

COURT ARBITRATION BY COMPROMISE: RETHINKING DELAWARE’S STATE SPONSORED ARBITRATION CASE

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INTRODUCTION.....	739
I. FOUR MODES OF COMPROMISE	745
II. COMPROMISE AS CONFLICT RESOLUTION.....	746
A. <i>Five Types of Arbitration</i>	749
B. <i>Compromise as a Peace Adjudication Process</i>	753
III. COMPROMISE AS PRECISE JUSTICE.....	754
A. <i>Court Imposed Compromise as “Precise Justice” – Major Arguments and Difficulties</i>	754
B. <i>Court Arbitration Compromise Verdict as an Opportunity for Performing Precise Justice</i>	756
IV. COMPROMISE AS EQUITY	759
V. COMPROMISE AS SOCIAL JUSTICE.....	761
CONCLUSION.....	764

INTRODUCTION

The adjudicative system is undergoing significant change as a result of the widespread introduction of various judicial dispute resolution (JDR) modes, which employ innovative hybrid methods of adjudicative decision making, combining elements of adjudication with those of alternatives dispute resolution (ADR).¹ This trend may be viewed in

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¹ See, e.g., Tania Sourdin & Archie Zariski, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (2013) [hereinafter *The Multi-Tasking Judge*].

light of what Judith Resnik recently defined as “the privatization of process” — the reconceptualizing of adjudication by introducing the multitasking judge who manages, settles, mediates, and promotes new forms of alternative dispute resolution.² This phenomenon corresponds with the fact that “most cases settle”³ and that the traditional trial is vanishing (“trial as error”).⁴ Hybrid methods of judicial dispute resolution exist in many countries.⁵ An interesting hybrid method is used in Delaware: a state-sponsored arbitration program—a binding arbitration before a judge that takes place in a courtroom—which is an alternative to trial for resolving certain kinds of (business) disputes.⁶ Although Delaware’s state-sponsored arbitrations program share characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a courthouse,⁷ because they result in a binding order of the Chancery Court, and because they allow only limited right of appeal. Delaware’s special arbitration program was

² Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure*, 162 U. Penn L. Rev. 1793, 1802-1814 (2014) (arguing that the new forms of ADR should be understood as a “New Private Process”).

³ Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 Stanford L. Rev. 1339 (1994) [hereinafter “Most Cases Settle”].

⁴ Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924 (2000).

⁵ The various JDR modes and processes used in the Court of Queen’s Bench of Alberta have stimulated a great deal of interest and provide a good example for judges’ new roles. See, e.g., John D. Rooke, *The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Instituted in the Court of Queen’s Bench*, in *The Multi-Tasking Judge*, *supra* note 1. This JDR program introduces a voluntary and consensual process whereby parties to a dispute, following the filing of an action in the court, seek the assistance of a JDR justice to help settle the dispute before trial in a mini-trial, facilitative or evaluative mediation or binding JDR. In the German legal tradition there are methods of judging and conciliation (“Richten oder Schlichten”), which also consist of hybrid forms containing elements of judging as well as elements of conciliation, for example the arbitration procedure. See Peter Collin, *Judging and Conciliation – Differentiations and Complementarities* 10, Max Planck Institute for European Legal History Research Paper Series No. 2013-04 (2013), available at <http://ssrn.com/abstract=2256508>. For examples from other countries, especially China and Canada see Part II of *The Multi-Tasking Judge* (Global Practices of Judicial Dispute Resolution). See also *infra* note 18.

⁶ The proceeding of Delaware’s state-sponsored arbitration is governed both by statute and by the Rules of the Delaware Court of Chancery. See 10 Del. Code Ann. Tit. 10, § 349 (2009); Del. Ch. R. 96-98.

⁷ In Common law judges may sit as arbitrators, in special circumstances. See, e.g., DAVID ST. JOHN SUTTON & JUDITH GILL, 4 RUSSELL ON ARBITRATION 25-28 (22nd ed. 2003) (indicating that under English law, in special circumstances, a judge of the Commercial Court or the Technology and Construction Court may accept appointment as arbitrator).

recently challenged by the US Court of Appeals for the Third Circuit.⁸ Although the Court appreciated some of the virtues of Delaware's state-sponsored arbitration,⁹ its decision was that the arbitration process, which permits the proceedings to be kept confidential, violates the US Constitution's First Amendment right of access of the public to civil trials, which applies to Delaware's proceedings.

Our paper calls to rethink the Delaware decision while discussing an innovative perspective which was not considered by the court in its decision. Many pointed out the main merits of arbitration (speed, cheapness, secrecy, informality, expertise etc.) when compared with proceedings before the ordinary courts.¹⁰ We would like to point out some other merits of state sponsored hybrid judicial dispute resolution processes, such as Delaware's arbitration program, by using the JDR processes as an opportunity to apply a broader scheme of judicial discretion. Such a discretion, we suggest, combines formal legal considerations with other considerations such as equity, peace, conflict resolution and social justice. The possibility of a broad judicial discretion, based on equity and justice, authorized by parties consent is found in Delaware's state-sponsored arbitration program in which the Chancery Court judge presiding over the proceedings "[m]ay grant any remedy or relief that [s/he] deems just and equitable and within the scope of any applicable agreement of the parties."¹¹ This possibility of a broad judicial discretion is found in the Common law concept of "equity" clauses, which allows the arbitral tribunal, when specifically instructed by the arbitration agreement, to decide the dispute on some basis other than the strict law.¹²

In general, arbitration is distinguished from adjudication in that the hearings are often more informal in arbitration than in court adjudication, and arbitrators are not required to explain how their rulings are

⁸ See *Delaware Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013) *cert. denied*, 134 S. Ct. 1551 (2014).

⁹ *Id.* at 22 (Judge Sloviter agrees with Judge Roth on the virtues of arbitration, and appreciates the difference between adjudication and arbitration, i.e., "that a judge in a judicial proceeding derives her authority from coercive power of the state, while a judge serving as an arbitrator derives her authority from the consent of the parties.")

¹⁰ See, e.g., Fleming James, Jr. et al., *Civil Procedure* 348 (2001); Neil Andrews, *Principles of Civil Procedure* 551-552 (1994).

¹¹ Del. Ch. R. 98(f)(1).

