בס"ד

Facilitating a functional commercial Beth Din operating within the Australian legal context by advancing greater accommodation between Jewish and Australian law

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ABSTRACT

This thesis explores the integration and accommodation of Jewish law within the Australian legal context, focusing on the establishment and operation of a commercial Beth Din (Jewish court) that adheres to both Jewish and Australian legal principles. The research employs a comparative law methodology, legal research methodologies, and a pragmatic methodology towards the empirical data gathered from interviews with *dayanim* (Jewish law judges) and other stakeholders in the USA and Israel.

The study begins by examining the jurisprudential underpinnings of Jewish law, distinguishing between *issura* (ritual law) and *mamona* (commercial law), and their interaction with secular law. It then delves into the historical and contemporary context of religious arbitration, legal pluralism, and multiculturalism, highlighting the challenges and methods of accommodating religious arbitration within secular legal frameworks.

The thesis analyses best practice from Battei Din (Jewish courts) in the USA and Israel, focusing on their structure, processes, and integration with secular law. Key areas of potential conflict between Jewish and Australian law are identified, including the suitability of the *zabla* method (where litigants take part in selecting *dayanim*), the principle of *dina demalkhuta dina* (the law of the land is law) and the requirement for reasoned judgments. The research proposes methods of accommodation to ensure compliance with Australian arbitration law whilst maintaining the integrity of Jewish law.

The historical background of the Melbourne Beth Din is also explored, tracing 150 years of operation, including the loss in communal confidence due to a half century of mismanagement followed by its corporate restructure and the installation of a board of governance.

The thesis concludes with a proposed working model for a commercial Beth Din in Australia, aiming to build communal confidence and ensure the enforceability of its awards by secular courts. Recommendations include the adoption of transparent procedural rules, the inclusion of subject-matter experts, and the establishment of an internal appeals process.

STUDENT DECLARATION

I, Chaim Cowen, declare that the PhD thesis entitled 'Facilitating a functional commercial Beth Din operating within the Australian legal context by advancing greater accommodation between Jewish and Australian law' is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

I have conducted my research in alignment with the Australian Code for the Responsible Conduct of Research and Victoria University's Higher Degree by Research Policy and Procedures. All research procedures reported in the thesis were approved by the Victoria University Human Research Ethics Committee (HRE19-184),

Signature

10/02/2025

Date

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TRANSLITERATION RULES

א*	Not transliterated
בּ	B
ב	V
גּ	G
ג	G
דּ	D
ד	D
ה	H
ו	V – when not a vowel
ז	Z
ח	Ḥ
ט	T
י	Y or I
כּ	K
כ, ך	Kh
ל	L
מ, ם	M
נ, ן	N
ס	S
ע	Not transliterated
פּ	P
פ, ף	F
צ, ץ	Tz
ק	K
ר	R
שׁ	Sh
שׂ	S
תּ	T
ת	T

* Transliteration criteria are based on the *General Transliteration Rules* of the *Jewish Encyclopaedia* (Macmillan Reference USA, 2nd ed, 2006) vol 1, 197 with minor changes.

GLOSSARY

Agunah	Chained woman. A woman whose husband is either missing or refuses to supply her with a *gett*, rendering her unable to remarry.
Aliyah	To ascend. A term used to refer to one who is called up to the Torah during prayer services.
Av Beth Din	The father of the Beth Din. The most senior *dayan* on the Beth Din, akin to the Chief Justice.
Beit Din HaRabani	Rabbinical Court. In Israel, the Rabbinical Courts form part of the judiciary with jurisdiction in matters pertaining to personal status.
Beit Din HaRabani HaGadol	The Great Rabbinical Court. The Great Rabbinical Court is based in Jerusalem and takes on appeals from Rabbinical Courts. Previously known as the *Beit Din Gvohah L'Irurim* (Rabbinical Supreme Court of Appeals).
Beth Din (pl. Battei Din)	A House of Law. A panel, typically comprised of three *dayanim* that presides over matters of Jewish law.
Borer (pl. borerim)	Selected judge. The *dayan* chosen by each of the parties in a *zabla* arrangement.
Dati Le'umi	National religious. An Orthodox sect that combines religious adherence with Zionism, roughly the equivalent of Modern Orthodoxy.
Dayan Yaḥid (also, yaḥid mumḥeh)	Singular *dayan*. A Beth Din which has a panel of only one judge.
Dayan (pl. dayanim, n. dayanut)	Judge. A rabbinical judge, qualified to preside on a Beth Din.
Dina demalkhuta dina	The law of the kingdom is law. A Jewish law doctrine that incorporates elements of the laws of the non-Jewish host country, making them *halakhically* binding.
Dinei mamenot (also, din torah or pl. dinei torah)	Commercial law. The segment of Jewish law that deals with commercial matters.
Eid (also eidut, pl. eidim)	Witness testimony. Jewish law has specific requirements as to what comprises valid witness testimony.
Ger (pl. geirim, n. geirut, v. megayer)	Convert. A Beth Din is required to oversee the conversion process of a non-Jew to Judaism.
Gett (pl. gittin)	*Halakhic* divorce. A Beth Din must oversee the divorce process, which includes the husband handing a document (known as a *gett*) to his wife to disband the marriage.
Gezerat hakatuv (pl. gezerot hakatuv)	Scriptural decree. Where there is no apparent reason for a Torah law.
Grama b'nezikin	Indirect damages. Damage that is caused indirectly by one party to another.

