YESHIVAT HAR ETZION

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**Before Sinai: Jewish Values and Jewish Law**

**By Rav Dr. Judah Goldberg**

**Shiur #36: Pursuit of the Ethical Life (7):**

**Moral Intuition (2) — Arbitration**

In the previous *shiur*, we embarked on a quest to identify and examine additional cases in which the corpus of Jewish law explicitly endorses moral intuition. Specifically, we posited that far from asserting an exclusive claim on justice, the law itself appears to recognize its own limits and assign a complementary role to intuition.

Our first example was the insistence upon independent judicial conscience despite proper implementation of legal procedure. A broader affirmation of justice outside of the law, I believe, emerges from Halakha’s approach to arbitration. Additionally, if we can trace its concept of intuitive justice specifically back to Avraham’s legacy of *tzedaka u-mishpat*, then the dual tracks of arbitration and *“din”* will provide yet another powerful example of *berit Avot* and *berit Sinai* working in tandem.

***Peshara* (Arbitration)**

*Sanhedrin* 6b quotes multiple opinions about the role of arbitration in Jewish law:

R. Elazar, son of R. Yosei the Galilean, says: It is forbidden to compromise, and anyone who compromises, in fact, sins…. Rather, let justice pierce through the mountain, as it says, “For justice belongs to God” (*Devarim* 1:17); and so Moshe would say, “Let justice pierce through the mountain.” But Aharon loved peace and pursued peace, and restored peace between a person and his fellow.

According to R. Elazar, son of R. Yosei the Galilean, there is only a single mode for justice: *din*. Any dispute that seeks justice, then, can be adjudicated only by the rules of “*din*” set forth by Halakha. To be sure, not every dispute need be settled through justice. If the parties can make peace through an “Aharon” character, without requesting judgment by the rabbinic “Moshe,” then the pragmatic solution obviates the need for *din*. But inside the court *(beit din*), a singular model reigns.

R. Yehoshua ben Korcha, on the other hand, endorses arbitration as an acceptable and even preferred strategy of a court:

R. Yehoshua ben Korcha says: It is a mitzva to compromise, as it says, “Truth and a judgment (*mishpat*) of peace judge in your gates” (*Zekharya* 8:16). But where there is justice (*mishpat*), there is no peace, and where there is peace, there is no justice! Rather, what kind of justice has peace in it? This is compromise.

And so it says with regard to David: “And David would do justice (*mishpat*) and charity (*tzedaka*)” (*II Shmuel* 8:15). But where there is justice, there is no charity, and [where] charity, no justice! Rather, what kind of justice has charity in it? This is compromise.”

Interestingly, R. Yehoshua ben Korcha invokes two different prooftexts for the legitimacy of arbitration. At first, he acknowledges the prima facie contradiction that R. Elazar maintains: “Where there is justice, there is no peace, and where there is peace, there is no justice… where there is justice there is no charity, and [where] charity no justice.” R. Yehoshua ben Korcha, however, does not stop there. Rather, the resolution to the contradictions is compromise. Apparently, there are variant forms of justice to classic “*din*,” all under the jurisdiction of the court: justice tempered by peace and justice tempered by charity. Moreover, for R. Yehoshua ben Korcha, tempered justice is always preferred.

“*Din*,” of course, comes with an elaborate instruction manual. But how does one arbitrate? There is precious little guidance from early rabbinic sources, and later authorities do not add much more. Apparently, the judges must rely on their own intuition in veering away from classic, rigid justice. Here, too, the law cedes territory to the moral intuition of a court, even when, by definition, it stands in direct opposition to the recommendation of “*din*.” More, cases of arbitration are no mere aberration. As the Gemara rules in accordance with R. Yehoshua ben Korcha, who believes arbitration is preferred, personal judgment actually becomes the convention for Jewish justice.