¹² SUTTON & GILL, *supra* note 7, at 165-66.

in accordance with prior formal legal principles.¹³ As a consequence, both the sources of decisions and the outcomes of the arbitration may be at variance with what adjudication might have constructed. Furthermore, while adjudication is often described as a win/lose activity, decisions by some arbitration programs often entail *compromises*.¹⁴

In light of the creation of the new various judicial dispute resolution methods, among them Delaware's arbitration program, a jurisprudential account of these methods is required. The emerging innovative practices require a coherent theory that focuses on the inherent tension between aspects of adjudication and ADR, and that proposes a structured model of judicial discretion in these methods. Not only is such a theory able to explain existing practices, but it will also demonstrate how they can provide reconstructive solutions to basic limitations of legal rules and conventional legal decision making. This paper introduces such a jurisprudential analysis while discussing the merits of one unique version of judicial dispute resolution: "court arbitration compromise verdicts". This version is an adjudication conducted by a judge-arbitrator presiding in the case to terminate a conflict by rendering a final decision based on "compromise considerations".¹⁵ Such an activity combines authority with consent in a unique way, in which the judge-arbitrator decides cases based on considerations that deviate from the regular legal rules, and this imposition is validated by the parties' prior consent.¹⁶ Court compromise verdicts are not merely a matter of theory. They are a matter of necessity on terms of the high rate of settlement and the pressure on judges to reach them.¹⁷ In some common

¹³ OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES 44 (2003).

¹⁴ *Id.* at 45-46 (dealing with the difference between *court-annexed arbitration* and regular adjudication).

¹⁵ Martin P. Golding, *The Nature of Compromise: A Preliminary Inquiry*, in COMPROMISE IN ETHICS, LAW, AND POLITICS 4, 20-22 (James R. Pennock & John W. Chapman eds., 1979) [hereinafter Golding, *Compromise*]. On the law of settlement in general see, e.g., FISS & RESNIK, *supra* note 13, at 633-754.

¹⁶ It should be noted that although the compromise consent verdicts discussed in this paper are not absolutely identical to the Delaware's state-sponsored arbitration program, they do have much in common in the sense that they all combine consent and adjudication, resulting in a binding judicial decision. The Delaware's arbitration processes may have been inspired by the ideas expressed below.

¹⁷ "Most cases settle", and increasing obligations of judges to press parties toward settlement are found in rules and policy statements of the judiciary in common law systems, as well as phrases in judicial reported decisions such as "a bad settlement is almost always better than a good trial," which resembles the view of "trial as error." See Resnik, *supra* note 4, at 926.

law systems, a compromise consent verdict process, which is a sort of court arbitration, is available as part of the binding judicial dispute resolution methods.¹⁸

The participating parties in a judicial dispute resolution process in general, and a court arbitration by compromise in particular, may agree on the rules to be followed in the process, including rules¹⁹ regarding the nature of the process, the matters constituting the subject of the process, the manner in which the process will be conducted, the role of the judge and any outcome expected of that role, and any practice or procedure related to the process. The present article is focused more on the role of the judge-arbitrator, the outcome of the compromise—the judicial decision sharing/dividing the pie amongst the parties—and the judicial considerations and discretion leading to the outcome rather than the practice or procedure relating to the process.

Most of those who write on the subject of judicial dispute resolution and compromise verdicts²⁰ have ignored the advantages of the possibility of combining the element of consent with the element of authority to grant the court the power to decide by way of compromise. Articulating the advantages of this court arbitration process of compromise verdicts, and the attempt to regulate and conceptualize the process and determine its bounds, is the challenge facing the authors of this article. The article elaborates a structured hybrid vision of modes of compromise as forms of justice, which transcend efficiency and procedural concerns. It defines new modes of arbitration which are guided by variety of standards. The innovative modes of compromise proposed in this paper contribute to a more pluralistic notion of judicial discretion which enriches the boundaries of adjudication.

¹⁸ Some of the methods of the Alberta JDR and Delaware's arbitration program were mentioned above. In Delaware there is a specific process for a settlement option. See Del. Ch. R. 98(e). A compromise consent verdict method is found in another legal system based on the common law tradition. In Israel, with the enactment of sec. 79A of the Courts Law [New Version] 1984 by virtue of the Courts (Amendment no. 15) Law, 1992, a court hearing a civil matter was given the authority to rule, in respect of the matter before it in whole or in part, by way of compromise, provided that it obtained the consent of the parties.

¹⁹ Such as those indicated in the Alberta Rules of Court. See Rooke, *supra* note 5, at 181.

²⁰ See, e.g., John E. Coons, *Approaches to Court Imposed Compromise – The Uses of Doubt and Reason*, 58 Nw. U. L. Rev. 750 (1964) [hereinafter Coons, *Compromise*]; John E. Coons, *Compromise as Precise Justice*, 68 Cal. L. Rev. 250 (1980) [hereinafter Coons, *Precise Justice*]; J. Jaconelli, *Solomonic Justice and Common Law*, 12 Oxford J. Leg. Stud. 480 (1992) [hereinafter Jaconelli, *Solomonic Justice*]; M. Abramowicz, *A Compromise Approach to Compromise Verdicts* 89 Cal. L. Rev. 231 (2001).

The use of different modes of compromise consent verdicts suggested in the present article is capable of promoting greater justice (precise justice, social justice and equity) by integrating new considerations into judges' discretion. With more regulated forms of compromise offered to the parties, who have the freedom to choose between different court arbitration modes of compromise,²¹ the legal system may become more pluralistic and nuanced when responding to the complexity of legal cases.

In cases of compromise verdicts it appears that the parties seek a decision based not only on legal arguments; they seem rather to be interested in other modes of decision making, based on conflict analysis, social justice or other considerations. This new pluralistic mode of judicial performance preserves the authoritative pre-emptive effect while expanding the variety of schemes from which the parties can choose.²²

In this paper we offer a model for formulating the court's discretion in court arbitration consent compromise verdicts by suggesting several modes of compromise which reflect and integrate various interests and policy considerations. These modes are based on clear guidelines and reflect considerations of law, justice, efficiency as well as principles of negotiation.

The first mode reflects the existing situation: *Compromise as a shortcut and prediction*. The usual way of understanding judicial actions aimed at compromise is as an attempt to arrive at an approximate decision in the case without the need to conduct the case in its entirety. The judges-arbitrators assess the case and its value, and accordingly decide (when the parties authorize them to do so) with a ruling that in their estimation is close to what would have been the outcome had the case been conducted in its entirety. Such an attempt focuses on quick and efficient determination of the superficial legal dispute, and does not seek to resolve it in a deep manner. This article will not deal with the mode of compromise as a shortcut and a prediction; rather, it will deal primarily with four other innovative modes that present additional possible uses of the process of compromise. These diverse tracks of decision making can be regulated and encouraged institutionally, and will

²¹ On the connection between democracy and compromise see Arthur Kuflik, *Morality and Compromise*, in COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 15, at 38, 41 [hereinafter Kuflik, *Compromise*].

