drown, in the case of the ships, or fall in, the case of the camels. Both parties could suffer major losses: their cargo or even more serious, their lives. When the resolutions are created both parties lose something and gain something as well. They lose time or money, yet they gain because both are able to reach their destinations. It is unclear in either case

if both parties initially expect to have an unimpeded journey. Yet it is clear that both want to reach their destination safely.

The third series of examples add another important layer of interpretation to the model. In the case of one that is loaded versus one that is unloaded, a preferential right is given to the one that is loaded, in recognition that it is weighed down and less able to maneuver. In the case of one that is near its destination and one that is far, the one that is close allows the one that is far to go first. The one that is closer recognizes that it is almost at its destination. Therefore, a slight change in course will not be as trying. For one that is far, encountering a delay early in the journey could be disconcerting and cause anxiety over how many other obstacles there may be on the road ahead.

In the case where both parties are equally close or equally far, they will experience some type of loss. One must concede and allow the other to go first. So, the one who goes first will need to pay some sort of monetary compensation to the party that agrees to go second. This is a significant example of פשרה. It is important to recognize that both parties need to give in to a certain extent in order to establish a פשרה. One other key element in the final example is that both parties are willing to recognize that one made a dispensation for the other, which thereby strengthens the power of the פשרה.

This text adds new dimensions to the understanding of פשרה. First, in this circumstance, the term itself means agreement. It is not a longstanding conflict. It is not an issue that needs intervention from an outside party, but a solution must be reached while on the road. Second, it can be handled during the dispute by the parties directly involved, without the recommendation of a court. Therefore, no special training is needed. Third, there is a recognition that both parties may need to sustain some type of

loss, yet in the end both will have gained an advantage. Fourth, money, as a sign of value, can be helpful in creating a resolution. Finally and perhaps the most important element, פשרה like דין, is a way to attain righteousness/achieve justice. It is done in a manner that takes into account the interests of both parties and emphasizes equality and fairness.

8) Palestinian Talmud Bava Kamma 3d

תלמוד ירושלמי מסכת בבא קמא פרק ג דף ג עמוד ד/ה"ד

חמורים שהיו רגלי אחד מהן רעות אין רשאים לעבור עליו מהו רשאים לעבור עליו דרסין עליו ועברין היה אחד ריקן ואחד טעון מעבירין את הריקן מפני הטעון אחד פרוק ואחד טעון מעבירין את הפרוק מפני הטעון היו שניהן טעוני שניהן פרוקין יעשו פשרה ביניהן שתי עגלות שתי ספינות אחת טעונה ואחת ריקנית מעבירין פרוקה מפני הטעונה שתיהן פרוקות או טעוני יעשו פשרה ביניהן.

- Case 1: (In the case of) donkeys, the legs of one of them are bad/unsound,
- Result 1: They are not permitted to pass him.
- Case 2: (If) one of them fell,
- Result 2: They are permitted to pass him.
- Question: What is the meaning of, "they are permitted to pass him?"
- Answer: They step over him and pass by.
- Case 3: One is empty and one is loaded,
- Result 3: The empty (one) passes before the loaded (one).
- Case 4: One is without a load and one is loaded,
- Result 4: The (one) without the load passes before the (one) that is loaded.
- Case 6: There were two loaded, two unloaded,
- Result 6: Make a פשרה between them.
- Case 7: Thus it is with two ships that were coming (directly) towards one another, one was unloaded, and one loaded,
- Result 7: The unloaded one passes before the loaded (one).
- Case 8: Two are unloaded, and two are loaded,
- Result 8: Make a פשרה between them.

This Gemara is almost word for word Tosefta Bava Kamma 2:10, the second passage discussed in the last chapter. The only addition is the question, "What is the meaning of, they are permitted to pass him?" The mere presence of this comment leads a reader to believe that there was some ambiguity presented by this phrase in the last

passage. Would the donkey and traveler that fell have an obligation to get out of the way? Would they need to move somehow to allow another party to pass? The conclusion based on this Gemara is that they would not need to get out of the road. Rather, the party that would like to get ahead would merely step over the fallen. The other difference is in the Palestinian Talmud piece there is no mention of one who is riding. Most important, the same conclusion can be made here, when parties traveling meet one another, are in the same category, the only feasible way to respond is by creating a פשרה, an agreement.

9) Ketubot 95b

תלמוד בבלי מסכת כתובות דף צה עמוד ב

מאי שנא מהא דתנן: וחוזרות חלילה, עד שיעשו פשרה ביניהן? התם אית להו פסידא לכולהו, הכא לוקח הוא דאית ליה פסידא.

Question: What is different¹⁸ from what we learned in the Mishnah: (where it says) "and they go around and around until they (wives, and the creditor) make a פשרה between themselves?"

Answer: In that case (the Mishnah) each of them have a loss, here in this case, the purchaser (is the only one) who possesses a loss.

The Talmud asks, "Why is this case different from the Mishnah?" (See analysis in Chapter II. Please note that there is a reference to the same Mishnah in the Palestinian Talmud in Ketubot 33c) The Talmud answers that this arrangement was made to protect unwitting buyers who have no idea about internal family arrangements. Since the purchaser is the only one who stands to lose by not knowing the husband's statement to the wife before she died, the purchaser is awarded what is rightfully his. No other party has real rights to the property except the purchaser.

¹⁸ This question refers to the Talmud's discussion of a case in which a husband says to his wife, "My property is yours and to those who follow after you." The wife sells the property and dies. The husband can retrieve the property from the purchaser since he has first claim on it as his wife's primary heir. But since the husband granted inheritors rights to the party, "who follows after the wife," that party may take the inheritance from the husband. The purchaser then goes to "the one who follows the wife" and retrieves the

In the Mishnah's case, each party has an equally valid claim and therefore suffers the potential for loss. In turn, this means that there must be the possibility for potential gain for each of the parties. Hence, an equitable, mutually acceptable arrangement must be made to settle matters. When there is this recognition, the resolution can be handled by the parties involved without any outside intervention.

As in the Mishnah, פשרה means resolution or solution. This Gemara claims that it can only be used when all of the parties suffer some type of loss, and not otherwise. Both parties involved can find a solution without the assistance from any outside party. The issue relates to scenarios about transfer of property, which is also relevant today. In modern real estate cases before signing any agreements, both parties have equal access to any other outstanding legal claims on the property. As with many of the other passages, the issue of equality is exceedingly significant.

Conclusion

פשרה is understood as a specifically legal concept by many of the Talmudic rabbis. Whereas, the focus in the Mishnah and Tosefta was to define the word itself, often times, the meaning of the term is implied in the Talmudic passages. For the most part, פשרה is defined in relation to דין. The rabbis' goal was to determine if it was a judicial concept or not, as is seen in most of the Sanhedrin citations. There are several cases where the term does have a more specific meaning. For example, in Berachot 10a, it takes on the meaning of bringing people together against their will. It can also mean a simple agreement as posited by the two sections of Gemara that relate to the rules of the road. In both of these scenarios it is simple for the parties to create a solution. There is an

property. The outcome is that the purchaser keeps the property, i.e. there is no "going around and around until they make a פשרה between themselves."

assumption that they may need to go back and forth to find a mutually acceptable approach to implement. The other definitions, in the last sugya, are resolution or solution. Perhaps the most helpful insight is that פשרה can only be used if there is a loss of some kind.

The most significant change from the Mishnah and Tosefta to the Talmud is the focus on the parties who facilitate פשרה. Unlike the earlier strata, in Talmud there were only two citations where the parties involved were the same ones to implement the פשרה. Instead, there were two innovations introduced. The most dramatic example is the reference to God as one who performs פשרה. As a result, the meaning and significance of the process is raised to a new level. The second innovation is the complete focus on judges as facilitators of פשרה. Certainly, the idea of a judge in this role is introduced in the last chapter, but not to this extent. The number of judges needed, anywhere from one to three, naturally leads into a discussion of whether or not פשרה is a judicial activity. This exploration is pursued through a comparison of the amount of judges needed to create a פשרה.

With the major focus on the court system, there is also an emphasis on when to use פשרה. There must be recognition that when פשרה is done by the court, it means that the parties alone were not able to find a resolution. Perhaps the matter needs professional, legal intervention, or the parties were simply not able to create viable solutions alone. One of the major debates handled in Sanhedrin 6b-7a is when it is reasonable for a judge to offer the option to seek פשרה/ביצוע. Two possible options are given: at the outset of the case, or before the judge knows how the judgment will lean. The most interesting response about when the process should take place is presented in Berachot 10a.

Here it is not the two parties involved in the issue, but the third party that decides action must be taken. In this particular Gemara the third party referred to is none other than God, which leads to another question. Can any one else aside from God, be the one to initiate the פשרה without the consent of the two other parties?

There are three possible alternatives given to explain how פשרה is handled. The first is that it is facilitated in a courtroom by judges. The second is that the one who creates the פשרה produces an external situation that forces the parties to see each other. And the third, as described in Sanhedrin 32b, money is given to the individual who steps aside. This illustrates, that the method of פשרה used by the rabbis assumes that if there is some inequality, people will need to make financial concessions.

Was there much change in the issues relating to פשרה? In reality, this question was difficult to ascertain because the Talmudic passages were not concerned with the practical issues that would involve פשרה, rather they provide more of an intellectual and philosophical exploration. Even with this being the case, there were still specific situations when פשרה could be used. These include: financial matters, when individuals are being obstinate, travel, and in real estate matters related to documents, specifically the ketubah.

Another significant area is how פשרה is understood in relation to other methods of conflict resolution, in particular דין. In truth, prior to reading these Talmudic passages, it was not obvious that דין is also a form of resolving conflict. In fact, it is becoming increasingly more evident that one of the major functions of the legal process is to create resolutions, particularly in difficult situations when the disputing parties cannot handle

the matter alone. By attempting to show that פשרה is part of the judicial system and comparable to דין, it also explores the feasibility of פשרה as a form of conflict resolution.

The Talmudic discussions relate to a number of contemporary issues. Can one in a position of power manipulate a situation forcing two parties that have no interest in interacting, to come together? Another major issue is that disputing parties must respect the method chosen to resolve conflict. Therefore, there must be agreement by the parties on what type of process is used. Also, there needs to be a means to recognize the validity of the agreement. If not in the courtroom, then exchanging a קנין can serve as the outward sign of good faith and proof of the agreement between the two parties.

In conclusion, the change in focus towards the courts also emphasizes a broader range of values. There is a de-emphasis on pride in favor of bringing people together. פשרה is no longer solely seen as the right thing to do, but as a Godly act. Even the most righteous people need to use פשרה from time to time. The values most often repeated are justice, fairness, equality, honesty, and impartiality. Yet, peace, and righteousness have a place above and beyond the values of fairness and equity. It is not enough to find a solution. One should also seek to find a solution that is peaceful. Even with all of these values the most profound is that פשרה is now related to mitzvah.

CHAPTER IV: CODES - SHULCHAN ARUCH AND MISHNEH TORAH

Introduction

In the previous chapter it was no longer necessary to establish the meaning of פשרה because it was well understood. The most significant change was the focus on פשרה in the courtroom. With the emphasis on court proceedings issues of who facilitated the process and the determination of applicable rules increased in importance. Therefore, in the following exploration of Codes a central question is how this trend does or does not continue. In reality of the twenty-one groupings of texts (this will be discussed below) only eight are based in a courtroom. In several cases, these courts are not comprised of legally trained and accepted judges, rather individuals who are acting as judges or arbiters.

In addition, the פשרה can be handled between the two disputing parties when it arises, as previously illustrated in the other two genres of Rabbinic Literature. In these Codes the focus shifts to issues related to contracts. These contracts are both literally written documents and agreements that are made following legal procedures through exchanges. The specific issues range from marriage contracts, to sending an agent to represent one's interest, to real estate.

The structure of this chapter is slightly different. Passages from the Mishneh Torah and the Shulchan Aruch that are exceedingly similar are grouped together. If there is any variation in language, slight or profound, both translations are included. In one instance, the exact wording appears in both Codes so only one translation is included. There are several examples where there is major overlap of material, and also elements that differ. In these cases, the pieces were also placed together.