**Fairness or Pragmatism?**

Whether the intuition employed, and sanctioned by Halakha, is necessarily moral, though, depends upon how we frame the goals of arbitration. Here, we encounter two possibilities, based on the two different prooftexts that R. Yehoshua ben Korcha cites. According to the first, the agenda that looms over the judges, in addition to the consideration of justice, is the pursuit of peace.[[1]](#footnote-1)

“*Din*” is exact, but also exacting. One party vanquishes the other, and the two sides may be even further apart than when they started. The courts, however, are enlisted not only to judge rightness, but also to bridge the chasm that has opened between these once-brethren. Their agenda is practical: to restore calm, to settle differences, and to leave all parties agreeable. Perhaps, then, the intuition that arbitration licenses is not moral but pragmatic. Strict justice accommodates the goal of restoring social order. The judges are problem-solving more than they are adjudicating; they are putting out a fire rather than calibrating the scales of justice.

Indeed, when the Rosh takes an even more radical stance regarding suspicious cases (discussed in the previous *shiur*) and allows a judge to extract money based on intuition alone,[[2]](#footnote-2) a primary motivation is the restoration of peace. Moreover, he cites the first of R. Yehoshua ben Korcha’s prooftexts:

This is the reason: Once the case has come before the judge and he cannot clarify the facts, he cannot just recuse himself from the case and let the litigants continue to fight. It says, “Truth and a judgment of peace,” (*Zekharya* 8:16) etc., because through justice is there peace in the world, and therefore they gave power to a judge to judge and do what he likes, even without a rationale or evidence, in order to establish peace in the world. (*Responsa* 107:6)

The Rosh expands the *beit din*’s mandate, but with a shift in emphasis. In contrast to the ethical conscience which motivates recusal, here he advances social harmony as an independent goal of the courts and authorizes them to follow intuition for its sake, even to extract payment. Similarly, in R. Yehoshua ben Korcha’s first prooftext, the value that competes with justice is harmony, not equity.

R. Yehoshua ben Korcha’s second prooftext, however, points in a different direction. According to his interpretation, King David tempers justice, *mishpat*, with charity, *tzedaka*; but with what agenda? Could it be that he refrains from enforcing full justice out of compassion for the losing party? Surely, this is Robin Hood-like charity at the price of justice! In fact, those who argue with R. Yehoshua ben Korcha interpret the verse along these lines but maintain that the charity comes out of David’s own pocket, for by what right could he deprive the winning party of justice?!

If R. Yehoshua ben Korcha nonetheless entertains “justice with charity,” I imagine that he believes the judges are aiming for a different sort of justice. While “*din*” is stark and allows only for an all-or-nothing decision, arbitration can reflect the complexity and murkiness of real-life conflict. If two Jews cannot resolve their differences, it is most likely because there is validity to each side. Arbitration can account for the claims of each one and assign incremental merit to their positions, whereas “*din*” cannot. Arbitration, then, is a deep exercise in fairness, and not just a strategy for blowing past conflict.[[3]](#footnote-3)

If this analysis is on target, then “justice with charity” is a clear and emphatic endorsement of moral intuition. It is saying that “*din*” is ultimately a blunt tool for reaching justice and that judges are trusted to find equity and fairness on their own. Certainly, a veteran judge on a Jewish court will be influenced by his overall experience of the law; his arbitration, hopefully, will reflect his immersion in it. However, it is also inescapable that in arbitrating a specific case, the court is necessarily resisting the conclusions of *din* and casting their own moral reading onto the situation at hand.

**Justice with Peace vs. Justice with Charity**

Presumably, different goals of arbitration might significantly influence both process and outcome; justice adjusted for harmony is entirely different than justice bent for equity. These different conceptions of arbitration may perhaps explain a debate between R. Meir, who requires three judges for arbitration, and the Sages, who require only one (*Sanhedrin* 6a). The Gemara first presumes that arbitration is linked to “*din*” — according to Rashi and R. Meir Ha-Levi Abulafia (Ramah), in light of the verse that “David would do justice (*mishpat*) and charity”[[4]](#footnote-4) — and that the same number of judges are necessary for each. Their disagreement, then, is about the minimal number of judges necessary for “*din*” generally, and not about arbitration at all.