Ḥabad	Chabad. A *Ḥassidic* Orthodox sect that is known for its emphasis on outreach within the Jewish community.
Halakhah	Jewish law. A term that encompasses the gamut of Jewish law, drawn from classical Jewish texts.
Ḥalitzah	Disbanding of a levirate marriage duty (*yibum*) which is performed before a Beth Din. At Jewish Law, when a man dies without children his brother is required to marry his wife and produce an heir who inherits the property of the deceased. The practice of *yibum* is not presently observed, and in its place the brother and the wife perform *ḥalitzah*.
Ḥaredi	Ultra-Orthodox. An Orthodox sect that is known for its insularity from society and adherence to a strict interpretation of Jewish law.
Harsha'ah	Power of attorney. The one granted the power of attorney on another's behalf is called a *murshah*, pl. *murshim*.
Hatro'at seruv	Warning of imminent issuance of a *seruv*. A step that a Beth Din providing a party notice that a *seruv* is soon to be issued, in an effort to ensure their compliance with the Beth Din summons or verdict.
Hazmanah (pl. hazmanot)	Beth Din summons.
Hefker bet din hefker	That which is rendered ownerless by Beth Din is deemed ownerless. Jewish Law vests a Beth Din with the power of unilaterally confiscating or transferring property as a remedy.
Ḥerem	Excommunication. A severe sanction whereby a Beth Din issues an edict to its community not to socially interact with an individual nor to do business with them beyond that which is required for the individual's survival.
Heter arka'ot	Permission to go to gentile courts. *Halakhic* permission for the plaintiff to take the matter to a non-Jewish court, removing their religious duty to litigate before a Beth Din.
Ḥillul HaShem	Desecration of G-d's name. A notion with Biblical origins that is typically used to refer to the besmirching of G-d's name because of immoral activity performed by a Jewish person.
Ḥukim	Statutes. A term used to describe Jewish law, which can also refer to specific Torah laws that lack an apparent reason.
Issura	Prohibitions. The section of Jewish law that pertains to ritual law, as a opposed to commercial law (see *mamona*).
Kashrut (adj. kosher)	Jewish dietary laws that govern the preparation, combination and consumption of food. The term is also used to refer that which is approved, or fit for purpose.
Kavua	Permanent. In the context of a Beth Din, this refers to a Beth Din that has automatic jurisdiction over a particular locale.
Kol tenai shebemamon kayam	Any monetary condition is considered binding. A principle in Jewish law that gives parties the flexibility to order their commercial affairs in accordance with how they wish, even when this is contrary to the established *halakhic* position. This principle does not apply to