²² The party-preference arguments are among the major reasons for saying that compromises are good. See "Most Cases Settle", *supra* note 3, at 1350.

enhance legal pluralism. Our article will deal with the conceptualization of the following four modes of compromise verdicts:

1. Compromise as conflict/dispute resolution
2. Compromise as precise justice
3. Compromise as Equity
4. Compromise as social justice

Section I will present, in a general manner, the four modes of compromise verdicts. The other chapters will discuss in detail each of the four modes. Section II will deal with compromise as conflict resolution. Section III will deal with compromise as precise justice. Section IV will deal with compromise as Equity, and Section V will deal with compromise as social justice. The last chapter of the article is a conclusion.

I. FOUR MODES OF COMPROMISE

When must the court arbitrator decide on the basis of the special considerations of compromise and deviate from decision making on the basis of substantive law?

We suggest four modes of court arbitration by compromise as follows:

1. *Compromise as a hybrid process that combines judicial authority with modes of conflict resolution:* Because judges are faced with disputes whose complex nature usually extends beyond the confines of the pleadings and reaches their courtroom, it is to be assumed that their activity is not exhausted by mere prediction, even if it is declared to be such. Judges who conduct negotiations in the courtroom, attempt to mediate, conduct dialogue or introduce conciliatory practices usually do so alongside their authority to decide on the dispute.

2. *Compromise as precise justice:* Compromise can provide a philosophical answer to situations in which justice according to the law is unattainable in principle. These are situations in which the idea of “such is the law, no matter the consequences” or “winner takes all” are fundamentally inappropriate for the legal or factual situation.²³ From a jurisprudential point of view, too, compromise is able to offer more precise justice, which can answer theoretical criticism that has been lev-

²³ See generally Coons, *Precise Justice*, *supra* note 20.

elled at the law.

3. *Compromise as Equity*: The tension between equity and formal rules exists mainly when a decision by way of equity is imposed upon the parties without their prior consent, whereas they expect a purely legal solution. In such cases, equity may indeed interfere with stability and equality before the law. It may be considered arbitrary and as causing instability in the system. There is no room for such a concern, according to our view, when the parties have agreed in advance to an equity-based decision. In such cases parties ask for rules which fit the unique nature of their conflict.

4. *Compromise as a balancing of legal rulings with considerations of social justice*: Implementation of the law is also liable to be fundamentally problematic when the law appears to be clear and certain but its implementation appears to be unjust. Legal decision making may sometimes harm the weak party, or a one-time litigant as opposed to a seasoned one, and invoking compromise verdicts may well correct the absence of social justice by means of a verdict that combines these considerations.

As long as the parties approach the court having agreed to reach an arbitration decision by way of compromise they should again be offered various structured alternatives for reaching a decision. It is important that the parties and the court agree on the nature of the compromise and choose one of the aforementioned four modes of compromise in a way that reflects informed consent and choice. The parties may also choose a mixture of the modes, such as compromise focused on interests (mode 1) and social justice (mode 4). They may also indicate the weight of each of the compromise considerations.

We will now discuss each of these four modes of compromise separately, and present a structured court arbitration process of proper judicial discretion.

II. COMPROMISE AS CONFLICT RESOLUTION

Legal disputes are usually framed as narrow controversies about facts and norms, which call for strict assignment of rights by judges through reference to reason and law.²⁴ The conflicts which underlie legal disputes are usually much broader than what appear as the controversies in courts, and they involve economic, emotional, cultural and

²⁴ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

other various aspects which cannot be captured through legal lenses.²⁵ The interest in the broader picture of legal conflicts goes together with an effort to engage deeply in their constructive transformation. It has its roots in the ADR movement, and continues with contemporary innovations referring to judging, lawyering and institutional reforms. New movements such as the Therapeutic Jurisprudence Movement emphasize the therapeutic and managerial aspects of judges' and lawyers' activities.²⁶ New institutional reforms such as the establishment of Problem-Solving Courts propose structural methods to address the complexity of some legal (mostly criminal) conflicts in ways which affect the roles of judges and lawyers.²⁷ Innovations in conflict-resolution judging such as "solution-based judging"²⁸ and "procedural justice"²⁹ approaches flourish in Australia and the US and offer judges new roles when dealing with criminal and civil conflicts. In Alberta Canada, the notion of judicial dispute resolution (JDR) has been introduced to regulate the role of judges in reaching settlement, while possibly addressing some aspects of the broadest conflicts.³⁰ These innovations and reforms remain on the margins and so far, no explicit discussion has been devoted to the judges' role in resolving conflicts. The pursuit of settlement rather than a deep constructive transformation of the conflict at hand is the prevailing goal according to cur-

²⁵ The distinction between "disputes" and "conflicts" is defined by John Burton, one of the founding fathers of the field of Conflict Resolution in the following way: "A generalization would be that *disputes* which are confined to interpretations of documents, and disputes over material interests in respect of which there are consensus property norms, fall within a traditional legal framework. *Conflicts* which involve non-negotiable human needs must be subject to conflict resolution processes. These would include many cases of crime and violence". See John W. Burton, *Violence Explained: The sources of Conflict, Violence and Crime and Their Prevention* 97 (1997). In our discussion a legal dispute is the narrow framing of a broader conflict which is based on various interests and needs which are not fully reflected in the claims before the courts. Conflicts are many times polycentric. See Fuller, *supra* note 24, at 371-72.

²⁶ See generally BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003).

²⁷ Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *Fordham Urb. L.J.* 1055 (2002); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *Fordham L. Rev.* 1285 (2000).

²⁸ MICHAEL KING, *SOLUTION FOCUSED JUDGING BENCH BOOK* (2009), available at <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

²⁹ The Journal of American Judges Association, *A Special Issue on Procedural Justice*, 44 *Court Rev* (2007-2008), available at aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf.

³⁰ *The Multi-Tasking Judge*, *supra* note 1, at 157-80. See also JUSTICE JOHN A. AGRIOS, *A HANDBOOK ON JUDICIAL DISPUTE RESOLUTION FOR CANADIAN LAWYERS* 7 (2004), available at <http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/1378>.

rent regulation of judicial activities.³¹

As Kuflik suggests, compromise has a broader sense than regular adjudication (or prediction of the adjudicative outcome).³² In regular adjudication the judge considers a matter that happens to be a dispute, leaving aside any consideration of the fact that there *is* an underlying conflict; in a compromise, however, additional considerations are weighed. When an issue is in conflict, and a compromise method is used, "there is more to be considered than the issue itself—for example, the importance of peace, the presumption against settling matters by force, the intrinsic good of participating in a process in which each side must hear the other side and try to see matters from the other's point of view."³³ Even if the regular judicial activity ought to remain focused upon reaching settlement, which relates more to the legal dispute, we argue that with parties' consent and through the use of compromise verdicts, various considerations of conflict resolution can become part of the judicial enterprise.