However, the Gemara then offers a different reading. Perhaps R. Meir and the Sages agree that *din* requires three judges. Rather, their point of disagreement is about the relationship between arbitration and *din*. R. Meir believes that arbitration, too, requires three judges, as it is linked to *din*. The Sages, however, believe that arbitration is not connected to *din* at all, and they therefore suffice with just one judge.

The Ramah explains that the number of judges that R. Meir and the Sages each demand reflects the needs of the actual process of arbitration. According to R. Meir, arbitration is delicately calibrated and must unfold with careful deliberation. Therefore, a panel of three judges must participate, “so that they can investigate the matter well, according to what their eyes see, so that they do not overburden either of the litigants.” According to the Sages, however, arbitration does not resemble *din* at all. Rather, it is a relatively blunt tool, and “there is no need to be so precise with it.” Therefore, just a single judge can handle the case.[[5]](#footnote-5)

Perhaps R. Meir and the Sages are reflecting two different conceptions of arbitration. Arbitration for the sake of harmony bears little in common with *din* and does not necessarily require painstaking analysis. Rather, any solution that restores amity is acceptable. If arbitration is an alternative mode of justice, however, then the actual deliberative process would be expected to share more in common with classic *din*. If the judges seek to reach a genuinely equitable solution, then investigation of the facts and consideration of all salient factors should be just as rigorous. Furthermore, the judgment is both sensitive and weighty enough that it cannot rest on the inclination of a single arbitrator but must emerge from a plurality of voices.[[6]](#footnote-6)

Elsewhere, the Ramah goes further, suggesting that arbitration requires even more careful consideration than *din*:

*Din* does not require such reflection and clarity, just that one rule in accordance with the Halakha, but one need not worry that he will penalize the innocent or exonerate the guilty. But arbitration requires greater reflection, to investigate with good judgment and to see which of the [litigants] is telling the truth and on which to be stricter. (*Yad Ramah*, *Sanhedrin* 32b)

In *din*, the judges are playing by God’s rules of justice; their task is to apply them thoughtfully and faithfully. In arbitration, the judges must generate their own, original conception of justice, which demands even more focus, effort, and deliberation.

**“Justice with Peace” vs. “Justice or Peace”**

According to this analysis, a spectrum of approaches to arbitration is possible, with one end closely associated with *din* and the other end much more practically oriented. Arbitration that is linked to *din* or described as “justice tempered by charity” offers a strong endorsement of moral intuition, I think, while arbitration that is more pragmatic may not.

Still, I think a depiction of “justice with peace” as purely pragmatic may be exaggerated, at least for R. Yehoshua ben Korcha. After all, he maintains that “justice with peace” is justice nonetheless, in contrast to R. Elazar, son of R. Yosei the Galilean, who sees peace-seeking as totally incompatible with justice. In other words, R. Elazar, in the context of justice, embraces the formalist position. Halakha outlines the pathway to justice, and any attempt to insert intuition into the process is wholly invalid. Conflict resolution is an alternative goal but stands in total contradiction to a Torah conception of justice; the modes of Aharon and Moshe, respectively, are mutually exclusive.

R. Yehoshua ben Korcha, however, absorbs the aspiration for harmony into the territory of the court. He will maintain that the art of peacemaking inevitably involves considerations of equity and fairness and therefore qualifies as a variation of justice. If so, then “justice with peace” is also an example of moral intuition at play within the framework of Jewish law.

