

# Peshara and Din

## PART 1

By Rav Dovid Josilowsky - Dayan at the Bais Havaad

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

### WHEN IS COMPROMISING ADVISABLE?

There is a *machlokes* in the Gemara (Sanhedrin 6B) regarding Bais Din initiating a *peshara* (compromise).

One opinion posits that it is forbidden for a Bais Din to make a compromise. This seems a bit puzzling. Why would it be forbidden to work out a mutually agreeable settlement? It would seem that making both sides happy through mediation would be an ideal conclusion to a dispute!

Rashi explains that the Gemara is speaking about a case where the litigants came before the dayan with the expectation of *Din* - a ruling according to the letter of the law. They only want to know the halacha and are not interested in any *peshara*. In such an instance, this opinion says that it would be improper to offer a compromise.

Another opinion states that it is a mitzvah to make a *peshara*. The Gemara explains that initiating a compromise is the ideal solution because it satisfies both *mishpat* (justice) and *shalom* (peace). If a conclusion can be reached that is just, while still making both sides happy, that is the most preferable outcome.

The Gemara quotes Rav as saying that the halacha follows the opinion that it is a mitzvah to make a *peshara*. This was put into practice by Rav Huna who would offer the litigants a choice of either having the case ruled according to the letter of the law or offering a compromise. In other words, the mitzvah is not to force a *peshara*; rather, it is to offer both options to the parties and allow them to choose the option of a compromise, while still granting the option of *din*.

The Shulchan Aruch rules accordingly and says that Bais Din should offer the litigants the choice of *din* or *peshara*. According to the Yad Rema and the Maharal of Prague (quoted by the Taz) the option of *peshara* should be offered to them; however, Bais Din should not specifically encourage the parties to utilize it more than the option of ruling according to the letter of the law. The Sema disagrees and says that Bais Din should urge them to accept *peshara* and explain to them why it will be mutually beneficial to take this course of action.

It is important to note that even when a Bais Din utilizes the method of *peshara*, it cannot be random. They must hear the case and know the proper halacha before reaching a settlement that is acceptable to both sides. If they do not bother to investigate and determine the halacha, and instead arbitrarily suggest a compromise, that would not be considered a proper *peshara*.

### TWO KINDS OF PESHARA:

The Shulchan Aruch cites the words of the Rambam that offering a *peshara* is the ideal course to take. While it sounds as if he is echoing the opinion of the Sema, it is possible that he is referring to only one of two possible means of creating a *peshara*.

The two types of *peshara* are explained by the Nesivos Hamishpat. They can be labeled in our terms as "arbitration" vs. "mediation". An arbitrated *peshara* would be where the Bais Din listens to the arguments of both sides and arrives at their own compromise which they expect the parties to abide by. A mediated *peshara* would be where the *dayanim* work with both sides to get them to come to a compromise solution that is acceptable to them both. This latter type of *peshara* is the more preferred type because it will be readily accepted by both parties and will lead to a peaceful outcome. It is likely that specifically this type of compromise is what the Rambam and Shulchan Aruch are referring to when they say that this is the ideal resolution for a *din Torah*.

The Rambam appears to expand on this concept in his introduction to his Peirush Hamishnayos. He says that *dayanim* should always attempt to make a *peshara*, if possible, and never to rule according to *din*. *Din* should only be used if *peshara* is impossible. However, even when offering a *peshara*, the *dayanim* should listen to both sides and work with them to reach an outcome that they are both happy with.

He compares this to a doctor treating patients. Whenever possible, it is always better to heal a patient through changes to his diet or vitamins than to put him through a difficult treatment or treat him with harsh medication. So too, it is preferable to work out a compromise that makes everyone happy than to put the sides through harsh judgment. Even though both sides come to the *din Torah* thinking they are in the right, at least one side will be very disappointed if *din* is used and he comes out on the losing end. It is much more preferable to work out a deal that will satisfy everyone than to force the bitter medicine of strict judgment upon them.

### AFTER THE P'SAK:

The Gemara says that after the *dayanim* conclude the *Din Torah*, they are no longer allowed to offer a *peshara*. Rashi explains that this is talking about after they issued a definitive ruling. As

opposed to before this, even if they heard the arguments and know what the *din* would be, they are still allowed to offer a *peshara* as long as there was no ruling issued. The Sema explains that even after the arguments are heard, making a compromise is still the preferable thing to do if it will create *shalom* between the parties.