	commercial matters that overlap with *issura* (e.g. charging interest, inheritance law etc).
Ktav seruv (also, seruv, shtar seruv, pl. seruvim)	Writ of refusal. The Beth Din can issue a *seruv* upon a party that acts in contempt of the court, typically due to their refusal to adequately respond to a *hazmanah* or for their non-compliance with its verdict. A *seruv* acts as a *heter arka'ot* for the plaintiff and may include sanctions for the non-complying defendant.
Latzet yedei shama'im	To fulfil their Heavenly duties. In the Beth Din context, where a party is found to technically not be liable, the Beth Din may nonetheless inform the party that they have a moral duty, which is not enforceable, to remedy any wrong they have caused. This is similar to the notion of *lifnim mishurat hadin* (beyond the letter of the law).
Mamona	Monetary matters. The section of Jewish law that pertains to commercial laws, as a opposed to ritual law (see *issura*).
Menahel	Director. In the Battei Din surveyed, in addition to the *Av Beth Din*, there was an administrator whose role was to oversee its internal operations and community relations.
Mesader gittin	Director of divorce proceedings. A role within the Beth Din to oversee the proceedings as they relate to *gittin*.
Mesarev l'din	One who refuses to attend the Beth Din. A litigant who does not provide an adequate response to a *hazmanah* by the Beth Din has the status of a *mesarev l'din*. This can give rise to a *heter arka'ot* for the plaintiff, and the issuance of a *seruv* against them.
Midrash	Rabbinical expositions on Scripture, often containing moral or *halakhic* ideas.
Minhag hamedinah	Custom of the region. *Halakhah* recognises the binding nature of commercial practices that are idiosyncratic to a particular region.
Minhag hasoḥerim (also, situmta)	Common commercial practice. *Halakhah* recognises the binding nature of customary practices among merchants.
Mishnah	The first written collection of the Jewish oral tradition.
Mishpat Ivri	Jewish law. A term used to denote the aspects of *halakhah* that could be applied in the context of a secular State, with a focus on their application to the modern State of Israel.
Mitzvot	Commandments. A set of 613 commandments, issued by G-d, which are core to Jewish practice. The term is also used colloquially to refer to a 'good deed'.
Moatzot hadatit	Religious Council. Local government bodies that oversee the religious needs of their communities in the modern State of Israel.
Murshah	See *harsha'ah*.
Ne'emanut	Credibility. The confidence that a *dayan* can have in the veracity of the presented witness testimony.
Nidui	Sanctions that disqualify the individual from forming part of a prayer quorum, as well limiting their social interactions with the community.

Orekh din (pl. orkhei din, orkhei hadayanim)	One who organizes a legal matter. A legal representative such as a lawyer (see *to'en rabbani*).
Pshara krova l'din	Compromise which is close to the law. Equitable considerations that a Beth Din may consider which diverge from the application of the strict *halakhah*.
Psak din (pl. psakim, piskei din)	Ruling. A verdict issued by a Beth Din or rabbinic authority.
Rasha	Wicked person.
Seruv	See *k'tav seruv.*
Sgan	Deputy. The Battei Din surveyed included personnel in positions of *sgan Av Beth Din* (deputy *Av Beth Din*) and *sgan menahel* (deputy director).
Shimush	Apprenticeship. An element of training to be a *dayan* involves serving as an apprentice to an experienced *dayan*.
Shoḥet (pl. shoḥtim)	Ritual slaughterer. For meat to be *kosher* only certain animals may be consumed, and only when they are slaughtered by a ritual slaughterer in accordance with *halakhah*.
Sholish	Third *dayan*. In a *zabla* arrangement, each party selects one *dayan* and by consensus a third *dayan* is selected.
Shulḥan Arukh	'Set table'. The title of the codification of Jewish law that has gained wide acceptance, authored by Rabbi Josef Karo (16th Century) and containing glosses by Rabbi Moses Isserles (16th Century).
Sibah	Cause.
Siman	Sign, or outcome.
Situmta	See *minhag hasoḥerim.*
Smikhah	Rabbinic ordination.
Sofer	Religious scribe. A scribe is required in the production of certain religious ritual items.
Takanat hamedinah	A sweeping economic regulation that requires regional compliance for it to be effective.
Takanant hatzibur	Public policy.
Takanot Hadiyun	Statute that governs the operation of State Rabbinical courts in the Modern State of Israel.
Talmid ḥakham	Torah scholar.
Talmud	Central text of Rabbinic Judaism, which forms an exposition of the *Mishnah* and includes both legal and moral teachings. There is a Babylonian and Jerusalem Talmud, of which the former is more authoritative and attracts broader study.
Tanakh	Bible. The corpus of 24 texts, divided into three categories, the Pentateuch, Prophets and Writings, which comprise the Jewish scriptural canon.

To'en Rabbani (also, to'en, pl. to'anim, to'anim rabani'im)	Rabbinical attorney.
Torah	A term used to either refer specifically to the Pentateuch, or to refer to the complete corpus of classic and modern texts which include the Written and Oral Jewish traditions.
Torah u'Madda	Torah and knowledge. An approach to integrating Jewish religious learning with academic learning.
Tosefot	Medieval commentary on the Talmud, authored by classical Jewish European scholars.
Yadin yadin	'He may judge? He may judge!' The term given to the qualification for *dayanut*.
Yibum	See *ḥalitzah*.
Zabla (also, zabla v'zabla)	An acronym for the Hebrew sentence 'this one chooses for themselves one *dayan* and the other chooses for themselves one *dayan*'. It refers to a process of setting up an ad-hoc Beth Din whereby each litigant selects a *dayan*, and a third *dayan* is jointly selected.