Of course, R. Yehoshua ben Korcha can also acknowledge the model of Aharon — a mode of conflict resolution which is completely divorced from justice or the judicial system. Thus, although the Gemara forbids court-based arbitration once the judges have handed down a ruling of *din* (*Sanhedrin* 6b), non-judicial mediation can still be pursued with a layperson (*Shulchan Arukh*, *CM* 12:2).[[7]](#footnote-7)

**Arbitration as *Lifnim Mi-shurat Ha-din***

Admittedly, from the Gemara it is not clear what the relationship between R. Yehoshua ben Korcha’s two depictions of arbitration is. They could be two independent models of arbitration, to be pursued, perhaps, in different circumstances; or they could be two considerations that are present within every case of arbitration. Interestingly, the Rambam, following the Rif, quotes R. Yehoshua ben Korcha at length, including both prooftexts (*Hilkhot Sanhedrin* 22:4). The Tur (*CM* 12), however, refers to “justice with peace” only, as does the Sema (12:8).[[8]](#footnote-8)

R. Joseph B. Soloveitchik is quoted as emphasizing arbitration’s overlap with the form and requirements of *din*, including regulation of the judges’ functioning (see Tur, *CM* 12).[[9]](#footnote-9) With regard to actual decision-making, *mori ve-rabbi* R. Herschel Schachter writes:

Regarding arbitration, our Rebbe frequently explained that it, too, is a judicial ruling… but that it is a ruling out of *lifnim mi-shurat ha-din*, based upon *yosher* (equity). The Halakha does not dictate that [the court] should split the sum in question, but rather, to decide through a sense of equity (*yosher*) who is right in this case.

R. Soloveitchik, it seems, fully embraces the implementation of moral intuition here, in pursuit of *yosher*. The term is not accidental, but reflects *Chazal*’s comment, as quoted by Rashi and the Ramban (*Devarim* 6:18), that the commandment to do *ha-yashar ve-hatov* also includes arbitration. Thus, R. Schachter continues:

Our Rebbe said… that the entire subject of arbitration is based upon the verse, “And you should do *ha-yashar ve-hatov*” — that we are obligated always to act according to *yosher* (and *lifnim mi-shurat ha-din*). (*Nefesh Ha-Rav*, 267-268)[[10]](#footnote-10)

In other words, fair arbitration and behavior *lifnim mi-shurat ha-din* both reflect the same root aspiration that our ethical sensibilities transcend the rigid parameters of the law. Furthermore, as R. Ido Reichnitz notes, arbitration and *lifnim mi-shurat ha-din* both specifically allow for the kind of nuanced, contextual responses that codified law, as the Ramban stresses, cannot provide.[[11]](#footnote-11)

*Yosher* also appears, in a slightly different context, in a responsum by R. Avraham Yitzchak Ha-Kohen Kook. As common practice has the litigants authorize the *beit din* to rule “by *din* or by arbitration,” it falls to the *beit din* to decide which is more appropriate in a given case. R. Kook outlines three reasons why a *beit din* might prefer arbitration: 1) uncertainties in application of the law; 2) concern that strict application of the law would worsen strife — in other words, for the sake of peace; and 3) **“if [the judges] see that *din* is contrary to *yosher ha-sikhli* (common-sense equity)”** (*Teshuvot Orach Mishpat*, *CM* 1). This last consideration, of course, puts the judges in the position of always “judging justice”— just as with concern for corruption — a task which inevitably involves their moral intuition and would be difficult for positivism or formalism to swallow.[[12]](#footnote-12)

While arbitration necessarily involves moral intuition, R. Soloveitchik also stresses that it is not applied in a vacuum. The judges work off of a deep understanding of the law in general and its thrust in this particular case. For example, if one litigant would have been obligated to take an oath but is offered the chance to compensate instead, the monetary sum should differ, depending on whether the oath is Biblical or rabbinic in origin (*Shiurei Ha-Rav*, *Sanhedrin* 6a, #82). As R. Abraham Besdin summarizes, extra-legal considerations “are evaluated within the broad halakhic parameters of the *Choshen Mishpat*, and the final resolution of the conflict is a delicate and sensitive blending of both objective legal norms and subjective humanistic goals” (*Reflections of the Rav*, p. 54) — of justice and charity, of law and intuition, or, we can say, of the modes of *berit Sinai* and *berit Avot*.

