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MEDIATION AND ADR: INSIGHTS FROM THE JEWISH TRADITION

*Robert A. Baruch Bush**

Two initial points will provide some context for these remarks. First, my primary professional involvement has been not in legal practice as such, but in alternative dispute resolution (“ADR”) and mediation, which has been my field of concentration over the last twenty-five years, both before and after coming to Hofstra Law School. Therefore, my comments will focus on how my view of this field has been affected by my religious tradition.

Second, the perspective reflected in these comments grows out of my own particular experience in relation to the Jewish tradition. Specifically, my involvement in Jewish traditional life and thought dates not from childhood, but from considerably later in life, and it has proceeded through slow and somewhat painstaking study over the last few decades. Therefore, my interest in ADR was first of all the product of my experiences in secular study and work, beginning in law school, and then in practice, teaching, and scholarship. Only later, after that secular experience was already in place, did my knowledge of the Jewish tradition begin to grow. As it did, my perspective on mediation and ADR was confirmed, reinforced, and refined by the insights of that tradition. Thus, the comments I offer here are the product of a gradual growth in knowledge of Jewish tradition that has been powerfully supportive of my original, intuitive attraction to and interest in ADR and mediation.

One of my first discoveries, made when I was already teaching ADR but just beginning to study traditional Jewish sources, was a section from the *Mishna*—which is the core of the *Talmud*, the primary source document of traditional rabbinic Judaism. At certain times of the year, it is customary to study a section of the *Mishna* called *Pirke Avot*—the *Sayings of the Sages*. In its talmudic context, *Pirke Avot* forms the conclusion of the laws of judicial procedure, and is essentially a code of ethics for rabbinical court judges. However, it is traditionally understood as a set of important ethical principles relevant to everyone.

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Like all of the *Mishna*, *Pirke Avot* takes the form of teachings attributed to sages of the Jewish tradition. On one particular occasion, while reading through the *Sayings of the Sages*, I stopped in my tracks upon reading this passage:

Rabbi Yishmael [the son of Rabbi Yosay] said: [A judge] who refrains from handing down legal judgments [but instead seeks compromise between the litigants] removes from himself enmity, theft and [the responsibility for] an unnecessary oath. But a judge who aggrandizes himself by [eagerly] issuing legal decisions is a fool, wicked and arrogant.¹

The passage struck me like a flash of lightning. I thought that it was truly remarkable—an explicit preference for compromise or mediation, stated right in the *Talmud* itself! I was eager to find out more about this talmudic view of what, in modern terms, we would call mediation or ADR; although given my then level of literacy in Jewish sources, this did not promise to be an easy task.

Fortunately, there were many English translations available. Therefore, a little effort led me to a translation of a wonderful essay written by Moses Maimonides,² widely recognized as one of the greatest scholars of Jewish law ever to have lived. Among his many other works, Maimonides wrote an introduction to the *Talmud*, which comments specifically on the above statement from *Pirke Avot*.³

In explaining the principle that a judge should adopt a preference for resolving cases by compromise rather than adjudication, Maimonides writes:

[The judge] must strive in all his cases to formulate a [compromise] settlement, and if he can refrain from passing a verdict his entire life, constantly [facilitating] a fair settlement between the litigants—how wonderfully pleasant that is!⁴

1. MISHNA, *Pirkei Avot* [Ethics of our Fathers] 4:9, reprinted in, SIDDUR TEHILLAT HASHEM 222 (Nissen Mangel trans., Kehot Publication Soc'y 1978) [emendation in cited translation by original translator].

2. Moses Maimonides (1135-1204 C.E.), a physician and one of the most famous Jewish philosophers and eminent rabbinical scholars, lived most of his life in Fostat, near Cairo, Egypt. His principal works include: MISHNA TORAH [CODE OF LAW]; MOREH NEVUCHIM [GUIDE TO THE PERPLEXED] (philosophical work); PERUSH HAMISHNAYOT [COMMENTARY ON THE MISHNA]; see JOSEPH TELUSHKIN, JEWISH LITERACY (1991), <http://www.us-israel.org/jsource/biography/Maimonides.html>.

3. MAIMONIDES, MAIMONIDES' INTRODUCTION TO THE TALMUD, 122-23 (Zvi Lampel trans., Judaica Press 1975) [bracketed text inserted by the author for clarity].

