Expanding Judicial Discretion: Between Legal and Conflict Considerations

Yuval Sinai* & Michal Alberstein**

Judicial discretion is usually considered a legal phenomenon, related to jurisprudential questions about the boundaries of rules, and the type of reasoning required from judges when making decisions in legal disputes. In this article we expand the notion of judicial discretion to include considerations of conflict resolution as well as legal and extralegal (beyond the line of the formal law) considerations, and to incorporate critical assumptions regarding the limitation of the formal application of rules.

Our article determines which additional considerations the judge may take into account in judicial dispute resolution processes. How do these additional considerations operate alongside the regular formal legal considerations which are determined by the general rule? What are the limitations of judicial discretion in this context?

Our article introduces an innovative model for understanding and conceptualizing judicial discretion as moving on two poles –legal and extralegal considerations, and conflict resolution considerations. We suggest that judges' decision making, especially considering the high rates of settlements today, may incorporate various perceptions of law, as well as various perspectives on conflict. We suggest five considerations for legal discretion: formal rules, equity, policy consideration, efficiency and social justice; and also five considerations for conflict resolution

* Schusterman Visiting Professor of Law at Yale University and a Senior Research Scholar in Law at Yale Law School, 2013-15; Visiting Professor, McGill University, Canada (2007-08); Associate Professor of Civil Procedure and Jewish Law and Director of the Center for the Application of Jewish Law (ISMA), Netanya College Law School, Israel.

** Associate Professor, Faculty of Law, Bar-Ilan University. Head of Conflict Management, Resolution and Negotiation Program, Bar-Ilan University. Visiting Associate Professor, Alternative Dispute Resolution, Fordham Law School (2013).

The article has been presented at the Yale Dispute Resolution Workshop, Yale Law School November 2014. Our thanks to the participants of the workshop, and to Noah Messing, Aharon Barak, Charlie Pillsbury and Judith Resnik for their valuable comments.

discretion: barriers to settlement, barriers to conflict resolution, relationship, identities, and narratives. We argue that judges' decision and processing of legal conflicts in general may adopt one mode of legal discretion in the shadow of another mode of conflict resolution consideration and vise-versa. This hybrid model expands the notion of judicial discretion familiar in legal literature so far.

With our new expanded notion of judicial discretion we hope that the role of law in promoting conflict resolution will become more articulated and institutionalized into new conceptual schemes of judicial work.

CONTENTS

I. Introduction

Judicial discretion is usually considered a legal phenomenon related to jurisprudential questions about the boundaries of rules and the type of reasoning required from judges when making decisions in legal disputes. In this article we expand the notion of judicial discretion to include legal, extra-legal (beyond the line of the formal law), and conflict resolution considerations and to incorporate critical assumptions regarding the limitation of the formal application of rules. We will present the phenomenon of decision-making in law as defined by two scales of evaluation: one is composed of legal and extra-legal measures for the application of rules, while the other is related to conflict resolution measures which deal with the social conflict underlying the legal dispute. Our claim is that when judges make decisions, their rulings can be based on various considerations, which go beyond those that are strictly legal, by moving on two axes: one of extra-legal considerations and the other of conflict resolution considerations.

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 alternative dispute resolution (ADR).[1] This trend may be viewed in light of what Judith Resnik recently defined as "the privatization of process" — the re-conceptualizing 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]

Many have pointed out the main merits of JDR (speed, cheapness, confidentiality, informality, expertise etc.) when compared with proceedings before the ordinary courts.[6] We would like to point out other merits of hybrid judicial dispute resolution processes by using the JDR phenomenon as an opportunity for judges and court administrators to apply a broader scheme of judicial discretion. This theoretical view will locate the JDR phenomenon as related to jurisprudential discussions of legal discretion. Such discretion, we

---

1. *See, e.g.*, TANIA SOURDIN & ARCHIE ZARISKI, ed., THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (2013) [hereinafter *The Multi-Tasking Judge*].

2. Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure*, 162 U. Pa. L. REV. 1793, 1802–14 (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 Stan L. Rev. 1339, 1339-40 (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, 924-28 (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 157-182. 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):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).

6. *See, e.g.*, FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 348, (5th ed. 2001); NEIL ANDREWS, PRINCIPLES OF CIVIL PROCEDURE 551–52 (1994).

suggest, combines broad legal considerations such as equity,[7] efficiency and social justice with conflict considerations such as interests, relationships (between the parties to the conflict and others), and needs.

Legal decision-making is a complex phenomenon that cannot be explained only by the mechanistic application of legal rules. Judges in their work are exposed to various critical claims and respond to two distinct contexts: the legal worldview and the social conflict framework. In terms of the legal worldview, judges acknowledge various limitations on rules as capable of determining a legal case. Judges acknowledge the fact that rules may miss the uniqueness of the individual case; they may be indeterminate; they may be meaningless without reference to their social goals; and they may reinforce inequalities in society. In terms of the social conflict framework, judges acknowledge underlying needs and interests which are deeper than the legal dispute and require unique processing. Judges acknowledge the diverse interests of parties, including their overlapping goals; they are exposed to underlying emotions and relationships, which drive the conflict and escalate it; they acknowledge the existence of third unrepresented parties; they are aware of various social considerations. The discretion that judges exercise may reflect this complexity and work with it.

Our innovative model for judicial discretion aspires to incorporate the reference to legal and conflict considerations by capturing concrete variations from which parties can choose and which may be used by arbitrators and judges. We offer a conceptual model of decision-making that incorporates various considerations borrowed from other methods of conflict processing. This model is a reflection of a judicial system that has been going through a constant transformation in the past decades following the ADR revolution and the institutionalization of various conflict processing methods.[8] The reference to the conflict aspect in judicial decision-making reflects the ongoing

7. 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. *See* DAVID SUTTON & JUDITH GILL, RUSSELL ON ARBITRATION 146–147 (22d ed. 2003). Furthermore, while adjudication is often described as a win/lose activity, decisions by some arbitration programs often entail *compromises*. *Id.* at 45-46 (dealing with the difference between *court-annexed arbitration* and regular adjudication).

8. Following the call of Lon Fuller, one of the fathers of the ADR movement who integrated various forms of social order to describe the role of law and society, we expand the notion of arbitration suggested by him (a rational decision between two parties arguing about facts and norms) and also provide a broader scheme to address

changing role of judges who find themselves oriented towards settlement much more then to trial and adjudication.

Our article determines which additional legal and conflict considerations a judge might take into account in judicial dispute resolution processes and seeks to answer the following two questions: How do these additional considerations operate alongside the regular formal legal considerations that are determined by public rules and policies? What are the limitations of judicial discretion in this context?

In light of the creation of the various new judicial dispute resolution methods, 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 as to how to employ judicial discretion in these methods. Such a theory should not only be able to explain existing practices, but also demonstrate how they can provide reconstructive solutions to basic limitations of legal rules and conventional legal decision-making. This article introduces such a jurisprudential analysis while discussing a test case of one unique form of judicial dispute resolution: "court compromise verdicts." This form is an adjudication conducted by a judge-arbitrator presiding in the case to resolve a conflict by rendering a final decision based on "compromise considerations."[9] Such an activity combines authority with consent in a unique way; the judge-arbitrator decides cases based on considerations that deviate from the regular legal rules in a decision validated by the parties' prior consent. Our model will be applied to compromise verdicts and will present a coherent scheme for addressing judicial discretion in such matters.

---

the role of law in reference to the social order. Kenneth I. Winstone (ed.) THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Hart Publishing, 2001) 81-206.; *see generally* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995); Philip Selznick, *Preface* to WILLEM WITTEVEEN & WILBREN VAN DER BURG, REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN (1999). Fuller has also developed the notion of purposive interpretation in law and referred to the social aspects of the norm and the policy considerations behind it as the ultimate way to understand judicial discretion. Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957); Lon L. Fuller, ANATOMY OF THE LAW (1968).

9. Martin P. Golding, *The Nature of Compromise: A Preliminary Inquiry*, in Ethics, LAW, AND POLITICS - NOMOS XXI 4, 20-22 (J Roland Pennock & John W Chapman eds., 1979) [hereinafter: Golding, *Compromis*e]. On the law of settlement in general *see* Owen M. Fiss & Judith Resnik, ADJUDICATION AND ITS ALTERNATIVES (2003).

Chapter II presents the core argument of this article, introducing our model. The chapter presents the legal and extra-legal considerations: equity, precise justice (dealing with uncertainty), efficiency, and social justice. It also presents the conflict considerations: barriers to legal settlement and conflict resolution, interests and needs, relationships, identity and narrative. It also discusses the limits of discretion.

Chapter III applies the discretion model to the test case of compromise verdicts. It deals with the degree of connection between legal and conflict considerations and with the boundaries of judicial discretion.

Chapter IV will then summarize our goals for this article with an eye towards future application of the model developed herein.

II. A New Model of Judicial Discretion: Between Conflict and Legal Considerations

A. *The Suggested Dual-Concern Model*

Our model captures the complex and hybrid nature of legal decision-making in reference to legal and conflict considerations. The model we suggest has a descriptive dimension, as illustrated in the chart presented at the end of this section, and can be used to understand existing judicial and extra-judicial activities in the context of legal conflicts. It can also be used, as this article argues in Section D, as criteria for drawing the boundaries of discretion. Additionally, the suggested model should be utilized, as demonstrated in Chapter III, as a set of choices from which parties may choose when they are interested in compromise verdicts and wish to limit the scope and mode of the process and outcome.

The model we offer for judicial decision-making reflects gradual and constant developments in the field of law and the field of conflict resolution. Such developments are the results of evolving theoretical and sometimes critical schools that challenge classic perceptions of law and of conflict resolution. We claim that such intellectual and practical developments are internalized in judicial practice and become reconstructive modes of decision-making. Judges who acknowledge this complexity use hybrid reconstructive perception in their judicial work and become dispute designers of legal conflicts brought before them. Instead of understanding their "managerial" role[10] as

10. Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 378 (1982).

related only to efficiency considerations in terms of court administration, we propose that judges perceive their function as incorporating theoretical critical notions of both law and conflict resolution.

This model of decision-making provides new insights into both the role of critical schools of law and the role of recent critical models of conflict resolution for the understanding of legal disputes. Instead of viewing critical schools as existing *outside* the actual judicial activity, we suggest judges actually work with assumptions developed by critical schools *from within* and make decisions while using them. We also believe that judges are able to incorporate various dimensions of the conflict and work with more advanced versions of conflict resolution methods. Such incorporation can be effected implicitly, in court proceedings and in legal written decisions, and can also be an explicit choice of the parties when they become aware of these variations.

The role of judges has been going through tremendous changes in the past decades, and the spread of ADR programs, together with the administrative pressure on judges to settle cases, have dramatically challenged old notions of adjudication and exposed judges to the conflict dimension of legal cases.[11] Judges are experts in the rules of law and, ideally, their role is to decide cases in reference to fixed legal norms; but, in reality, judges are exposed to various critical claims about the possibility of making such decisions, and are also expected to avoid full-blown adjudication by using diverse methods to address the legal conflict.[12] We claim that when the constraints and incentives imposed on judges are taken seriously, a new, complex image of the judges' decision-making process emerges. This role is a reflection of some forty years of development in the field of conflict resolution, and ADR in particular, and of a century of critical development in law.

The question of discretion in law has usually been discussed in jurisprudential thinking as related to hard cases.[13] In terms of judicial discretion, the common debate in legal literature focuses on the

11. Carrie Menkel-Meadow. *Introduction: What Will We Do When Adjudication Ends-A Brief Intellectual History of ADR*, 44 UCLA L. Rev. 1613, 1623-1625 (1997).

12. Marc Galanter, *" . . . A Settlement Judge, not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & Soc'y 1, 2–3 (1985); Morton Denlow & Jennifter Shack, *Judicial Settlement Databases: Development and Uses*, 43 Judges J. 19 (2004).

13. Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1057 (1975); Ronald Dworkin, *Judicial Discretion*, 60 J. Phil. 624, 634 (1963); Dworkin, Taking Rights Seriously 81 (1977). *See generally* Dworkin, *No Right Answer*, 53 N.Y.U. L. Rev. 1 (1978). Dworkin's "one right answer" thesis has been challenged by Hart and others. They assume that not every legal question has a right answer, and in difficult cases at least two alternative decisions are possible. *See, e.g.*, H. L. A. Hart, The concept of law 139 (2012); Josef Raz, The Authority of Law 201-209 (1979).

extent to which judges deviate from formal legal rules and are allowed or required to balance between elements such as social goals or legal principles. Some scholars perceive the judges' role as applying rules in a straightforward way, and others claim that no such application is possible and that discretion is inevitable in judges' work.[14] For all participants in this debate, reference to external considerations such as conflict resolution options is considered irrelevant. Our claim is that the reality of legal conflicts processing, given that most cases settle and ADR procedures have become institutionalized, requires an expansion of the notion of judicial discretion. Judges can consider aspects of conflict resolution, incorporate them into their decision-making process, and, with the appropriate legislation and regulation, they could perform this role in a predictable way.

The common perception of judicial activity in the dispute resolution process is often referred to as "bargaining in the shadow of the law,"[15] and this concept is a significant part of the *rights*-based evaluation in the bargaining process. However, as John D. Rooke correctly suggested —

> [T]he 'shadow of the law' concept is not exclusively associated with assessing rights in a direct sense. It also provides the context — the BATNA/WATNA (best and worst alternatives to negotiated agreement) — by which the parties can assess the potential of a settlement based on interests, as an alternative to a litigation outcome based on rights.[16]

Further, we believe that bargaining in legal cases may be carried out in the shadow of a variety of conceptions of law, and, at the same time, legal decision-making should occur in the shadow of various conceptions of conflict resolution and bargaining. The nature of judicial discretion, as described in contemporary jurisprudence, is more a determination of the relative weight and importance of each legal principle in the process of balancing between the principles in a particular cases rather than a basing of judicial discretion on one principle only while rejecting others.[17] Judicial decision-making could be based, in principle, on rights only, on policies only, on relationships, identities, encounters, or on any combination of rights and interests. Conflict resolution can be affected in the shadow of ideas of judges

14. *Id*. *See also* for the debate between Hart and Dworkin, Ronald Dworkin, *The Model of Rules* 35 U. CHI. L. REV. 14, 32–40 (1967).

15. *See, e.g.*, Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 950 (1979).

16. Rooke, *supra* note 5, at 175.

17. *See, e.g.*, Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823, 846 (1972); Oliver W. Holmes, Collected Legal Papers 181 (1921).

deciding by rules, balancing social interests, increasing efficiency or promoting social justice.

We assume that judges can expand the horizons of their judicial work, when they are authorized to do so by the parties, in order to capture some of the various contexts that characterize the conflict before them. Judges can use their authority, with the explicit consent of the parties,[18] to incorporate conflict resolution considerations into their decision in a court arbitration process.[19] This can occur when the parties fail to reach settlement or a mediation agreement outside the court, and 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 be dispute system designers and use broad discretion relating to conflicts to redirect parties to other processes. The unique position of judges to consider both conflict and legal principles may produce new and interesting roles for judges in promoting the resolution of conflicts.

Judges' expanded discretion may be used during their effort to resolve conflicts. Conflict resolution studies and ADR literature suggest modes of transforming conflicts,[20] and we would like to see these modes employed by judges inside the courtroom. Alternatives may provide helpful tools for judges to promote constructive solutions to conflicts. Compromise settlements can be reached in two ways — by

18. Indeed, as stated by Arthur Kuflik, *Morality and Compromise*, in COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 9, at 38, 41 [hereinafter Kuflik, *Compromise*], "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 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."

19. It should be noticed, as asserted by Kuflik, *id.*, 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." "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." 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."

20. *See*, *e.g.*, THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Morton Deutsch, Peter T. Coleman, and Eric C. Marcus eds., 2011); STEPHEN B. GOLDBERG, ERIC D. GREEN, AND FRANK EA SANDER, DISPUTE RESOLUTION (1985).

negotiation or by arbitration.[21] A negotiated settlement will sometimes involve the services of a mediator — someone who has no binding authority but who acts as a go-between.[22]Arbitration may be undertaken either by a person who has been selected by the parties themselves or, as in the test case presented in the present article, by a judge in a court, who acts under authority of the state.[23] Parties' authorization for conflict resolution by court arbitration by way of compromise verdict can be regulated and may include explicit reference to the conflict and legal considerations we list here. 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.

The model we suggest is a dual concern model. It reflects the intersection between the legal world and the world of conflict resolution. The model represents the link between the legal world (including challenges to the idea of mechanical formalistic jurisprudence) and the conflict resolution world (including challenges to the realistic positional bargaining perspective of conflict as a one-dimensional struggle for scarce resources. Judges operate in the legal world and the world of conflicts and, in using their discretion, can reflect the richness of these two evolving worldviews. The dual-concern model includes two axes: the legal (and extra-legal) considerations and conflict considerations. These two types of considerations are introduced in the following sections. The axis of law moves along the critical lines, beginning with formalism and continuing to the external opposing social goals of efficiency and social justice. The axis of conflict resolution moves from the perspective of competitive positional bargaining to narrative and identity as the source of conflict. Judges can aspire to one legal or extra-legal consideration or another by adopting a particular conflict resolution perception or another,

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

22. Stephen Goldberg, Frank Sander, Nancy Rogers & Sarah Cole, Dispute Resolution: Negotiation, Mediation, Arbitration, And Other Processes 6 (6th ed., 2012).

23. *Id.* at Chapter 7; *see also* Yuval Sinai & Michal Alberstein, *Court Arbitration by Compromise: Rethinking Delaware's State Sponsored Arbitration Case*, 13 Cardozo Pub. L. Pol'y & Ethics J. 739, 741-743 (2015); Cal. Civ. Proc. Code § 1141.10–1141.31 (West 2016).

and vice versa. Some existing models of ADR explicitly address these two poles.[24]

THE DUAL CONCERN JUDICIAL DISCRETION MODEL: BETWEEN LEGAL AND CONFLICT CONSIDERATIONS

Narrative clash 5						
Identity struggle 4						
Relationship Crisis 3						
Barriers to Conflict Resolution 2						
Barriers to Settlement 1						
Conflict Considerations / Legal and extra-legal Considerations	Mechanical Jurisprudence Formal Rules A	Equity B	Precise Justice C	Policy and Principles Instrumentalism D	Efficiency E	Social Justice F

The dual-concern model includes two axes: the legal (and extra-legal) considerations and conflict considerations. These two types of considerations are introduced in the following sections.

B. *Legal and Extra-legal considerations: From Mechanical Jurisprudence to Efficiency and Social Justice*

1. *Classical mechanical jurisprudence: the application of formal law (A-F, 1-5)*

Ideal-type judicial decision-making, which is often defined as the essence of adjudication, and of arbitration as well, entails deciding

24. Our offer for a test case of compromise verdicts (Chapter III) will be a model of judging which incorporates this complexity.

conflicts on the basis of strict legal rules. According to this perception, conflicts are brought before judges after all negotiation have failed, and at this point judges are asked to engage in rational rule-based decision-making.

Judicial discretion in our dual concern chart begins when the two axes of conflict and legal considerations merge. It does so at this point since judges operate in this ideal-type mode as if rules apply in definitive ways to conflicts, which are translated into strict legal questions about facts and norms. A narrow perception of the conflict as a legal dispute about rules is enforced at this juncture (A1).[25] A broader perception also includes extra-legal considerations, which are discussed in this section, such as equity (B), precise justice (C), policy and principles instrumentalism (D), efficiency (E), and social justice (F). A broader perception may also include conflict considerations (1-5), which are described in detail in the following section (section D).

When moving up the scale of conflict considerations, from the perspective of the judge making a decision under a formalistic mechanical notion of law, ideas about the conflict may vary significantly. Moving from a narrow positional bargaining in which parties aim to predict what the court will decide, the judge may be authorized by the parties to take into account a broader perception of interests and needs to be addressed in a problem-solving manner (A2). The judge can also perceive the conflict as reflecting a crisis in a relationship (A3), a clash of identities (A4) or the intersection of opposing narratives (A5). Such a broad perception can be determined within the court proceedings before the judge, within the written decision of the judge, and in referring cases to alternative methods.

Another matter to be considered is the reciprocal relationship between the substantive considerations by which the parties wish the decision to be made and the procedural character of the court proceedings. It is clear, in our opinion, that the procedure, too, should be adapted according to the proposed substantive considerations. For example, parties can agree that their dispute should be decided on the basis of conflict considerations that concern the relationship between them (3, A-F). In that case, it is clear that regular adversarial processes that aggravate the conflict between the parties are not suitable. By contrast, adopting non-adversarial procedures, which will

25. Compromise verdicts or arbitration in this mode aspire to predict the final legal decision as the strict application of rules.

help to create an atmosphere of cooperation and appeasement between the parties, could be highly beneficial for all sides. The procedural aspects of our suggested model are beyond the concern of this article. However, some procedural devices are mentioned in the following sections while dealing with the substantive judicial considerations.

2. *Equity: a sense of justice (B, 1-5)*

Once we move to the right side of the chart on the legal considerations axis, assumptions about the possibility of strict application of legal rules are critically attacked. The first level of attack, already defined by Aristotle, is the search for equity and the inability of the general rule to capture a sense of justice of a particular case.[26] When judges invoke equity in decision-making they use a hunch, a sensitivity that goes beyond the rules, and they expand the formal rules to incorporate a new standard.

The nature of law is to determine rules, and to provide solutions that 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 as may be the situation in most of legal cases, in which the particular circumstances involved do not align with the strict rules. Aristotle dealt with these situations and suggested overcoming them through the use of equity, or *epiekeia*, 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.[27] The dialectic between legal formality and other considerations is regulated differently within each legal system.

Traditionally, as shown by Atiya, in the English legal tradition there exist two widely differing approaches to dispute resolution and the law.[28] 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.[29] Throughout much of English legal history these two approaches have been embodied in the systems of the

26. ARISTOTLE, NICHOMACHEAN ETHICS 83–84; Anton-Hermann Chroust, *Aristotle's Conception of "Equity" (Epieikeia)*, 18 NOTRE DAME LAW 119 (1942).

27. *Id.* at 122. *See also* Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, LAW & CONTEMP. PROBS. 263, 263-295 (1996).

28. P. S. Atiya, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249 (1979).

29. *Id.* at 1250.

Common law and Equity respectively.[30] With the crystallization of Equity laws, and especially after their inclusion within the common law system during the 19th century, they became more general and predictable.[31]This process of formalization helped to prevent arbitrariness and, at the same time, made these laws less case-sensitive.[32]

When judges assume that a case cannot be decided by a strict rule and that it requires equity considerations, this may be a reflection of unique conflict characteristics of the dispute and it may reflect an inherent problem in the rule. Either way, when they exercise equity judgment, judges can combine, within our dual concern model, perceptions of the conflict which may vary between pure competitive bargaining on narrow positions (B1) and complex narration of identities (B, 4-5) as required in such cases.

3. *Precise justice: formal law should be more nuanced (C, 1-5)*

In 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.[33] 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 some degree of discretion.[34]

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

30. *Id.*

31. For a more extensive discussion of this topic, see C. K. Allen, Law in the Making 399-441 (1964).

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

33. *See* G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819 (1986).

34. Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 470(1988).

principles is part of the process of legal decision making.[35] This balancing cannot be structured rationally, according to Realists and 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 partial and subjective.[36] These critiques of and challenges to basic legal tenets produced turmoil in legal academia and have been followed by various efforts at reconstruction.[37] The indeterminacy and uncertainty of rules often require a more nuanced, structured decision-making, which incorporates situations that are statistically complex, involving probabilities that are not easy to apply and choices that depart from the winner-takes-all principle. Such cases require a mode of decision-making which can be called "precise justice".[38] Aspiring to "precise justice" 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" is fundamentally inappropriate for the legal or factual situation. This model tries to answer theoretical criticism that has been leveled at the law.

Discussions of the modes to overcome the indeterminacy of the rule of the formal law have been conducted mostly in the context of compromise verdicts, which will be discussed later in this article; in general, this mode of decision-making has been praised by some scholars as a more justified method which overcomes the traditional dichotomous all-or-nothing or "winner takes all" method of judicial decision making. Some perceive its merits as reflecting "Solomonic justice"[39] and others have viewed compromise as "precise justice",

35. *Id.*; *see also* Karl N. Llewellyn, *Some Realism About Realism-Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931).

36. Jerome Frank, *Say it with Music*, 61 HARV. L. REV. 921, 923-24 (1948). *Cf.* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 612-19 (2007) (noting that, unlike Formalists, Realists take judges' biases into account).

