

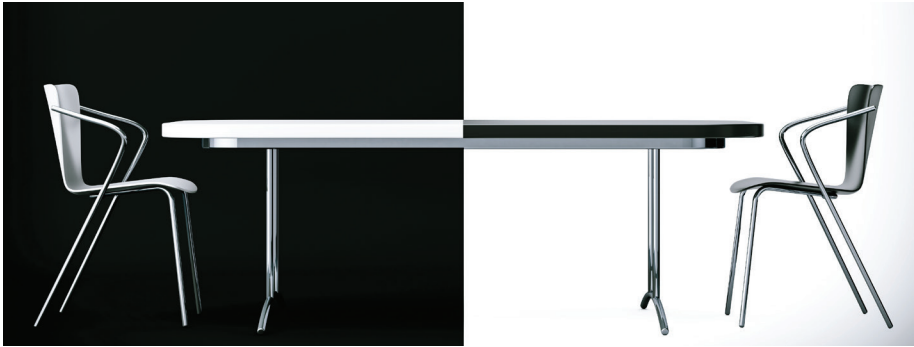


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טבת תשפ"ה



COMPROMISE IN BEIS DIN LOSE-LOSE OR WIN-WIN?

by Rabbi Aaron Kraft

Rabbi Aaron Kraft is a cRc Dayan Kavua and serves as Rosh Bais Midrash at Bais Chaim Dovid.

One of the common misimpressions that people associate with adjudication in *beis din* is that the *dayanim* will arbitrarily impose a compromise ruling instructing the parties to split their differences fifty-fifty. In fact, the Talmud has a term for *dayanim* who render decisions based on the principle of pure unadulterated compromise of this variety, referring to them as *dayanei chatzatzta*, judges who split in half (see *Bava Basra* 133b). However, this overly simplistic perception misrepresents the decision-making process and the role of compromise in *batei din* today. To better understand the method utilized in rendering a decision in a *din Torah*, we should more closely analyze the concept of *pesharah*, compromise, and its import in the *Choshen Mishpat* framework.

The Talmud (*Sanhedrin* 6b) cites three opinions regarding *pesharah*: 1) it is prohibited 2) it is optional or 3) it is a mitzvah (mandated). We *pasken mitzvah livtzoah*, it is a mitzvah for the *beis din* to impose a court ordered settlement whenever possible (*Shulchan Aruch, Choshen Mishpat* 12:2). In fact, the Talmud states that the *Beis Hamikdash* was destroyed because *Klal Yisrael* were "*dan al pi din Torah*," judged based on Torah law (*Bava Metzia* 30b). Why would litigation according to Torah principles lead to the destruction of the *Beis Hamikdash*? Are we not supposed to try our cases in front of a qualified *beis din*? The Gemarah explains that the criticism here was for insisting on strict judgment without any willingness to compromise or employ what is known as "*lifnim mishuras hadin*," going beyond the letter of the law. In other words, the Torah so values compromise as the ideal outcome¹ in a dispute that its neglect, even in favor of meticulous enforcement of Torah law, contributed to the destruction of the *Beis Hamikdash*. As such, we understand that the *Shulchan Aruch* emphasizes the importance of incorporating *pesharah* into *dinei Torah* (see for example, *Shulchan Aruch, Choshen Mishpat* 12:20). Before addressing whether the *beis din* can demand that the parties agree to a *din Torah* that will be decided based on the principles of *pesharah*, we should clarify and

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1. See also *Rashi* (*Devarim* 6:18) on *v'asisa hayashar v'hatov*, act in a way that is just and good, which he explains as *pesharah lifnim mishuras hadin*, connecting *pesharah* with the concept of going beyond the letter of the law (although there are some texts of *Rashi* which state *pesharah* and *lifnim mishuras hadin* as two separate concepts).



by Rabbi Dovid Cohen

Rabbi Cohen is the Administrative Rabbinical Coordinator at cRc Kosher, where he leads the research and policy development efforts.