4. *Id.*

In the final phrase, Maimonides alludes to a popular verse from *Psalms*: “[B]ehold how good and how pleasant it is for brothers to dwell together in unity.”⁵ Quoting this verse is his way of emphasizing the great virtue of bringing about compromise. Drawing upon his personal background as not only a judge and legal scholar, but also an expert physician, Maimonides then explains the principle in greater detail:

In short, the judge must be like an expert physician, who attempts a cure first through food, and not medicine, as long as he can. Only if he sees the sickness intensifying, the food failing to cure the patient, will he prescribe medicines, but gentle ones, bearing resemblance to food Only if he still sees the patient worsen, and that these means do not subdue and overcome his sickness, will he then resort to curing him with strong drugs . . . and bitter . . . medicines.⁶

As I read this, the analogy struck me as fascinating, especially considering the connections some of us see today between ADR and related developments in law and other fields, such as “alternative medicine” and “holistic lawyering.” Maimonides made the connection several hundred years ago. His comment concludes:

Likewise, the judge must strive to effect a [compromise] settlement. If he cannot, then he should judge between the two litigants, but in a pleasant manner [still hoping to encourage them to compromise]. Only if he is unable to do so because of the stubbornness of one of the litigants who will stop at nothing in order to prevail, then he must become more firm [and decide the case according to the strict law].⁷

So, from this commentary, I learned some of the reasoning behind the ethical principle that a good judge is one who fosters compromise between the parties. However, as I continued to explore

5. *Psalms* 133:1.

6. MAIMONIDES, *supra* note 3, at 123.

7. *Id.* [Bracketed text inserted by the author for clarity]. There is no implication here that every party who refuses to accept a compromise is wrong for doing so. For example, if one party victimizes another in a clear injustice, and then offers a “compromise” that would simply continue the injustice, it is the victimizer who is “stopping at nothing to prevail,” and the victim would certainly be justified in demanding the protection of the law. Nor will the court require such a party to compromise. *Infra* note 12 and accompanying text. In general, Judaism’s concern for social justice is by no means abandoned in the preference for compromise. Rather, both are seen as serving the larger ethical and moral principle of encouraging parties to “love your fellow as yourself,” in different ways. *Infra* text accompanying notes 23-28; *see also* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989).

the subject, I discovered that the preference for compromise is more than simply an ethical principle in Jewish tradition. It is actually a legal obligation on a judge in a traditional rabbinical court. In fact, Maimonides himself includes it as one of the rules for rabbinical court judges in his famous *Code* of Jewish law.⁸ Here is the section of Maimonides' *Code* addressing the subject, freely translated:

It is a positive legal obligation for the judge to say to the parties at the beginning [of every civil case], "Do you really want to litigate this case or wouldn't you prefer to work out a *pshora* [compromise]?"⁹

As the syntax implies, and as the commentaries on this rule make clear, the obligation of the judge is not just to ask the parties whether they want to proceed by way of compromise or litigation. A judge is also obliged to try to persuade the parties that compromise is preferable.¹⁰ To quote one of the commentaries, "The judge must explain to the parties that compromise will be more satisfying for them . . . and must speak heart to heart with them so that they will agree to compromise . . . because it is desirable for one to make a compromise."¹¹ The commentaries also clarify that the process of compromise is indeed a form of ADR. Specifically,

8. MAIMONIDES, MISHNA TORAH [CODE OF LAW], *Sefer Sho'etim* [Book of Judges], *Laws of Courts* 22:4, at 121 (Mordechai Rabinowitz et al. eds., Mossad Harav Kook 1976) [hereinafter RAMBAM L'AM] [translation by author].

9. *Id.* In this instance, as noted in the text, the translation is not strictly literal, but conveys the accepted meaning of the rule as explained by the commentaries on it. See also, YOSEF KARO, SHULCHAN ARUCH [CODE OF LAW], *Choshen Mishpat* [Civil Law], *Laws of Judges* 12:2. The term *pshora* is sometimes translated as "arbitration," possibly because the codes themselves use another term, *bittua*, as a synonym. The commentaries make clear, however, that *pshora* is more properly understood as a form of mediation, both in talmudic and in modern usage. Arbitration also plays a role in rabbinical court procedure, but a very different one based on very different reasons. Compare Menachem Elon, *Compromise*, in *PRINCIPLES OF JEWISH LAW* 570 (1975), with Menachem Elon, *Arbitration*, in *PRINCIPLES OF JEWISH LAW*, *supra*, at 565. See generally MAIMONIDES, MISHNA TORAH, BOOK OF JUDGES (Abraham M. Hershman trans., Yale University Press 1949), for another English translated source of Maimonides' *Mishnah Torah*.