Textual Analysis

1A) Mishneh Torah Ishut 14:16

רמב"ם הלכות אישות פרק יד הלכה טז

איש ואשתו שבאו לבית דין הוא אומר זו מורדת מתשמיש והיא אומרת לא כי אלא כדרך כל הארץ אני עמו, וכן אם טענה היא ואמרה שהוא מורד מתשמיש והוא אומר לא כי אלא כדרך כל הארץ אני עמה, מחרימין בתחלה על מי שהוא מורד ולא יודה בבית דין, ואחר כך אם לא הודו אומרים להם התייחדו בפני עדים, נתייחדו ועדיין הם טוענים מבקשין מן הנטען ועושין פשרה כפי כח הדיין, אבל לבעול בפני בני אדם אי אפשר לפי שאסור לבעול בפני כל בריה

- Cases: A man or woman that went before the court,
 A) He says this, "She refuses to have sex" and she says, "No this is not true. According to the normal custom of the land I am with him."
 B) And thus if she claims and says that, "He refuses sex," and he says, "No this is not true. According to the normal custom of the land I am with her."
- Result 1: We excommunicate at the outset the one accused of refusing sex who confesses this before the court.
- Result 2: And if afterwards (post court) neither party admits (to refusing sexual rights) to his/her partner, we say to them, "Closet yourself before witnesses."
- Result 3: If they do so, and still claim that the other is withholding sex, the court pleads with the one accused and tries to work out a פשרה according to the ability of the judge. However, (to have them) have intercourse before people (to resolve the disputed claims) is impossible, since intercourse before any living being is prohibited.

1B) Shulchan Aruch Even HaEzer 77:4

שולחן ערוך אבן העזר סימן עז סעיף ד

איש ואשתו שבאו לב"ד, הוא אומר: זו מורדת מתשמיש, והיא אומרת: לא כי אלא כדרך כל הארץ אני עמו; וכן אם טענה היא ואמרה שהוא מורד מתשמיש, והוא אומר: לא כי אלא כדרך כל הארץ אני עמה, מחרימין תחלה על מי שהוא מורד ולא יודה בב"ד, ואח"כ, אם לא הודו, אומרים להם: התייחדו בפני עדים. נתייחדו ועדיין הם טוענים, מבקשים מן הנטען ועושין פשרה כפי כח הדיין.

- Cases: A man or woman that went before the court,
 A) He says this, "She refuses to have sex" and she says, "No this is not true. According to the normal custom of the land, I am with him."
 B) And thus if she claims and says that, "He refuses sex," and he says, "No this is not true. According to the normal custom of the land, I am with her."

- Result 1: We excommunicate at the outset the one accused of refusing sex who confesses this before the court.
- Result 2: And if afterwards (post court), neither party admits (to refusing sexual rights) to his/her partner, we say to them, "Closet yourself before witnesses."
- Result 3: (If) they do so, and still claim (that the other is withholding sex), the court pleads with the one accused and tries to work out a פשרה according to the ability of the judge.

This particular case is highly problematic for the court. The judge cannot determine it because the issues relates to the sexual affairs between a husband and a wife. Take note that this is stated explicitly in the Mishneh Torah but not in the Shulchan Aruch. In general for a case to be tried there must be evidence or witnesses. Here there is no outside evidence, only the words of the two claimants. Furthermore, it is inappropriate to have witnesses observe their sexual behavior to determine if, in fact, one of the spouses is not fulfilling his/her sexual obligation. Therefore, the Codes suggest two possible solutions. The first is for the couple to closet themselves together privately with parties witnessing that they have done this. The presumption would be that they had reconciled in order to do this. The second option is for the couple to create a פשרה between themselves.

As with many of the examples of פשרה thus far, it is necessary for both parties to be on equal terms. In other words, neither has an advantage over the other. What is slightly different in this situation is that the case is not eligible for analysis because of its sexual nature. In other cases, parties are considered equals because they would suffer a loss financially, physically or emotionally (such as Mishnah Ketubot 10:6, and Sanhedrin 32b).

These Codes also add insight into the importance of the judge as seen by the phrase "פשרה כפי כח הדיין" - to make a פשרה according to the ability of the judge. Certainly

all judges do not have the same skill set and ability to create equally sound resolutions.

An exceptionally skilled judge may be able to guide this particularly hostile couple to recognize what brought them together in the first place, what qualities each possesses, and bring them back together. Someone less skilled or more convinced that nothing could be salvaged might implement a פשרה in which they agree that their best option is to dissolve their marriage.

In addition, this halachah responds to the question: Are there issues that by their very nature should not be handled before a court? Both pieces clearly illustrate that the answer is no. Yet, there is recognition that the court can operate both publicly and privately. If there are personal matters, such as the ones introduced in this case, the judge has the option to speak with the litigants privately in his chambers. Emphasizing that all legal matters must be dealt with in terms of the highest level of respect and recognition of the law, but this does not mean that all cases must be handled in the same manner.

In these examples, the judges do not turn to the process of פשרה immediately. Rather, other options defined in the law are attempted first. If these do not work effectively then פשרה is utilized. In terms of contemporary relevance, it is clear that פשרה can be used in cases dealing with sexual relations. Is this the only the case with sexual issues or are there other matters that must be handled as delicately? Can these halachot apply to other matters or solely to the issue of sexual relations? In conclusion it is vital to note, there is a great value placed on fulfilling sexual obligations and most of all, while respecting privacy.

האשה שבאה לבית דין ואמרה בעלי אינו יכול לשמש כדרך כל הארץ שמוש שמוליד או שאינו יורה כחק, יעשו הדיינים פשרה ואומרים לה ראוי לך שתנהגי עם בעליך עד שתשהי עשר שנים ולא תוליד ואחר כך תתבעי, ומגלגלין עמה בדבר זה ואין כופין אותה לישוב ולא דנין אותה דין מורדת אלא מאריכין בדבר זה עד שיעשו פשרה.

- Case:** A woman that goes to the Court and says, "My husband cannot have sex according to the way (custom) of the land that results in birth, or does not, 'shoot arrows,' "
- Result:** The judges make a פשרה and say to her, "According to the law it would be proper for you to be with your husband for 10 years. If you have not given birth after that, you could make your request."
- A) But they give credence to her claim, and do not force her to sit (remain with her husband),
- B) Nor do they judge her as a rebellious wife. Rather they speak with her at length until they have made a פשרה.

Again in this case the Mishneh Torah deals with the private issue of sexual relations between a husband and a wife. The judge therefore takes an exceedingly active role as an arbiter attempting to find a resolution to the dispute. What makes this issue slightly different from the previous case is how the judge deals with a legal obligation that a husband has to procreate. In this case, the judge should create a פשרה. As with the previous halachot, this occurred after the legal obligations are presented before the litigants. Here, the election to complete a פשרה takes precedence over a ruling according to the law (as seen in the "result" section above). It is fascinating that the judge would override the legal injunction that a wife must be with her husband for 10 years in favor of פשרה.

One of the most intriguing aspects of the case is that a great deal of consideration is given to the emotional impact on the woman. So much so, that the woman is allowed a to discuss how the judge's determination will influence her. This recognizes that דין has

limitations and there are times when a litigant needs to have a more active say in the ruling. Furthermore, the judges do not look at the women in a derogatory way if she chooses an alternative rather than waiting ten years. This case only enhances the validity of the פשרה and those who arbitrate it.

As with the previous two halachot, one of the questions to consider is if this type of case allows a court to be more flexible about highly personal matters or is פשרה of this kind reserved solely for matters of sexual relations. Again, respect for privacy is a value that the judges take seriously. Furthermore, there is recognition that דין cannot be used universally, and judges must be aware of other options and approaches including פשרה.

3A) Mishneh Torah Ishut 17:12

רמב"ם הלכות אישות פרק יז הלכה יב

מי שהיו לו שתי נשים ומכר את שדהו וקנו מיד הראשונה שאין לה שיעבוד על שדה זו ואינה טורפת אותה מן הלוקח והיה קנין המועיל שאינה יכולה לטעון בו נחת רוח עשיתי לבעלי ואחר כך מת הבעל או גירש שתיהן, השנייה מוציאה מיד הלוקח שהרי לא קנו מידה ללוקח, והראשונה מוציאה מיד השנייה מפני שהיא קדמה ולא הסירה שיעבודה אלא מעל הלוקח, וכשתחזור השדה לראשונה חוזר הלוקח ומוציאה מידה שהרי קנו מידה לו, וחוזרות חלילה עד שיעשו פשרה ביניהן.

Case:

One who has married two wives and sold his field,

A) And receives (notification) from the first (wife) that she does not claim any possession of the field and rejects it (any claim) from the purchaser, this is an effective קנין - she cannot make a claim on it (by saying), "I did this only to please my husband,"

B) And afterward the husband died, or divorced the two (wives),

1) The second (wife) reclaims (the rights to the land) from the purchaser, because she did not pass over (possession) to the purchaser.

2) The first reclaims from the second because she was first, and only passes over (possession) to the purchaser.

3) When the field was returned to the first (wife), the purchaser returns and reclaims from her hand, because he had acquired it.

Result:

And they go around and around until they make a פשרה between them.

שולחן ערוך אבן העזר סימן ק סעיף ד 3B) Shulchan Aruch Even HaEzer 100:4

מי שהיה נשוי שתי נשים, ומכר את שדהו וקנו מהאשה הראשונה תחלה, ואחר כך ממנו; השניה מוציאה מיד הלוקח, והראשונה מיד השנייה, והלוקח מיד הראשונה וחוזרים חלילה, עד שיעשו פשרה ביניהם.

Case: One who married two women and sold his field.
A) Initially, the first wife acquires it (the field)
B) And afterwards from him [the purchaser acquires the field].
C) The second (wife) reclaims the field from the possession of the purchaser,
D) And the first (wife) [acquires the field] from the second (wife)
E) And the purchaser [acquires the field] from the possession of the first (wife),
Result: And they go around and around until they make a פשרה between them.

Both of these cases are variations on Mishnah Ketubot 10:6. The basic facts of the two halachot are the same. As the Mishneh Torah states, there is a man who is married to two wives and he sold a field. The first wife writes the buyer and states that she does not have a claim to the field. In both the Mishneh Torah and in the Mishnah, this statement waives her rights to the land. The major difference is that the Mishneh Torah states that a valid קנין is created when she rejects her claim to the field. It also explicitly mentions that the husband either died or divorced the two women. (Note that in Pinhas Kahati's translation of this Mishnah he explains that the husband dies.) The Shulchan Aruch on the other hand, includes less elaborate details. Instead of focusing on the factors that lead to the conflict, it focuses on how the ownership could be transferred from one party to the next.

Rambam only brings up קנין in order to inform us that if the wife ceded the field to the purchaser during her husband's lifetime, she cannot claim that she did it to please her husband without being serious about the purchaser acquiring it.

As with the Mishnah, each of the parties involved has something to gain or lose through this potential transaction. What differentiates this case from many of the other halachot evaluated thus far, is the factor that the negotiation does not take place before a judge. A majority of the Talmudic texts on פשרה are cited within Tractate Sanhedrin. Thereby showing the need to have judges or individuals with training available to arbitrate the case. This is not true in these citations where only the affected parties are needed to resolve the dispute. There is no set time frame in which the resolution must be attained, rather, the parties are told to reach a reasonable פשרה or face having no access to the piece of property in question as is also seen in Mishnah Ketubot 10:6.

4A) Mishneh Torah Gezeilah Veaveda 13:6

רמב"ם הלכות גזלה ואבדה פרק יג הלכה ו'

באו שנים זה נתן סימני האבדה וזה נתן סימניה כמו שנתן האחר לא יתן לא לזה ולא לזה אלא תהיה מונחת עד שיודה האחד לחבירו או יעשו פשרה ביניהם. נתן האחד את הסימנים והשני הביא עדים יתן לבעל העדים, זה נתן סימנים וזה נתן סימנים ועד אחד הרי העד האחד כמי שאינו ויניה.

Scenario:	(Applies to all three cases presented.) Two parties came (before a court).
Case 1:	One gave a description of a lost article, and (the other) gave a description just as the other party gave.
Result:	Do not give the lost item either to this one (the first party) or that one (the second party). A) Rather the object should rest with the court until one admits (it is not his.) B) Or until they make a פשרה between them.
Case 2:	The first party gives a description of a lost article and the second party brings witnesses,
Result:	Give it to the one who possesses witnesses.
Case 3:	(One party) gives a description of a lost article and (the second party) gives a description of the lost article and provides a single witness.
Result:	Behold the one witness is like no witness at all, and the case is left undecided.