This chapter assumes that when a judge-arbitrator decides cases by compromise she may use various conflict resolution methods. It also assumes that, based on the parties' consent,³⁴ judges can expand the horizons of their judicial work in order to capture some of the various contexts which characterize the conflict before them.³⁵ This means that after the parties have failed to reach settlement or mediation agreement outside the court, and after the efforts of judges to help them settle in the courtroom (in a settlement conference) or to mediate between them have not succeeded, judges can use their authority, combined with the explicit consent of the parties,³⁶ to incorporate conflict resolution con-

³¹ The role of lawyers as resolving conflicts, both in criminal and civil cases, has been discussed as part of the spread of ADR and other movements, but judges were considered as more bounded by legal constraints and as striving for compromise in the shadow of the judicial prediction.

³² Kuflik, *Compromise*, *supra* note 21, at 38, 51 (1979).

³³ *Id.*

³⁴ Although the parties failed to reach a settlement on their own, Kuflik argues that the agreement to submit the matter to the judgment of a disinterested third party (the judge or arbitrator) could well constitute a significant compromise in its own right: "first, the parties concede, in effect, that they are not the best judges of their own dispute; second, they affirm that they are prepared to make concessions to one another if, in the considered judgment of a competent judge, that is what they ought to do."

³⁵ Kuflik, *Compromise*, *supra* note 21, at 53 (1979).

³⁶ Indeed, as stated by Kuflik, "people cannot always work out their differences on their own. But even when negotiations fail to produce the terms of settlement, the parties may come

siderations into their decision in a court arbitration process.³⁷ Such an authorization will redirect the judge's broad discretion as to the use of legal procedure and legal rules and will enable her to focus on the conflict aspects of the case. The unique consent-based adjudication which is not bound by the classic perception of rational, external balancing of parties' claims through legal principles (based on rights only) may produce new and interesting roles for judges in promoting the resolution of conflicts.

A. *Five Types of Arbitration*

Differentiating between outcome and process when dealing with compromise is important and useful.³⁸ Conflict resolution studies and ADR literature offer modes of transforming conflicts, and we would like to use common alternatives to adjudication as relevant for compromise consent verdicts and as helpful tools for judges to promote constructive reconstructions of conflicts. Compromise settlements can be reached in two ways—by negotiation or by arbitration.³⁹ A negotiated settlement will sometimes involve services if a mediator—someone who has no binding authority (but who acts as a go-between). Arbitration may be take undertaken either by a person who has been selected by the parties themselves or, as in the concern of the present article, by

away convinced that a compromise solution is in order. For it is often easier to acknowledge that what others have to say has some merit and even to concede that one's own view is not immune to reasonable criticism than to see just how competing claims ought to be adjusted. So although an agreement on the substance of the matter is not immediately forthcoming there may yet be a mutually agreeable third party whose informed, impartial, and sympathetic concern commands the respect of all sides." *Id.*

³⁷ It should be noticed, as asserted by Kuflik, that in some cases, even if the parties should manage to reach a settlement on their own, "there is some danger that it will be a settlement of the wrong sort." *Id.* "The parties to a dispute are sometimes simply too biased by their own involvement in the matter to be able to give each other a fair hearing," and therefore "they are liable to take one another's strengths and weaknesses more seriously than their reasons and arguments." *Id.* In such cases, argues Kuflik, "one hopes that the balance of morality relevant considerations, and not the balance of force, will be more nearly reflected in the judgment of a disinterested third party." *Id.*

³⁸ Golding, *Compromise*, *supra* note 15, at 7 (distinguishing between the end-state and the process. The first looks to the result or outcome and tries to see how it compares with the original situation for which it is alleged to be a compromise. The second looks to ways and means, the methods by which the result is reached, and it characterizes the result as a compromise in virtue of the process by which it is achieved).

³⁹ For a discussion of the methods of settlements: arbitration vs. negotiation see Kuflik, *Compromise*, *supra* note 21, at 52-55.

someone, a judge in a court, who acts under authority of the state. Parties' authorization for conflict resolution by a court arbitration in a way of compromise can be regulated and may include explicit reference to a closed list of hybrids and types of arbitration such as the following:⁴⁰

Arbitration under a high-low contract: Parties in this arbitration try to minimize the risk in the outcome by providing a high and a low limit to the judge's decision. The process reduces the risk to both sides by converting a "win-lose" situation into a "partial-win partial-lose" situation.⁴¹

Final offer Arbitration: This method helps to encourage creative and collaborative thinking and here the arbitrator may not compromise but must, rather, choose the final offer of either one party or the other. This should advance the prospects of successful bargaining. The parties, knowing that the arbitrator cannot compromise, are likely to assume that he will select the more reasonable offer.⁴² In legal cases, judges can offer parties such a process when opportunities for collaborative thinking seem possible but the parties cannot reach agreement by themselves.

Arbitration based on analysis of interests and barriers: This method of arbitration is the most innovative and the least explored judicial activity in promoting settlement. It may also be considered as the most intriguing and inspiring role of judges in imposing compromise. Judges can function, with the parties' consent, as experts in conflict resolution, and can impose genuine solutions based on conflict resolution considerations when exercising their judicial role. Typical analysis of conflict resolution will typically include two types of questions:⁴³

What are the interests/goals of the parties? In conflict resolution literature the interests are "the secret movers" behind the legal positions and therefore, an important question which a judge may ask the parties when the investigating the core of the conflict is "why?" Why do you claim you are entitled to a certain outcome? What is important

⁴⁰ The following types of arbitration may be used in legal systems which have a state-sponsored arbitration program (such as in Delaware).

⁴¹ STEPHEN B GOLDBERG, FRANK A SANDER & NANCY H ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 225 (1992).

⁴² *Id.* at 223-24.

⁴³ Frank A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 Harv. Negot. L. Rev. 1 (2006). The authors in this paper suggest a third question which is related to conflict qualities but for the sake of this form of arbitration we find it less relevant.

for you and what underlies your positions in the way they are framed before the court? Parties may care about various interests such as speed, privacy, public vindication, maintaining relationships, improving understanding of conflict, creating new solutions and so forth. Interests can be addressed.

What are the impediments which prevent the parties from resolving this conflict by themselves? Common barriers are identified in conflict resolution literature as: poor communication, the need to express emotions, different views of facts/norms, important principles, the jackpot syndrome; psychological barriers, unrealistic expectations and so forth.