37. *See id.*; *see also* Walter B. Kennedy, *Realism, What Next?*, 7 FORDHAM L. REV. 203 (1938).

38. John E. Coons, *Compromise as Precise Justice*, 68 CAL. L. REV. 250 (1980) [hereinafter: Coons, *Precise Justice*].

39. Joseph Jaconelli, *Solomonic Justice and the Common Law*, 12 OXF. J. LEG. STUD. 480 (1992) [hereinafter: Jaconelli, *Solomonic Justice*].

emphasizing the element of equality.[40] 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.[41] Parties in those cases may be considered as having the right to receive a compromise verdict, or in our words, the judge is authorized by the parties to have a broad discretion based on the indeterminacy of the law. 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."[42]

When judges perceive their legal decision as aspiring to precise justice, they may have various ideas about conflicts, including perceiving them as positional and narrow (C1), or understanding them to be based on biases and subjective perspectives (C2), as well as relationship-driven (C3) or identity-inspired (C4).

4. *Policy considerations: balancing policies and principles instrumentally (D, 1-5)*

The assumption that legal decision makers can rely on legal rules without reference to policy arguments or to any moral principles derives from the assumption of law as a closed, unified rational system. In formalistic terms, any appeals to policy considerations or unwritten principles of the law are rejected. Legal positivists claim that law consists of a system of rules, and therefore, in "hard" cases, where no clear-cut rule exists, non-legal factors guide the judges in their decision.[43]

Rejecting this claim, a large body of writing maintains that legal decisions are based on values, policy considerations, and legal principles that do not necessarily correspond to the definition of a rule, but are still not political or subjective by nature. The most famous elaboration of such a claim has been presented in the writings of Ronald Dworkin.[44] Dworkin claims that discretion in hard cases is limited because judges are bound by the principles and policies inherent in legal norms.[45] While his interpretive ideal of "law as integrity" depicts law as a unified system, unlike classical scholars of formalism, Dworkin does not suggest that judges will find the "right answer" in

40. John E. Coons, et al., *Approaches to Court Imposed Compromise – The Uses of Doubt and Reason*, 58 Nw. U. L. Rev. 750 (1964) [hereinafter: Coons, *Compromise*]; Coons, *Precise Justice*.

41. Golding, *Compromise* at 21.

42. Jaconelli, *Solomonic Justice* at 485.

43. H. L. A. Hart, The Concept of Law, Oxford University Press (2012) 124-154

44. Dworkin, *supra* note 13.

45. Dworkin, *No Right Answer*, *supra* note 13, at 113.

the law by discovering the particular norm that solves the case. Rather, he views the correct legal solution as the one that reflects the most coherent and just order of principles and policies that underlie the norm.[46]

Over the past century, the Legal Process school of law, as well as many realists and pragmatists, promoted a notion of decision-making in law based on purposive interpretation.[47] Legal rules under this perception cannot be applied in a straightforward manner without addressing and balancing the social policies behind the law. The policies and principles underlying the legal formula are considered the basis for a legal mode of decision-making based on reasoned elaboration[48] and instrumental reasoning and not based on the straight application of formal rules. Judges under this perception mediate social goals when they apply rules.[49]

When judges exercise discretion within the dual concern model, they may assume that the parties care about narrow positional interests, whereas they — the judges — perceive their role as to be mediators of social goals (D1). Judges may also assume (based on parties' consent) that the parties mediate private interests in the shadow of social interests, which the court balances (D2). They can also assume that a judicial decision based on external balancing of social interests can never capture relationships (D3), identities (D4) or narratives (D5) that underlie the legal conflict before them. They may even reflect their perception of the limits of law and the challenges of conflict resolution in their writing.

5. *Efficiency considerations: application of legal rules should mimic the market (E, 1-5)*

During the 1970s the disciples of the Legal Process school of law suggested new perceptions of law, which were not rule based, but instead provided reconstructive notions of the legal system.[50] The Law

46. DWORKIN, Hard Cases, *supra* note 13, at 1094; *see also* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 29 (1967).

47. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (William N. Eskridge, Jr. & Philip P. Frickey, eds.,1994); *see also* Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J. L. REFORM 561, 568 (1988).

48. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change,* 59 VA. L. REV. 279 (1973); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

49. *Id.*

50. MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION 32-41 (2002).

and Economics school of law claimed a central role for efficiency in applying legal rules and reducing transaction costs while also believing that it was central to a judge's role to mimic the markets.[51] Richard Posner, the founder of this movement, suggested that instead of looking into the language of law in search of an internal logic, which he calls mystique, judges should be pragmatic and aspire to apply the social sciences, and especially economics, to resolve legal problems.[52] According to this approach, private ordering and the market should be encouraged and promoted through legal decision-making. Legal rules are required when transaction costs prevent efficient deals, and judges should use their discretion in order to promote a more efficient allocation of resources in society.[53]

When judges use their discretion and apply economic principles and social science, their perception of legal conflicts may vary. They treat the legal conflict as a competitive bargain based on game theory rationality (E1), relying on a broad perspective of the interests and needs implicated in the situation at hand (E2), in which the conflict is about subjective perspectives that can be balanced constructively. Ideas of conflict as a crisis in a relationship (E3) may go together with a judicial perception of pragmatic economic discretion, while identity (E4) and narrative perspectives (E5) may be less common due to their less positivistic quality; in principle, however, such combinations might exist.[54]

6. *Social justice considerations: law as promoting social change and empowering weak groups in society (F, 1-5)*

On the other side of the academic spectrum, as another reconstructive school resisting the Legal Process perspective, there is the aspiration to apply legal rules in a manner that promotes social

51. Richard A. Posner, The Problematics of Moral and Legal Theory (1999); Richard A. Posner, Economic Analysis of Law (2007).

52. Richard A. Posner, The Problems of Jurisprudence (1990).

53. Roberto M. Unger, The Critical Legal Studies Movement (1986).

54. Under a law and economics individualistic perspective, identity is usually universal and embedded in the person, and elements of culture are considered as private tendencies of the individual. *See* Jay Rothman and Michal Alberstein, *Individuals, Groups, Intergroups: Theorizing about the Role of Identity in Conflicts*, 28 Ohio St. J. on Disp. Resol. 631 (2013).

change. The Law and Society movement,[55] the Public Law movement,[56] and the Critical Legal Studies movement[57] provided countermotivation to Law and Economics during the 1970s. These movements proposed resisting the market, and using legal rules to challenge repressive and unequal structures in society.[58] These movements, especially Public Law, emphasized a progressive and moral interpretation of law, reflecting and promoting lofty values of the existing moral community.[59] According to the Public Law perception of legal interpretation, as demonstrated by the ideas suggested by Owen Fiss, law is about transforming society, adjudication is about promoting social values,[60] and structural reforms, such as those introduced by *Brown v. Board of Education*, are the preferred form of justice in our time.[61] Reality is constructed and not given as in the Law and Economics perception, and when judges exercise discretion according to this view, they should use institutional imagination and resist the market in the name of social justice and rights. The promise of law, according to this view, is to create a bridge between an imagined reality and the world.[62] This bridge is created through judges' narratives and their development of a normative world.

The perception of judges' discretion as aiming to transform society and improve social justice can coincide with all manners of conflict resolution, but in terms of the bargaining and the interests perspective of conflict resolution (F1, F2), the two modes of decision-making may seem to contradict each other. This contradiction was the background for the opposition by Owen Fiss, an early Public Law proponent, to the pursuit of settlement through ADR.[63] His idea of conflict resolution was of positional bargaining (1) and not of pragmatic problem solving based on interests (2). Fiss opposed ADR since, instead of changing the social order and promoting justice through

55. Susan S. Silbey and Austin Sarat, *Critical Traditions in Law and Society Research*, 21 L & Soc'y. Rev. 165 (1987).

56. William N. Eskridge, Jr. and Gary Peller, *The New Public Law Movement: Moderation as a Post-Modern Cultural Form,* 89 Mich L. Rev. 707 (1990).

57. Roberto M. Unger, *supra* note 53.

58. Mark Tushnet, *Critical Legal Studies: A Political History*. Yale L.J. 1515 (1991).

59. Roberto M. Unger, The Critical Legal Studies Movement: Another Time, a Greater Task. (2015).

60. Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982).

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

62. Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986).

63. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

institutional reforms, parties were referred to settling and bargaining while their conflict was privatized.[64] Fiss did not address other perceptions of relationships, identities, or narrative. Adopting the dual-concern model can recontextualize Fiss' critique, and allow judges, when authorized by the parties, to explore ways to combine the aspiration of social justice with the interest in the resolution of conflicts.

C. *Conflict resolution considerations: From competitive bargaining to identity conversation*

1. *Overcoming barriers to legal settlement: bargaining in the shadow of various legal perspectives (1, A-F)*

The common perception of the intersection of law and conflict is that of a competitive negotiation, which assumes that the expected legal outcome will be a formal application of law.[65] The parties bargain "in the shadow" of that prediction and their "private ordering" is a market of rulemaking in which new sub-rules and arrangements constitute the law in action.[66] The legal conflict setting, which is assumed under this notion, is that of competitive bargaining. This means that the goals in the conflict oppose each other, that resources are limited,[67] and that parties are aspiring to maximize their benefits at the expense of each other. Perspectives on parties' behavior in legal negotiation are often founded on the competitive paradigm, and some law and economics studies have dealt with the correlation between cost reduction and willingness to settle.[68] Some procedural rules of pre-trial aim to improve the information exchange within this competitive interaction.

When judges understand the conflict to be competitive bargaining of a win-lose interaction, they may perceive their decision as the clear-cut mechanistic application of the legal rules (1A). Judges may also assume that this case has a principle that is vaguer than the formal legal rules, and relates to equity sensitivity, and therefore parties' predictions should reflect this vagueness (1B). Sometimes, as

64. For a critique of Owen Fiss and for other discussions of his claim see Alberstein, *supra* note 50, at 185–250.

65. Mnookin & Kornhauser. This paper provides one of the prevailing models for understanding the relationship between legal decision-making and conflicts. It assumes that prediction of the legal decision-making affects the private ordering of parties, which is based on prediction of a mechanistic application of rules.

66. *Id.* at 958.

67. Roy J. Lewicki, David M. Saunders & Bruce Barry, Negotiation (7th ed., 2014).

68. *See, e.g.*, R. Posner, Economic Analysis of Law, 522–526 (3d ed. 1986).

in precise justice, judges may assume that compromise is the right verdict, and they can be encouraged to consider a less strict prediction (1C). When judges are more policy-oriented, their push to competitive bargaining may be considered as an effort to privatize the conflict (1D), and their call to the parties would be to consider the conflicting principles and policies behind legal rules. Judges who pursue social justice or efficiency may nevertheless call upon parties to engage in more private bargaining on their own (1E, F).[69]

2. *Overcoming barriers to conflict resolution: Problem Solving Based on Private Interests and Needs (2, A-F)*

The prominent conflict resolution emphasis in legal decision-making derives from developments in negotiation studies and in court administration in the 1970s and 1980s.[70] Since the 1970s and 1980s, negotiation studies have developed a complex perspective on negotiation and conflicts, portraying the conflict phenomenon as both deeper and more complex than surface-level positional bargaining.[71] Legal disputes, under such a perception, are only shallow façades, which conceal an array of interests and needs, including emotions and subjective perceptions.[72] These interests and needs can be addressed and constructively processed in a collaborative way, with parties expanding the pie and overcoming strategic and psychological

69. The strong resistance to ADR during the 1980s was inspired by a social justice orientation to law which depicted the movement as denying the social aspects of conflicts.

70. *See, e.g.*, Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Carrie Menkel-Meadow, *Toward another view of legal negotiation: The structure of problem solving*, 31 UCLA L. REV. 754 (1984).

See, e.g., Herbert C. Kelman, *The Role of National Identity in Conflict Resolution*, *in* SOCIAL IDENTITY, INTERGROUP CONFLICT, AND CONFLICT REDUCTION 3, 187, 198 (2001).

71. *See, e.g.* Herbert C. Kelman, "The role of national identity in conflict resolution," Social identity, intergroup conflict, and conflict reduction 3 187 (2001).