4B) Shulchan Aruch Choshen Mishpat 267:8

שולחן ערוך חושן משפט סימן רסז סעיף ח

ה באו שנים, זה נתן סימני האבירה וזה נתן סימני האבירה כמו שנתן האחר, לא יתן לא לזה ולא לזה אלא תהא מונחת עד שיורה האחד לחבירו או יעשו פשרה ביניהם.

- Case: Two parties came (before a court). One gave a description of a lost article, and (the other) gave a description just as the other party gave.
- Result: Do not give the lost item either to this one (the first party) or to that one (the second party).
- A) Rather, the object should rest with the court until one admits (it is not his)
- B) Or until they make a פשרה between them.

These two halachot hold the first case in common. When it is difficult to determine who is the owner of a lost item due to comparable descriptions presented, no judgment is rendered and the object is held in escrow. Eventually, one party may admit that the object is not his or the two parties may accept a פשרה. Neither halachah explicitly states that the two parties went to the judges seeking פשרה or דין. Although, when one party brings evidence or what one believes to be evidence, it implies that individual is looking for a דין. Therefore, it is exceedingly difficult to determine if there are indeed separate entities that handle cases of פשרה.

The Mishneh Torah also tackles the next level of questions. As it states, there are varying degrees of evidence that must be provided within a case. The weakest form of evidence is a description of a lost object. The second form of evidence is providing two witnesses. Through the Mishneh Torah's interpretation, it is clear that two witnesses are necessary. In the case of one witness, the testimony does not carry any legal weight. In reality, it does not offer more substantiation of a claim than is already provided by the descriptions of the lost item (as seen in scenario one).

Again, this text, as with many of the others analyzed, illustrates the necessity for both parties to be on equal ground in order to utilize פשרה. Here the equality is created by the amount of evidence both parties present and therefore there is no clear-cut דין. Therefore, some of the responsibility then falls upon the shoulders of the litigants to “make a פשרה between them.” Meanwhile, the court continues to hold the item in escrow. Notice that in these passages, the debate is over objects, as opposed to the emotionally charged issues of sexual relations (as seen in Mishneh Torah Ishut 14:16, Shulchan Aruch Evan HaEzer 77:4 and Mishneh Torah Ishut 15:15). In those sections, this author raised the question of how flexible the court would be in terms of issues that were not as emotionally charged. Clearly, the court is accommodating when it reaches beyond explicit law. The difference is the level of sympathy conveyed by the court. In Mishneh Torah Ishut 15:15, this sympathy is shown by how the court judges her, “not as a rebellious wife.” In other words, she is not behaving in an unacceptable manner. Her actions are valid. On a different level, the halachot in this section illustrate the importance of fairness and the value of the parties involved in the case to be active participants in פשרה even when a third party facilitates.

5) Mishneh Torah Chovel Vemazik 3:6 רמב"ם הלכות חובל ומזיק פרק ג הלכה ו

מעשים היו אצלנו תמיד בכך בספרד, ויש תלמידי חכמים שהיו מוחלין על זה וכך נאה להם, ויש שתובע ועושין פשרה ביניהן, אבל חרדינים היו אומרים למבייש חייב אתה ליתן לו ליטרא זהב.

Case: Cases of this sort came up constantly in Spain (Here in Spain among us things were always done this way in regards to damages of embarrassment),¹⁹

¹⁹ In the previous halachah, Rambam discusses damages of embarrassment. He states that a person is exempt from this specific punishment if one embarrasses a friend either by words or as he literally says, by spitting – an example of a physical response. In the case of a friend, the penalty is not in the category of a

- Result 1: And there were wise scholars that waived this (those who embarrassed them) and that was a nice thing to do (to behave in that fashion).
 Result 2: There are (those) that did sue and frequently made פשרה between them.
 Result 3: But, judges said to the one who caused the embarrassment - you are obligated to give him a pound of gold.

The Mishneh Torah begins this halachah by stating that the previous halachah (described in the footnote) was handled the same way in Spain. Here, it presents three examples of how wise men can respond to the issue of embarrassment. First, he can waive the payment for damages of embarrassment. This tactic is considered exceptionally generous. Second, the scholar could sue and thereafter be willing to make a פשרה with the other party. In other words, the scholar follows his right to have a trial, but is still willing to make some sort of compromise and not complete the דין. Instead, a פשרה is created between the wise scholar and the one who defames him.

פשרה, in this halachah should be defined as a resolution although there is a significant distinction here. Many of the textual citations go to great lengths to show that פשרה is a viable option when there are two parties that are on equal footing: When both run the risk of benefiting and/or losing in the process. In this case, the logic is slightly different. It is solely up to the one who has been defamed to decide how to handle the matter. In reality this gives a greater amount of control and power to one party. As a result, in order to reach some type of פשרה, compensation must be made by the defamer to the one defamed. The third possible result offered by the Mishneh Torah is that the judge handles the case in the process of דין. In doing so, the judge determines the specific amount that must be paid instead of allowing the two parties to work out the agreement

damage of embarrassment. Although, the Court can still penalize the individual, which forces the individual to pay an amount determined by the court. In addition, the halachah clarifies that there is a difference when a scholar is affected by these damages of embarrassment. When a wise scholar is defamed that person is

alone as implied by result two. In conclusion, there is recognition that defamation should be handled differently than a case of ambiguity over an object (seen in Mishneh Torah Gezeilah Veavedah 13:6 and Shulchan Aruch Choshen Mishpat 267:8) and personal relations (Mishneh Torah Ishut 14:16, Shulchan Aruch Evan HaEzer 77:4 and Mishneh Torah Ishut 15:15). There is no universal procedure applicable to all cases that come before a court. Rather, the difference in subject matter must be taken into account.

6A) Mishneh Torah Rozeach Veshmirat HaNefesh 13:11

רמב"ם הלכות רוצח ושמירת הנפש פרק יג הלכה יא

היה אחד טעון ואחד רוכב ודחקן הדרך מעבירין את הרוכב מפני הטעון, אחד טעון ואחד ריקן מעבירין את הריקן מפני הטעון, אחד רוכב ואחד ריקן מעבירין את הריקן מפני הרוכב שניהן טעונין שניהן רוכבין שניהן ריקנין עושין פשרה ביניהן.

- | | |
|-----------|---|
| Case 1: | There is one loaded and one ridden and the road narrowed. |
| Result 1: | The ridden one passes before the loaded one. |
| Case 2: | One is loaded and one is empty, |
| Result 2: | The empty one passes before the loaded one. |
| Case 3: | One is ridden and one is empty, |
| Result 3: | The empty one passes before the ridden one. |
| Case 4: | (If there are) two loaded, (or if there are) two ridden, (or if there are) two empty, |
| Result 4: | Make a פשרה between them. |

6B) Shulchan Aruch Choshen Mishpat 272:13

שולחן ערוך חושן משפט סימן רעב סעיף יג

היה אחד טעון ואחד רכוב, והדרך צר, מעבירים את הרכוב מפני הטעון. אחד טעון ואחד ריקן, מעבירים הריקן מפני הטעון. שניהם טעונים, שניהם רוכבים, שניהם ריקנים, עושים פשרה ביניהם.

- | | |
|-----------|--|
| Case 1: | There was one loaded and one ridden and the road narrowed. |
| Result 1: | The ridden one passes before the loaded one. |
| Case 2: | One is loaded and one is empty. |
| Result 2: | The empty one passes before the loaded one. |

paid the entire penalty even if they are defamed solely by words. They are paid 35 dinars of gold both in Israel and outside of Israel.

Case 3: (If there are) two loaded, or (if there are) two ridden, or (if there are) two empty,
Result 3: Make a פשרה between them.

These halachot are reiterations of both Tosefta Bava Kamma 2:5 and the Palestinian Talmud Bava Kamma 3d. However, there are some significant alterations. The first alteration is that the two halachot do not refer to one mode of transportation. In the Tosefta and the Palestinian Talmud it only referred to donkeys. Here there is more flexibility in the application of the rule. One could imagine that the modes of transportation varied greatly from the time of the Talmud to the Mishneh Torah and Shulchan Aruch.

The Codes do not use all of the illustrations given in the previous strata of Jewish Law. Rather, they present half of the scenarios. Therefore the specifics of who is given permission to go first, is no longer significant. Instead, the emphasis is on the final cases where all parties are equal and the rules of the road cannot apply. Again, it is unclear how this פשרה should be done specifically, but it can be handled directly by the parties involved on the road. For a more detailed analysis see comments on Tosefta Bava Kamma 2:5 in Chapter II and Palestinian Talmud Bava Kamma 3d in Chapter III.

7A) Mishneh Torah Rozeach Veshimrat HaNefesh 13:12

7B) Shulchan Aruch Choshen Mishpat 272:14

רמב"ם הלכות רוצח ושמירת הנפש פרק יג הלכה יב
שולחן ערוך חושן משפט סימן רעב סעיף יד

וכן שתי ספינות העוברות ופגעו זו בזו, אם שתיהן עוברות (בבת אחת) שתיהן טובעות, ואם בזו אחר זו עוברות, וכן ב' גמלים העולים במעלה גבוהה ופגעו זה בזה, עם עוברים שניהם בבת אחת נופלים, ואם בזה אחר זה עולים, כיצד הם עושים; טעונה ושאינה טעונה, תרחק שאינה טעונה מפני הטעונה; קרובה ורחוקה, תרחק קרובה מפני שאינה קרובה; שתיהן רחוקות או שתיהן קרובות

או טעונות, הואיל וכולן בדוחק אחד, הטל פשרה ביניהם והם מעלים שכר זה לזה. ובה וכיוצא בו נאמר: בצדק תשפוט עמיתך (ויקרא יט, טו).

- Case 1: There were two passing ships and they met one another,
- Result 1A: If both pass in the same moment, they will sink,
- Result 1B: And if one is after the other, they (both) pass (fine).
- Case 2: Thus it is with two camels that are ascending up high and they meet one another.
- Result 2A: If both pass in the same moment, they will fall
- Result 2B: And if one is after the other, they will (both) ascend.
- Case 3: How do we decide what to do - One is loaded and one is not loaded,
- Result 3: The one that is not loaded (gives way) before the one that is loaded.
- Case 4: (One is) near and (one is) far,
- Result 4: The one near gives way before the one that is not near.
- Case 5: If two are far or (two are) near or (two are) loaded,
- Result 5: Since all (parties) are pressured in the same way, arrange a פשרה between them and they will give a payment one to another. In this case and in others like it, it is said, "Judge your kinsman fairly." (Leviticus 19:15)

This halachah found both in the Shulchan Aruch and in the Mishneh Torah, is almost a direct quote of Sanhedrin 32b. A majority of the differences are stylistic. The vocabulary remains the same. There are only three changes. The first is not significant but still deserves to be noted. The Mishneh Torah and Shulchan Aruch remove the detail of ascending Beit Choron in order to enable the text to apply more broadly to any steep slope.

The second is the specific biblical text used and its placement in the halachah. In Sanhedrin 32b, the Gemara is presented as an interpretation of Deuteronomy 16:20 "Justice, Justice shall you pursue." It claims that the first word justice refers to the attribute of דין and the second one refers to the attribute of פשרה. The Mishneh Torah and Shulchan Aruch change the basic structure of this halachah by presenting the five different cases and conclude with a different verse, Leviticus 19:15, which states that one should "judge your kinsmen fairly." It is important to note that the term "judge" in this verse is תשפט, not דין. By the structure used in the halachot, it appears that they want to

emphasize the lesson rather than the biblical verse, whereas Sanhedrin 32b emphasizes the biblical verse by beginning with it. It is unclear why they chose to make a correlation between *פשרה* and *תשפט*, rather than using the standard comparison between *פשרה* and *דין* used throughout many of the Talmudic texts analyzed in the previous chapter.

Third, more explanation is given about why one is compensated monetarily. According to the Mishneh Torah and Shulchan Aruch, the two parties are not similar because of external qualities or being in the same circumstance, rather, because they are being pressured in the same way. This pressure forces the one who passes first to pay the other for the privilege.

8a) Mishneh Torah Mechirah 10:3 רמב"ם הלכות מכירה פרק י הלכה ג

במה דברים אמורים במוכר או בעושה פשרה, אבל במתנה או במחילה אם מסר מודעה קודם מתנה אע"פ שאינו אנוס הרי המתנה בטלה, שאין הולכין במתנה אלא אחר גילוי דעת הנותן שאם אינו רוצה להקנות בכל לבו לא קנה המקבל מתנה, והמחילה מתנה היא.