10. See E. SCHOCHETMAN, SEDER HADIN [PROCEDURE OF JUDGMENT] 210 ("It appears that the more common view of the authorities is that the court must try to . . . persuade the parties to accept the suggestion to use compromise.") [translation by author].

11. YEHOSHUA VAULK, MEIRAS AINAYIM [ENLIGHTENING THE EYES], *on Choshen Mishpat*, [Civil Law], *Laws of Judges* 12:2 n.6 [translation by author].

it is a voluntary, court-sponsored mediation process, with the judge himself taking the role of mediator between the parties.¹²

At this point, an obvious question would be: Why does Jewish law hold that a mediated compromise between two parties is better than a court-imposed judgment? Why would that be true, especially in a tradition where application of law, one would think, is considered a lofty if not a supreme value? As if anticipating the question, Maimonides explains this right in the *Code* itself, following the above statement of the judge's obligation.

He begins his explanation with words that echo his earlier-quoted commentary on *Pirke Avot*, and then immediately gives the scriptural basis for the legal rule:

The court that always succeeds in effectuating compromise between the litigants is praiseworthy, and regarding this it is said, "the judgment of peace shall you judge in your gates." (Zechariah 8:16)¹³

Clarifying the scriptural reference, Maimonides explains what is meant by "the judgment of peace." "What kind of judgment is accompanied by peace? The answer is: compromise."¹⁴

The commentaries explain the logic behind the answer: adjudication gives judgment, but it does not lead to peace because it produces a winner and loser, and the loser is unlikely to be appeased or reconciled with the winner.¹⁵ By contrast, when a mediated compromise is achieved, both parties are to some extent satisfied, both parties accept the situation and each other better, and there-

12. A *pshora*, or compromise, is defined as a process in which "an agreement is reached by concessions on all sides. . . . The difference between judgment and compromise is that in a judgment one side wins and the other loses, while in compromise, the 'winner' does not take all and the 'loser' does not give all. . . . [In this process t]he judges are the ones who mediate the concessions." RAMBAM L'AM, *supra*, note 9, *Laws of Courts* 22:4, at 121-22 n.16-17. Though the court is obligated to try to persuade the parties to use the compromise (mediation) process, see *supra* notes 10-11 and accompanying text, the court cannot require parties to do so. See SCHOCHETMAN, *supra* note 10, at 213 ("In Jewish law the general principle is that compromise requires the voluntary agreement of the parties.").

13. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 122.

14. *Id.* The *Talmud*, whose question and answer Maimonides paraphrases, puts it even more strongly: "Surely where there is strict justice there is no peace, and where there is peace there is no strict justice!" TALMUD BAVLI, *Sanhedrin* 6b (Soncino Press, London).

15. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 122 n.18 ("The loser leaves angry and without accepting the result."); see also SCHOCHETMAN, *supra* note 10, at 208 (citing SHMUEL ELIEZER EDELS [MAHARSHA], COMMENTARY ON THE TALMUD, *Sanhedrin* 6b ("A compromise brings the agreement and acceptance of both sides, by contrast to an adjudicated result, where the loser never gives up, in his mind, his claim against the other side, even after the court has ruled in that side's favor.")).

fore enmity is reduced and connection is, to some extent at least, restored. In this way, compromise constitutes "the judgment of peace."¹⁶

Maimonides then adds another scriptural basis for the preference for compromise: "[A]nd thus it says regarding [King] David [when he sat as a judge, as kings then did], 'David did judgment and charity for all his people.' (2 Samuel 8:15)"¹⁷ Again, Maimonides clarifies the meaning of the verse, since judgment and charity don't normally go hand in hand: "What kind of judgment is accompanied by charity? The answer is: compromise."¹⁸ Here, too, the commentaries explain the logic of the question and answer: adjudication does not involve charity, in any sense. The process does not involve anyone's giving more than they must, or accepting less than they deserve. Rather, parties get (and give) their just desserts—their rights and obligations, no more and no less.¹⁹