Using conflict resolution considerations to adjudicate a legal case is not always possible. If some of the interests or needs of the parties are related to the processing of their case, and they need communication, apology or active listening in order to deal effectively with their conflict, an authoritative decision may not suffice to answer these needs. The same is true in relation to impediments to settlement, which sometimes depend on subjective perceptions such as optimistic overconfidence which judges cannot truly overcome. In some cases, such as communication problems, arbitration and adjudication are not the right processes for overcoming the difficulty. Nevertheless, our claim is that awareness of such considerations and incorporation of some of them into court arbitration compromise verdicts, even if only as relevant considerations that are mentioned within the written decision, may encourage more conflict resolution outside the courtroom. Judges may write in such hybrid decisions that they perceive the conflict as reflecting a lack of communication or involving diverse subjective perspectives of facts which can be bridged, and try to decide based on a more nuanced narrative of the facts. They can also emphasize the need of one party for acknowledgement and give it to her in their writing without jeopardizing neutrality or displaying bias. Such decisions can promote peace since they are oriented towards achieving such a goal. The actual outcome may be splitting the difference, but the argumentation may be based on conflict resolution considerations which are intended to bring the parties closer to each other.

Med-arb.: This is a special framework for reaching a verdict, whereby the parties begin mediation on the basis of interests, and if the

process fails, arbitration follows on the basis of rights.⁴⁴ In this way, the parties know that if they cannot solve the case on their own, they will be given a solution based on rights, which was drafted at the beginning of the procedure. This process, when conducted in court, will provide the parties with assurance that even if the mediation does not succeed, they will have the benefit of an authoritative decision which resolves the conflict, or at least puts an end to the legal dispute. The problem with such a process is that it usually discourages parties from speaking openly about their interests and from revealing information, since they know that a judge will decide the case and are afraid to be taken advantage of by the other party, who will not reveal her own interests and will claim for the value they created without offering anything on her part. To overcome such an inclination, an alternative process of arb-med was developed.

Arb-med.: This is a process in which the court rules based on rights, but keeps the decision concealed and conducts negotiations to try to bring the parties to an agreement.⁴⁵ The parties know that they have a solution if they cannot reach an agreement, but they are not afraid to cooperate because even if their concealed interests are revealed, the decision based on their rights has already been made and is not affected by this information. In this case the first decision may be a prediction-based analysis of the case based on a short presentation. The later stage will be an open-ended discussion of the complexities of the case, including interests, emotions and relationships. Parties can freely develop a nuanced constructive solution while remaining assured that a fixed solution is at hand if they fail to reach it. This process has similarities with “post-settlement-settlements” as described by Howard Raiffa.⁴⁶

Indeed, as Jaconelli writes in his “Solomonic Justice and Common Law” article, “adjudication and conciliation, at any rate as far as modern legal systems are concerned, are entirely distinct processes.”⁴⁷ He comments, however, that there are societies “where the function of the judge is conceived as conciliatory; that is, to effect a compromise between litigants in the interest of retaining intact the web of social relationships.”⁴⁸ Surprisingly or not, an excellent example of a legal sys-

⁴⁴ GOLDBERG ET AL., *supra* note 41, at 226-27.

⁴⁵ *Id.* at 228.

⁴⁶ Howard Raiffa, *Post Settlement-Settlement*, 1 *Negotiation J.* 9 (1985).

⁴⁷ Jaconelli, *Solomonic Justice*, *supra* note 20, at 484.

⁴⁸ *Id.* at 484, n. 17.

tem that combines adjudication and conciliation is perhaps King Solomon's Jewish legal tradition.

B. *Compromise as a Peace Adjudication Process*

In the modern theoretical literature dealing with compromise verdicts, the term "Solomonic justice" appears frequently, referring to the biblical story recounting the manner of judgment of Solomon, King of the Jews. Now, it appears that the famous biblical story about King Solomon's ruling does not refer to the compromise consent verdict discussed in this article, but undoubtedly it is possible to find in the classical Jewish sources very extensive discussions about the process of judicial compromise verdicts.⁴⁹ An analysis of several of these sources, which will be undertaken in the present section, will afford us a better understanding of the manner in which the compromise may be used as a peace adjudication process.

According to Jewish law, one of the goals of compromise is to make peace between the parties. Compromise is defined in the Talmud as "law making which contains peace,"⁵⁰ though it may seem the combination of law and peace is inherently contradictory. On the one hand there is the familiar discourse of rights so common to legal thinking. Such a discourse differentiates between the parties and posits the boundaries between them as the subject for authoritative decision. On the other hand there is the discourse of peace which aims at reconciliation, connection and collaboration, without searching for the ultimate truth or the right argument. Peace, in that sense, is a separate category from law.⁵¹ In order to promote peace, personal involvement of parties is required, subjective impressions need to be transformed, engagement in constructive interactions is needed and deep emphasis on relationship, interests and emotional acknowledgement is encouraged. Aspiration for peace is not usually a goal in itself in law making, and only "public order" is legitimate cause for modifying strict legal applications. Peace, according to Lifshitz, compensates for inherent gaps within law. It enables people to waive their rights or to acquire rights which they do not have, not only for the sake of public order, but to overcome a

⁴⁹ See, e.g., MENACHEM ELON, *Compromise, in* THE PRINCIPLES OF JEWISH LAW 570-73 (1975).

⁵⁰ B.T. *Sanhedrin* 6b.

⁵¹ Itay E. Lipshitz, *P'shara' in Jewish Law* 137 (July 2004) (unpublished Ph.D. dissertation, Bar-Ilan University Ramat-Gan, Israel) (on file with author).

bias or distortion within the law itself. Peace considerations include fraternity, friendship, relationship, and trust.⁵² Based on the parties' consent, judges can incorporate peace considerations into their decision, or they can promote a conflict resolution process or a peace-oriented outcome within conference settlement.

Rabbi Abraham Itzhak Hakohen Kook (1865-1935), the first Ashkenazic Chief Rabbi of the Land of Israel, argued that as a matter of legal policy, the court may incorporate peace considerations into its decision in cases where, in its opinion, ruling by law may not resolve the conflict.⁵³ If a legal decision based on the law is liable to leave bitterness and hostility between the parties, a peace-oriented legal decision should aspire to avoid these outcomes. Rabbi Naftali Zvi Yehuda Berlin (Lithuania, 19th century) wrote in the same spirit, saying that if law cannot bring peace to the conflict, a compromise decision is sometimes desirable.⁵⁴ His decision related to a public controversy between two communities who had an argument based on ethnic differences. Berlin realized that deciding by law would not resolve the conflict and bring peace and tolerance between the communities in the multicultural society, and therefore he deviated from the law and rendered a compromise verdict. The same ruling was given in a case involving young orphans. The goal of "reducing the conflict"⁵⁵ was mentioned as being in the best interest of the orphans, who would have an on-going relationship throughout their lives.