Gevinas Yisroel

Cheese is made by separating casein (a protein) from milk. In order to create a firm cheese like cheddar, muenster, mozzarella, or "American" cheese, you add "rennet" to the milk and that causes the casein to coagulate into cheese. [Soft cheeses like cottage cheese or cream cheese are made without rennet.] The traditional way to obtain rennet is from the *keivah* (fourth stomach) of a cow, and while that sounds like it would make the cheese not kosher - it's milk and meat mixed together - it does not pose a *kashrus* concern if done in a very specific way. [See *Nodah B'yehudah* YD 1:26 and *Teshuvos Rabbi Akiva Eiger* 1:207 for details.] However, *Chazal* were concerned that cheese would be made with rennet from a *neveilah* (an animal which did not have *shechitah*) and therefore they forbade all cheese made by non-Jews. This is called *gevinas akum*.

The prohibition of *gevinas akum* is stricter than *chalav akum*, and therefore even those people whose practice it is to eat *chalav stam*, cannot eat cheese unless it is *gevinas Yisroel* (literally: "Jewish cheese"). Thus, kosher cheese can be *chalav stam* and *gevinas Yisroel* at the same time.

What does it take to create *gevinas Yisroel*? *Rema* says that a Jew must be present when the cheese is made to be sure the cheesemaker didn't use rennet from a *neveilah*. *Shach* argues that this is not good enough and one of two things is necessary to create *gevinas Yisroel*: either the Jew must own the milk (or cheese or rennet), or he has to participate in making the cheese by throwing the rennet into the vat of milk.

Most *Poskim* accept *Rema*, and some *chalav stam* cheese is made that way, with a *Mashgiach* present during the cheesemaking to watch which rennet they use. But some *chalav stam* and all *chalav Yisroel* cheese in the United States is made in a way that also satisfies the *Shach's* opinion. Accordingly, the *Mashgiach* is present (as per *Rema*) and puts in the rennet (as per *Shach*).

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COMPROMISE IN BEIS DIN LOSE-LOSE OR WIN-WIN?

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define the parameters of *pesharah* and how it is practically implemented in a *din Torah*.

We noted previously that one model of *pesharah* discussed in the *poskim* is pure compromise like the *dayanei chatzatzta*. These *dayanim*, after hearing the facts and circumstances of the dispute, render a decision based on their understanding of the litigants, what each would be willing to settle for and what would ultimately bring peace between them. Even though this model of *pesharah* may vary significantly from the strict *din*, it has the benefit of striving for the most peaceful resolution possible. However, the *poskim* also speak of an alternative model of *pesharah*, referred to as "*pesharah krovah l'din*," a settlement that more closely resembles the strict *din*. This model, most commonly invoked by *batei din* today, incorporates the core principles of *Choshen Mishpat* while granting the *dayanim* some flexibility in their application based on principles of justice and equity.

Rav Yaakov Reischer (*Shvus Yaakov* 2:145) quantifies the concept of *pesharah krovah l'din*, stating that any adjustment to the judgment within one third of the true *din* amount constitutes *pesharah krovah l'din*. Any greater discrepancy between the award and the true liability would constitute a significant deviance from *din*. Based on this principle, some *batei din* will reduce the obligation of the obligated party by one third for the sake of *pesharah*.² Another common application of the *Shvus Yaakov* occurs when according to the *din*, one of the litigants is obligated to take an oath in *beis din*. Due to the severity of an oath and the gravity of

swearing falsely, *batei din* no longer administer oaths in *beis din*. Therefore, when halacha would technically require a litigant to take an oath to substantiate his position (usually to defend himself against a claim), the *beis din* will often impose a monetary obligation equal to one third of the claim amount as the "price" he paid in exchange for his oath.

Rav Yosef Dov Soloveitchik (cited in *Nefesh Harav* pg. 267-268 and *Am Mordechai Daled Chelkei Shulchan Aruch siman 49*) understood that there really is no distinction between *pesharah* and *pesharah krovah l'din*. Instead, *pesharah* in its essence is a *din* based on *yosher* and *lifnim meshuras hadin*, principles of justice, equity and going above and beyond the letter of the law. This is also why it is known as *mishpat she'yeish bo shalom* (*Sanhedrin* 6b), judgment resulting in peace. After all, the legal merit of each side's position is considered, and the judgment is crafted accordingly. Even if one side prevails overall, which is often the case, the judgment nevertheless accounts for the meritorious points on the opposing side and reflects that in the final award. In this way, both parties often feel like they received a fair judgment even if mathematically, one came out ahead. According to this approach, *pesharah* does not entail compromise for the sake of appeasing one side even if his claims lack legal credibility. It is a nuanced application of *din* which takes into account principles of fairness, equity and ethical obligation.