**Arbitration and *Mishpat U-tzdaka***

Finally, though R. Soloveitchik, following Rashi and the Ramban, traces the moral intuition of arbitration to *ha-yashar ve-hatov*, I can’t help but note the linguistic echo of *berit Avot* here. In describing King David’s work as an arbitrator, employing his moral intuition and seeking justice specifically through balancing multiple values, the Navi invokes terms so familiar to us from *Parashat Vayera* — *mishpat* and *tzedaka*![[13]](#footnote-13) As an arbitrating judge, King David is following in the footsteps of his ancestor Avraham, and thus the practice of arbitration represents an application of the extra-legal values of *berit Avot*.

The parallel between Avraham and David is already noticed by *Chazal*. Observing that Avraham is the first character in the Torah who is said to grow old, *Midrash Tanchuma* derives that this is a privilege — a “crown” of sorts — and a reward for his charity:

This is Avraham, as it says regarding him, “For I have known him in order that he may command” (*Bereishit* 18:19), etc. The Holy One, Blessed Be He, said to him, “By your life, you are appropriate for agedness.” Therefore, it says: “And Avraham was old” (*Bereishit* 24:1).

Of course, the continuation of the cited prooftext relates to Avraham’s performance of *tzedaka u-mishpat*, which the Midrash then hears echoed regarding David, along with agedness:

And so did David procure this crown, as it says, “And King David was old” (*I Melakhim* 1:1). Why? **Because he acted like Avraham**, as it says, “And David would do justice (*mishpat*) and charity (*tzedaka*).” (*Midrash Tanchuma* [Buber ed.], *Chayei Sara* 4)[[14]](#footnote-14)

In other words, the practice of *mishpat u-tzdaka*, whether by King David or contemporary judges, is rooted in the ethical tradition of our forefather Avraham.

Furthermore, Rashi directly links arbitration to *Bereishit* 18:19: “There it says, ‘*tzedaka u-mishpat*,’ which is *din* and *peshara*” (*Sanhedrin* 56b). Thus, the impetus, the license, and even the mandate to question *din* and complement it with moral intuition begins with *berit Avot*. Later, it is filtered through the Sinaitic commandment to pursue *ha*-*yashar ve-hatov* and, ultimately, incorporated into the guidelines of *Torah she-be’al peh*.

After all, isn’t Avraham the first to question *din* — “Will the Judge of the whole earth not do justice?” (*Bereishit* 18:25). Thus, the *Keli Yakar* (*Bereishit* 18:1), echoing many themes that are familiar from our analysis of *Parashat Vayera*, also introduces *peshara*:

He seated Avraham on a terrestrial *beit din*[[15]](#footnote-15)… and as it says, “Shall I hide from Avraham… For I have known him… to do *tzedaka u-mishpat*” (*Bereishit* 18:17-19), for by this reason he will agree to [Sedom’s] destruction, as they have not done *tzedaka u-mishpat*…. Or He will say that since Avraham is “The father of a multitude of nations” (*Bereishit* 17:5), perhaps he will search for [Sedom’s] merit **to do *peshara*, as this is *tzedaka u-mishpat***: For “What kind of justice has charity in it? This is compromise” (*Sanhedrin* 6b).

Avraham, as one sitting in judgment with God, is the first to suggest *peshara*, in keeping with his philosophy of *tzedaka u-mishpat*. Furthermore, if, following R. Yehoshua ben Korcha, we view arbitration as a variant of *mishpat* and not mere mediation, then Avraham is not challenging Divine judgment, but pointing out that justice can come in many different hues. In the case of Sedom, compromise proves impossible, but the precedent has been set of tempering justice — even Divinely ordained! — with *tzedaka.*[[16]](#footnote-16)

**Conclusion**

In these two *shiurim*, we returned to a core question that lies at the heart of this entire project: Is there room in Judaism for moral intuition outside of the law? Following the model of *mori ve-rabbi* HaRav Lichtenstein, we looked further into *Torah she-be’al peh* itself and found examples, in the context of jurisprudence, where the law seemingly asks its own champions not to be overly loyal. Judges should not check their personal conscience or moral intuition at the door but should employ them honestly and robustly in the context of their everyday work.