III. COMPROMISE AS PRECISE JUSTICE

A. *Court Imposed Compromise as "Precise Justice" – Major Arguments and Difficulties*

In legal theory court compromise verdicts or court imposed compromise have been praised by some scholars as a more justified method which overcomes the traditional dichotomic all-or-nothing or "winner takes all" method of judicial decision making. Some perceive the merits of the court imposed compromise as reflecting "Solomonic justice"⁵⁶ and some have viewed compromise as "precise justice", emphasizing

⁵² *Id.* at 133.

⁵³ *Responsa Orach Mishpat, H.M. 1, s.v. vehine be'inyan.*

⁵⁴ *Responsa Meshiv Davar* 3:10 (Jerusalem, 1968).

⁵⁵ *Sh.Ar. H.M. 12:3.*

⁵⁶ See Jaconelli, Solomonic Justice, *supra* note 20.

the element of equality.⁵⁷ According to this view there are cases in which judges should render a court imposed compromise as the preferred and more justified legal resolution of the dispute. Indeed, there are cases, especially if the law and the facts in the case are unclear, where there may be sound reasons of policy and justice for splitting the difference between the parties.⁵⁸ Parties in those cases may be considered as having the right to receive a compromise verdict. If this is the case, argues Joseph Jaconelli, we are dealing “not with compromise of one’s legal right, but rather with compromise *as being* one’s legal right.”⁵⁹

These arguments depict the court imposed compromise as a more accurate decision making process in a world in which dichotomic decisions are not always possible. They posit decisions by compromise as a deep answer to critical approaches in law, such as Legal Realism and Critical legal studies, which have challenged the objectivity of legal decision making by referring to the indeterminacy of legal rules and to the social and economic barriers which they reinforce.⁶⁰

This approach in favor of court imposed compromise and various versions of it, has challenged the conventional dichotomic approach to legal decision making and has evoked rich discussions among scholars, who have pointed to some downsides of the new concept. Some have criticized the compromise verdicts approach by invoking utilitarian considerations. Others have appealed to justice or due process. Even some of the proponents of court imposed compromise verdicts have developed some modified and narrower notions of such verdicts, sometimes in response to the criticism against them. Under such modified versions, courts may use this mode of decision making only for very specific cases, whereas in other cases the traditional dichotomic decision making method will apply. Abramowitz, for example, has offered an intermediate model of a “system of mixed verdict”, which benefits from the relative advantages of both modes of decision making – dichotomic and compromise alike.⁶¹ He offered a scheme of analysis to choose among the modes of decision making in different cases. According to his suggestion, the dichotomic method should be applied

⁵⁷ See Coons, *Compromise*, *supra* note 20; Coons, *Precise Justice*, *supra* note 20.

⁵⁸ See Golding, *Compromise*, *supra* note 15, at 21.

⁵⁹ See Jaconelli, *Solomonic Justice*, *supra* note 20 at 485.

⁶⁰ In this sense, compromise verdicts can provide a reconstructive answer to the critique of legal formalism.

⁶¹ See Abramowicz, *supra* note 20.

when there is no doubt about the plaintiff's chances of winning or losing the lawsuit, i.e., when the threshold of probability is high (a situation in which one party's version is significantly and compellingly superior to that of the other party). By contrast, when the plaintiff's chances of winning are unclear or balanced, the compromise method should be chosen. Coons deals with a compromise that applies a 50-50 division in cases of factual doubt, when it is not possible to rule in favor of one side as opposed to the other.⁶² Scholars who favor the compromise method have recommended it in cases of evidentiary balance (Abramowicz), or advocated a regime of proportional liability in tort claims based on causal probability,⁶³ as well as liability based on probability in cases of unclear causation.

B. *Court Arbitration Compromise Verdict as an Opportunity for Performing Precise Justice*

We argue that the opposition to court compromise verdicts is much more convincing in relation to court *imposed* compromise verdicts which are not authorized in advance by the parties. Indeed, in such cases, the legitimate expectation of the parties is for a decision based on a determination of legal rights, which reflects a dichotomic all-or-nothing approach. Trying to overcome the shortcomings in such dichotomic decisions based on strict legal rules cannot be done by courts deviating from these rules, through imposition of compromise verdicts on the parties. In these cases the parties also feel that there is a lack of procedural justice, because they are not really aware of what are the considerations for the court imposed compromise verdicts.

On the other hand, if parties acknowledge the shortcomings of law both from a jurisprudential perspective and due to efficiency considerations, the possibility of the judge-arbitrator rendering compromise consent verdicts may be much more justified. The parties in such cases are aware of their legal rights and of their chances of winning in court, and they nevertheless choose to authorize the court to render compromise verdicts in a court arbitration process. The parties may choose to enjoy the benefits of compromise verdicts, and can decide which mode of compromise they authorize the judge to impose.

⁶² See Coons, *Compromise*, *supra* note 20.

⁶³ John Makdisi, *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages based on Probability*, 67 N.C. L. Rev. 231 (1989).

The advantages of court arbitration compromise *consent* verdicts over court *imposed* compromise verdicts, insofar as we are dealing with the goal of precise justice, extend well beyond the justification and authorization perspectives alone. Expanding the range of possible compromise verdicts is a significant improvement to legal decision making. Imposed compromise verdicts are justified, even according to Coons, only in specific cases,⁶⁴ and he lists ten examples in which, due to a factual doubt, the dichotomic legal solution cannot be considered justified and right in the circumstances. Splitting the difference between the parties in such cases (which Coons defines as “doubt-compromise”) should be preferred, but this equally-divided fifty-fifty compromise, Coons insists, should be strict and not amenable to different divisions.⁶⁵ Some scholars have challenged that view and called for different types of divisions, such as seventy-thirty or sixty-forty compromises.⁶⁶ Others claim that Coons’ proposal does not really overcome the “winner takes all” perception of law: “You can say that in this particular case we will compromise for various reasons, but this is a very rare and special instance where we will allow such a result.”⁶⁷ Our claim is that adding the *consent* element to compromise verdicts will allow the parties to authorize the judge to provide a compromise decision in a court arbitration process which will accurately reflect the parties’ rights or their evidence. It will afford the court broader discretion to approve various divisions of the pie (not only fifty-fifty) and to do so in a broad range of cases. Factual controversies require a much more complex perspective based on partiality and probability. According to Fuller:

Except that I think, characteristically, truth questions are closer to the negligence question than we imply. That is to say something happened; neither one of may be lying. Each is putting his best foot forward; each has improved on the story in remembering it. So you are asking yourself, well, let’s see, which of these stories is the closest—and perhaps neither is very close—but you are ready to accept. You are dealing with probabilities.⁶⁸

⁶⁴ Coons, *Compromise*, *supra* note 20, at 753-54.

⁶⁵ The reason for this, Coons argues: “As long as we confine our attention to instances of balanced probability, any division other than fifty-fifty would discriminate against one party. In other words, it would offend the equality principle.” *Id.* at 759.