1 INTRODUCTION, OVERVIEW AND METHODOLOGY

1.1 INTRODUCTION

Based on the 2021 Australian Census data, Australian Jews total 116,967 people with the State of Victoria hosting its largest and most religiously observant community.[1] Australia boasts the ninth largest Jewish community in the world,[2] of which 14% deem observing *halakhah* (Jewish law) to be very important to their sense of Jewish identity.[3]

Jewish law can be split into the two broad categories of ritual and commercial law.[4] With the rise of the nation-state, Jewish citizens in the West have been free to observe ritual law, under the protection of their Freedom of Religion. However, the post-Enlightenment era has also seen the aspect of Jewish law that governs internal commercial disputes largely relegated to theoretical study, with its practical application set aside in favour of using state-sponsored dispute resolution mediums, in an attempt at legal centrism.[5]

The rise in multiculturalism over the greater part of the last century, has promoted a fuller expression of the identity of minority cultures within the context of the nation-state.[6] In the sphere of law, this has translated into the development of the notion of legal pluralism which recognises that an important component of multiculturalism is the state's accommodation of the laws and customary practices that are a component of its minority cultures' identity. In tandem with this shift, the courts have become more accommodating of arbitration, which allows for groups within society to choose the format of their dispute resolution.[7]

The utilisation of Jewish law as the basis for commercial arbitration within the Australian context, has encountered setbacks over the past quarter century. In three cases which achieved a high profile

[1] See David Graham, *The Jewish population of Australia: Key findings from the 2021* Census (JCA, 2024) 18; Andrew Markus et al, *The Jewish population of Victoria: Key findings from the 2016 Census* (Monash University, 2020) 69. See also David Graham and Andrew Markus, *Gen17 Australian Jewish Community Survey: Preliminary Findings* (Monash University, 2018). It is noteworthy that this likely underrepresents the true number of Jewish people in Victoria, as not all participants state their religious identity.
[2] Graham and Markus (n 1) 1.
[3] Ibid 16; notably 98% of those who self-described as belonging to the 'Strictly Orthodox' or 'Haredi' (Ultra-Orthodox) sects of Judaism rated 'Observing *halakhah* (Jewish law)' as 'very important' as did 41% of those who self-described as 'Modern Orthodox'. It is for these elements within the Jewish community that this research is most pertinent.
[4] See below Part 2.2.6.
[5] See below Part 3.
[6] See below Part 3.1.
[7] See below Part 3.2.

within the Jewish community, awards issued by Battei Din practicing commercial arbitration in Victoria and New South Wales, were vacated by the courts based on non-compliance with the relevant arbitration legislation and, in one case, criminal obstruction of access to the constitutionally established courts.[8] Coming on the back of a half century of mismanagement in matters of personal status such as conversion and divorce at the Melbourne Beth Din,[9] these cases did significant damage to any residual communal confidence in the possibility of establishing a Beth Din as a trusted venue for Jewish law commercial arbitration.

This thesis seeks to address this problem, by providing the theoretical groundwork for facilitating a functional commercial Beth Din operating with the Australian legal context by advancing greater accommodation between Jewish and Australian law. In doing so, this paper addresses the question,

> What are the requirements of a commercial Beth Din, functioning within the Australian legal context?

In approaching this question, several sub-questions will be explicated, including:

> What are areas of potential conflict between Jewish and Australian law, and how might they be resolved?
>
> What lessons can be learned from best practice commercial Battei Din that operate in analogous common-law contexts?
>
> What can be learned from the history of Australia's oldest Beth Din, the Melbourne Beth Din, in terms of potential pitfalls to offering Jewish law commercial arbitration?

These sub-questions emerged organically as the research progressed and form the basis for the structure of the thesis which will be outlined in the following section.