If our analysis here is cogent, then positivism seems less and less viable; and while formalism might counter that here, formal law is endorsing moral intuition, I think it survives largely diluted of its significance. As HaRav Lichtenstein comments in a slightly different context, “It should be clear to those who deny an independent morality that that which was not allowed by them ‘through the front door’ now penetrates ‘through the roofs and windows’ (see *Bava Metzia* 88a)” (“*Halakha Ve-halakhim*,” 44). The law has declared itself incapable of answering all moral needs; it asks us, in effect, not to turn to it exclusively for direction. Intuition and conscience, by whatever name, have been invited into the *beit midrash*. Should we expect them to only concern themselves with “the Laws of Judges,” but to disappear when the conversation turns to personal conduct or communal or national affairs?

At the same time, we cannot stress enough, as did *mori ve-rabbi* HaRav Lichtenstein,[[17]](#footnote-17) that intuition and conscience are complements to the formal law but not competitors or insurgents; in other words, the invitation is crucial. When Divine command asserts itself inflexibly, they will submit, just as Avraham himself does at both ends of *Parashat Vayera*, regarding Sedom and the *Akeida*, respectively; and that is just as central to his legacy as is his ambitiousness. However, when the law is either neutral or welcoming, they represent authentic expressions of our tradition, starting with Avraham’s *tzedaka u-mishpat* and continuing through *berit Sinai*’s *ha-yashar ve-hatov* and *lifnim mi-shurat ha-din*.

**For Further Thought:**

1. In evaluating the nuanced relationship between arbitration and *din*, two factors in particular require careful consideration: 1) the number of judges for arbitration and 2) the possible need for a *kinyan* (binding act) on the part of the litigants, either before or after the judges’ ruling. What are the *sugya*’s conclusions, and how should they influence our understanding of arbitration? In addition to the sources cited above, see *Chiddushei Ha-Ran*, *Hagahot Asheri* and *Mordechai* on *Sanhedrin* 6a and *Teshuvot Maharshal*, 4.
2. The Gemara presents multiple opinions about when it is too late to switch to a track of arbitration (*Sanhedrin* 6b-7a; see Rashi and Tosafot, as well as *Meromei Sadeh*). Can we relate this to different understandings of the relationship between *din* and arbitration?
3. For those who frown upon arbitration: Is this because of formalist or positivist leanings? That is, is the hesitation out of allegiance to law, or because of pessimism about moral intuition? For a practical ramification, see *Meshekh Chokhma* (*Bereishit* 18:19), who suggests that even this opinion might endorse arbitration for Noahides, who are not bound by Sinaitic law.

**Questions or Comments?**

Please email me directly with your feedback at [judahlgoldberg@gmail.com](mailto:judahlgoldberg@gmail.com)!