By contrast, in making a compromise, parties do more than they really are required to do; they accept less than they are entitled to, or give more than they are obligated to give. That is the very nature of a compromise. In compromise, in other words, parties go beyond the letter of the law, beyond what is strictly required, beyond the call of duty—and that is the very essence of the virtue called charity.²⁰ Therefore, when a compromise is mediated and

16. See Joseph B. Soloveitchik, *The Role of the Judge*, in SHIUREI HARAV: A CONSPECTUS OF THE PUBLIC LECTURES OF RABBI JOSEPH B. SOLOVEITCHIK 81, 82 (Joseph Epstein ed., 1974) ("As a result of one victor and one loser, hatred deepens, animosity is intensified . . . [Compromise] brings peace by getting the litigants to retreat . . . and see that neither was totally right nor wrong. . . . Peace and friendship are restored.").

17. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 122. The term "charity" is the translation of the Hebrew word *tzedaka*, which is translated as both "charity" and "righteousness." According to the commentaries, and to the *Talmud* itself, it appears that "charity" is the more appropriate translation here. See TALMUD BAVLI, *Sanhedrin* 6b; *infra* notes 20-21 and accompanying text.

18. RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4 at 122.

19. See Soloveitchik, *supra* note 16, at 82 ("Matters of litigation are resolved by victory for one and defeat for another. Victory and loss are total.").

20. See RAMBAM L'AM, *supra* note 9, *Laws of Courts* 22:4, at 121 n.20-21 ("The implied meaning [of 'judgment and charity'] is disregarding one's legal claims and going beyond the requirement of the law. . . . *Pshora* is like apportioning the claim, as described above [i.e., so that each side either gets less than it deserves or gives more than it owes]."); see also Soloveitchik, *supra* note 16, at 82 ("Judaism knows of a charitable justice A human being can never be completely right because he is finite But if he can't be unreservedly right, he can also never be completely wrong. The two litigants . . . are both right and wrong. Therefore Judaism tries to protect against total defeat [In *pshora*,] both participants give up something. This is a judgment that is righteous [and charitable].").

confirmed by the court, there is judgment and charity at the same time.

So in my initial explorations of traditional Jewish sources, both ethical and legal, I found that both place the highest value, not on the application of law to resolve conflict, but on the achievement of compromise through a form of "judicial mediation."²¹ This discovery was gratifying as a source of support for my longstanding interest in mediation and ADR,²² but it also was surprising and puzzling. I had always assumed the Jewish tradition elevated the concept of law to the highest level. Now I found that mediation and compromise actually were preferred to adjudication on the basis of law. It took some further study to assimilate and understand more fully the essential moral insight implicit in this principle from the tradition.

In fact, the explanations offered by Maimonides and the rabbinic commentaries, taken together, pointed the way to this deeper insight. The scriptural references and rabbinic explanations of "judgment of peace" and "judgment and charity" imply that, in Jewish tradition, the process of compromise reflects and embodies two fundamental values: the value of *shalom*, peace or reconciliation; and the value of *tzekada*, charity, in the sense of going beyond one's strict obligations to others. However, traditional teachings suggest that both of these values embody a still higher principle: whether in striving for peace or in acting charitably toward others, the common element is that the person, while still aware of individual self and needs, lets go of the self for a moment, sets the self aside as it were, and acknowledges and reaches out toward the other fellow.

It is this self-conscious transcendence of self and reaching toward other that is seen as the essence of both peace and charity, at least

21. See Soloveitchik, *supra* note 16, at 82 ("[C]ompromise is the ideal legal solution, not strict adherence to legality."). It is important to note that the significance of this view is that the law itself, in Jewish tradition, incorporates recognition of the value of *disregarding* one's legal rights or *going beyond* one's legal obligations.