According to Rav Soloveitchik a case may occur where technically the law dictates that Shimon is fully liable, but the *dayanim* feel

that *yashrus* dictates that he really should not pay anything. Or the opposite may occur, that technically Shimon is completely exempt, but *yashrus* dictates that he really should pay the full amount to the claimant. Other times, the technical law and the just and equitable outcome are one and the same and then the *din al pi yosher* is to rule in favor of the prevailing party. Most commonly, cases fall somewhere in the middle where even if one party prevailed overall, the opposing party also had some salient points supporting his position and so it would be appropriate to adjust the award accordingly even if only slightly. In such an instance, the *beis din* may deem it appropriate to adjust the award by ten percent or fifteen percent or another percentage and not necessarily employ the one third principle of the *Shvus Yaakov*.

We know that adjudicating matters through *pesharah* certainly fulfills the ideal expressed in the Talmud and the *Shulchan Aruch* that *mitzvah livtzoah*, it is a mitzvah to engage in compromise or a court ordered settlement rather than submit to a hearing decided *al pi din*, according to strict law. But, can the *beis din* compel the litigants to accept a panel that will judge based on *pesharah* or *pesharah krovah l'din*?

The *Rishonim* argue whether a *beis din* can compel parties to act *lifnim meshuras hadin*, above and beyond the letter of the law (see *Beis Yosef*, *Choshen Mishpat* 12:2(2)). The *Rema* (*Choshen Mishpat* 12:2) cites both opinions and rules like the *Rosh* who prohibits forcing someone to act *lifnim meshuras hadin*. Although some exceptions exist in outlier cases,³ this is the generally accepted position. It appears that

2. Other authorities allow for adjustment up to fifty-one percent of what would have been the obligation according to strict *din* (see *Divrei Malkiel siman 133*). 3. See *Pischei Teshuva* (*Choshen Mishpat* 12:6) citing the *Bach* that if the litigant is wealthy and can afford to act *lifnim meshuras hadin* the *beis din* can compel him to do so. Also see *Minchas Asher* (*Devarim* 12:5) who cites *poskim* in favor of compelling litigants to act *lifnim meshuras hadin*.

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according to this position, *beis din* lacks the authority to force litigants to binding arbitration that allows for court ordered *pesharah*. However, certainly when it comes to *pesharah krova l'din*, some *poskim* write that *beis din* can compel the litigants to submit to a *din Torah* of this nature (*Seder Hadin* 4:25). Rav Eliezer Waldenberg (*Tzitz Eliezer* 7:48:9) even allows a *beis din* to issue a *seiruv*, notice of contempt, if a litigant refuses to submit to a *din Torah* and sign an arbitration agreement empowering the *beis din* to rule based on *pesharah*. He explains that because the *Shulchan Aruch* (*Choshen Mishpat* 12:20) requires the *dayanim* to judge based on *pesharah* and avoid strict *din*, a litigant cannot demand a *din Torah* that requires the *dayan* to neglect his judicial responsibility. Furthermore, he writes that since the *minhag* has become that all litigants who appear in *beis din* sign an arbitration agreement that empowers the judges to utilize *pesharah* as they see fit, refusal to submit to this forum constitutes refusal to submit to a proper *din Torah*. To substantiate this claim he cites the *halacha* of *minhag hasochrim* (see *Pischei Teshuva* 3:2). This refers to the common practice within certain industries to settle disputes in front of an internal board for dispute resolution. One can be compelled to appear in front of such a board according to Halacha even though this board does not qualify as a halachic *beis din*. If someone can force a hearing in front of such an arbitrating body because that is the *minhag*, then certainly one should be able to compel a hearing in front of a proper *beis din* that insists on following the *minhag* of incorporating compromise into their decision.