72. 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* Lon L. Fuller, *The forms and limits of adjudication*, 92 Harv. L. Rev. 353, 371–372 (1978)).

barriers.[73] From the perspective of the ADR movement, 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.[74] The conflicts which underlie legal disputes are usually much broader than the issues presented in courts and they involve economic, emotional, cultural, and other various aspects which cannot be captured through legal lenses. Such conflicts can be processed in a problem-solving manner while overcoming the common adversarial mode.[75]

Analysis of conflict resolution will typically include two types of questions:

a. 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 investigating the core of the conflict is "why?" Why do you claim you are entitled to a certain outcome? What is important 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 their understanding of the conflict, creating new solutions and so forth.

b. What are the impediments preventing 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,[76] psychological barriers, unrealistic expectations and so forth.[77]

Judges who perceive the legal conflict as a situation of integrative bargaining will refer parties to mediation as a prerequisite to

---

73. Kenneth J. Arrow, Robert H. Mnookin, Lee Ross, Amos Tversky and Robert B. Wilson, Barriers to Conflict Resolution (1995).

74. Lon L. Fuller, *The forms and limits of adjudication*, 92 Harv. L. Rev. 353 (1978).

75. Menkel-Meadow, *supra* note 70.

76. Jean Poitras & Susan Raines, Expert Mediators: Overcoming Mediation Challenges in Workplace, Family, and Community Conflicts 131 (2013). "Jackpot syndrome" is the phenomenon in which a party becomes entrenched because they believe they will receive a large payout in court, in which case, mediation seems like a foolish proposition.

77. Frank A. Sander & Lukasz Rozdeiczer, *Matching cases and dispute resolution procedures: Detailed analysis leading to a mediation-centered approach*, 11 Harv. Nego. L. Rev. 1 (2006). The authors of 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.

appearing in court. Judges or policy-makers may make mediation mandatory when such an assumption is strong, such as in family cases. When these judges render decisions and exercise their discretion they may have a formalistic assumption about law, as determined by strict rules (2A). They can also perceive law as equity as in some cases or as precise justice (2B). A pragmatic judge who engages in policy balancing when deciding legal rules can perceive integrative bargaining as performed in the shadow of the public interests (2D). A Law and Economics judge will portray adjudication as a public good, able to decide cases that the market cannot effectively manage (2E). A social justice judge may perceive the public interest as trumping private interests in some cases (2F). When judges become primarily focused on conflict resolution, as in the case of a settlement judge in pre-trial, their perception about law may vary along the legal and extra-legal consideration axis (2, A-F).

3. *Transforming relationships through empowerment and recognition (3, A-F)*

Second-generation models in conflict resolution began to challenge the problem-solving approach as being too efficiency oriented.[78] According to the Transformative school, conflict is a positive opportunity for moral growth and not a problem to be solved.[79] In view of these assumptions, efforts directed at conflict engagement should focus on empowerment and recognition, not on interest satisfaction, and dialogue and relational growth should be the paramount goal of mediation.[80] The relational perspective on conflicts assumes that emotions and relationships are much more central and foundational for the understanding of conflicts than interests and basic needs. Parties need to work on their capacity to communicate and to strengthen healthy connections between self and others. This approach was named "second generation" in the field of conflict resolution, since in contrast to the first generation, which offered pragmatic tools without reflection on the theory behind them, here a theory of relationships, combined with an "ethics of care," was offered to renew the

78. Sara Cobb, *Creating Sacred Space: Toward a Second-Generation Dispute Resolution Practice*, 28 FORDHAM URB. L.J. 1018 (2001).

79. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (1994).

80. Robert A. Baruch Bush and Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002); Joseph P. Folger and Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Mediation Practice*, (13)4 MEDIATION QUARTERLY 263 (1996).

promise of mediation. Problem solving and overcoming barriers were rejected by this school.

When the conflict is perceived as a crisis in a relationship, where dialogue facilitation can help the parties to resolve the crisis by themselves or make decisions about it, the legal solution is one option on which the parties can decide. The perception regarding what is the legal decision in terms of its relationship to rules may vary along the scale of formal law, equity, precise justice, social justice or efficiency (3, A-F). In a famous mediation-simulation called "the purple house" videotaped by the founders of the model, the black woman in the mediation is interested in going to court to have the case decided by a jury of her peers and to fight the discrimination she experiences as a black woman.[81] The woman holds a social justice perspective of law as redistributing resources in society in favor of disempowered groups. Mediating in the shadow of such a perception of law (3F) makes her reluctant to do the relational work. The separation between the rights issues and the relationship at the center of the mediation helps to reach transformation for both parties. Judges may create moments of relational work in their courtrooms as well, and separate them from the legal considerations, which may vary between formalism and social justice (3A-F).

4. *Constructively engaging with identities through consensus building (4, A-F)*

Identity "is a self-perception filled by a cultural formula."[82] According to this definition, identity can most usefully be described by and conceptually organized into three main categories: individual, group, and intergroup identity. When referring to these three levels of identity, our basic assumption is that while some aspects of identity are ascribed, identity more generally emerges as a social construct.[83]

Identity varies across individuals, groups, or inter-groups, but it always conditions the conflict perception. Parties may perceive themselves as separated maximizers, pursuing their self-interests in the

81. *The Purple House Conversations* (Institute for the Study of Conflict Transformation, Inc., 2003).

82. Rothman & Alberstein, *supra* note 54.

83. Social Identity and Intergroup Relations 2 (Henry Tajfel ed., 1980) ("social identity will be understood as that *part* of the individual's self-concept which derives from their knowledge of their membership of a social group (or groups) together with the value and emotional significance attached to that membership"); Dominic Abrams, Social Identity Theory: Constructive and Critical Advances (1990).

most efficient manner and expressing individualistic identities. Parties might identify themselves on the group level and experience themselves as part of a collective social unit that has a common narrative, or one that challenges the hegemonic identity narrative. They can experience themselves as sharing many social identities and groups and may be considered as located on the intergroup level. All these experiences are based on the cultural formula that informs identity. When identities are perceived as clashing by the parties, engaging with the conflict through an interests focus may not suffice. Identity cannot be considered to be an "interest," or even one need among others; rather, it should be recognized as an ideological framework. Jay Rothman has suggested that when people are organized around a group identity in a collaborative, consensus-building manner, a combination of transformative mode and pragmatic mode is needed in order to enable constructive processes. This means that parties should acknowledge antagonism, move through resonance, and later get to a level of implementation and action.[84] It also means that they may build plans of action while reflecting on their identities, without going through an antagonistic phase.[85]

An innovative experiment in engaging constructively with identity clashes that underlie the legal conflict was conducted in 2002 in Cincinnati, following a class action suit regarding profiling of the black population by the police. The federal judge nominated a special master to conduct a broad-scale identity dialogue, and, following a few years of mass participation in this process, a consensus plan for reform of the police was brought before the judge for her approval as a legal ruling.[86] It seems that the federal judge, in exercising her discretion, emphasized the conflict resolution aspects of the conflict, and perceived it as identity-based. This led her to delegate her power to a

84. ARIA is a framework for transforming identity conflicts developed by Rothman and named after the four phases of its process: Antagonism, Resonance, Invention, and Action. *See* JAY ROTHMAN, RESOLVING IDENTITY-BASED CONFLICT: IN NATIONS, ORGANIZATIONS, AND COMMUNITIES 17–20 (1997) ("Antagonism surfaces the battle . . .Resonance fosters a harmony that can emerge between disputants . . . . Inventing is a process of brainstorming mutually acceptable, creative and integrative options for addressing central and underlying aspects of the conflict . . . . Action is then built upon the previous stages, implementing what should be done and why, by whom, and how?").

85. FROM IDENTITY-BASED CONFLICT TO IDENTITY-BASED COOPERATION: ARIA APPROACH IN PRACTICE (Jay Rothman ed., 2012).

86. Jay Rothman & Randi Land, *The Cincinnati Police-Community Relations Collaborative*, 18 CRIM. JUSTICE 35–42 (2004); Jay Rothman, *Applying Action Evaluation on a Large Scale: Cincinnati Police-Community Relations Collaborative – Successes, Failures and Lessons Learned*, *in* FROM IDENTITY-BASED CONFLICT TO IDENTITY-BASED COOPERATION: THE ARIA APPROACH IN THEORY AND PRACTICE (Jay

facilitator and mediator. Her decision was based on a mass consensus that was reached among the various identity groups within the community in Cincinnati. It became the foundation for a reform of the police in the city. When an offer to consider such a process was made after similar riots in New York in 2013, it was criticized by the appellate court as breaching the boundaries of legal decision-making.[87] The legitimacy of using such methods seems not to have been determined yet; nevertheless, the model of Cincinnati is often cited as an example of a constructive use of the role of law in society.[88]

A judge who perceives a certain conflict as a political struggle about identities may assume that the role of law is to de-politicize the conflict by using strict rules (4A). She may also believe that equity is the way to decide such cases (4B), or policy balancing (4D), which is a more legal, nuanced way to distribute resources in society. The judge may also use the market as the background and perceive her legal role as mimicking it while overcoming transaction costs (4E). She may also believe that the role of law is to promote justice and therefore a progressive, value-driven decision is needed in this case in order to promote social rights (4F). The more coherent combination would be the social justice oriented judge who politicizes the conflict and who uses identity based consensus building, which is a mode of overcoming politics through mass private ordering (4F). In reality, activist progressive judges may prefer normative decision-making rather than harmonious consensus building.

5. *Reconstructing narratives of entitlement (5, A-F)*

The narrative approach in conflict resolution assumes that ideologies and social constructionist perceptions are the core of conflict; therefore neither interests nor relationships, nor even identities, should be the focus of intervention.[89] Conflict processing should focus on changing the narratives of the parties, while transforming their

---

Rothman ed., 2012); and Jay Rothman, *Identity and Conflict: Collaboratively Addressing Police-Community Conflict in Cincinnati, Ohio*, 22 OHIO ST. J. ON DISP. RESOL. 105 (2006).

87. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

88. Elliot Harvey Schatmeier, *Reforming Police Use-of-Force Practices: A Case Study of the Cincinnati Police Department*, 46 COLUM. J.L. & SOC. PROBS. 539.

89. Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOTIATION J. 245 (1993); Sara Cobb, *A Narrative Perspective on Mediation: Toward the Materialization of the 'Storytelling' Metaphor*, NEW DIRECTIONS IN MEDIATION: COMMUNICATION RESEARCH AND PERSPECTIVES 48 (Joseph P. Folger and Tricia S. Jones, eds., Sage Publications, Inc., 1994) 48; SARA COBB, SPEAKING OF VIOLENCE: THE POLITICS AND POETICS OF NARRATIVE IN CONFLICT RESOLUTION (2013).

identities and helping them to overcome their exaggerated perception of entitlement.[90]

From a narrative perspective, parties who come before a court are not motivated by biological needs or economic interests. Instead, their quest should be understood through the prism of culture and narrative. Parties perceive injury when society, culture, and the law tell them they were deprived of a certain entitlement.[91] A conflict is constructed when a gap exists between a perceived reality and the guiding norms of the parties to the conflict. The work of the mediator would be to help parties tell their stories in a way in which entitlements do not clash, and instead co-exist. Such a transformation could happen through a long process of co-authoring and reframing.

Judges who perceive a conflict as a clash of narratives of entitlement, may be formalistic about law (5A), equity-oriented (5B), policy-balancing (5D), or social justice- or efficiency-oriented (5, E-F). Judges may test parties' narratives of entitlement, and challenge them during court proceedings or pre-trial. Deep relational work that challenges the parties' multiple identities and reconstructs them cannot be done in court, and may be too time-consuming to happen in the shadow of court proceedings.

D. *The Boundaries of Discretion*

Beside empowering judges and court administrators to exercise a broad discretion when processing legal conflicts, parties to a legal dispute may choose various modes of hybrid discretion when they are empowered to do so by law. Allowing the parties to a conflict to agree upon a broader format of judicial discretion, including both broad conflict and extra-legal considerations, is not unlimited; it is restricted by public considerations. Indeed, this is a matter of an agreement between the parties, which expresses the autonomy of will, but there is also a third party to this agreement – the court. Must the court be constrained by every agreement between the parties regarding the nature of the judicial considerations that the court must weigh when resolving a dispute between them? Certainly not. If the parties were to agree between themselves that the court must decide by tossing a coin, clearly the court would not be bound by such an agreement, even though it expressed the free will of the parties. The

90. Winslade & Gerald Monk, Narrative Mediation: A New Approach to Conflict Resolution (2000).

91. William L. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming,* 15 L. & Soc. Rev. (1980-1981) 631.

court is a trustee of the public, and must serve considerations of justice, integrity, and other important values that are accepted by society. What then are the boundaries of the possibility of expanding judicial discretion? What are the appropriate criteria that the court should invoke in examining the agreements reached by the parties in relation to the scope and nature of judicial discretion?