While the Australian context is the intended focus of this thesis, the importance of developing an understanding of how best practice Battei Din operate internationally in analogous secular settings became clear early in the research. Rather than seeking to recreate the wheel, I travelled to the two most populous Jewish communities – Israel and the USA – seeking to identify and interview personnel of well-regarded Battei Din in those locations. Commercial Battei Din in both Israel and the USA operate as arbitral bodies operating within a secular legal context, which share many

[8] These cases are discussed below in Part 8.4.
[9] See below Part 7.

similarities with the Australian arbitral context.[10] The empirical work performed in the USA and Israel make the findings of this research pertinent to a host of countries that operate under the common law. Additionally, the Jewish law research into potential forms of accommodation with secular law,[11] has implications beyond the Australian context and is relevant for Orthodox Jewish communities worldwide.

The findings have demonstrated that Jewish law is able to provide the accommodations needed to align with secular law. This is due to the fact that it is in the interest of Jewish law practitioners for the decision of their Battei Din to made enforceable by the courts,[12] which will only occur if their awards are made in accordance with relevant legislation and common law principles. Additionally, the application of Jewish law over two millennia of Diasporic existence has evidenced its adaptability to accommodate to the demands of the many host societies in which it has operated.[13] As such, for this research to achieve its intended impact, it is written with Jewish law practitioners, primarily *dayanim* (Jewish law judges), in mind.

Awareness of the intended audience impacts the language used in this study, as well as the sources selected to be included in the research. The language is intended to be clear and intelligible to an audience that has not had a secular legal education, and the sources used are those that are authoritative within the Orthodox Jewish law tradition. This has not precluded the consultation of a wide range of academic sources; however, they have been selected where their insights and findings sit alongside traditional sources and are palatable to the intended audience so as not to undermine the intended practical purpose of this study.[14]

The wider Jewish community are also an intended audience of this study. One of the significant findings, and elements of the working model that emerge from the research, relates to building communal confidence in the Beth Din.[15] The reputational damage that Battei Din in Australia, and in Melbourne in particular, have suffered over the greater part of the last century, coupled with the overturning of multiple decisions made by commercial Battei Din in more recent years, mandates

[10] Australia, Israel and certain States within the USA have adopted the *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> *('UNCITRAL Model Law')* as the basis for their arbitration framework. For the full list of jurisdictions that have adopted the *UNCITRAL Model Law*, see <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.
[11] See below Parts 5 and 6.
[12] See commentary of Rabbi Elijah of Vilna to Proverbs 31:9, 'the *dayan* must see to it that their decision is enforced, and that the stolen item is extracted from [the thief's] hand' (translation is my own).
[13] See below Part 2.1.
[14] Sensitivity to the indigenous approach to Jewish law, which is meaningful to its Orthodox practitioners, is discussed below Part 2.2.3.
[15] See below Part 8.3.2.

that building community confidence is crucial in the success of any future such endeavour. As such, this document aims to provide a transparent account of what measures are proposed for adoption in the formation of a commercial Beth Din in Australia and the basis upon which this model would be founded. In serving this purpose, clear language and structure, as well as explanations of all concepts, both legal and *halakhic*, are imperative. While this document will still not be an easy read to the lay person, it is intended to be one that a motivated member of the Jewish community, with a working knowledge of the Jewish and secular contexts relevant to the paper, could understand.

Finally, a key audience to which this research is geared, is the academic community. The thesis addresses an important gap in knowledge, particularly via the empirical data gathered and processed from its twenty-one long-form interviews conducted across three continents. Additionally, the elements of doctrinal Jewish law research heavily grounded in primary and secondary sources and applied in the context of its accommodation with regards to Australian commercial arbitration, is a novel contribution, especially in its synthesis of materials that are not yet available to the English-speaking academic community. Further, this research adds to the academic findings in the fields of multiculturalism and legal pluralism, providing a practical application of academic theories in these fields to the context of the minority Jewish community and its relationship with the majority Australian culture.[16]

1.2 Overview of the Thesis

The thesis proceeds from the broader Jewish and common law context as well as the surveying of international Battei Din, which forms the basis of Part 2 to 4, and then narrows in its focus over Parts 5-8 to the specific areas of Jewish and common law relevant to this study as well as the Melbourne Beth Din experience. The elements of the broader context explored in the first part of the paper include a limited conceptual study of Jewish law and a comparison to secular common law, an overview of commercial arbitration in modern times with a focus on the evolution of religious commercial arbitration, as well as an account of the features of best practice Battei Din in the USA and Israel. The second part of the thesis narrows to examine specific conflicts that pose a challenge to commercial Battei Din operating within a secular legal context and their potential resolutions. An outline is then provided of the historical backdrop of the longest-standing Beth Din in Australia, the Melbourne Beth Din, and a working model is proposed, considering the idiosyncrasies of the Australian context.