The Shulchan Aruch rules like this Gemara, implying that even the type of *peshara* that is mediated between the two parties and is agreeable to both cannot be made after a halachic ruling has been issued. Why is this? If both sides are happy with the *peshara*, why can't it be made after the ruling? The answer seems to be that once a *p'sak din* has been issued, it must be respected as the true and just ruling. If it would be rescinded and a compromise offered instead, that would be akin to rejecting justice.

The Teshuvas HaRashba, which is cited by the Shulchan Aruch, rules that only the Bais Din itself cannot offer a *peshara* after a *p'sak din* was issued. A third party does have the right to step in outside of Bais Din and offer a mutually acceptable compromise even at this time.

The Shach cites a Shiltei Giborim that goes a step further and says that even the Bais Din itself is permitted to offer a compromise after the *p'sak din* as long as it presented as a purely optional way of creating *shalom* between the parties. The Urim V'Tummim objects, saying that the Rashba clearly rules not like this, and the Pischei Teshuvos adds that the minhag is not like this Shiltei Giborim. The Nesivos Hamishpat makes a distinction between the two aforementioned types of *peshara* and says that an arbitrated *peshara* cannot be offered after a *p'sak din* but a mediated *peshara* that is accepted by both sides can be if it will create peace and help put an end to a dispute.

The sefer Tiferes Yaakov offers a slightly different view. He explains that the reason Bais Din should not try to persuade someone to accept a compromise after the ruling has been issued is because this would be incorrectly implying that the halacha requires it. However, if they explain to him that the *p'sak* is correct, but it might be in his interest or in the general interest of all involved for him to give in and accept a *peshara*, even if it means surrendering something he may be entitled to under the letter of the law, then it would be fine. In other words, they cannot specifically push for a *peshara* as being the right thing to do, but they can advise the parties that it would be a good idea to accept a compromise.

We have seen this to be relevant on several occasions. Sometimes, after a *p'sak* is issued, one side is very upset and is screaming and yelling about how unfair it seems to him. While the *p'sak* cannot be changed, it sometimes is possible to suggest a compromise that satisfies the aggrieved party, while keeping the other party happy as well. It must be clear the *psak* stands, however, it is a suggested to agree to forgive. This way, we are able to put an end to the *machlokes* and satisfy everyone.

## WHEN A PESHARA IS MANDATORY:

The Gemara speaks about a case where two ships, both of which are loaded with passengers or merchandise, come to a passage with only enough room for one. The Gemara says that since neither has more rights than the other, it is necessary to create a compromise; i.e., one ship should pay the other for the right to go first, with the highest bidder going first. Shailos U'Teshuvos Meishiv Dovor discerns from this that there are times when a Bais Din must make a *peshara* in order to reach a resolution. Examples of this would be cases where a ruling according to *Din* would not bring a decisive end to the matter and the dispute would perpetuate unless a compromise can be reached. This is often the case in disputes involving numerous business partners, where each side has overriding claims that could force the case to continue endlessly and work its way in circles without a full resolution. Rav Moshe Feinstein and other Poskim say that *peshara* can be forced in such cases, as it is the only way to resolve the dispute.

Another case where *peshara* could be mandated is when one party is halachically obligated to take a *shavuah*. Contemporary *batei din* do not oblige people to make vows, even when halacha dictates that they should; therefore, the only solution in such cases might be to propose a compromise. Numerous Poskim, including Shailos U'Teshuvos Even Yekara, the Divrei Malkiel and Rav Moshe Feinstein, explain that every case of *shavuah* is different, and no definitive rules can be given as to how to offer a *peshara* in such a case. In each individual case, the Bais Din must investigate all of the details and determine the correct type of compromise that will lead to the best outcome.

Finally, there are many cases where a litigant may not be obligated to pay for damages according to the letter of the law but he does have a responsibility to pay "*latzeis yedei shomayim*." An example of this is "*grama b'nezakim*", indirect damages. In such cases, Bais Din may have the right to force a *peshara* so that the damager can be made to pay for some of the damage he caused indirectly and fulfill his obligation "*latzeis yadei shomayim*."

## DOES PESHARA NEED A KINYAN:

The Shulchan Aruch writes that the parties must make a *kinyan* to obligate themselves to abide by a *peshara* in order for it to be binding. In contemporary *batei din*, the two sides make a *kinyan* when they sign the *shtar beirurin* at the beginning of the proceedings, which obligates them to obey any ruling of the Bais Din. While this *kinyan* would technically work for the *peshara* as well, the common custom is to make a new *kinyan* specifically for the terms of the *peshara*.

To watch the video or listen to the shiur given by the Dayan, visit: [www.baishavaad.org/yorucha-topics](http://www.baishavaad.org/yorucha-topics)