Question: When he sells or makes a *פשרה* (under duress known to witnesses, the sale or *פשרה* is invalid).

Case 1: However (in the case of) a gift or a waiver if he lodged a protest before a gift (award), even though there is no pressure,

Result 1: Behold the gift is invalidated. In the case of a gift, we only follow the stated will of the one who gives, if he does not want to give (transfer) the object with all of his heart, the receiver does not acquire a gift, and a waiver is equivalent to a gift.

8B) Shulchan Aruch Choshen Mishpat 205:3

שולחן ערוך חושן משפט סימן רה סעיף ג

ה *פשרה*, דינה כמכר; ומחילה, דינה כמתנה.

Case: Rules of *פשרה* are similar to sales, and the rules of waivers are judged similar to the laws of gifts.

8C) Shulchan Aruch Choshen Mishpat 205:6

שולחן ערוך חושן משפט סימן רה סעיף ו

במה דברים אמורים שצריך שידעו שהוא אנוס, במוכר או בעושה פשרה; אבל במתנה או במחילה, אם מסר מודעא קודם, אף על פי שאינו אנוס, חרי המתנה בטלה, שאין חולכים במתנה אלא אחר ז גלוי דעת הנותן, שאם אינו רוצה להקנות בכל לבו לא קנה המקבל מתנה; והמחילה, מתנה היא.

- Question: (When witnesses are aware) of the (duress of one) when he sells or makes a פשרה (the sale or פשרה is invalid).
- Case: However (in the case of) a gift or a waiver if he lodged a protest before, even though there is no pressure,
- Result: Behold the gift is invalidated. In the case of a gift, we only follow the stated will of the one who gives, if he does not want to give (transfer) the object with all of his heart, the receiver does not acquire the gift, the waiver is equivalent to a gift.

These halachot are attempting to define פשרה in relation to other entities. In the last two strata of Jewish Law, the main comparison was between פשרה and דין. Here, three specific categories are introduced: gifts, waivers and sales. פשרה is not akin to either gifts or waivers. Instead, Mishneh Torah and Shulchan Aruch explain that פשרה follows the same rules that apply to sales. Consider what happens when there is a sale. Both parties mutually benefit in the process. One gains monetary compensation and the other gains the desired product.

In addition, these three halachot explain that in order for gifts, waivers, sales and פשרה to be valid, none of them can be influenced by pressure. Although, there is an additional factor that applies to gifts and waivers, but does not apply to פשרה and sales: intent. Both Mishneh Torah and Shulchan Aruch state that the giver's intent must be known prior to giving a gift or a waiver. Without this knowledge, one cannot really know if the item truly is a gift. Yet, the same is not said about פשרה and sales. In a sale, a merchant does not know why a buyer is interested in a particular item unless he explicitly

chooses to say. Even so, the merchant would certainly be willing to sell the product. The same is true with פשרה. Therefore when a resolution is created between two parties, understanding the intent for making the פשרה is not a necessity. Instead, the main requirement is that neither side is pressured to create the solution. If one side is pressured, the sale or פשרה is invalid, as long as duress can be proved.

9) Mishneh Torah Shluchin V'shutfin 3:9

רמב"ם הלכות שלוחין ושותפין פרק ג הלכה ט

הבא בהרשאה שמחל לזה הנתבע או שמכר לו או שמחל לו על השבועה או שעשה עמו פשרה לא עשה כלום שהרי אומר לו לתקן שלחתיך ולא לעוות, לפיכך אם התנה עמו בין לתקן בין לעוות אפילו מחל לו על הכל הרי זה מחול.

- Case: One (representative) comes with authorization that pardons the one to whom he (the sender) sues or sells, or releases him from an oath or makes a פשרה with him: that agent has accomplished nothing.
- Result 1: Because the one who appointed him can say "You have been sent out to repair my position and not to destroy (harm) it."
- Result 2: Therefore, if you prescribe with him (the agent) either to repair (improve) or to destroy (harm), even if the agent waives everything, this is a valid waiver.

This text is more a comment about the nature of one who can represent you, rather than a comment on how to understand פשרה. Yet, there are several factors about פשרה that can be learned. First and foremost, a representative, chosen and sent on one's behalf, can negotiate a possible solution. Therefore, the individual involved in the case is not the sole person who is able to represent oneself. Furthermore, the representative only has the authority to make a פשרה with explicit permission (as seen in result two). Otherwise, according to the model presented in result one, pardoning a person, releasing a person from an oath or making a פשרה is actually considered damaging to a position. Unless a decision falls completely in the litigant's favor, the representative does not have authority

to act. Therefore, at the outset, the litigant must determine if the representative is able to create a פשרה regardless of cost.

As a result, the amount of authority a party gives to his/her representative determines what the representative is able to do or say on behalf of his/her client. In some ways, this sounds like a precaution about how much control to give to a representative. It is true that this warning is not solely directed to individuals participating in פשרה, but individuals that are participating in any type of case. Furthermore, one of the values that this halachah emphasizes is the magnitude of trusting one's representative. Certainly there are already built in protections within the system: as it states a representative can only repair a position. Even so, there is still a risk involved any time that another individual has the power to represent one's interest.

10A) Mishneh Torah Malveh Velaveh 19:8

רמב"ם הלכות מלוה ולוה פרק יט הלכה ח

מי שלוח מאחד ואחר כך מכר הלוח נכסיו לשנים וכתב בעל חוב ללוקח שני דין ודברים אין לי עמך וקנו מידו אינו יכול לטרוף מלוקח ראשון שהרי אומר לו הנחתי לך מקום לגבות ממנו אצל בעל חובך מן הנכסים שקנה לוקח שני אחרי ואתה הפסדת על עצמך שהרי סלקת עצמך מהן, והוא הרין לאשה בכתובתה אם כתבה לשני, אבדה כתובתה ואינה יכולה לטרוף, אבל אם כתבו לראשון טורפין מן השני, מכר הלוח שדה ללוקח ומכרה לוקח ראשון ללוקח שני וכתב המלוה ללוקח ראשון דין ודברים אין לי עמך וקנו מידו חריב"ח טורף מלוקח שני אותה השדה ולוקח ראשון טורף אותה מב"ח שהרי כתב לו ולוקח שני טורף אותה מלוקח ראשון שהרי הוא מכרה לו וב"ח חוזר וטורף משני וחוזרין הלילה/חלילה/ עד שיעשו פשרה ביניהן וכן האשה בכתובתה.

- Case 1: One who borrows (money) from another and afterwards sells his property to two (purchasers at separate times). And the lender writes to the second purchaser, "Judgment and words I do not have with you (I release you from any litigation)" and makes a קנין,
- Result: (The lender) cannot take by force from the first purchaser, because (the buyer can) says to him, "I left you a place to collect after me with your lender from the property that the second purchaser acquired after me, and you disadvantaged yourself, so that behold you removed yourself from

(any other possessions because you made the deal). [The first purchaser claims that s/he left enough property available – i.e. there was a second purchaser who bought second and therefore logically the second purchaser should be the first one that the lender goes after to claim the money. This case results because the borrower must have defaulted on the loan. Therefore, the lender is forced to pursue the purchasers to reclaim the money.]

Case 2: [Here is a similar application of the above ruling] And this is the judgment for a woman in her ketubah [here the woman is the claimant], if she wrote to the second purchaser [as above], then she [in effect] lost her (claim to her) ketubah and cannot collect the debt.

Result: But if they (the claimants in the above cases) wrote to the first purchaser ["I do not have any claims against you." Then they can] take by force payment from the second. [Agreement with the first does not inhibit claims to the property of the second purchaser.]

Case 3: If the borrower sold his field to the purchaser and the first purchaser sells to a second purchaser, and the lender writes to the first purchaser "judgment and words I do not have with you" and performs קנין – that lender can take that field by force from the second purchaser, and the first purchaser takes it by force (the field) from the lender [according to what] had been written to him, the second purchaser takes it by force from the first purchaser [because he sold it], then the lender returns and takes it by force from the second purchaser,

Result: And they go around and around until they make a פשרה between them and thus it is with the woman and her ketubah.

10B) Shulchan Aruch Choshen Mishpat 118:2

שולחן ערוך חושן משפט סימן קיח סעיף ב

מכר חלוה שדה ללוקח, ומכר אחריה שדה שניה ללוקח שני, וכתב המלוה ללוקח שני: דין ודברים אין לי עמך, וקנו מידו, הרי בעל חוב טורף מלוקח ראשון שדה ראשונה, ולוקח ראשון טורף מלוקח שני שדה שנייה, שהרי קנה אחריו, ב ובעל חוב טורף אותה מלוקח ראשון, ולוקח שני מוציא אותה מבעל חוב, שהרי כתב לו: (דין ודברים אין לי עמך), ולוקח ראשון חוזר וטורף משני, וחוזרים חלילה עד שיעשו פשרה ביניהם. וכן האשה בכתובתה, וחוא שהיה החוב כנגד שתי השדות.

Case: A lender sold a field to a purchaser and afterwards sold a second field to a second purchaser.

A) And the lender wrote the second purchaser, "Judgment and words I do not have with you (I release you from any litigation)" and makes a קנין.

B) Behold the lender takes, by force, the first field from the first purchaser,

C) And the first purchaser takes, by force, the second field from the second purchaser that was acquired after him (his field).

- D) And the lender takes it, by force, from the first purchaser,
 E) And the second purchaser reclaims it from the lender who wrote to him (the second purchaser) "Judgment and words I do not have with you."
 F) And the first purchaser returns and takes, by force, from the second
 Result: And they go around and around until they make a פשרה between them.
 A) Thus it is with a woman and her ketubah,
 B) And one that was a lender with two fields.

10C) Shulchan Aruch Choshen Mishpat 118:3

שולחן ערוך חושן משפט סימן קיח סעיף ג

וכן הדין אם החוב מנה, ומכר לשני לקוחות, לכל אחד במנה, וכתב בעל חוב ללוקח שני: דין ודברים אין לי עמך, ונמצא השרה שקנה הראשון שאינה שלו, הרי הראשון טורף מהשני, ובעל חוב טורף מהראשון, ושני טורף מבעל חוב, וחוזרים חלילה עד שיעשו פשרה ביניהם.

- Case: And thus is the דין when the debt owed is one manch (100 zuz), and the lender sold to two purchasers,
 A) To each one for one manch.
 B) And the borrower wrote the second purchaser, "Judgment and words I do not have with you" ("I will never litigate against you.")
 C) And the result is the field that sold first was not the purchaser's (since it was liened to the lender),
 D) So the first takes, by force, from the second (purchaser)
 E) And the lender takes, by force, from the first (purchaser),
 F) And the second takes, by force, from the lender
 Result: And they go around and around until they make a פשרה between them.

The Mishneh Torah and the Shulchan Aruch base these halachot on both Mishnah Ketubot 10:6 and also on Mishneh Torah Ishut 17:12. As is customary of these Codes, rather than solely comparing them to the case of two women who both have ketubot that need to be paid, they now apply the ruling to any case where there are two individuals who have a claim to a single property. The noteworthy factor added to this scenario is that a lender sells some land after he has taken a loan. That property was sold illegally because it was now liened to a borrower, i.e., a claimant similar to a wife seeking payment of her Ketubah.

In all of these situations, פשרה is viewed as a solution or resolution that must be worked out between the disputing parties due to their seemingly equal claim to the property. First, there is an individual who initiated the scenario, thereby making the interaction more complex. In the halachot above, that individual is the borrower who makes a contract with the second purchaser. This contract leads to some difficulties. The wording of the contract is the same as the ones found in Mishneh Torah Ishut 17:12, and Mishnah Ketubot 10:6, "Judgment and words I do not have with you" i.e. "I release you from any litigation."

The order in which the contracts were made is significant. In this situation, priority is given to the first purchaser because that individual made the initial agreement with the borrower who still had possession at that time with which to pay his lender. The basic lien falls on the second purchaser. When the borrower chose to waive certain claims with the second purchaser, in effect that waiver of claims also protects the first purchaser. As stated in the Mishneh Torah, the first purchaser who made a legal purchase sends the borrower to the second purchaser if there are financial difficulties. After all, the second purchaser bought lien property. The interrelationship between the first and second purchasers is based on when they bought the land is further clarified by the Mishneh Torah in the second case. If the lender writes a contract of non-litigation with the first purchaser, then this does not waive his right to collect from the second purchaser. Therefore, the order in which the land was purchased is significant.