[16] See below Part 3.6.

Part 2: 'Jewish law in Context' commences with an overview of Jewish law and proceeds to explore the jurisprudential underpinnings of both *halakhah* and common law. A distinction is drawn within *halakhah* between ritual law *(issura)* and commercial law *(mamona)* and their jurisprudential underpinnings, which provides a basis for a conceptual understanding of the conflicts that may emerge when a Beth Din provides *halakhic* arbitration under the aegis of the common law.

Part 3 'Religious Arbitration in Context' focuses on the formal relationship between Jewish and secular law in the post-Enlightenment nation-state. Formerly, Jewish commercial law and the dominant legal system operated in parallel, a relationship which has been retrospectively referred to as a form of strong legal pluralism. The rise of the nation-state ultimately forced Jewish law to accommodate the arbitral frameworks established by the statute and common law, resulting in a weaker form of legal pluralism. The initial wariness of the courts at the inception of the nation-state towards arbitration, as legal monism aimed to professionalise and unify the disparate quasi-judicial courts and arbitration fora that proceeded it, has given way over the last half-century to a more embracing attitude towards arbitration, aligning with the growth in multiculturalism, as well as the increased interest in protecting private commercial interests. Notwithstanding these increased protections afforded to religious arbitration because of this general trend, it is apparent that society remains cautious about its implications for vulnerable members of the minority culture and various theories of accommodation with the aim of avoiding the pitfalls of such institutions are explored and evaluated.

Part 4 'International Best Practice: Battei Din in the USA and Israel' shifts from the theoretical towards the empirical, drawing on a range of interviews with personnel affiliated with Battei Din across the USA and Israel to paint a picture of how best-practice commercial Battei Din operate in several of the world's largest Jewish communities. The Beth Din of America in New York ('BDA'), the Chicago Rabbinical Council Beth Din in Chicago ('cRc Beth Din') and the Eretz Ḥemdah Gazit network of Battei Din in Israel are the subjects of this chapter, and their origins, structure, procedures, practices and innovations are outlined and contrasted.

Part 5 'Jewish Law Accommodation: Judicial Aspects' narrows the theoretical focus to select areas of potential and actual conflicts between Jewish and secular law and proposes methods by which the former can accommodate the requirements of the latter. The specific focus of this chapter are the challenges that relate to the nature of the makeup of the arbitral panel, the application of secular law by the Beth Din where required by secular and/or Jewish law (*dina demalkhuta dina*), as well as an examination of the requirement for arbitrators to provide reasoning for their awards.

Part 6 'Jewish Law Accommodation: Procedural Aspects' continues in this vein, with a shift in focus towards the potential and actual conflicts between the two systems of law that pertains to procedural elements of Beth Din commercial arbitration. Aspects explored in this chapter include the Beth Din's use of a *ktav seruv* (writ of refusal) to enforce attendance or compliance, the rights of the parties to legal or *halakhic* representation, the admission of female testimony as well as the possibility of an internal appeals system within the Beth Din. The theoretical elements of this and the previous chapter are interwoven with the empirical data collected from the personnel of the Battei Din in the USA and Israel, exploring how the proposed Jewish law accommodations are perceived by *dayanim* in these countries.

Part 7 'The Melbourne Beth Din: From Mayhem to Modernity' explores the origins and history of the Melbourne Beth Din which is the longest standing Australian Beth Din servicing its largest Jewish community. The purpose of this chapter is to provide a nuanced understanding of the context into which the findings of this research are intended to be implemented. The study reveals how the institution navigated challenges stemming from internal conflicts and mismanagement, competing local Battei Din, shifting demographics within the Jewish community as well as changes in allegiance to the Chief Rabbinate of the United Kingdom. While the Melbourne Beth Din has been the *halakhic* backbone of the Melbourne Jewish community since its inception, thus making it the most appropriate venue for religious law arbitration, its history reveals significant hurdles in restoring communal confidence, furthering the need for increased transparency, community education and research into best practice to underpin an attempt to incorporate commercial arbitration into its ambit.