⁶⁶ *See id.* at 800.

⁶⁷ *Id.* at 802; *see also id.* at 802-03 (“I am not suggesting this would be an across the board proposition, You have to be very careful about the areas you select”).

⁶⁸ *Id.* at 800.

When parties agree to accept compromise-based decisions in a court arbitration process they may be considering the possibility of endorsing a decision which takes into account critical claims about legal decision making.

During the previous century, a famous attack on legal objectivity and on legal formalism in general was launched by the Legal Realism movement during the 1920s, followed by the Critical Legal Studies movement during the 1970s.⁶⁹ The Realists developed a theory of rule skepticism and claimed that legal decisions cannot be explained as being “based on mechanistic applications of rules.” Instead, they argued, it is more realistic to claim that rules are indeterminate and that legal doctrine is filled with gaps, ambiguities and multiple interpretational possibilities, which make it impossible to objectively decide cases without exercising a broad discretion. Some of the Realists and their predecessors, like Llewellyn and Kennedy, claimed that behind each rule there are conflicting principles which call for opposite interpretations, and that judges can never decide by a pure reference to rules, since balancing between these principles is part of the process of legal decision making. This balancing cannot be structured rationally, according to Realists or critical scholars. It is affected by personal or ideological motivations. Another major claim which Realists and other critical writers developed was that legal facts cannot be determined objectively, and that judges suffer from biases and multiple perspectives which make their factual determinations biased and subjective.⁷⁰ These critiques of and challenges to basic legal tenets produced turmoil in legal academe and have been followed by various efforts at reconstruction. One possibility of overcoming the indeterminacy of rules and facts is to propose a court arbitration judgment based on compromise and not on pure legal reasoning. The possibility of working with critical claims as constructive paradoxes has never been discussed by the Realists, and in arbitration studies, but there may be agreement among the parties that rule and fact skepticism will guide judges’ decisions when they try to give a nuanced decision which does not claim for full objectivity. Such a decision can be called “precise justice” since it overcomes the “winner takes all” assumption of mainstream jurisprudence. It is more sensitive to gaps and doubts while remaining pragmatic and constructive when

⁶⁹ ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

⁷⁰ JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1973).

working with them.

IV. COMPROMISE AS EQUITY

Although ruling by compromise based on equity is mentioned in some places when the development of the common law is reviewed, the basic rule which remained throughout common law history is that the winner takes all,⁷¹ and equity has not developed as an independent cause.⁷² Even in more recent times, again with a few notable exceptions, the traditional rule of “winner takes all” continues to hold sway.⁷³

Why the option of compromise on the basis of equity is not used widely in common law? This may be related to the struggle between law and equity. The nature of law is to determine rules, and to provide solutions which are intended to be applied in future to an unlimited number of cases. This feature of law creates a unique problem of correlation between case and rule. There are cases, and maybe most of legal cases are such, in which the particular circumstances of the case do not slot into the strict rules. Aristotle dealt with these situations and suggested overcoming them through the use of equity, or *epieikeia*, which means to amend the law in such a way as to prevent its generality from interfering with the need to do justice in the concrete case. The dialectic between legal formality and other considerations is regulated differently within each legal system. Our efforts are aimed at articulating a certain balance which is appropriate for consent compromise verdicts, and which may expand the traditional perception of the role of law. But first, let us discuss further the relationship between common law and equity.

Traditionally, as shown by Atiya, in the English legal tradition there exist two widely differing approaches to dispute resolution and the law.⁷⁴ One approach requires cases to be decided according to generalized and inflexible rules. The second approach emphasizes the importance of individualized justice, of adjudication of the specific facts of the case in question. Throughout much of English legal history these two approaches have been embodied in the systems of the common law and Equity respectively. With the crystallization of Equity laws, and

⁷¹ Jaconelli, *Solomonic Justice*, *supra* note 20, at 487.

⁷² Coons, *Compromise*, *supra* note 20, at 767.

⁷³ Jaconelli, *Solomonic Justice*, *supra* note 20, at 488.

⁷⁴ P. S. ATIYA, *FROM PRINCIPLES TO PRAGMATISM: CHANGES IN THE FUNCTION OF THE JUDICIAL PROCESS AND THE LAW* (1978).

especially after their inclusion within the common law system during the 19th century,⁷⁵ they became more general and predictable. This process of formalization helped to prevent arbitrariness and at the same time made these laws less case-sensitive. Some have described the development of the ADR movement as representing the formalization of a new Equity approach, this time based on the procedural processing of disputes.⁷⁶

Our main argument is that the tension between equity and formal rules exists mainly when a decision by way of equity is imposed upon the parties without their prior consent, while they expect a purely legal solution. In such cases, equity may indeed interfere with stability and equality before the law. It may be considered arbitrary and as causing instability in the system. There is no room for such a concern, according to our view, when the parties have agreed in advance to an equity-based decision in a court arbitration process. In such cases parties ask for rules which fit the unique nature of their conflict. The relation between equity-based decision and parties' consent is found in Delaware's state-sponsored arbitration program mentioned above, in which, as we had seen in Chapter I, the Chancery Court judge presiding over the proceedings "[m]ay grant any remedy or relief that [s/he] deems just and equitable and within the scope of any applicable agreement of the parties."⁷⁷ Still, equity as an open-ended aspiration of law remains a separate category within our framework.

The limits of formal law have been extensively described and debated in jurisprudential thinking and legal theory in general. We have tried to present some of the challenges to the formality of law within the various modes of compromise consent verdicts we proposed for court arbitration. We believe that these new modes offer new regulated forms of equity and they all enable various new balances between rules and discretion. Nevertheless, even after parties consider each of the three modes on its own merits, we believe that the possibility going back to Equity as a law making method which incorporates general considerations of justice may still exist within the system we propose. A court arbitration by compromise based on ethics will be a return to

⁷⁵ For a more extensive discussion of this topic, see C. K. ALLEN, *LAW IN THE MAKING* 399-441 (1964).

⁷⁶ Austin Sarat, *The 'New Formalism' in Disputing and Dispute Processing*, 21 *Law & Soc'y Rev.* 695 (1988).

⁷⁷ Del. Ch. R. 98(f)(1).

the old role of law making as doing justice, reviving it through the parties' endorsement.

V. COMPROMISE AS SOCIAL JUSTICE

The incorporation of distributive justice considerations into legal decision making is usually considered problematic, since the common assumption is that the legislator determines the consensual distributive principles in the law and the judges apply them in an equal way. Cases of court imposed compromise verdicts have also been criticized when they invoked such considerations.⁷⁸ We argue, however, that this criticism is less applicable to court arbitration compromise consent verdicts.