A broad study of this issue requires detailed research and analysis that are beyond the scope of this article. However, we wish to mention, in a general way, three criteria with which the court should examine whether it is appropriate to adopt the expanded judicial discretion that is sought by the parties, to include the broad considerations that are described in the preceding sections.

The first type includes criteria that are common in examining procedural contracts. The second criterion touches directly upon the model presented in this article. It includes standards relating to the nature of the considerations and their distance, in relation to the center of formal rules in the above chart, from the set of considerations that are accepted in a normal legal dispute. The third type relates to the examination of the compatibility of the specific conflict with the appropriate legal framework, similar to the Dispute System Design criteria used in ADR.[92]

We shall now describe in detail the nature of the three types of criteria that have been proposed. We begin with the first type: those invoked in the literature in relation to procedural contracts.[93] In our opinion, these must also be applied to contracts that involve the substantive judicial legal and conflict considerations that the court must weigh, according to our model, when resolving a conflict. This is because we believe there is no difference between substance and procedure in the context of contracts regarding judicial function.

The practice of parties agreeing on the procedures and the substantial judicial considerations that will govern the resolution of their dispute is an inherent characteristic of various private mechanisms, such as mediation and arbitration. In these procedures, not only do the parties set the procedures that will apply to their dispute, but they also agree on the substantive applicable law. Nevertheless, applying a similar concept of private parties designing procedural and

92. *See, e.g.*, John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 109–18 (2002).

93. *See, e.g.*, Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723 (2011).

substantive rules in public litigation seems problematic. Indeed, several constraints on the parties' autonomy within adjudication have been set, and some scholars have identified the criteria that should inform the enforcement of private agreements that set procedures in public courts.[94] The debate over private party rulemaking is sharply divided. Some scholars favor broad freedom to customize procedure both before and after a dispute arises.[95] Others urge much stricter limits.[96] Some scholars highlight a key feature of the analysis — the timing of the party-rulemaking — i.e., whether it precedes or follows the emergence of the dispute.[97]

We support the relatively expansive approach granting the parties freedom of negotiation, both with respect to the procedural rules and with respect to the substantive legal considerations that the court will weigh when deciding on the dispute. In view of the many benefits that the parties are likely to gain from drawing up procedural contracts, as well as contracts that chart the judicial considerations that the court will take into account in making its decision, we suggest that as a general default rule, the court honor contracts that maximize the interest of the free will of the parties and "the principle of private autonomy." We suggest using the appropriate criteria for examining the question of the enforcement of these contracts by the court. These criteria assume the task of deciding on the dispute in view of the possibility of the existence of a gap between the private interest of the parties in drawing up a contract in relation to the substantive and the procedural rules that will apply in their case, and the social interests embodied in conducting a legal proceeding. It also assumes deciding in the dispute in view of the existence of an institutionalized legal system whose decisions have expressive value and reflects a public sense of justice. According to this criterion, which is

94. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules through Party Choice*, 90 TEXAS L. R. 1329 (2012); Daphna Kapeliuk, Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*. 91 TEXAS L. R. 1475 (2013).

95. *See, e.g.*, Daphna Kapeliuk & Alon Klement, *Contracting Around Twombly*, 60 DEPAUL L. REV. 1, 1–3 (2010); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 581 (2007).

96. *See, e.g.*, Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 622–26, 666 (2005); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1159–61 (2002).

97. Dodge, *supra* note 93, at 790–91.

mentioned in the literature in relation to procedural contracts,[98] and which we suggest be applied to contracts which involve the substantive judicial considerations that the court includes in its decision, the court will endeavor to establish the purpose that the parties sought to attain by means of the procedural contracts, and will refrain from applying them only if their negative impact on the legal process is significant as compared to the benefit derived by the parties from them (a cost-benefit analysis).

However, there are another two types of criteria that are directly connected to the model described in this article. According to the chart presented above, there is a series of broad considerations that we described on two axes, one representing legal and extra-legal considerations and the other conflict considerations. On the chart we also placed the considerations according to their distance from the intersection of the axes that expresses the accepted substantive legal basis in every regular formal legal rules-based decision. This is not merely a theoretical chart; it has meaning from the point of view of structuring judicial discretion (A). In our opinion, when a court is prepared to respect the will of the parties, it ought to weigh considerations that are relatively close — both on the legal axis and on the conflict considerations axis — to the accepted legal standard. On the other hand, the further the considerations the parties propose as a basis for the decision are from the accepted legal standard (A), then the less liberal the court must be, and it should establish, with great meticulousness, whether the specific case indeed justifies such a wide departure from the regular standard accepted by the courts. In appropriate cases, the court will honor the will of the parties, and it will base its decision on these considerations. In other cases, the court will examine whether it might be preferable to transfer the conflict to a forum better suited to adjudicating on the basis of these considerations. Alternatively, the court might decide that it must rule on the legal dispute on the basis of the standard substantive considerations, and not on the basis of the considerations proposed by the parties.

Consider a case in which parties would like the decision to be based mainly on considerations of equity (B), or precise justice (C), which are relatively close to the accepted legal standard. In our opinion, the court should respect their wishes, excluding cases in which the use of such considerations will lead to a conclusion that greatly

98. Alon Klement & Daphna Kapeliuk, *Procedural Contracts*, 33 IYUNEY MISHPAT, THE TEL-AVIV U. LAW REV. 187 (2009).

contradicts the rules of justice and public policy. A similar liberal approach, in our opinion, must be applied by the court with respect to the proposal of the parties on which the court bases its decision on considerations that are likely to prevail over barriers to settlement (A1). On the other hand, however, the court should adopt a much less liberal approach with respect to a proposal from the parties to base its decision only on considerations that are very far from the normal legal standard, such as a proposal to base the decision only on considerations of social justice (F) or on narratives (5), disregarding the accepted formal substantive legal rules. In such cases, the court will determine whether it is not preferable to transfer the dispute to other dispute resolution forums, such as private arbitration or mediation, as it is possible that they are more suited than the court to oversee the specific dispute.

The third constraint on judges is related to their role as dispute designers and to their discretion regarding the demarcation between adjudication and other conflict resolution processes. Judges become "less competent" as they move up the scale of conflict considerations, and less legitimate in terms of the rule of law as they move right on the legal considerations scale. Judges are not trained in facilitating dialogue or in inquiring about interests, though conflicts often require such interventions when they reach the court. The dispute design criteria provide judges with a set of questions that are supposed to diagnose the legal conflict and to separate the adjudicative elements of it from those that require other modes of ADR. When parties endorse judges' authority to decide based on extra-legal and conflict considerations, judges may refer in their decisions to the limits of the hybridity they can exercise, and exclude the aspects of the conflicts which can be resolved in other procedures, whether political or ADR-oriented. Judges who were trained to use ADR procedures can exercise active listening or inquire into interests in court as part of their decision-making.

III. A Test Case: Compromise Verdicts as a Liminal Space

This chapter analyzes the application of the aforementioned model to a unique test case — compromise verdicts. A compromise verdict is an adjudication conducted by a judge-arbitrator presiding in a case to terminate a conflict by rendering a final decision based on "compromise considerations." The nature of court-arbitration discretion in compromise verdicts is special in that the judicial decision dividing the pie amongst the parties is usually based on legal, extra-

legal, conflict, and procedural considerations. In many ways, compromise verdicts may be viewed as a liminal space between the regular adjudication and JDR/ADR, and such verdicts are therefore the most suitable process to serve as a test case for our expanding discretion model.

A. *Toward a Judicial discretion in court: compromise consent verdicts*

David Hume, the eighteenth-century philosopher, noted the tendency of arbitrators to decide cases by dividing the pie based on compromise considerations and Solomonic justice according to their assessment of all the merits of a case.[99] The major merits of compromise consent verdicts are reflected in a passage in his *Treatise*. Hume writes[100] that from the principles of law and philosophy emerges an approach whereby the general rule of decision making in standard cases is "that property, and right and obligation admit not of degrees." The rule is therefore clear and unequivocal: the winner takes all. As Hume says, "An object must either be in the possession of one person or another. An action must either be perform'd or not. The necessity there is of choosing one side in these dilemmas."[101]

At the same time, Hume stresses, there are cases in which justice demands departure from this "winner-take-all" conception. In such circumstances, the court-arbitrator, authorized by the parties consent, must render a decision that divides the pie amongst the parties: compromise. In his words: "[I]n references, where the consent of the parties leave the referees entire masters of the subject, they [the arbitrators] commonly discover so much equity and justice in both sides as induces them to strike a medium, and divide the difference betwixt the parties."[102]

By contrast, he notes:

> Civil judges, who have not this liberty [as the arbitrators], but are oblig'd to give a decisive sentence on some one side, are often at a loss how to determine, and are necessitated to proceed on the most frivolous reasons in the world. Half rights and obligations, which seem so natural in common life, are perfect absurdities in their tribunal; for which reason they are often oblig'd to

99. D. Hume, A Treatise of Human Nature III. 6, 531 (1888).
100. *Id*.
101. *Id.*
102. *Id.*

> take half arguments for whole ones, in order to terminate the affair one way or other.[103]

A careful study of Hume's words reveals that although he refers to a compromise verdict rendered by the court in appropriate cases, the most correct resolution is possible only when it is accompanied by the consent of the parties, and the content of the consent of the parties leaves the referee arbitrators entire masters of the subject. It is this consent of the parties that grants the judges the liberty to weigh broad considerations of justice and equity, allowing them to pursue justice through decision-making by way of compromise. However, Hume adds, those "civil judges, who have not this liberty" permitting them to weigh considerations of justice and equity and deciding by way of compromise, are compelled to decide according to the general dichotomous conception of absolute decision-making in favor of one party and not the other — i.e., the winner takes all. However, this dichotomous conception constrains the judges, and makes it difficult for them to achieve just and appropriate outcomes. The two important elements that Hume emphasizes are more freedom for the judge-arbitrator and the consent of the parties as authorizing such freedom.

Most of those who write on the subject of judicial dispute resolution and compromise verdicts 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.[104] The present chapter offers a jurisprudential analysis of judicial discretion in compromise verdicts by applying the expanding-discretion model suggested in the previous chapter. It introduces a structured, hybrid vision of compromise as forms of justice, which incorporates legal and conflict considerations alongside efficiency and procedural concerns.

Classifying court compromise verdicts is challenging, and requires careful theoretical analysis. Court compromise verdicts are not merely theoretical. They are a matter of necessity in terms of the high rate of settlement, and the pressure on judges to reach settlements.[105] In some common-law systems, a compromise consent

---

103. *Id.*

104. *See, e.g.*, Coons, *Compromise*, *supra* note 40; Coons, *Precise Justice*, *supra* note 38; Jaconelli, *Solominic Justice*, *supra* note 39; M. Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 Cal. L. Rev. 231 (2001).

105. "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, *Trial as Error*, *supra* note 4, at 926.

verdict process, which is a sort of court arbitration, is available as part of binding judicial dispute resolution methods.[106]

The parties in a judicial dispute resolution process in general, and a court arbitration by compromise in particular, may agree to procedural rules, including those regarding the nature of the process,[107] the matters constituting the subject of the process, the manner in which the process will be conducted, the role of the judge, any outcome expected of that role, and any practice or procedure related to the process. The present chapter is focused more on the role of the judge-arbitrator, the outcome of the compromise — the judicial decision sharing and dividing the pie amongst the parties — and the legal and conflict considerations and discretion leading to the outcome rather than the practice or procedure relating to the process.