The more standard practice among *batei din*, however, is to offer the choice to their litigants, albeit to strongly encourage them to empower the *beis din* to incorporate *pesharah/pesharah krova l'din* into the decision.⁴ The Rules and Procedures of the Beth Din of the Chicago Rabbinical Council (Section 3(b)) states, "The Beth Din will strive to encourage the parties to resolve disputes according to the compromise

of settlement related to Jewish law principles (*p'shara krova l'din*); however, the Beth Din may hear cases either according to Jewish law as it is understood by the arbitrators or compromise (*p'shara*) alone, if that is the mandate of the parties." Nonetheless, there is one important exception where the *beis din* can impose a court ordered settlement even without authorization



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from the parties if, in the *dayanim's* assessment, there is no real *halachic* resolution to the matter at hand (*Shulchan Aruch, Choshen Mishpat* 12:5).

Even if litigants can choose whether or not to authorize the *beis din* to utilize *pesharah/pesharah k'rova l'din*, it is important to recognize the many benefits of choosing this route. As mentioned earlier, often a proceeding ending with a decision governed by principles of *pesharah* results in the ideal outcome of



mishpat sh'yeis bo shalom. The parties feel more satisfied and will likely be more cooperative in complying with the decision. Additionally, some practical advantages related to the procedure of the *din Torah* exist as well. Adhering strictly to the rules of *Choshen Mishpat* imposes an extremely high standard for burden of proof on the litigants. Fact must be established by two kosher witnesses and circumstantial evidence is insufficient. However, Rav Zalman Nechemia Goldberg (*Shivchei Hapesharah* in *Dinei Borerut*) points out that in context of *pesharah krova l'din* the threshold for proving liability is lower and that the *beis din* has more leeway in using their discretion in determining truthfulness of the claims such that a claim may be accepted even if it does not rise to the level according to strict Torah law. He also explains that *pesharah* recognizes a broader range of claims that according to strict *din* would not result in liability (for example indirect damages which are not recoverable in *din*, but still considered *chayiv b'dinei shamayim*), but can be collectable under the rubric of *pesharah*. *Pesharah* similarly benefits plaintiff and defendant alike in that it allows the *dayanim* to consider all matters associated with the case including moral considerations or other grievances that would go unrecognized in a proceeding governed by pure *din*.⁵

When in the throes of an interpersonal dispute it is often difficult to look past the details of the disagreement at hand and recognize that just as important as resolving points of contention is doing so in a way that promotes the values of the *Torah hakedosha*. Not only does *pesharah* play an important role in producing the best outcome in the case, but it also reminds us that what we truly strive to achieve is a *mishpat sheyeish bo shalom* and a *mishpat sheyeish bo tzedakah*. Both *dayanim* and litigants alike should have the *Siyata Dishmaya* to achieve this lofty goal.

4. See *Sma* (*Choshen Mishpat* 12:6) 5. See *Pesharah vs. Din* by Rabbi Itamar Rosensweig, found on the Beth Din of America website <https://bethdin.org/pesharah-vs-din/>.

CHEESE AND FRIES

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LACTOSE

Milk contains fat, two kinds of protein (casein and whey), water, calcium, and a type of sugar which is called lactose. To create cheese, you add rennet or an acid (such as vinegar) to the milk, and it causes the casein and fat to clump together into “cheese,” leaving behind a grayish liquid that contains water, whey, calcium, and lactose. That liquid can be filtered to isolate the whey, which will be dried into a powder and sold as whey protein. The fluid left after that filtration step contains lactose, and if the water is removed from it, you will be left with plain lactose.