Part 8 'A Working Model: Summary and Evaluations' sews together the empirical findings gathered from best practice international Battei Din (Part 4), the theoretical and empirical study of potential and actual conflicts between Jewish and secular law and their accommodation (Parts 5 and 6) together with an understanding of the historical and cultural milieu of the Melbourne Beth Din (Part 7) to propose a working model for how the Melbourne Beth Din could go about offering commercial arbitration in a manner that accommodates the secular arbitral framework and promotes communal confidence. In evaluating the efficacy of this working model, data gathered from interviews conducted with Australian *dayanim*, is used to evaluate the potential for success of the working model by assessing their openness to the proposed Jewish law accommodations. Additionally, the working model is assessed in terms of its ability to prevent a repeat of the mishandling of commercial arbitration by Australian Battei Din whose awards and processes were criticised by the courts.

The question that the thesis seeks to answer, culminates in the working model depicted in the final chapter (Part 8). The sub-questions guide the research of the earlier Parts, namely *'what are areas of potential conflict between Jewish and Australian law, and how might they be resolved?'* is addressed in Parts 2,3, 5 and 6, *'what lessons can be learned from best practice commercial Battei Din that operate in analogous common-law contexts?'* is the subject of Part 4, and *'what can be learned from the history of Australia's oldest Beth Din, the Melbourne Beth Din, in terms of potential pitfalls to offering Jewish law commercial arbitration?'* is explored in Part 7.

1.3 Methodology Relevant to the Thesis

1.3.1 Introduction

The research involved in this study contained both theoretical and empirical components. The theoretical aspects utilise comparative law methodology as well as a range of legal research methodologies which will be outlined in this section. The empirical elements of the research applied the pragmatic approach towards interpreting the qualitative data that emerged from interviews conducted with *dayanim*, Beth Din administrators and historiographers.

1.3.2 Comparative Law Methodology

A significant component of this study deals with the intersection of Australian and Jewish law. Parts 2 and 3 which focus on the macro-comparison, explore the jurisprudential underpinnings of each system to frame the tensions that have emerged in the context of the Beth Din acting as religious arbitration in a secular state. Parts 5 and 6 invoke a micro-comparison of specific points of Jewish law that conflict with Australian law and to propose forms of accommodations at Jewish law that address these challenges. The comparative law methodology that has been applied in those Parts is guided by the formulations of Walter Kamba and Peter De Cruz, as discussed below.

1.3.2.1 Methodological Outline

In his *Comparative Law in a Changing World*, De Cruz lauds Kamba as the only comparatist scholar to have 'suggested some "objective" practical comparative techniques'.[17] Kamba suggests three steps which include:

1. the 'descriptive phase' which involves describing the norms, concepts and institutions of the systems concerned;

[17] Peter De Cruz, *Comparative Law in a Changing World* (Routledge-Cavendish, 3rd ed, 2007) 240.

2. the 'identification phase' in which similarities and differences between the systems are outlined; and
3. the 'explanatory phase' whereby the divergences and similarities are accounted for.

Kamba qualifies that these steps are not required to proceed in a specific order nor are they always presented distinctly from one another, but all three are required as elements in a comparative law study.[18]

De Cruz points out that Kamba's method assumes a high level of expertise in specialist legal research which is uncommon even among postgraduates of high quality. As such, De Cruz proposes a far more scaffolded approach to comparative law research, comprised of eight steps, and guides the researcher through the elemental aspects of producing a limited comparative study.[19]

De Cruz's methodology has guided the current study, and I am conscious of limiting the comparison between the two legal systems to that which is relevant and necessary for the research aims. My intentions are to ensure that all assertions are based in texts indigenous to the foreign law being analysed – Jewish law in this case – as well as academic material that has been produced by experts in the field. The enormity, and indeed impossibility,[20] of the task of producing a comprehensive comparison between common law, as it is practiced in the Australian jurisdiction, and Jewish law is a matter to which I have heightened awareness. By taking methodological guidance from Kamba and De Cruz as well as remaining tethered to the academic research relating to this field, I have aspired towards producing a comparison that is limited but authentic and one which sufficiently illuminates the subject of this study: the integration of Beth Din commercial arbitration within the Australian legal context.

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[18] This brief outline of Kamba's methodology is paraphrased from Walter J Kamba, 'Comparative Law: A Theoretical Framework' (1974) 23 *International and Comparative Law Quarterly* 485, 511-512.

[19] De Cruz (n 17) 241-245. In brief his method involves the following elements:

- Identifying the problem and stating it as precisely as possible
- Identifying the foreign jurisdiction including its parent legal family, sources, mode of legal thought, ideology etc.
- Deciding on primary sources of law that will be needed
- Gathering materials relevant to the jurisdiction being examined
- Organising materials based on various headings such as the legal, philosophical and ideological aspects of the system
- Mapping out provisional answers to the problem, taking into account non-legal aspects, such as local customs, religion etc.
- Critically analysing the intrinsic meaning of the legal principles of the foreign law, based on their own terms – not Western terms
- Setting out the conclusion with caveats and reasons so future researchers can understand the approach adopted.