Indeed, among the merits of compromise are what some scholars define as "superior-outcome arguments,"[108] e.g., normative richness (compromise is more principled, infused with a wider range of norms, permitting the actors to use a wider range of normative concerns); inventiveness (compromise permits a wider range of outcomes than the "all or nothing" result specified by the law, greater flexibility in solutions, and admits more inventiveness in devising remedies); golden mean (compromise is superior because it results in a compromise outcome between the original positions of the parties); and superior knowledge (compromise is based on superior knowledge of the facts and the parties' preferences). Another superior-outcome argument in favor of compromise is that parties are more likely to comply with dispositions reached by compromise.[109]

Another merit of compromise consent verdicts, with which this article is concerned, is that they are the product of a judicial process in all respects, administered by the competent court arbitration, by means of consent of the parties, for rendering a decision by way of compromise. As such, these decisions have all the qualitative advantages that characterize adjudication. Such an adjudicative process,

---

106. In Delaware's state sponsored arbitration program 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.

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

108. "Most Cases Settle", *supra* note 3, at 1350–51.

109. *Id.*

when it takes place within the court rather than outside of it, is superior in meeting standards of fair procedure, accurate determination, and application of norms that are widely shared and publicly endorsed.[110] In many ways we are dealing with a hybrid process similar to that described by Otis and Reiter (discussing judicial mediation) as "combining some of the legal and moral *gravitas* of adjudication with the flexibility and adaptability of ADR."[111]

In cases of compromise verdicts it appears that the parties seek decisions based not only on formal legal arguments but also other modes of decision making. These modes include extra-legal considerations, conflict analysis, social justice, and other considerations. This new pluralistic mode of judicial performance preserves the authoritative pre-emptive effect of a decision, while expanding the variety of schemes from which the parties can choose.[112]

A lot has been written on the overall standards of private arbitral discretion. Those standards are quite broad. Indeed, in some circuits, even "manifest disregard of the law" is not grounds for vacating an arbitration award.[113] The U.S. Supreme Court recently noted that parties to an arbitration are free to contract as to even choice of substantive law.[114] This very broad standard applies to private arbitration outside the court. It also applies to international arbitration.[115] However, in our opinion, the boundaries of judicial discretion by a

110. *Id.*

111. Louise Otis & Eric H. Reiter, *Mediation by Judges: A new Phenomenon in the Transformation of Justice*, 6 Pepperdine Dispute Resolution L. J. 351, 362 (2006).

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

113. *See, e.g.*, *S. Mills, Inc. v. Nunes*, 586 F. App'x 702, n.2 (11th Cir. 2014) ("In this Circuit, manifest disregard of the law is no longer a valid basis for vacating an arbitration award.").

114. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("Hall Street is certainly right that the FAA lets parties tailor some, even many, features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, *which issues are arbitrable, along with procedure and choice of substantive law*."). This case has been cited by the Second Circuit. *See In re American Express Merchants' Litigation*, 554 F.3d 300, 310 (2d Cir. 2009); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 217 (2d Cir. 2008).

115. Article 33 of the United Nations Commission on International Trade Law's Arbitration Rules (1976) provides that the arbitrators shall consider only the applicable law, unless the arbitral agreement allows the arbitrators to consider *ex aequo et bono* (Latin for "according to the right and good" or "from equity and conscience." In the context of arbitration, this legal term of art refers to the power of the arbitrators to dispense with consideration of the law and consider solely what they consider to be fair and equitable in the case at hand.), or *amiable compositeur*, instead. *See* UNCITRAL Arbitration Rules art. 33, Dec. 15, 1976, U.N. Doc A/RES/31/98. This rule is also expressed in many national and subnational arbitration laws, for example s. 22 of the Commercial Arbitration Act 1984 (NSW).

judge-arbitrator in a *court* arbitration compromise verdict must be drawn, and the manner in which such discretion is exercised must be presented in a structured way.

The combination of adjudication and compromise in a court arbitration process creates an insoluble mixture between the public and the private, order and arbitrariness, elegance and awkwardness, rationality and power. Therefore, there is a growing need to present clearer rules for the process and for the judicial discretion used in court arbitration by compromise — rules based on the principles of justice and equity and will provide an answer to the criticism leveled by opponents of the ADR movement.[116] We believe that our dual concern model may provide such an answer.

B. *Compromise Verdicts Considerations*

Most of the considerations mentioned above in the general model are relevant in the context of compromise verdicts. As long as the parties approach the court having agreed to reach an arbitration decision by way of compromise, we argue they should again be offered various structured considerations 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 legal, extra-legal, conflict, and procedural considerations of compromise in a way that reflects informed consent and choice. The parties may also choose a mixture of considerations, such as a compromise focused on interests and conflict analysis, and social justice with a flexible procedural regime. They may also indicate the weight of each of the compromise considerations.

In the present section we elaborate on some of the various compromise considerations.

1. *Legal and Extra-legal Considerations*

1.1. *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, as they expect a purely legal solution. In such cases, equity may interfere with stability and equality before the law. It may be considered arbitrary, and as causing instability in the system. In our view, there is no cause for such concern when the parties have agreed in advance to an equity-based compromise verdict. In such cases, parties seek rules that fit the unique natures of their conflicts.

116. *See, e.g.*, Fiss, *supra* note 63.

Although ruling by compromise based on equity is mentioned in some places when the development of common law is reviewed, the basic rule, which has remained throughout common law history, is that the winner takes all,[117] and equity has not developed as an independent cause.[118] Even in more recent times, again, with a few notable exceptions, the traditional rule of "winner takes all" continues to hold sway.[119]

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. 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.[120] An analysis of several of these sources, which will be undertaken in some of the following sections, will afford us a better understanding of the manner in which the compromise judicial discretion should be structured in general and specifically in an equity-based compromise verdict.

Most of the Jewish law sages perceive compromise verdicts as softening the law in favor of a nuanced decision that takes into account the particular circumstances of the case. Such a decision enables the incorporation of justice and extra-legal considerations that cannot be considered according to the formal law. The perception of compromise as a sort of justice is reflected in one definition of it as "a law which has justice (*tzedaka*)."[121] The Hebrew expression "*tzedaka*" refers to justice that goes beyond the law, and Maimonides posits *tzedaka* as deriving from equity.[122] This approach is interpreted by some scholars as going back to an Aristotelian perception of equity, which regards it as overcoming the shortcoming of formal law in addressing the particularity of cases.[123] It could also be understood as positing compromise as superior to law, as it incorporates different values and merging the rules with what is beyond them. In other

117. Jaconelli, *Solomonic Justice*, *supra* note 39, at 487.

118. Coons, *Compromise*, *supra* note 40, at 767.

119. Jaconelli, *Solomonic Justice*, *supra* note 39, at 488.

120. *See, e.g.*, Menachem Elon, *Compromise*, *in* The Principles of Jewish Law 570–73 (1975).

121. Tosefta Sanhedrin 1.

122. Maimonides, *Guide for the Perplexed* 3:53.

123. Many contemporary scholars have disputed the question of whether Maimonides indeed followed Aristotle on the question of law and equity, or whether he expressed a different, independent view.

words, *tzedaka* offers the freedom to choose and to apply moral norms which the law does not enforce, such as "doing beyond what the law requires" (*lifnim mishurat hadin*).

Rabbi Abraham Itzhak Hakohen Kook (1865-1935), the first Ashkenazic Chief Rabbi of Israel, mentioned equity considerations as one of the causes for the court to deviate from the formal rules of law toward compromise consent verdicts. He emphasized the value of equity when referring to law making as follows:

> Rules of religion and law, just like the laws of nature, are general. The sun will be full-blown each noon and if a single person or animal suffers because of it, it will not stop shining to avoid that and will keep shining for everybody. [but] as we sweeten the rules of nature. . not by changing them but by making artificial adjustments. . in the same way we try whenever necessary, to come to a compromise, when it is the will of the litigants, *especially when the legal measure is too extreme for one side.*[124]

According to this perception, the compromise maker should know the law well and examine whether, in the particular circumstances, equity requires deviation from strict legal rules. If this is the case, the compromise verdicts will be different from the law. We believe that the possibility of going back to equity as a lawmaking 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 the old role of law making as doing justice, reviving it through the parties' endorsement.

1.2. *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" is fundamentally inappropriate for the legal or factual situation.[125] From a jurisprudential point of view, too, compromise is able to offer more precise justice, which can answer theoretical criticism that has been leveled at the law.

In legal theory, court compromise verdicts or court imposed compromises have been praised by some scholars as a more justified method which overcomes the traditional dichotomous all-or-nothing or "winner takes all" method of judicial decision making.[126]

---

124. A. I. Kook, Igrot Re-aya, 1:166.
125. Coons, Precise Justice.
126. See *supra* Section III.B.3.

This approach in favor of court-imposed compromise as a mechanism of "precise justice" and various versions of it have challenged the conventional dichotomous approach to legal decision-making and have evoked rich discussions among scholars, who have pointed to some downsides of the new concept. 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.[127] Under such modified versions, courts may use this mode of decision-making only for very specific cases, whereas in other cases the traditional dichotomous 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 – dichotomous and compromise alike.[128] He offered a scheme of analysis to choose among the modes of decision-making in different cases. According to his suggestion, the dichotomous method should be applied 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.[129] 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.[130] 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,[131] as well as liability based on probability in cases of unclear causation.[132]

Elsewhere we had suggested using court arbitration compromise verdicts as an opportunity for performing precise justice.[133] We argued 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

127. Abramowicz, *supra* note 104.
128. *Id.*
129. *Id.*
130. Coons, *Compromise*, *supra* note 40, at 759.
131. J. Makdisi, *Proportional Liability: A Comprehensive Rule to Apportion Tort Damages based on Probability*, 67 NC L. Rev. 231 (1989).
132. Coons, *Compromise*, *supra* note 40, at 753-754.
133. Sinai and Alberstein, *supra* note 23, at 756.

determination of legal rights, which reflects a dichotomous all-or-nothing approach. Trying to overcome the shortcomings in such dichotomous 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 the considerations for the court imposed compromise verdicts.

On the other hand, we argue, 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.

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 verdict are justified, even according to Coons, only in specific cases, and he lists ten examples in which, due to a factual doubt, the dichotomous legal solution cannot be considered justified and right in the circumstances.[134]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.[135] Some scholars have challenged that view and called for different types of divisions, such as seventy-thirty or sixty-forty compromises.[136] Others claim that Coons' proposal does not really overcome the "winner takes all" perception of law: "You can

134. Coons, *Compromise*, *supra* note 40, at 753-754.

135. *Id.* at 759: "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."

136. *See* Francis A. Allen et al., Comments, Approaches to Court Imposed Compromise—The Uses of Doubt and Reason, 58 NW U L. Rev. 795 (1963-1964), 799-800.

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."[137]

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.

When parties agree to accept compromise-based decisions in a court arbitration process they may be considering the possibility of endorsing a decision that takes into account critical claims about legal decision-making. 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 decision may embrace the complexity and engage with it through nuanced ruling, instead of avoiding the indeterminacy through a sharp, binary, choice. The possibility of working with critical claims as constructive paradoxes has never been discussed by the Realists, or in arbitration studies, but there may be agreement among the parties that rule and fact skepticism will guide judges' rulings when they try to give a nuanced decision which need not claim 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 working with them.

1.3. *Compromise as balancing of legal policies and principles*

Parties can empower the judge-arbitrator to decide by compromise by using purposive interpretation of the law, and by balancing policies and principles. We assume that this mode of judicial discretion will not be very popular since it is mostly a public concern of judges, and there is less expectation for it to be in the interest of parties, unless they represent the state or big organizations.

---

137. *Id.* at 802 (comment by Schuyler). *Id.* at 802-803 (Response by Coons) ("I am not suggesting this would be an across the board proposition, you have to be very careful about the areas which you select.").

1.4. *Compromise as considering efficiency*

Parties who are players in the market may be interested in giving the court the authority to decide based on economic considerations and not only legal rules. They can also ask the judge to balance efficiency considerations with legal rules, and to render a decision based on a compromise between these two sources.

1.5. *Compromise as considering 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.

The recourse of court arbitration compromise consent verdicts may open a legitimate and unique track for introducing social justice considerations into judicial dispute resolution and legal decision-making. 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. With or without the parties' consent, such considerations may anyway infiltrate judges' decisions when they deal with a severe perceived imbalance in a case before them; although the judges' compassionate treatment may be interpreted as biased and as going against the rule of law principle. Organizations' representative experiences in such cases is 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 gunman" taking on the big organization. The repeat player organization will gain a reputation and acknowledgement as having a social justice agenda and as an activist in terms of protecting customers and weak populations. Society will

gain greater equality and systemic gaps from which it suffers will close. The legal system may benefit from a pro-social image signifying 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.