The role of law in promoting social justice has been a major concern of many jurisprudential schools, both from a critical and a normative perspective. A major sociological claim in this context is that within the reality of legal disputes handled in the court, the "haves" have various advantages over the "have nots", and that repeat players and big organizations are more likely to utilize the system to acquire gain and to win long-term benefits, often at the expense of the disadvantaged.⁷⁹ From a normative perspective, some have argued that the role of law is to institute structural reforms, to transform society, and to use legal decision making to promote a form of justice which is transformative and has an educative value.⁸⁰ Inequalities in society have been a major concern for many legal scholars, and traditionally courts and judges have been considered responsible for balancing them. Although adjudication is not supposed to favor the poor over the rich on the individual level, and judges are supposed to apply a balanced principled measure in the concrete case, as a policy matter new rules and precedents are intended, according to some legal thinkers, to promote greater equality in society and to prevent the oppression of the weaker communities.

A judicial policy of promoting social justice has also been broadly criticized by some legal scholars and philosophers as anti-democratic, against integrity and biased. If a certain distribution of goods or as-

⁷⁸ Jaconelli, *Solomonic Justice*, *supra* note 20, at 498-504.

⁷⁹ Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & Soc'y* 95 (1974).

⁸⁰ Owen M. Fiss, *The Supreme Court 1978 Term Forward: The Forms of Justice*, 93 *Harv. L. Rev.* 1 (1979).

signments of rights in society was approved by the legislator or has an historical foundation, how can a judge use her biased interpretive skills to challenge this distribution and to demarcate the social boundaries in society? These critics have often described the social justice interpretation as activism, and have called for greater restraint and neutral policy in applying legal rules.

Our discussion shifts this debate about the role of law in promoting social justice to the more pluralistic terrain of many types of conflicts and many possible legitimate standards for legal decision making. The recourse to court arbitration compromise consent verdicts may open a legitimate and unique track for introducing social justice considerations into judicial dispute resolution legal decision making. We are not suggesting here a policy of promoting social justice while creating *new rules*, as some legal scholars have suggested, and therefore we are not interfering with the majoritarian principle nor with the official distribution principles as provided by the state. Instead we propose a bottom-up market of individual compromises, in which social justice considerations are consensually incorporated into the court arbitration legal decision making process. Such developments may fit certain types of disputes, and may promote a more pluralistic consent-based perception of justice within the legal system.

Cases which include big organizations facing small citizens may call for an offer to the parties to authorize the judge-arbitrator to incorporate social justice principles in a compromise consent verdict. Such considerations may anyway infiltrate judges' decisions, when they deal with a severe perceived imbalance in a case before them, but usually their compassionate treatment may be interpreted as biased and as going against the rule of law principle. Organizations' representative experience in such cases as receiving unfair treatment and as being coerced to give what they do not owe according to the law. In contrast to the usual mode of adjudication, when social compassion is legitimate and authorized by the parties as part of the decision making, such judgment may be good for all parties involved. The weak party will receive acknowledgement and material recognition as a lone gun-man taking on the big organization. The repeat player organization will gain a reputation and acknowledgement as having a social justice agenda and as activist in terms of protecting customers and weak populations. Society will gain greater equality and the closing of systemic gaps from which it suffers. The legal system may benefit from a pro-social image

which signifies generosity and social responsibility as publicly encouraged by the court. Such developments may flourish when offered by law, and may become mainstream modes of decision making in some areas of law.

Three contemporary examples of compromise verdicts given by Israeli rabbinical court arbitrators may serve to illustrate the potential in compromise consent verdicts based on social justice. In these cases the consent of the parties for such a decision was given by litigants by choosing the religious court—authorizing it to render a compromise verdict as an arbitrator—and by preferring it over the general secular system. We argue that the legal considerations weighed by the religious court reflect legal pluralism,⁸¹ which can become a model of mainstream legal decision making.

The first is the case of a teacher who was fired unfairly at a time when it was hard for him to find a job.⁸² Although the school had the right to fire him according to the contract, and although the teacher was not poor according to formal criteria, the court ruled “beyond what the law requires” (*lifnim mishurat badin*) that the school should compensate the teacher. The court said that the school has wealthy donors and its pockets are deeper, so therefore it should compensate the individual in the name of social justice.

A second example is the case of another teacher who was fired after two years of employment in a school in Safed (northern Israel). Following his dismissal he had to relocate his family to the south of Israel to his new workplace. After a year the school asked the teacher to come back and rehired him to teach, but one year later he was fired again. The teacher sued for compensation for his three years of work and also for the costs of relocation. The court granted both demands; among the reasons for its ruling, the court wrote that the plaintiff had not found a job yet, and since he is considered a pauper the decision should go “beyond what the law requires” (*lifnim mishurat badin*) based on social justice considerations.⁸³

A third example actually comprises a group of cases in which religious courts enabled debtors to spread out their repayments, even though from a strict legal perspective they were obligated to repay their

⁸¹ See Adam Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J.L. & RELIGION 101-33 (2010).

⁸² YOEZER ARIEL, LAWS OF ARBITRATION 224 (2005) (Heb.).

⁸³ *Id.* at 225-26.

debt immediately. Such cases were interpreted as following the principle of going beyond what the law requires; taking into account the economic situation of the debtor was within the court's discretion, since the parties had agreed in advance to be judged by law or by compromise.⁸⁴

These examples, which stem from a communal and religious system of law, may inspire mainstream adjudication in secular courts and expand the possibilities which are available to judges when confronting legal conflicts. When parties agree to promote certain values and policies, judges should be authorized to respect such choices and to incorporate into the law considerations which go beyond the rules, while not violating general principles of the rule of law. In time, such developments may acquire their own general characteristics and may function as open code systems to inform new disputants in new circumstances.

CONCLUSION

Our paper has argued for a new role for court arbitration judges deciding cases by compromise, based on the parties' consent. We suggested that this mode of judicial dispute resolution can overcome some basic limitations of legal rules and legal decision making. It can promote more precise justice, overcome the indeterminacy of rules and facts, promote social justice, enhance equity and combine new considerations into judges' discretion. With more regulated forms of court arbitration by compromise and the explicit consent of the parties, the legal system may become much more pluralistic and nuanced when responding to the complexity of legal cases.

Considering the fact that most cases settle and do not reach a final formal decision based on law, and that only a small part of them is resolved through ADR, judges have a significant role in the settling of legal disputes. Although their role has changed dramatically in the past few decades, its new nature has not brought about a corresponding shift in legal thought, and has remained largely unexplored. Our paper contributes to a new conceptualization, hopefully followed by new regulation, of the judges' role in cases of consent of the parties to court arbitration compromise verdicts. Such consent makes possible an interesting mixture of authority and consent, legal rules and social complexity, autonomy and community, old and new.

⁸⁴ *Id.* at 224-25.