The most obvious thing about lactose is that it comes from milk and is, therefore, *milchig*. [Lactic acid has a similar sounding name, but it is not made from milk, and it is pareve.] However, to the surprise of most people, the halacha is that since it takes two separations to isolate it from milk, it is only *milchig mid'rabannan*. [*Poskim* refer to it as *meimei chalav*.] This is not just an academic point, and it has a very practical application. It is forbidden to have *hana'ah* (benefit) from milk and meat which are cooked together, but that prohibition only applies if the mixture is considered *basar b'chalav mid'oraisah*. In this case, since lactose is only dairy *mid'rabannan*, one may benefit from a food that contains meat and lactose (with no other dairy). A common example of the *issur hana'ah* relates to pet food; if it contains meat and milk then it cannot be used, since the person is benefitting from it when he feeds it to his pet, but if the only dairy is lactose, then it may be given to the pet. [Another example of *basar b'chalav* which is only *assur mid'rabannan* is when the “meat” is actually poultry; poultry cooked with milk is only *assur mid'rabannan*, and it would be permitted to have *hana'ah* from the mixture.]

We have seen that lactose is a byproduct of cheesemaking, and for cheese to be kosher a Jew must be present (and potentially participate) when it is made. Cheese made without a Jew present is *gevinas akum* and is not kosher. Nonetheless, in most cases, the whey and lactose separated from *gevinas akum* remains kosher. It is beyond the scope of this article to explain why that is true but suffice it to say that if the milk was hot during the cheesemaking process, the whey and lactose become forbidden, since they absorbed *ta'am*/taste of *gevinas akum*. One of the reasons lactose requires *hashgachah* is to ensure that it was not created from this type of cheese.

Lactose is often found in chewable and swallowable tablets, and these items typically are not kosher certified. That raises questions for consumers who are ill and want to use the medicine. Must they be concerned that the lactose is not kosher? What if they only eat *chalav Yisroel*? [See *Koveitz Teshuvos* 1:73a.] Can they consume the tablet if they ate a meat meal less than 6 hours ago? These are all questions that should be addressed to your local Rabbi who can weigh the *halacha* and *kashrus* concerns together with the needs and leniencies appropriate for the person's particular medical condition.

Waiting 6 Hours After Hard Cheese

Generally, after one eats dairy, they can eat meat right away if (a) they eat something pareve, (b) drink something pareve, and (c) check or wash their hands to ensure there is no dairy residue on them. An exception to this rule is that if someone eats cheeses which have aged more than 6 months, the cheeses are considered “hard cheese” and leave such a strong taste in the mouth that one must wait 6 hours before eating meat. If a cheese is aged, it will say that on the label (and it will also say how long it was aged for). Some cheeses that are commonly aged are Parmesan, Asiago (medium or old), Romano, and aged cheddar cheese.

There are different opinions about whether one must wait 6 hours if the “hard” cheese is melted etc. As per Rav Reiss' direction, the cRc position is that if the cheese is whole, or just shredded or grated, you must wait 6 hours, whether you eat the cheese as-is or when it is mixed into another food without heating, such as in a Caesar salad. But if the cheese was cooked or melted and is still in a liquid or semi-liquid form – such as in lasagna or eggplant parmesan – then there is no need to wait 6 hours after eating it.

Waiting 6 Hours After Pareve Cooked in Fleishig Pot

Another common question regarding waiting 6 hours after meat (having nothing to do with cheese) is whether you must wait after eating pareve food cooked in a *fleishig* pot. If there was no meat in the pot when the spaghetti was cooked, you do not have to wait 6 hours before eating dairy. The same is true even if the pot had some meat residue in it when the spaghetti was cooked, such as if you emptied chicken soup from a pot and then immediately used the pot to cook the spaghetti without cleaning the pot beforehand.

But if there were pieces of meat (or poultry) in the pot together with the spaghetti, then you must wait 6 hours before eating milk even if you were careful to only eat spaghetti and not eat any of the meat. A common example of this is that if a person eats a potato from a *fleishig cholent*, he cannot eat milk for 6 hours even if he didn't eat any of the meat from the *cholent*. This halacha also applies if there was animal fat in the pot together with the pareve ingredients. Eating French fries from a *fleishig* restaurant is a good example of this. The same fryer is (typically) used for French fries and chicken, and this causes there to be so much chicken fat in the oil that it is as if the fries were cooked together with chicken fat, which means you cannot eat dairy for 6 hours after eating these fries.

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2701 W. Howard Street
Chicago, IL 60645

Questions? Comments? Feedback?

773.250.5499

office@crcweb.org

www.crcweb.org

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