2. *Conflict considerations*

Parties who use our expanded model of discretion in compromise verdicts should choose among legal considerations and conflict considerations in order to instruct the judge on the mode of exercising her discretion. Compromise verdicts can become a hybrid process that combines judicial authority with modes of conflict resolution.

As Kuflik suggests, compromise has a broader sense than regular adjudication (or prediction of the adjudicative outcome).[138] 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."[139] 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 consideration 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,[140] judges can expand the horizons of their judicial work in order to capture some of the various contexts that characterize the conflict before them.[141] The unique consent-based adjudication which is not bound by the

138. Kuflik, *Compromise*, *supra* note 18, at 51.

139. *Id.*

140. Although the parties failed to reach a settlement on their own, Kuflik, *id.*, at 53, 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."

141. *Id.* at 53.

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. The parties can choose which perception of conflict the judge should use–interests underneath, relationship oriented, identity-based, narrative driven. Considering the prevalence of interest-based mediation in the ADR field, it's probable to assume that most parties will choose a conflict resolution discretion based on interests and overcoming barriers to conflict resolution.

It is important and useful in this case to differentiate between outcome and process when dealing with compromise.[142]Until now we were dealing with compromise verdict outcomes and the discretion judges use in order to decide them. Compromise settlements can be reached in two ways — by negotiation or by arbitration.[143] A negotiated settlement will sometimes involve services of a mediator — someone who has no binding authority but who acts as a go-between. Arbitration may be undertaken either by a person who has been selected by the parties themselves or by a judge in a court or other actor operating under the authority of the state. Parties' authorization for conflict resolution by a court arbitration towards compromise can be regulated in terms of process as well and may include explicit reference to a closed list of hybrids and types of arbitration.[144]

3. *Procedural considerations: compromise as a short-cut*

According to the procedural considerations, a compromise verdict is usually viewed as a short-cut and a 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 judge-arbitrators assess the case and its value, and decide accordingly (when the parties authorize them to do so) with a ruling that in their estimation is close to what

142. Golding, Compromise, *supra* note 9, 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."

143. *See* Kuflik, *Compromise*, *supra* note 18, at 52-55 (discussing the modes of settlements: arbitration v. negotiation).

144. *See* Sinai and Alberstein, *supra* note 23, at 751. *See also id*. at 753-754 (discussing the way in which the compromise may be used as a peace adjudication process in the Jewish legal tradition).

would have been the outcome had the case been conducted in its entirety. Such an attempt focuses on the quick and efficient determination of the superficial legal dispute, and does not seek to resolve it in a deep manner. Its location in terms of our model is where formal law prediction meets positional bargaining, which is the point where our two axes meet.

In a case in which the parties choose to authorize a judge to rule by way of compromise in a mode of prediction, they are usually interested in a flexible, simple and relatively fast procedure, which saves the steep litigation costs in civil cases.

C. *The Degree of Connection Between Compromise and Substantive Law*

When does the judge-arbitrator rule according to substantive law (mainly based on formal legal rights) and when does it rule according to the special extra-legal and conflict considerations of compromise?

An analysis of several of the Jewish legal sources, which will be undertaken below, will afford us a better understanding of the manner in which the considerations of substantive law go together with those additional considerations peculiar to compromise. On the basis of those sources, *inter alia*, we present a clearer conceptualization of the compromise consent verdict.

In the Talmud (the central text of Rabbinic Judaism), "compromise" (*p'shara*) usually means a dispute resolution method that requires consent of the parties and its purpose is to instill peace (*shalom*) and do justice (*tzedaka*). The Talmud drew an important terminological distinction between the term "law" (*din*), which refers to a judicial ruling governed by clear mandatory rules (usually based on legal rights), and the term "compromise" (*p'shara*), referring to a ruling not in accordance with these rules, which nevertheless takes place in court.[145] The common denominator of *peace* and *justice* (and equity) — the values underlying compromise in Jewish law — is that they are both found outside of or beyond the parameters of the law. It may even be said that these two values — peace and justice — attach moral perfection to the status of compromise, and moral imperfection, the weight of which varies from case to case, to those who stick to the law at any cost.[146] The Tannaitic sages debated whether compromise

145. Itay E. Lipschits, 'P'shara' in Jewish Law (Ph.D. thesis, Bar-Ilan University Ramat-Gan, Israel, July 2004) (Heb.) [hereinafter: Lipschits, Compromise] at Chapter 1.

146. *Id.* at 137

is desirable, permitted, or forbidden.[147] Although one Sage was against compromise (using some of the arguments later raised by Owen Fiss)[148] and preferred adjudication according to the regular legal principles, the prevailing approach in the *halakhah* (Jewish law) views compromise as a desirable mode of adjudication (also by using some arguments in favor of the ADR movement).[149] The rationale underlying the approach that prefers compromise is not related to shortening and speeding up processes and other such utilitarian factors, which are mentioned in modern Western literature,[150] but rather to the supreme importance attributed by Jewish law to the value of instilling peace amongst people. Accordingly, if both parties will be placated by means of compromise, then such an arrangement is preferable to a legal solution, even if from the point of view of absolute truth, the legal solution is preferable.

In the Jewish sources, it is mentioned that compromise gives expression to wider extra-legal and conflict considerations than does the law, and it therefore requires wider discretion.[151] According to Jewish law, compromise is not a matter for arbitrary decision, but it must be done after serious consideration,[152] and the law determines that "just as a person is warned not to distort the law, so he is warned not to distort the compromise in favor of one more so than the other."[153] In more modern Jewish law sources, there is explicit discussion of the nature of discretion granted to the judge in ruling by way of compromise.[154]

---

147. Babylonian Talmud Sanhedrin 6b.

148. It is interesting to see the common lines between Fiss' arguments, *supra* note 3, and those raised as an explanation of the approach that opposes compromise in the Talmud. Rabbi Moshe Zvi Neria (Israel, 20th century), *Compromise Decision*, in Rabbi J.B. Soloveitchik Jubilee Volume 362-363 (1984) (Heb.), explained that the exponents of this approach believed that the role of the court was to delve deeply into the case and to reach the absolute truth in its decision. When true justice is done true peace will reign, because legal norms will be fixed and the boundaries of justice and equity will be set. The court must not deal in compromise, according to this approach, "because the peace that will be achieved thereby is a truncated peace. For compromise leaves the truth hanging, and it also enables each party to continue to think that absolute justice law with him, whereas the party who did not have justice on his side was the one who gained from the compromise."

149. *See* Maimonides' Code, Hilkhot Sanhedrin 22:4; Shulhan Arukh HM 12:2.

150. *See, e.g.*, "Most Cases Settle", *supra* note 3, at 1350, 1360-1371 (discussing cost-reduction arguments such as party savings and court efficiency).

151. Babylonian Talmud Sanhedrin 6b.

152. *See* Jerusalem Talmud Sanhedrin 1:1.

153. Shulhan Arukh HM 12:2.

154. Lipschits, Compromise 147, 243-282.

According to Jewish law, *dayanim* (judges in the rabbinical court) may not decide by way of compromise unless explicitly authorized to do so by the parties. In order to overcome this obstacle, and to enable *dayanim* to rule by way of compromise where this seems just, disputes would be put before *dayanim* "whether by law or whether by compromise."[155] Thus the possibility of arguing against the rabbinical court that ordered a compromise instead of ruling according to the law was averted. The opposite question once arose: the dispute was submitted "whether by law or whether by compromise" and the *dayanim* ruled by law. In his *responsum* (rabbinic *responsa* constitute a special class of rabbinic literature), Rabbi Kook discusses the argument of one of the parties, who complains that the *dayanim* who served as arbitrators in the dispute that was brought before them ruled according to the law of the Torah and did not "incline to the way of compromise."[156] He argued that the intention was in fact to achieve compromise. The Rabbi answered that the formula "whether by law or whether by compromise" explicitly authorizes the *dayanim* to rule according to the law, but even if it is said that the parties expected a compromise, nevertheless:

> It must be said that the intention in saying "whether by law or whether by compromise" is that the *dayanim* will rule in both ways, that is, they will deliberate on the matter according to the law, and if they see that the law is not far from the equity of the situation, then they will adhere to the law, but if they see that as opposed to compromise, ruling in accordance with the law places too heavy a burden on one side or on them both, then they will rule on a compromise.[157]

To put this in contemporary language the idea is that where the "insistence on the formalities of the law" seems too rigid an approach in the circumstances of the case under discussion, the ruling should be made by way of compromise, but a just solution should never be ruled out just because it parallels the substantive law.

When does the court rule according to the strict law and when does it rule according to the special characteristics of compromise?

As noted by scholars of Jewish law,[158] the judicial discretion of the court that presides over the compromise may be described in a general way as broad, though its precise nature is a matter of dispute. According to one view, the compromise process and its outcome

155. *See, e.g.*, R. Kook Resp. Orah Mishpat, Hoshen Mishpat 1.
156. *Id*.
157. Resp. Orah Mishpat, Hoshen Mishpat 1
158. Lipschits, Compromise at 243-282.

are entirely at the discretion of the court.[159] In opting for the court to apply compromise, litigants authorize the court to exercise full discretion in all matters relating to the dispute. A second view sees the regular rules of the substantive law (the legal rights) as the starting point for the court, even when it adjudicates by way of compromise, but compromise allows deviation from the law in a way that makes room for the values of peace and justice (extra-legal and conflict considerations).[160]

The discretion of the compromiser, based on ruling according to the substantive law, was ably presented in a modern book that summarizes the rabbinical rulings regarding compromise, which determines that compromise is governed by an extremely clear conceptual framework: "The court must first determine where the laws tends and how much each of them would be awarded according to law and in this way the compromise will be made as they see fit and according to the substance of the matter."[161] There is still room to examine the interpretation of the words "as they see fit" or "the substance of the matter"; however, it is clear that the point of departure is the situation according to the law. We too, in this article, usually accept this point of departure. Nevertheless, we suggest, in the case of a conflict-considerations-based compromise — one of the methods of compromise discussed at length above — the degree of connection between the compromise and the outcome that would have resulted under the substantive law will not necessarily be close. This is due to the nature of the judicial dispute resolution by way of compromise that allows the court to examine wider interests and conflict considerations involved in the dispute. These interests include those that are not examined by virtue of the regular substantive law, and therefore, the method of conflict-considerations-based compromise justifies granting wider discretion to the judge, independent of the substantive law.[162]

---

159. *Id*. at 245.

160. *Id*.

161. Halakah Pesuka - Hilchot Dayanim (1986) (heb.) at HM 12.

162. On the other hand there is also room for the opposing view in which conflict-considerations-based compromise, should include the rule that any compromise should be heavily influenced, if not dictated, by the law. In this manner the process that occurs in court assumes a more judicial character that, while combining elements of ADR, makes them subject, at least partially (in that the outcome must approximate the law) to what would have been the outcome in a regular judicial process. The choice between the two said options for determining discretion in relation to the alternative process of conflict-considerations-based compromise—broad and independent discretion (focused more on interests) or limited discretion close to the law (giving more room for considerations regarding the legal rights)—must be decided by the parties to

The extent to which the court invokes the substantive law depends on the compromise forms that the litigants have chosen. In the Jewish law sources, there is discussion primarily of two forms of compromise to which the parties give their prior consent when authorizing the judge-arbitrator to adjudicate their case.[163]

The first form is the common mode of compromise. A practice has developed in Jewish law whereby before the start of the proceedings, the court asks the parties to sign an agreement authorizing the rabbinical judges to choose "whether by law (a regular trial) whether by compromise."[164] This form allows judges greater discretionary space that enables them to choose between the compromise and law alternatives.

The second form is when the parties allow the judge to adjudicate specifically by way of "compromise close to the law."[165] This form dictates that the judge-arbitrator rendering a compromise verdict must know the law well, and determine whether, based on his knowledge of the law and on the previously stated opinions on the issue by all the decision makers, there is room to deviate from the law as part of the compromise. According to this method of "compromise close to the law," it is clear that the discretion of the rabbinical judge-arbitrator in rendering the compromise verdict is not unlimited. His judgment must be based on the law, and accordingly, the outcome of the compromise cannot usually be too removed from the outcome that would have been obtained through the normal judicial route under the law.[166] The compromise must reflect Torah law as closely as possible. But when it is not possible to resolve the conflict by a compromise that is close to the outcome of a trial according to the regular law, the rabbinical judge may render a compromise verdict which deviates from the law, as required by the circumstances.