פשרה becomes a part of these disputes when there are ambiguities in terms of which party has a stronger claim on the land. When all of the parties have equally valid

claims they must "go around and around" to create a resolution. There is no outside intervention needed, simply the involvement of each of the entities of the contract.

The cases discussed here are strikingly similar to modern real estate. In a modern real estate transaction if there were a lender, a borrower and two purchasers before any money exchanges hands, each of the parties would have access to all of the previous existing cases related to that one piece of property. Since the land discussed above has a lien on it, there is a preexisting contract between the lender and the borrower. This in turn inhibits the borrower from having full control over the property. When the two purchasers attempt to buy the land, they verify that their interests as purchasers are protected. For example, the contract created could list a variety of terms such as, "We will pay you this money to buy this property, upon checking title, ensuring that there is no lien, etc." When the borrower who is now selling the property has taken a mortgage as in the case cited here, then s/he must show that s/he will pay off the lender whereupon the lender will dismiss the lien. A third party arbiter often handles this process. This individual is called an independent stakeholder. S/he is paid a fee, collectively by all parties involved and acts on instruction that must be unanimously agreed upon.

11A) Mishneh Torah Sanhedrin 6:5

רמב"ם הלכות סנהדרין פרקו הלכה ה

דיין שטעה וחייב שבועה למי שאינו חייב בה ועשה זה פשרה עם בעל דינו כדי שלא ישבע ואחר כך ידע שאינו בן שבועה, אע"פ שקנו מידו על הפשרה אינה כלום שלא קבל עליו ליתן לו או למחול לו אלא כדי שיפטר משבועה שחייבו בה הטועה וכל קניין בטעות חוזר וכן כל כיוצא בזה.

Case:

A judge who errs and obligates someone who is not required to take an oath to swear, and (the party forced to take the oath)

A) Makes a פשרה with his fellow litigant so that he does not have to take an oath,

B) And afterwards it is known that he did not have to take the oath, even if he has made a קנין on the פשרה,

- Result:** It (the פשרה) does not count.
- A) He only (agreed) to pay a claim, or to waive it, in order to exempt (himself) from the oath that he was erroneously required to take.
 - B) And every קנין in error, has no force.
 - C) Thus all are exempt from this [קנין and oath].

11B) Shulchan Aruch Choshen Mishpat 25:5

שולחן ערוך חושן משפט סימן כה סעיף ה

דיין שטעה וחייב שבועה למי שאינו חייב בה, ועשה זה פשרה עם בעל דינו כדי שלא ישבע, ואחר כך ידע מו שאינו בן שבועה, אף על פי שקנו מידו על הפשרה, מז אינה כלום, דקנין בטעות הוא, וחוזר.

- Case:** A judge who errs and obligates someone who is not required to take an oath to swear, and (the party forced to take the oath)
- A) Makes a פשרה with the fellow litigant so that he does not have to take an oath,
 - B) And afterwards it is known that he did not have to take the oath, even if he has made a קנין on the פשרה.
- Result:** It (the פשרה) does not count. It was a קנין in error, and such a קנין has no force.

The requirements set forth protect individuals, even after the fact, if they have been forced to make agreements that have not been handled correctly. Under the circumstances stated in the Mishneh Torah, the individual made a פשרה in order to be released from an obligation to take an oath. After the fact, it became known that the oath did not apply and therefore, the פשרה that was made, even if there was a קנין, does not apply as well. This adds an important dimension to the understanding of פשרה. It is binding as long as the factors that lead to the פשרה are valid.

As stated above, one of the major reasons that the פשרה is no longer binding is because the judge, in a sense, forced someone to make a פשרה (in order to avoid an oath). For one who is diligent and takes steps to make a binding פשרה, this includes קנין. Unless a פשרה is made based on true circumstances, it will be invalidated. Prior to this halachah there were references to litigants who attempted to force someone into a פשרה (see

Mishneh Torah Machirah 10:3 and Shulchan Aruch Choshen Mishpat 205:6). In that situation the פשרה was nullified as well. These halachot are the first cases where a judge caused an individual to enter into a contract based on false information.

These halachot can serve as a model for how to deal with contracts and oaths today. The same requirements and guidelines are applicable. The most helpful element is the ethical aspect implied by these halachot. Agreements founded on error are not agreements. In other words, having a goal of creating agreements solely for the sake of creating agreements is frowned upon by our tradition.

12A) Mishneh Torah Sanhedrin 22:4 רמב"ם הלכות סנהדרין פרק כב הלכה ד

מצוה לומר לבעלי דינים בתחילה בדין אתם רוצים או בפשרה, אם רצו בפשרה עושין ביניהן פשרה, וכל בית דין שעושין פשרה תמיד הרי זה משובח ועליו נאמר משפט שלום שפטו בשעריכם אי זהו משפט שיש עמו שלום הוי אומר זה ביצוע, וכן ברוד הוא אומר ויהי דוד עושה משפט וצדקה לכל עמו איזהו משפט שיש עמו צדקה הוי אומר זהו ביצוע והיא הפשרה, במה דברים אמורים קודם גמר דין אע"פ ששמע דבריהם וידע להיכן הדין נוטה מצוה לבצוע אבל אחרי שגמר הדין ואמר איש פלוני אתה זכאי איש פלוני אתה חייב אינו רשאי לעשות פשרה ביניהן אלא יקוב הדין את החר.

- Case 1: It is a mitzvah to say to the litigants at the outset of a court case, "Is it דין that you want or פשרה?"
 A) If they want פשרה, make a פשרה between them.
 B) Every court that always makes פשרה is worthy of praise and about them it is said, "Execute the justice of peace in your gates" (Zechariah 8:16).
- Case 2: What is משפט that has within it peace? This is ביצוע.
 A) Thus it is said about David, "And David made משפט and צדקה with all of his people (II Samuel 8:15).
 B) What kind of justice has within it righteousness, it is said that this is פשרה, which is ביצוע.
- Case 3: To what circumstances does this halachic statement apply?
 A) Before the judgment is complete although you have heard their (the litigants) words and know how the judgment leans, it is a Mitzvah to perform ביצוע.
 B) But after the judgment is complete and the (judge) said, "Mr. So and So you are innocent. (Or) Mr. So and So you are culpable." (The Judge) is not permitted to make a פשרה between them, rather "the law must take its course."

שולחן ערוך חושן משפט סימן יב סעיף ב

מצוה לומר לבעלי דינים בתחלה: הדין אתם רוצים או הפשרה; אם רצו בפשרה, עושים ביניהם פשרה. ובשם שמוזהר שלא להטות הדין, כך מוזהר שלא יטה הפשרה לאחד יותר מחבירו. וכל בית דין שעושה פשרה תמיד הרי זה משובח. במה דברים אמורים, קודם גמר דין, אף על פי ששמע דבריהם ויודע להיכן הדין נוטה, מצוה לבצוע. ג אבל אחר שגמר הדין ד ואמר: איש פלוני אתה זכאי, ה איש פלוני אתה חייב, ו אינו רשאי לעשות פשרה ביניהם. אבל אחר, שאינו דיין, רשאי לעשות פשרה ביניהם שלא כמושב דין הקבוע למשפט. ואם חייבו בית דין שבועה לאחד מהם, ז רשאי חבית דין לעשות פשרה ביניהם כדי ליפטר מעונש שבועה.

- Case 1: It is a mitzvah to say to the litigants at the outset of a court case, "Is it דין that you want or פשרה?"
- A) If they want פשרה, make a פשרה between them.
- B) And just as one is warned by the Torah not to sway the דין, similarly one is warned not to sway the פשרה in favor of one of the litigants over the other.
- C) Every court that always makes פשרה, this is worthy of praise.
- Case 2: Before a Court completes a judgment although you heard their (the litigants') words and know how the judgment leans, it is a Mitzvah to perform ביצוע.
- Case 3: But after the judgment is complete and (the judge) said, "Mr. So and So you are innocent. (Or) Mr. So and So you are culpable." (The Judge) is not permitted to make a פשרה between them.
- Case 4: But another person who is not a judge can make a פשרה between them (Although) not in a place that has been set aside for trials.
- Case 5: If the Court obligated one litigant to swear an oath to one of them, the Court is authorized to make a פשרה between them in order to free this person from the severe punishment of oath taking.

To gain a greater understanding of how פשרה is interpreted by the rabbis, it is essential to compare how the term relates to both דין and ביצוע. This halachah is one example where the terms פשרה and ביצוע are used synonymously. One of the ambiguities is whether it is the intent of the Mishneh Torah to claim that פשרה and ביצוע are synonymous solely in ביצוע with justice that has righteousness in it, or if the Mishneh Torah is claiming, in general, that the two terms can be interchanged. The notion that it is a mitzvah to ask the litigants at the outset of a court case if they want פשרה or דין is found

in Sanhedrin 6b-7a. The major debate within that Gemara is what specifically about פשרה is a mitzvah. The perspective of R. Yehoshua ben Karchah, a 5th Generation Tanna, is that the mitzvah is the offering of פשרה. As is customary, the Mishneh Torah excludes the controversy over the matter. Whereas the Gemara gives examples when פשרה is not a mitzvah under any circumstance and other cases where there is specific timing that must be followed in order for it to be a mitzvah.

Furthermore, it appears that the Mishneh Torah used the same interpretation as Sanhedrin 6a-6b where it posits that David is the quintessential model of one who is able to attain ביצות. Both texts use Zechariah 8:16 as the basis for the discussion about attaining justice that contains peace. Furthermore, both use the example of David, as cited in II Samuel 8:15, as one who is able to attain ביצות by doing justice and righteousness with all of his people.

The Shulchan Aruch on the other hand supplements what is learned in the Gemara by including the final two cases. The fourth case illustrates that judges were not the only individuals who were serving as mediators of פשרה. Other individuals have the opportunity, as long as it is not in the same context lest they create confusion over their role. If one were to walk into a courtroom, the natural assumption would be that there are judges sitting on the bench. To avoid this confusion the non-judge who is mediating must move to another venue. Case five restates the seriousness of oaths. Oaths could not be entered into lightly and therefore, the court can allow the party required to take the oath to make a פשרה instead.

These halachot reinforce the notion of פשרה as a mitzvah. Not simply a nice thing to do, or a right thing to do, but as an act that is an obligation to God. It is also a

legitimate means to avoid the serious obligation of an oath. Both a judge and a non-judge are able to preside over a פשרה. This is the first example that an arbitration model is used where a judge is not the arbiter. It is unclear what type of training this individual would need or what his status was in the community. All that is clear is that they were not allowed to present rulings in the courthouse. The Shulchan Aruch presents a reminder of the profound nature of taking oaths, which should not be handled lightly even today.

There are times when the significance of taking an oath could have negative effects, so much so that other avenues should be utilized first.

13) Mishneh Torah Sanhedrin 22:5 רמב"ם הלכות סנהדרין פרק כב הלכה ה

אע"פ שרצו בעלי הדין בפשרה בבית דין יש להם לחזור ולתבוע את הדין עד שיקנו מיד שניהם.

Case: Even if both litigants want a פשרה by the court
A) They can change their mind
B) And demand דין until they perform a קנין between them.

The Mishneh Torah's statement of the importance of קנין in relation to פשרה comes from Sanhedrin 6a. Throughout that Gemara there are painstaking efforts to find a way to compare פשרה and ביצוע דין. At the conclusion of the debate there is a statement by the Stam that a פשרה needs to have a קנין. Thereafter, Rashi clarifies that קנין is required even if פשרה is reached by three. Furthermore, this reinforces a halachah (Mishneh Torah Sanhedrin 6:5), which discusses the interrelated nature of קנין and פשרה.

In the passages mentioned above, the focus is on having a קנין and thereby a פשרה that is based on factual evidence that follows rules and procedures. Here, in this halachah, it states more explicitly that פשרה and קנין are closely related. The only way to finalize and assure the פשרה is by a קנין. Therefore the dispute can be resolved through a different

means, דין, until קנין has been made. In reality, קנין becomes the most operative moment in deciding the case. פשרה is only one of the options when seeking a resolution. It is able to provide flexibility that is not available if the two litigants choose דין. For example, one can attempt to make a פשרה but if this fails, there is an opportunity to return to דין. Imagine how helpful this mindset would be today. Rather than going to דין, the most adversarial method immediately, two parties could attempt to work out an agreement more amicably. If there is an understanding that פשרה does not always work and that returning to דין is not considered a failure, then it could be a more effective way to resolve disputes.