1. Also see *Mekhilta*, *Shemot* 18:16. [↑](#footnote-ref-1)
2. As to whether the Rambam would agree to the Rosh on this point or not, see *Bach* and *Derisha, CM* 15. [↑](#footnote-ref-2)
3. Also see R. Abraham Besdin, *Reflections of the Rav*, pp. 55-57. [↑](#footnote-ref-3)
4. However, see Tosafot. [↑](#footnote-ref-4)
5. See also *Tosafot Ha-Rosh* and *Temim Dei’im*, 207. The Ramah further suggests that the need for a *kinyan* (binding act) between the litigants may also depend on the debate between R. Meir and the Sages. According to R. Meir, arbitration is a parallel track of adjudication. Like *din*, it is independently binding and does not require a *kinyan*. According to the Sages, however, arbitration is only binding if the litigants formally commit to its conclusions. Also see Rabbeinu Yona and *Lechem Mishneh*, *Hilkhot Sanhedrin* 22:6. [↑](#footnote-ref-5)
6. Also see Tosafot, who attribute to R. Meir a statement in the Yerushalmi that “arbitration requires deliberation” (*Sanhedrin* 1:1). However, the common text of the Yerushalmi quotes this statement in the name of R. Matnaya; also see Meiri. [↑](#footnote-ref-6)
7. As for whether or not the judges themselves may subsequently suggest a peaceful resolution, see *Shakh* (12:6) and *Pitchei Teshuva* (12:5). [↑](#footnote-ref-7)
8. Also see *Teshuvot* *Shevut Yaakov* 2:144-145, which focus upon the goal of peace. [↑](#footnote-ref-8)
9. See *Shiurei Ha-Rav*, *Sanhedrin* 6a, #74-91; and *Reflections of the Rav*, p. 54. [↑](#footnote-ref-9)
10. Also see R. Schachter’s *Ginat Egoz* 35:4. [↑](#footnote-ref-10)
11. “*Mavo Le-torat Ha-mishpat: Bein Mishpat Ve-tzedek Eloki Le-tzedek Enoshi*,” available at <http://dintora.org/article/928>. In this essay, R. Reichnitz collects a remarkably similar list of examples of morality outside the boundaries of the law: *lifnim mi-shurat ha-din*, *middat Sedom*, *ha-yashar ve-hatov*, and arbitration. [↑](#footnote-ref-11)
12. See R. Reichnitz, “*Mavo Le-torat Ha-mishpat”* (including fn. #13), for a list of other authorities who invoke the concept of *yosher*, including its potential tension with *din*. Also see R. Daniel Katz, “*Keitzad Mefasherim? Bein Peshara Le-din Tzedek*,” Position Paper #4 of the Mishpetei Eretz Institute, 2009 (available at: [http://dintora.org/publication/15](http://dintora.org/publication/15.)), for a review of latter-day approaches to arbitration. [↑](#footnote-ref-12)
13. *Avot De-Rabbi Natan*, A, 33 contrasts Avraham’s *tzedaka u-mishpat* with David’s *mishpat u-tzdaka*. However, that text seems to accord with the opinion that forbids arbitration and thus separates *mishpat* from *tzedaka*; see *Sanhedrin* 6b, as well as *Devarim Rabba* 5:3. Also see *Meshekh Chokhma*, *Bereishit* 18:19. [↑](#footnote-ref-13)
14. Compare to *Midrash Mishlei* 16:31. [↑](#footnote-ref-14)
15. See Rashi. Also see *shiur* #31, fn. #8. [↑](#footnote-ref-15)
16. Also see Prof. Berachyahu Lifshitz, “*Peshara*,” in *Mishpetei Eretz* 1 (Ofra: 5762 [2002]), 143-149 (available at: <http://asif.co.il/download/kitvey-et/mishpatey/mishpatey%201/mishpatey%201%20137-151.pdf>), who characterizes arbitration as human justice, in contrast to the Divine justice inherent in *din*. Of course, R. Elazar, son of R. Yosei the Galilean, disqualifies arbitration for this very reason: “for justice belongs” — exclusively — “to God” (*Devarim* 1:17). [↑](#footnote-ref-16)
17. See, for example, “*Halakha Ve-halakhim Ke-oshiyut Mussar: Hirhurim Machshavtiyyim Ve-chinukhiyyim*,” *Mussar Aviv* (Maggid, 2016), 47-51. HaRav Lichtenstein’s strongly normative orientation, in the footsteps of R. Chayim of Volozhin, also features in two other essays in the same volume: “*Aveira Lishmah: Hirhurim Be-halakha U-vmachshava*” (163-191) and “*Tahalikh Ve-siyyum Be-historiya*” (281-295). [↑](#footnote-ref-17)