22. This is not to suggest that I favor adoption, in our secular legal system, of the practice of judicial mediation. For a variety of reasons beyond the scope of this article, I do not believe that would be a good policy. Nevertheless, my interest in the use of mediation to address conflict, within and beyond the legal system, has long been based on values that find support in the Jewish tradition's view of the ethical and moral significance of compromise. See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). As noted at the outset of this essay, the insights I have gained through study of the tradition have supported and refined my understanding of the value of mediation, although my views originated from secular practice and study.

in the Jewish tradition, and I suspect within all of our great ethical traditions; it is also the essence of mediation and compromise.

This, then, is the value that the Jewish tradition sees in compromise. To express it formally, the value is self-conscious, self-aware, self-transcendence. In more colloquial terms, the value lies in finding a way to stand up for oneself while simultaneously making room for the other. Precisely because the Jewish tradition places such great value on fostering this kind of relation between people as fellow human beings, it places value on and encourages processes of compromise and mediation.²³

Having reached a deeper understanding of the basis of the preference for compromise, I began to see how this principle of conflict intervention is connected to fundamental themes running throughout the great ethical teachings of Judaism. For example, the book of *Leviticus*²⁴ proclaims the famous injunction, "Love your fellow as yourself."²⁵ And the traditional commentary on this verse notes that Rabbi Akiva,²⁶ one of the great sages of the *Talmud*, said, "This is the fundamental principle of the Torah."²⁷ The all-encompassing principle of moral conduct is to love your fellow as yourself. What is implied in this principle? The point is that you have to do both. It is natural and understandable to care about yourself, and, in fact, a person must have healthy self-respect. But it is not enough to consider and respect yourself only. The fulfillment of the moral imperative is to love your fellow as yourself, to recognize and integrate consideration for both self and other equally. That is the challenge—the moral challenge, the religious challenge—not only in responding to conflict but in all realms of human interaction.

To come full circle, back to the first of the traditional sources I discovered, there is another very well-known passage in *Pirke Avot*

23. See *supra* note 21; see also Soloveitchik, *supra* note 16, at 82 ("In compromise, the litigants see that neither was totally right nor wrong. This is not merely a judicial decision—it is enlightenment.")

24. The *Torah* consists of the Five Books of Moses. The third book is *Leviticus*.

25. *Leviticus* 19:18.

26. Rabbi Akiva (50-135 C.E.) was one of Judaism's greatest scholars. He grew up a poor, semi-literate shepherd, but at the age of forty he began a sincere study of the law and had a decisive influence on its development of the Jewish oral law. Many talmudic scholars trace their learning from Rabbi Akiva. *Rabbi Akiva*, at <http://www.us-israel.org/jsource/biography/akiba.html>.

27. TANACH (TORAH/PROPHETS/WRITINGS): THE TWENTY-FOUR BOOKS OF THE BIBLE 279 (Stone Edition, Mesorah Publications 1998). This is the commentary of Rabbi Shlomo Yitzchaki, or "Rashi," the most widely accepted commentator on the biblical text.

that reflects the same ethical principle—integration of concern for self and other, self-conscious self-transcendence. It might serve almost as a motto, a slogan, for those supportive of processes like mediation:

[Rabbi Hillel] used to say:

If I am not for myself, who is for me?

And if I am only for myself, what am I?

And if not now, when?²⁸

As Hillel's teaching suggests, it is certainly proper to stand up for oneself, in conflict and in general. It is not only proper, but necessary. But, as the teaching continues, there also has to be the movement outwards, the acknowledgment and reaching out toward the other. Otherwise, as Hillel eloquently puts it, even if I have succeeded in standing up for myself, *what* am I? I have gone only half way toward fulfilling the moral imperative of considering both self and other, loving other as much as self, achieving a full-fledged humanity. And as the *Mishna* concludes, if not now, *when*? What are we waiting for? Of course it is hard to achieve this kind of self-conscious self-transcendence under any circumstances, and especially in the midst of conflict. But Hillel's saying encourages us to meet the challenge head-on, without shying away from it or seeing it as too difficult. Read as a whole, the teaching is that standing up for self, while simultaneously making room for other, is not only possible but necessary to being fully human. Therefore, a process that encourages and supports people in doing so, like mediation, is considered uniquely valuable in the Jewish tradition.

I have continued to discover a wealth of insights in traditional Jewish sources that enrich my understanding of conflict and mediation. It has been a privilege to share some of them.

28. MISHNA, *Pirke Avot* 1:14, *supra* note 1, at 213.