In the rules of arbitration by compromise published by a contemporary rabbinical court judge based on the classical sources of Jewish law, guidelines were laid down regarding the degree of proximity of the compromise to the law in accordance with the type of compromise

---

the dispute based on their wants and needs. When making this decision, parties should keep in mind the nature of the process and the expected outcome as agreed to by the parties (namely, whether the judicial decision should be based on rights in addition to or as an alternative to interests).

163. Lipschits, Compromise at 282.

164. *Id*.

165. *Id*.

166. *Id*. at 255-261.

to which the parties consented and in accordance with the circumstances.[167] Examination of these rules reveals that they describe a possible model that includes clear principles that operate in accordance with the compromise form chosen by the parties: "compromise close to the law" or "whether by law whether by compromise."

The first rule relates to a situation in which the form chosen was "compromise close to the law," in which the court cannot divide the amount fifty-fifty between the parties, indiscriminately and without examining which of them is entitled to a larger sum.[168] In a compromise close to the law the court may, in its verdict, reduce the award by a third vis-à-vis the obligation by virtue of the substantive law. In other words: in the process of "compromise close to the law," whoever should have won in court under the law will achieve a compromise verdict that is close to what he would have obtained in court under the law, or at least two thirds of the amount he would have received under the law, whereas the party who was expected to lose by law will receive at most one third.[169]

The second rule states that a court that has been authorized to render its compromise verdict "whether by law whether by compromise" is authorized to compromise to the extent of half the amount only.[170] The third rule states that the court is authorized to compromise with a disposition other than fifty-fifty, if there are well-based assessments or serious reasons favoring one of the parties.[171]

We are of the opinion that these rules are very logical and they are capable of structuring judicial discretion in court arbitration compromise verdicts. It will be stressed that, in our opinion, discretion as to whether to embark on one form or another should not be given to the judge-arbitrator; rather, the choice between forms and modes of

---

167. Yoezer Ariel, Laws of Arbitration (2005) (Heb.), in the chapter dealing with the rules of compromise [hereinafter: Ariel, Compromise] at 249-253, 259.

168. *Id.*

169. *Id*.

170. *Id*.

171. Thus, for example, a court may determine the ratio of compromise in accordance with the weight of the evidence, or the degree of probability that a particular event occurred, leading to a compromise that favors (to differing degrees) the party that is better supported by the available information. This is particularly so in a case in which the court is authorized by the parties to decide as it sees fit. In this situation, the parties empower the judges to adjudicate with discretion, while keeping with good sense and equity, if the judges believe there are several factors militating for a compromise that is not equivalent to an even split. This may also apply in relation to the other alternative of compromise as the mode of conflict resolution, where there is room, as we have said, for allowing independent discretion, unconnected to the law (based on interests rather than on rights).

judicial dispute resolution is a matter for the litigants. The main advantage of the rules lies in the fact that they allow the parties to choose between two forms of compromise in accordance with their needs, and thus to set clear boundaries for the court regarding its discretion in the compromise verdict from the perspective of the degree of connection of the outcome to what would have been decided by virtue of the substantive law.

The advantages of the "whether by law whether by compromise" form lies in its flexibility and in the fact that it grants broad discretion to the judge, who is likely to achieve the most just and proper outcome under the circumstances. Its disadvantage is the limited control of the parties and the uncertainty involved. The "compromise close to the law" form reduces risk, and it is therefore appropriate for risk-averse parties. This form corresponds in some ways to high-low arbitration, a procedure in which the parties circumscribe for the judge the boundaries of her decision, thereby reducing the level of their risk and granting them greater control.

Finally, we would stress the great advantage of the rules of discretion of the court arbitration compromise verdict of Jewish law, as presented above, vis-à-vis the accepted common law approach to compromise in the context of outcome. The common law approach was articulated by Golding: "The more usual connotation of the way in which compromise enters into adjudication in the context of the decision (or outcome) is that the adjudicator splits the difference (or gains or losses) between the parties."[172] Golding, however, is troubled by this process, because "the conflict is terminated, in some sense, but the *parties*' case is not decided, for the third party will not really be adjudicating *their* dispute! That is, the third party hasn't decided whose claims were right."[173] Golding's concern is indeed justified when we are dealing with the accepted sense of compromise in the common law, which means distribution of the pie without any real exercise of judicial discretion. However, the conception that emerges from the Jewish law sources is entirely different, for the Jewish sages rejected any arbitrary distribution of the pie fifty-fifty between the parties. As we saw, they fashioned a process of compromise that indeed takes into consideration what would have been the outcome according to the substantive law, and does not operate independently of it.

172. Golding, *Compromise*, *supra* note 9, at 21.
173. *Id*.

As such, in many cases the compromise outcome is in fact a type of determination in favor of one of the parties, relying on the strength of the arguments and their justification according to the rules of law; particularly according to the "compromise close to the law" form, in which, as a rule, the party whose arguments are more justified according to the law will get the larger share of the pie, whereas the opposing party will receive only a small portion. True, this is not a decision that is wholly in favor of one party, who would receive 100% in a regular process, although, as we saw above, this too is possible in certain cases of compromise. Nevertheless, it is a process in which there is definitely a judicial determination in relation to the dispute and an according of clear preference to the person whose arguments are stronger.

D. *The Boundaries of Discretion*

Boundaries must be set for court arbitration by compromise. Compromise is not appropriate in every case. Some scholars argue, and we agree with them, that courts and policymakers should approach compromise and settlement with a more critical eye, distinguishing "good" settlements from less desirable ones.[174] They argue that:

> [T]he task for policy is not promoting settlements or discouraging them, but regulating them. How do we encourage settlements that display desirable qualities? This requires that we have a sense of which qualities we consider important in a particular settlement arena — full disclosure of relevant facts, adequate compensation, fair sharing of exchange surplus, encouraging future relations between the parties, providing guidelines for future negotiations, or any of the many other features by which we might judge a settlement. When we are evaluating the efficacy of policies to promote settlement, we have to assess their net contribution of desirable (and undesirable) features.[175]

Indeed, there are many cases in which it is important to settle the dispute by way of substantive law and not by way of compromise. Such cases have been mentioned in the general jurisprudential literature.[176] In Jewish law sources, too, substantive and procedural

174. "Most Cases Settle", *supra* note 3, at 1339.

175. *Id.* at 1388.

176. *See also* Kuflik, *Compromise*, *supra* note 18, at 44-48 (discussing the limits of legitimate compromise).

boundaries were set surrounding compromise.[177] With respect to the substantive boundaries, a threshold test was determined for the litigant enjoying the privilege of deviating from the process of law to a process of compromise. In general, it may be said that the rabbinical court will not compromise if one of the parties comes to resolve the dispute when his hands are not clean, both so that a sinner should not be rewarded, and because compromise in such cases will not promote the values of peace and justice.[178] These cases are characterized by the malicious intent of the litigant, when it is possible to attribute fault, misleading, fraud, etc., to him.[179]

As such, it may be assumed that there will be consensus that when a thief who lives off his criminal activity is caught and sued for return of the stolen property, there is no room for a compromise with him. This is also the case if a person claims "it is all mine" with the intention of compromising and receiving half, even though nothing is due to him.[180] At the same time, mention should be made of the dilemma that sometimes faces the court, between the purity of intentions of the parties to the compromise and the best interests of the litigant. There are cases in which it is preferable for a litigant to settle with a cheat rather than to lose all his money. However, the question is whether the court should have a hand in such a compromise, and even to anchor it, of its own initiative, in the verdict it renders. There is no unequivocal answer to this question, but it would appear that the point of equilibrium between law and compromise is reached in the vicinity of a balance between the values of compromise, peace, justice (with other extra-legal and conflict compromise considerations), and the general values of law – truth and justice. In this context, we accept the position that sometimes, the value of "peace" that is present in compromise as an expression of peace between parties to a conflict, must yield before the general value of "peace" that exists in law as societal peace and public order.[181] This is so, in extreme cases, even if the parties agreed to compromise in a certain way, as in the above case of the cheat; however, it may be that this arrangement will harm third parties who were not party to the agreement, or that the arrangement will be detrimental to public order, and therefore the court will not agree to authorize such a compromise.

177. Lipschits, Compromise at 145-242.

178. *Id.* at 146.

179. Compare to Ariel, Compromise at 256. Similar approach was presented by Fuller and Jones, *Coons, Compromise*

180. Lipschits, Compromise at 147.

181. *Id*. at 182.

Another substantive threshold criterion relates to aspects of the nature of the particular dispute and the compromise outcomes. The balance between law and compromise necessitates an examination of which concrete values the law is protecting in a particular case, and to what extent, if at all, these values may be subordinated to the values of compromise.

Classic examples of limiting the compromise are those cases in which the compromise harms cogent norms that Jewish law wishes to protect. In these cases, the values that are protected by law tilt the balance and prevail over the values of compromise, and therefore the court must decide by way of law (based on rights) and not compromise (even if the parties consented to the latter). In the Jewish law sources, procedural boundaries, too, were set for compromise, applying, *inter alia*, to the stage at which the judge-arbitrator is permitted to render a compromise verdict, and mainly connected to the status of the compromise vis-à-vis a regular Torah law ruling. The tension between the compromise and the regular Torah law ruling is expressed in the abovementioned dispute between two approaches: one whereby the court is obligated to adjudicate by way of Torah law and is not permitted to engage in compromise, and the other, an opposing approach that views decision by way of compromise by the court as a desirable mode of adjudication.[182] However, despite the latter being the accepted approach in Jewish law,[183] the tension between the Torah law and compromise continues to exist, and it finds expression in the procedural boundaries.[184] All are in agreement that the stage of offering a compromise must be limited subject to the degree of progress of the proceedings.[185] The dispute is over how this principle should be implemented. The considerations guiding the litigants are based, as Lipschits suggests,[186] on a determination of the desirable balance between the status of the compromise and that of the law. The more advanced the stage of the legal proceedings, the greater the fear that deviation from the law and seeking a compromise, means to settle the dispute are liable to impugn the legal process and the result achieved thereby. The process of court arbitration by compromise by its nature will be undertaken at an early stage of the proceedings, and it may even be brought forward to the stage of submission of written pleadings, if this is possible from a procedural point of view.

182. *See supra* note 147.
183. *See supra* note 149.
184. Lipschits, Compromise at 189-242.
185. *Id.* at 239.
186. *Id.*

IV. Conclusion

Our article has presented an innovative model for understanding and conceptualizing judicial discretion as moving on two poles — legal and extra-legal considerations, and conflict resolution considerations. We have suggested that judges' decision-making, especially considering the high rates of settlement today, may incorporate various perceptions of law, as well as various perspectives on conflict. We listed five possibilities for legal discretion: formal rules, equity, policy consideration, efficiency, and social justice. Furthermore, we described five possibilities for conflict resolution discretion: barriers to settlement, barriers to conflict resolution, relationships, identities, and narratives. We argued that judges' decisions and processing of legal conflicts in general may adopt one mode of legal discretion in the shadow of another mode of conflict resolution considerations, and vise-versa. This hybrid model expands the notion of judicial discretion familiar in legal literature to date.

As a case study for our general claim, we have offered a new role for court-arbitration judges deciding cases by compromise, based on the parties' consent. We suggested that in cases in which parties agree to endorse the judge's authority to decide by compromise or through a mode of arbitration, parties should be allowed to choose options within the model we described. Judges in court arbitration by compromise can promote more precise justice, overcome the indeterminacy of rules and facts, promote social justice, enhance equity, and combine various considerations of conflict resolution according to parties' choice. With more regulated forms of court arbitration by compromise and the explicit consent of the parties, the legal system may become more pluralistic and nuanced when responding to the complexity of legal cases. Indeed, boundaries must be set for judicial discretion in compromise verdicts and in other judicial dispute resolution methods. In a JDR process that is not a compromise verdict, we suggested that the process may indeed consider what would have been the outcome according to the substantive law, and it does not operate independently of it. Nevertheless, we suggested that in a judicial dispute resolution by way of compromise the court may examine wider interests and conflict considerations involved in the dispute — those that are not examined by virtue of the regular substantive law — and, therefore, the method of conflict-considerations-based compromise justifies granting wider discretion to the judge, independent of the substantive law.

With our new expanded notion of judicial discretion we hope that the role of law in promoting conflict resolution will become more articulated and institutionalized in new conceptual schemes of judicial work.