14A) Mishneh Torah Sanhedrin 22:6 רמב"ם הלכות סנהדרין פרק כב הלכה ו

יפה כח פשרה מכח חרין ששני הדיוטות שדנו אין דיניהן דין ויש לבעלי דינין לחזור בהן ואם עשו פשרה וקנו מידן אין יכולין לחזור בהן.

- Case: Greater is the strength of פשרה then the strength of a דין.
- A) When two regular people try a case, their דין is not valid and the litigants can reject it,
 - B) But if (two regular people) do a פשרה with קנין (the litigants) cannot reject it.

14B) Shulchan Aruch Choshen Mishpat 12:7

שולחן ערוך חושן משפט סימן יב סעיף ז

י אף על פי שנתרצו הבעלי דינין בפשרה בב"ד, יא יכולים לחזור בהם כל זמן שלא קנו מידם. יב הפשרה צריכה קנין, אפילו בשלשה; יג אבל אם קנו מידם, אין יכולים לחזור בהם יד אפילו ביחיד; ויש אומרים טו דדוקא בשנים.

- Case:
- A) Even though two litigants agree to a פשרה in court, they may retract (that agreement) as long as they have not make a קנין because פשרה requires קנין.
 - B) Even when three people are present but if they made a קנין they cannot retract even before one person.
 - C) And there are those that say, קנין requires two.

As seen in previous genres of rabbinic literature, the rabbis explore the strength of פשרה in relation to the strength of דין. In Sanhedrin 5b there is a discussion about which of the two is actually stronger. The nature of the discussion here is radically different than the Gemara. There, the issue is how many judges must decide a case. The debate claims that since two judges are needed for פשרה whereas three are needed for דין, פשרה is stronger. This in turn implies that פשרה is not directly comparable to דין and therefore not part of the legal process in the same way.

The Mishneh Torah takes on an entirely different tone because the issue is not the number of people, but their qualifications. It introduces the idea that judges are not even needed at all in order to make a פשרה. All that is needed are two average people and a קנין. It is the קנין that makes the פשרה stronger. Both of these texts, the Mishneh Torah and Sanhedrin 5b use similar reasoning that פשרה is stronger because there is a lesser number of judges or a lesser amount of training needed (i.e. Regular people), and the litigants agree to accept the outcome.

On the other hand, the focus of the Shulchan Aruch passage is to explicate the strength of קנין. It is clear that there are a variety of opinions in terms of how many people are needed in order to preside over a פשרה. It does not emphasize the debate, compare פשרה to דין, or care to explore which number of people is valid. Instead, the focus is solely the קנין. As long as קנין is utilized, the פשרה is valid.

רמב"ם הלכות סנהדרין פרק כד הלכה ב 15A) Mishneh Torah Sanhedrin 24:2

כל אלו הדברים הן עיקר הדין אבל משרבו בתי דינין שאינן הגונים ואפילו היו הגונים במעשיהם אינן חכמים כראוי ובעלי בינה הסכימו רוב בתי דיני ישראל שלא יהפכו שבועה אלא בראיה ברורה, ולא יפגמו שטר ויפסידו חזקתו בעדות אשה או פסול וכן בשאר כל הדינין ולא ידון הדיין בסמיכת דעתו ולא כידיעתו

כדי שלא יאמר כל הדיוט לבי מאמין לדברי זה ודעתי סומכת על זה, וכן אין מוציאין מן היתומים אלא בראיה ברורה לא בדעת הדיין ולא באומדן המת או הטוען, ואעפ"כ אם העיד אדם נאמן בדבר מכל הדברים ונטתה דעת הדיין שאמת הוא אומר ממתין ברין ואינו דוחה עדותו ונושא ונותן עם בעלי דינין עד שיורו לדברי העד או יעשו פשרה או יסתלק מן הדין.

- Case: All of these things are the essence of the דין. But with the increased amount of the courts that are not fit/worthy.
- A) And even if they are fit/worthy in their actions, they are not as wise as needed or masters of understanding.
 - B) Therefore a majority of the Jewish courts agreed not to force or reverse oaths without clear evidence [two kosher witnesses].
 - C) And they don't disqualify documents and undermine their strength with women witnesses or unfit witnesses, and so it is with the remainder of all cases.
 - D) And the judge should not judge by inclination of his intellect nor with his knowledge in order that the average judge will not say, "My heart believes these words, and my opinion relies on this (my intellect)."
- Result 1: And therefore we do not exact money from orphans except by clear evidence, and not by the opinion of the judge, and not by an estimate of the dead (person's wishes), or by the plaintiff.
- Result 2: Nevertheless if a trustworthy man testified in any one of these matters and the judge's opinion leans to the view that he tells the truth,
- A) The Judge should hold off judgment and should not dismiss the testimony of this trustworthy man,
 - B) And he (the judge) should have a dialogue with the litigants
 - 1) Either until one admits to the words of the witness
 - 2) Or until they come to a פשרה between them or (if they cannot until) the judge recuses himself.

15B) Shulchan Aruch Choshen Mishpat 15:5

שולחן ערוך חושן משפט סימן טו סעיף ה

יש לדיין לדון דיני ממונות על פי הדברים שדעתו נוטה להם שהם אמת, והדבר חזק בלבו שהוא כך אע"פ שאין שם ראיה ברורה. ומשרבו בתי דינים שאינם הגונים ובעלי בינה, הסכימו שלא יהפכו שבועה אלא בראיה ברורה, ולא יפגמו שטר ויפסידו חזקתו על פי עדות אשה או קרוב אע"פ שדעתו סומכת על דבריהם, וכן אין מוציאין מהיתומים אלא בראיה ברורה, לא בדעת הדיין ולא באומדן המת או הטוען; ואעפ"כ אם העיד אדם נאמן בדבר מכל הדברים ונטתה דעת הדיין שאמת הוא אומר, ממתין ברין ואינו דוחה עדותו, ונושא ונותן עם בעלי דינים עד שיורו לדברי העד, ודורש וחוקר עד שיתברר הדבר או יעשו פשרה, או יסתלק מן הדין כמו שנתבאר.

- Case:** A judge must judge cases of civil law according to his sense that certain matters are true and his heart senses that the issue is thus even though there is no clear evidence there.
- A) But with the increased amount of courts that are not fit/worthy and masters of understanding agree the courts have agreed not to force or reverse oaths without clear evidence (two kosher witnesses).
 - B) And they don't disqualify documents and undermine their strength via women witnesses or the like (similar unfit witnesses). Even though the judge's view gains support from them. Similarly, we do not exact money from orphans except by clear evidence and not by the opinion of the judge, and not by an estimate of the dead (person's wishes), or by the plaintiff.
- Result:** Nevertheless if a trustworthy man testified in any one of these matters and the judge's opinion leans to the view that he tells the truth,
- A) The Judge should hold off with judgment and should not dismiss the testimony of this trustworthy man,
 - B) And he (the judge) should have a dialogue with litigants
 - 1) Either until they agree to the words of the witness,
 - 2) Or he examines the evidence of the matter until the law becomes clear,
 - 3) Or until they come to a פשרה between them, or (if they cannot then) the judge must recuse himself as has become clear.

These halachot deal with a phenomenon, the rise of legal courts that did not have judges that were fully trained in the field of law. As a result, the individuals presiding over a case, due to their lack of training, have restrictions placed upon them. These judges were expected to emphasize tangible evidence, witnesses and documents versus their opinions or leaning in a case, although both the Mishneh Torah and Shulchan Aruch refer to one circumstance when the individual testifying is a trustworthy man. In this situation, the judge is given more leeway to rely on his opinions. As a result, the judge speaks with the litigants to see if they will agree with the witness, create a פשרה, or as it solely states in the Shulchan Aruch, the judge can continue to investigate evidence until the case's solution becomes clear. If none of these options work, then the judge is forced to recuse himself from the case.

Again, here is an example where the law is limited and cannot provide a clear-cut solution. Due to the leeway given to the judges, they are able to consider the words of a trustworthy witness more seriously. As a result, there are more options available in the legal proceeding. פשרה can only be used when every other option is attempted and there is no other solution. Here the פשרה is not a separate entity or attempted prior to דין. Instead, פשרה is used after דין is unable to create a solution. Both well and poorly trained judges are able to preside over not only a פשרה, but also a דין. The exact number of judges is not an issue in this circumstance. Whereas, the values of fairness and impartiality are so essential that the court must use procedures and clear evidence in order to protect the authenticity of the process and the rulings.

16) Shulchan Aruch Choshen Mishpat 12:4

שולחן ערוך חושן משפט סימן יב סעיף ד

יש כח ביד ב"ד לגזור ולחחרים שתתקיים הפשרה, ושלא יוכלו היתומים למחות כשיגדילו.

Case: The Court has authority to decree and excommunicate, (party or parties) in order for the פשרה (which they made) to be fulfilled. And (minors who are) orphans (and party to פשרה) cannot object (to the פשרה) when they grow up.

The Shulchan Aruch explains that a פשרה that is accepted by minors cannot be summarily dismissed when they become adults. Therefore the age of a litigant becomes a consideration both at the time of פשרה and throughout its duration. Here the court acts as a body of arbiters that has the authority to impose decrees or excommunicate in order to enforce a פשרה. This gives the court a great deal of authority in creating the פשרה. As we have seen, in many of the other texts, this is not always the case. Even in the two halachot analyzed in the previous section, although the judge coordinates the פשרה, he must rely

on the two litigants to participate as well. Here the role of the judge is more active. This raises a question: does the court have more power and ability to direct the focus of the פשרה because it is a case related to a minor? It is particularly difficult to respond to this question because it does not refer to a specific case.

17) Shulchan Aruch Choshen Mishpat 12:6

שולחן ערוך חושן משפט סימן יב סעיף ו

מי שתובעים אותו ממון שהוא מוחזק בו, אסור לבקש צדדים להשמט כדי שיתרצה הלה לעשות עמו פשרה וימחול לו על השאר.

Case: Someone who is being sued for money, which he is presumed to have, is prohibited from seeking legal avenues (to find loop holes in the law) that will allow him to get out of the claim so that his claimants will make a פשרה with him, and forgive the rest (of the obligation).

This halachah again reinforces that a פשרה cannot be forced. This idea is first introduced by Mishneh Torah Mechira 10:3 and Shulchan Aruch Choshen Mishpat 205:3. There it is unclear what type of force or pressure is being placed on the parties. All that is known is that pressure is being used. Here the type of pressure is specified. A person who has enough money to pay a claim then uses every legal argument or trick to get out of an obligation hoping that the extensive process will cause the other side to back down. This halachah states that this is not a legitimate way to handle a legal proceeding.

There are many modern examples where this happens or could happen today. Often times the news reports stories of insurance companies that force customers to jump through a variety of hoops before they will approve a medical procedure. Sometimes these hoops include telling the customer that the option is not feasible under the plan. Unless customers are persistent, they may not get the necessary health care. Another prominent example is of large corporations that violate environmental law knowing that

the parties that may bring lawsuits against them do not have equivalent resources. As a result, the companies spend exorbitant amounts of money in an attempt to exhaust the will of the other side in hopes that they will drop the claim. Clearly, this halachah is stating that honesty and equalization of all parties is an essential value. This equality of parties illustrates that one cannot use finances to his advantage. All of the entities must have a right to a fair proceeding which can only happen if rulings are accepted and "tricks" are not attempted in order to by-pass the law.

18) Shulchan Aruch Choshen Mishpat 12:11

שולחן ערוך חושן משפט סימן יב סעיף יא

אם ראובן הפחיד את שמעון למסרו אם לא יתן לו ממון שהיו דנין עליו ואין לו בו זכות כפי הדין, ועשו פשרה יט בקנין וביטול מודעא, יכול לחזור בו.

Case: If Reuben threatens Shimon that he (Reuben) will turn him (Shimon) over (to the government – external forces) if he (Shimon) does not give him (Reuben) the money that they were litigating over,
 A) And Reuben has no rights to the money according to the law,
 B) And they make a פשרה by קנין and a cancellation of (any statement implying the retraction of the קנין),
 Result: Shimon can still retract

This threat against the opposing litigant, an example of force, is strongly rejected by the Shulchan Aruch. Here, the threat refers to outside pressure from a non-Jewish power. The threat of having to face an outside entity, not a Jewish legal system, could certainly serve as a deterrent for anyone pressing forward with a case. What is most interesting is that even if Shimon makes a פשרה and verifies it by giving a קנין to Reuben, this קנין and, therefore, this פשרה can be rejected. Once again as פשרה is continually elaborated upon and developed, an increasing value is placed on honesty and fairness in these proceedings.

19A) Shulchan Aruch Choshen Mishpat 12:12

שולחן ערוך חושן משפט סימן יב סעיף יב

שנים חלוקים בבנין שבקרקע, ופשרו ביניהם בלא קנין, כיון שקבלו עליהם
כובנה זה קצת וזה קצת כדברי הפשרנים, כא אינם יכולים לחזור בהם.

Case: Two people are arguing about a building on a piece of property
A) And they פשרו between them (visa vis building rights) without קנין
B) Once they accepted (the פשרה) upon themselves then each one built
something according to the words of the ones who helped them arrive
at the פשרה.

Result: They cannot retract.

19B) Shulchan Aruch Choshen Mishpat 12:13

שולחן ערוך חושן משפט סימן יב סעיף יג

פשרה בלא קנין וקבל הנתבע גזירתם ועשה שטר, הן כב בלשון הוראה הן
בלשון חיוב, אינו יכול לחזור בו.

Case: קנין where there is no פשרה,
A) But the defendant has accepted the (compromiser's) enactment, and he
made a document.
B) Whether in the language of admission, or in the language of
obligation.

Result: He cannot retract.

Here the Shulchan Aruch does not ask questions about פשרה. It does not seek to
define how it is carried out or who is presiding over the issue. Rather, the focus is again
on the issue of creating a valid פשרה. As has been seen in many of the previous halachot
in the Mishneh Torah and in the Shulchan Aruch, it is clear that the easiest means to
solidify a פשרה is through קנין. This case clarifies that other items can serve as a
confirmation of an agreement reached in a פשרה. In all of these, a tangible action
confirms the acceptance of a resolution by both parties. In the first case, when two people
are arguing over a piece of property as soon the agreement is reached and the two begin
to build on the land, this is as strong a sign of agreement/compromise as a קנין. In the
second case, when an arbiter presents his resolution and it is resolved by signing a

document, this has the same binding nature as a קנין. It is evident that the first halachah relates to issues of real estate, but the issues in the second halachah are uncertain. Each of these actions, the building and the writing of a document is a statement of value. Just as, one would not begin to build without a guarantee that the deal is final. So too, one would not sign a document unless a valid resolution is in place. Therefore, this expands and allows creativity in terms of our definition of פשרה. It is true that there must be an exchange of some sort to solidify the agreement, but it does not need to be קנין.

20) Shulchan Aruch Choshen Mishpat 12:19

שולחן ערוך חושן משפט סימן יב סעיף יט

פשרה בלא קנין, ונתנו משכון ביד הפשרנים, אינו כלום כו אא"כ אמרו: דלא כאסמכתא כז או מעכשיו. כח ואם היה המשכון שטר חוב, אינו כלום.

- Case: A פשרה without קנין (but the parties to it) give a pledge²⁰ in the hands of the פשרנים.
- Result: It does not mean a thing (This holds no legal ramification).
- A) Until the compromisers (two parties mediating) say (they have given this pledge) not as a conditional obligation (rather as a full commitment). Or (when they say our obligation starts) from now.
- B) But if a pledge (given to פשרנים) was a bill of debtment (IOU) that is no pledge.

This halachah continues the exploration of what is comparable to קנין in terms of its ability to legalize the פשרה, through another category: pledges. The Shulchan Aruch is careful to explain that that it cannot be any type of pledge. Rather, the mediating parties must state explicitly that the pledge is unconditional, or that the pledge will bind immediately and not act as a promise of a future guarantee. Since pledges are generally

²⁰ A משכון is a security or pledge. It is an item that a creditor takes from a borrower to guarantee that the loan will be repaid. Steinsaltz, 224.

used with loans, it is logical that they assure an action in the future. In the case of פשרה there is a sense that a future promise can be retracted too easily.

21) Shulchan Aruch Choshen Mishpat 246:3

שולחן ערוך חושן משפט סימן רמו סעיף ג

יש מי שאומר דהוא הדין בריא שכתב כל נכסיו לאחר מחמת שהיה צריך לברוח מפני בעלי חוביו או מפני אויביו, ואחר כך עשה פשרה עם בעלי חוביו ואויביו, או שמתו, אם נתברר שלא כתב מתנה זו אלא מחמת כן, הואיל ונדחת השעה מפניו וחרי הוא צריך לנכסיו, בטלה המתנה.

Case: There is one who says that the same rule applies to one who is healthy who deeds (in writing) all of his property to another person because he needs to flee from his creditors or his enemies.
Result: And afterwards he makes a פשרה with his lender and (with) his enemies or they die. If it becomes clear that he deeded this property to this other person because of his problems and now his troubles are over and he needs his property back, the deeded gift he made is invalidated.

Not only are there cases where a פשרה is nullified because it was made on faulty information (Mishneh Torah Sanhedrin 6:5 and Shulchan Aruch Choshen Mishpat 25:5) now, there is a case where forming a פשרה allows a person to reclaim property that he had previously given to another. As a result of the פשרה or the death of the creditors, the written document that transferred his property is no longer valid. In this halachah, the man gave over all of his belongings in order to run away from creditors and enemies. Now that they are no longer his enemies there is no reason for him to abandon his property. Based on this passage it is clear that agreements are binding as long as the factors leading up to the agreement remain valid. If they change, the agreement will change as well. This exemplifies the significance of knowing what motivates a person to sign an agreement with another party. There are a number of values that are conveyed as well including flexibility, and recognizing that even a binding document is not completely obligatory if the parties to it change in some way.

Conclusion

The actual definitions attributed to פשרה are de-emphasized even more in these Codes. פשרה is a well-accepted and defined concept. It can mean resolution, solution, agreement, or arbitration. There were only two comparison of פשרה to דין and mitzvah (Mishneh Torah Sanhedrin 22:4 and Shulchan Aruch Choshen Mishpat 12:2) Instead there are two new comparisons offered by the Codes which enhance the understanding of פשרה. First, פשרה is compared to sales (Mishneh Torah Mechirah 10:3, Shulchan Aruch 205:3, and Shulchan Aruch Choshen Mishpat 205:6), which illustrates that intent is not significant. Second, פשרה is fully legitimate with the inclusion of קנין. Certainly there were references to קנין in other strata of rabbinic literature, but here it is so much a part of פשרה that it serves as the basis for comparison to other modes of exchange. There is no question that קנין is essential to create a binding פשרה. Therefore, comparisons are made between it and buildings, documents, and pledges. This in turn expands the classification of what can be considered פשרה.

The issue of who is responsible for facilitating פשרה is one of the areas that changed most profoundly in these Codes. Certainly judges play an important role, but who these judges are also is not so clear. Mishneh Torah Sanhedrin 24:2 and Shulchan Aruch Choshen Mishpat 15:5, present a hierarchy of courts, those in antiquity when judges were well-trained, and contemporary courts where this cannot be guaranteed. No longer is it merely the responsibility of judges or the disputing parties to create a פשרה. Now, as Shulchan Aruch Choshen Mishpat 12:2 explains, it is feasible to use an individual that is not a judge as long as that person does not preside in a courtroom setting. In addition, a representative can advocate for one's best interest (Mishneh Torah

Shluchin V'Shutaftin 3:9). This enables the party directly involved in the conflict to take a step back from the details and allow another individual to deal with the intricate matters of creating a resolution.

As in the previous chapters, פשרה occurs when a case is difficult, beyond the scope of the law or a contract, or when the parties realize that they are equals (or in other words at a standstill). In terms of timing, it can happen in the moment of an impasse on the road, or it can happen after the fact in a courtroom. In the courtroom setting, it occurs when the two disputing parties request their issue be dealt with by פשרה.

The next question of how פשרה is handled is another area where there is great diversity and innovation. For the first time there are cases where the Codes introduce disputes about sexual relationships and procreation. Rather than following strict rules of law, emotional consideration is given to both parties particularly the woman (Mishneh Torah Ishut 14:16, Shulchan Aruch Evan HaEzer 77:4 and Mishneh Torah Ishut 15:15).

There is also an emphasis on how פשרה cannot be handled. For example, pressure cannot be part of the protocol. There cannot be force to make a פשרה (Mishneh Torah Mechirah 10:3, Shulchan Aruch Choshen Mishpat 205:3, and Shulchan Aruch Choshen Mishpat 205:6). More specifically, pressure cannot include using legal loopholes as a means exhaust the other party into acquiescing to a פשרה (Shulchan Aruch Choshen Mishpat 12:6). Also, it cannot be the result of fear of a non-Jewish force (Shulchan Aruch Choshen Mishpat 12:11).

Some of the specific issues solely discussed in the Codes are the sexual relationship between a husband and a wife (discussed above), lost articles (Mishneh Torah Ishut 17:12 and Shulchan Aruch Evan HaEzer 100:4), defamation of character

(Mishneh Torah Chovel Vmazik 3:6) and avoidance of oaths (Mishneh Torah Sanhedrin 22:4 and Shulchan Aruch Choshen Mishpat 12:2).

פְּשָׁרָה is also greatly enhanced by understanding how it happens in relation to other methods of conflict resolution. Here, as in earlier texts, פְּשָׁרָה and דִּין are both examples of resolution. Included in this list should also be בִּיצוּעַ and קִנּוּן. There are many circumstances when פְּשָׁרָה can exist alone and be utilized before any other approach.

Although, פְּשָׁרָה is simply one of the steps in the process of conflict resolution, it is not always the best approach. There are even cases where parties are able to try to solve their conflict by פְּשָׁרָה and if it is not successful, they can return to דִּין (Mishneh Torah Sanhedrin 22:5).

Many of the cases discussed in these Codes can be related to modern issues. Two specific areas are real estate and contracts. On a personal level there are contracts created by marriage (cases one and two). On a practical level, there are unwritten contracts that are simply understood, such as when one passes on the road.

In conclusion, the values that are expressed in these halachot are quite similar to the other bodies of work. There is certainly an emphasis on fairness, equality, health, honesty, burden and timing, respect for קִנּוּן, פְּשָׁרָה as a mitzvah, impartiality and reverence for the authority of the process. Although the Codes offer several important additions: respect for privacy, flexibility to change processes when one does not work, not overlooking errors to guarantee an accurate פְּשָׁרָה, and not threatening the other parties. These new values, more than anything else, show that even within the confines of the legal process there is room for flexibility without compromising standards.

CHAPTER V: CONCLUSION

This section of the thesis will synthesize all of the cases evaluated by tackling three overarching issues. First, it will discuss the challenges of comparing the rabbinic meaning of פשרה to the modern understanding of conflict resolution. Second, it will present six ideas from פשרה that are useful in the field of conflict resolution today. Third, it will evaluate what makes פשרה unique and also a distinctive Jewish approach to conflict resolution and why these factors are relevant.

Initially the goal of this thesis was to find a system of conflict resolution that existed within the body of Jewish Literature. When פשרה was first analyzed, it became apparent that this goal was unobtainable. First and foremost, it bypassed the first necessary stages of analysis. Yet, even more challenging is trying to adapt the rabbinic notion of פשרה, which is not a system, into something that is a system. It is more accurate to say that פשרה is a concept. It is a concept that guides behavior and shows how conflicts over stolen objects and contracts, to name a few, can and should be handled. This is radically different from defining it as a system.

There is a third challenge, which is the most difficult part of the entire thesis. In many of the rabbinic cases, there is a procedure and protocol in terms of how a specific issue should be handled that is counter to Western logic and reasoning. In turn, it contradicts the standards created by the American legal system. In order to illustrate the complexity of this challenge, three of the pericopes discussed in Chapter II: The Mishnah and Tosefta will be evaluated.

The first pericope is Mishnah Ketubot 10:6 and all the other cases that include the statement, “דין ודברים אין לי עמך” which can be understood as “I have no claim against

you.” In the scenario of the husband and his two wives, the first wife states in writing that she does not have a claim against the purchaser. In the American legal system, this documentation would exempt her from a claim against the purchaser and in turn anyone else involved in that legal action. Yet, in the Mishnah, the first wife still has a claim against the second wife. One of the key values derived from the pericope is the equality of each of the parties. Yet, there would not be equality under the American legal system.

The scenario in Tosefta Bava Metzria 3:5 where a person forgets to whom he owes money, is advised to pay the sum to both entities. This scenario is also counter to what would happen in the legal system in the United States. Here, given the same circumstance the money would be put in escrow with the courts and not given to the appropriate parties until they were able to determine the correct recipient.

A third example that illustrates differences in legal procedure is in Tosefta Sanhedrin 1:2, and other cases where it states that the strength of פשרה is greater than דין. Here the reasoning is a bit circuitous. It is obvious that there is a distinction in procedure between פשרה and דין. Today, if one were to state this difference it would be done more directly rather than comparing the number of judges.

All of these examples are presented not to downplay the significance of the rabbinic pieces evaluated throughout this thesis. Rather, to show that they are counter to Western thinking. If in fact, they run counter to the law that is accepted by our society today, is it feasible to compare them American legal logic and reasoning? Can these texts in turn be seen as an ideal model for our explorations? This author would certainly argue even though the reasoning and logic established by the Jewish legal world, as illustrated above runs counter to American legal logic, there is still a great deal to be learned.

Rather, the emphasis must be placed on the values that are established by the rabbis.

Even if this author did not agree with many of the decisions or the reasoning used by the rabbis, it does not in any way, shape or form decrease the import of their statements.

As a result of these challenges, it is not feasible then to take all of the elements of פשרה and apply them to modern conflict resolution. Instead there are six specific ideas from פשרה that not only relate to, but also enhance, the modern process. The first is determining which method of conflict resolution will be used at the outset. This is illustrated in Sanhedrin 6b-7a where it claims that at the outset a judge should make the following statement, "If you want דין, I will provide, if you want פשרה, I will provide." This phrase is significant for several reasons. First, it recognizes that there is no one universal method or approach that can be applicable to every conflict or to all of the parties involved. Second, it also states that simply asking this question of the litigants is a mitzvah. By defining פשרה as a mitzvah, it now fits it in an entirely different category. It is no longer something commendable, or strongly suggested. Instead, it is a religious obligation. פשרה is part of the relationship between the Jewish people and God. In reality our relationship with God becomes one of the obligations that a Jewish person must address when dealing with conflict. In addition, it recognizes that conflict is an unavoidable part of life and, therefore, consequently so is the resolution of conflict.

The second essential piece is the recognition that there is no one universal standard for who should handle the issue. Our texts provide several options: highly trained judges, moderately trained judges, arbiters or the disputing parties themselves. The complexity of the issue, the sensitive nature of the material, or the intricate nature of the law that applies, can determine who should be chosen to assist the process. By nature,

there are some situations that require the intervention of an outside, unbiased, third party.

On the other hand, there are times when each of the parties involved will feel a greater sense of relief and comfort by being able to handle the matter independently.

There is also recognition that there are five major areas that are eligible to use פשרה. All of these categories must in some way, shape or form fall under the definition of civil law. פשרה is most commonly recommended or applied in the area of contracts.

Specifically there is mention of real estate and marriage contracts. Even if precautions are taken, and concise language is used, there are occasions when an issue arises beyond the scope of what is written in the contract. If all of the parties have an equal claim to the case, then it can be resolved internally through פשרה. The second are every day scenarios. These situations are primarily travel, and loaning money. They arise as part and parcel of a daily routine. Their inclusion recognizes that an issue does not have to be profoundly significant in order for it to merit the intervention of פשרה. It can also be a means to resolve disputes in areas that are highly personal in nature, such as the inability to procreate and the inability to have sexual relations. It is also feasible to use פשרה in cases of defamation as well. Furthermore, no political, physical, or financial pressure may be used in order to attain the desired goal. In other words, not all types of cases can use פשרה. They must be civil cases, dealing with contracts, every day scenarios, and personal issues, as long as there is no pressure placed on individuals in order to create the פשרה.

Perhaps one of the most interesting findings in the thesis is how the opposing parties or litigants are presented. When all of the parties are on equal footing, they work in an alliance, rather than opposition. There are several ways that this partnership is illustrated. As Asher Gulak explains, the exchange of a קנין creates the alliance between

the two parties.²¹ In theory, legal proceedings and protocol by nature do not need to be adversarial. In several of the cases, where there is a disagreement, including Mishnah Ketubot 10:6, each of the parties has a vested interest in reaching a consensus. This is a profound shift in thinking. Rather than considering a disagreement as rivalry, it can be seen as an opportunity to create an association.

Also, many of the questions addressed by the rabbis are exceedingly relevant today. Questions of where, who, when, etc. are still essential questions to be asked and answered by the contemporary world if our systems and processes are to be consistent, predictable and fair.

Throughout this thesis there are recurring examples of conflict resolution that are motivated by fear of the court. Certainly, this is not comparable to modern day conflict resolution. In reality, one could argue that once two parties have taken a conflict to the courts it is already beyond conflict resolution. Yet, this is not the case in rabbinic law. In fact, for some litigants and some issues, the fear of being given a judgment and forced to face trial is the motivation needed to create a solution. Perhaps this is a more healthy approach. Rather than emphasizing that as soon as one reaches the courtroom it is no longer conflict resolution, it appears to be healthier to claim, even in the courtroom, that compromise or a resolution is possible.

Which leads directly into the final element of פשרה that adds insight to conflict resolution today. There is a need for both פשרה and דין. Both are viable models of ways to resolve conflict. In some circumstances being able to reach a solution is the most important goal. In others, reaching a solution amicably is the goal of the parties involved.

²¹ Asher Gulak, *Yesodei HaMishpat Halvri Seder Dinei Mamonot B'Yisrael Al Pi Mekorot HaTalmud Ve-ha Posekin*, Volume V (Jerusalem: Hotzaat Davir, 1922), 178.

פשרה actually deals with the process of reaching a solution in a more realistic and healthy manner. As a result, when a solution is achieved, whether it is through פשרה or דין, it can be a success.

These six serve as models of the elements of פשרה that can be used when creating a resolution today. By implementing one or a few of these factors, it will enable conflict resolution to move more smoothly. For congregations or Jewish communities seeking to add values deeply embedded in the Jewish tradition into their resolutions, these are viable, healthy options.

Conflict resolution, as mentioned in the introductory chapter, is prevalent in practically every aspect of life: business, law, organizations, and in schools. So why does something that is so deeply engrained in our larger society need to be engrained in the Jewish society as well? What makes it both unique in relation to other types of conflict resolution and what makes it a distinctive Jewish approach?

In truth, the most profound contribution by פשרה, as defined in the rabbinic texts, is not a requirement for conflict resolution today. The element that differentiates פשרה from other forms of conflict resolution is the requirement for all of the parties to be equal. Certainly, as mentioned in previous chapters there are ways to foster agreements without parties being equal but they would not be considered פשרה.

Throughout this thesis there have been references to other Jewish values, particularly, when פשרה was discussed in relation to mitzvah. There is a significant difference between claiming that something is a reasonable or commendable idea versus stating that God commands it. By understanding פשרה as a mitzvah, it places it into a grander system. Through פשרה one is confirming the relationship of people to God. With

this type of mindset, actions are not taken lightly. There is more thought and care given to what is said and how it is handled, which certainly moves this form of conflict resolution beyond the realm of, for example, the business world. Corporations do not create solutions because of a relationship to God, although there may be individuals who behave this way based on theological convictions, rather, they are done in order to achieve effective working conditions. In that context, the benefit of creating a resolution is that people will be able to work more effectively together. In a Jewish or other religious contexts, creating a resolution is not the final goal. Rather creating solutions that mesh with religious convictions is the focus.

פשרה is also a means to attaining shalom - wholeness, completeness and peace. There are few values that surpass the significance of shalom in liturgy and political life of the Jews. It is a term that Jewish people use as a greeting to one another. In Hebrew it is also a way to inquire about one's well - being or wholeness. פשרה can enable two disputing parties to find a peaceful resolution that contributes to each party's sense of well - being and wholeness.

פשרה is also profound because it can achieve tzedek – justice or righteousness. By basing a solution on פשרה it is not solely a solution, but one filled with righteousness. In Judaism we can achieve righteousness by donating time and money to others. There is also the teaching that the greatest of all individuals achieve the honor of tzadik. By claiming that the ideal פשרה is not only a mitzvah but, one that can attain shalom and tzedek, the status of פשרה is elevated.

Another value not explicitly mentioned, but certainly reinforced, is tikkun olam – repairing the world. By inhering with the concept of פשרה, we are able to take steps that

allow our actions to influence the rest of the world. Rather than breaking down, we are able to make changes that enable the world to be a just and fair place.

Due to the religious nature of these ideals, mitzvah, shalom, tzedek and Tikkun Olam, **מִצְוָה** takes on cosmic significance. In reality, anyone can make a compromise or a resolution. Whereas, the same cannot be said about **מִצְוָה** because it is a fulfillment of mitzvah (the ultimate sign of our relationship with God), shalom, tzedek, and Tikkun Olam. Not only does **מִצְוָה** fulfill each of these values, it leads to each of these values, which enables them to become part of our lives. Furthermore, these values and the discussions related to them throughout the generations inform how we live as modern Jews. The underlying values and concerns of **מִצְוָה** can help us reframe activities that we did not initially see as Jewish into reflections of our Jewish selves and values.

SELECTED BIBLIOGRAPHY

- Brown, Francis, S.R. Driver and Charles A. Briggs, *A Hebrew and English Lexicon of the Old Testament*. Oxford: Oxford University Press, 1951.
- Buttrick, George Arthur ed., *The Interpreter's Bible*. New York: Abingdon Press, 1956.
- Carmell, Aryeh, *Aids to Talmud Study*. Jerusalem: Feldheim Publishers, 1980.
- Elon, Menachem, *The Principles of Jewish Law*. Jerusalem: Keter Publishing House Ltd., 1975.
- Fisher, Roger, William Ury, *Getting to Yes*. Edited by Bruce Patton. Boston: Houghton Mifflin Co., 1991.
- Frank, Yitzhak, *The Practical Talmud Dictionary*. Jerusalem: Ariel Israel Institutes, 1991.
- Charlie Gartman, interviewed by the author, January 2001.
- Gulak, Asher, *Yesodei HaMishpat Halvri Seder Dinei Mamonot B'Yisrael Al Pi Mekorot HaTalmud VebaPosekin*. Vol. 5, "Pesharah." Jerusalem: Hotzaat Davir, 1922.
- Jastrow, Marcus, *A Dictionary of the Targumim, The Talmud Babli and Yerushalmi, and the Midrashic Literature*. New York: Choneb, 1926.
- The Jerusalem Bible: The Holy Scriptures*. Jerusalem: Koren Publishers, 1992.
- Kahati, Pinhas, ed., "Seder Nashim," *Mishnayot Mevorarot*. Tel Aviv: Haychal Shleima, 1966.
- Leas, Speed B., *Moving Your Church Through Conflict*. With forward by Loren B. Mead. Baltimore: The Alban Institute Inc, 1985.
- Maimonides, Rabbi Moses, *The Mishneh Torah*. Edited by Zvi H. Preisler. Jerusalem: Ketuvim Publishers, 1985.
- Schorr, Rabbi Yisroel Simcha and Rabbi Chaim Malinowitz, eds. "Berachot," "Sanhedrin," and "Ketubbot," *Schottenstein Edition Talmud Bavli*. Brooklyn: Mesorah Publications Ltd., 1990.
- Shapiro, Martin, "Compromise and Litigation" in *Compromise in Ethics, Law and Politics*. New York: New York University Press, 1979.

Steinsaltz, Rabbi Adin, *The Talmud: A Reference Guide*. New York: Random House, 1989.

_____. "Berachot," "Sanhedrin," and "Ketubot," *Talmud Bavli*. Jerusalem: Israel Institute for Talmudic Publications, 1967.

Tanakh: A New Translation of The Holy Scriptures According to the Traditional Hebrew Text. Philadelphia: 1985.

Tidwell, Alan C., *Conflict Resolved? A Critical Assessment of Conflict Resolution*. London: Pinter, 1998.

"Mishnah," "Tosefta," "Talmud Bavli," "Talmud Yerushalmi," "Mishneh Torah," "Shulchan Aruch," *Responsa Project CD-ROM*. Version 6.0. Ramat Gan: The Responsa Project – Bar Ilan University, 1998.