[20] See Kamba (n 18) 515, who asserts that 'the standard of scholarship demanded of comparative lawyers is extremely high – well-nigh impossible to attain'.

1.3.2.2 Caution in Comparison

Any exercise in comparative law is accompanied by a litany of challenges, which are only exacerbated when contrasting religious and secular legal systems. In attempting to compare areas of disparate legal systems one must recognise that each system comprises a separate organism, with its own jurisprudential underpinnings, historical context, and socio-cultural influences. Terms used by one system may appear similar to those used by another, but refer to something else entirely.[21] Conversely, even where there are no words used by a legal system to describe a particular idea or concept, this does not rule out its existence within that particular system.[22]

Comparative law scholar, Sir Otto Kahn-Freund utilises the metaphor of an organism to describe a legal system, equating the attempt to cross-pollinate between two legal systems to that of transplanting a living organ. He asserts that '[t]ransferring part of a living organism and transferring part of a mechanism are comparable in purpose, but in nothing else'.[23] The former entails the prospect of 'rejection' by the rest of the system into which it is inserted, and as such the process of comparing legal systems with the intention of there being some form of dialogue, or accommodation, between the two must be advanced with caution, and with a wholistic understanding of the body of law from which their relevant legal rules are derived.

While this challenge applies in the comparative study of any two legal systems, there is a further challenge which presents itself when one of those systems is a religious legal system. Unlike secular law which sees its origins in human creativity, Jewish law is accepted by its adherents as being ultimately sourced in the Divine will, as revealed through written and oral traditions. In an address in the 1950s Rabbi Isaac Herzog, the first Ashkenazi Chief Rabbi of the modern State of Israel and a scholar who invested significant research into the attempt to utilise *Mishpat Ivri*[24] as the nascent State's legal system condemned,

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[21] See Menachem Elon, 'The Legal System of Jewish law' (1985) 17 *New York University Journal of International Law and Politics* 221, 241-3 where he cautions researchers of Jewish law from falling into traps of translating terms used in Jewish law in a manner that they neatly accord with common-law terms.

[22] See Norman Lamm and Aaron Kirschenbaum, 'Freedom and Constraint in the Jewish Juridical Process' (1979) 1 *Cardozo Law Review* 99, 112, where they argue that the lack of reference to natural law in classic Jewish scholarship does not mitigate against its existence, as 'concepts, like people, have an existence independent of their names.'

[23] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 5.

[24] A leading authority defines *Mishpat Ivri* as the *halakhic* areas dealing with societal laws (*be'in adam l'ḥavero*), commonly treated by other legal systems, such torts and property law – as opposed to areas that relate to ritualistic practices (*bein adam l'makom*) such as the laws pertaining to Sabbath and *kashrut*; see Menachem Elon, *HaMishpat HaIvri: Toldotav, Mekorotav, Ikronotav* [Jewish Law: History, Sources, Principles] (The Hebrew University Magnes Press, 1973) vol 1, 146-151 [Hebrew].

> "a conspicuous proclivity in large portions of the modern literature on *Mishpat Ivri,* to invariably search for comparisons and analogies from external sources. In essence, from an internal, spiritual perspective, such a comparison – G-d forbid – is inconceivable, for as the heavens are higher than the earth, so the Divine Torah granted from Heaven is higher than any kind of jurisprudential system produced by human intellect and spirit. At the most, it is useful for explanatory purposes, enlisting human intellect to invoke external concepts in explaining certain concepts of *Mishpat haTorah* for those who are not conversant with classical Jewish sources, but are familiar with other legal systems."[25]

While there are Jewish law scholars who pursued comparative studies without the same reverence for the Divine origin of the law, the view promulgated by Rabbi Herzog and adopted by his rabbinic colleagues is more reflective of the position of the Orthodox community to whom this study is directed.[26] As such, an additional level of caution needs to be adopted in ensuring that comparisons between Jewish and secular law are not performed in a manner that aims to equate the two, and instead for the pragmatic purpose of ensuring harmony between them.

A further challenge relevant to the comparison of Jewish and secular law is their relative stages of development. Jewish law has not operated as a state judicial system for two millennia. For the duration of the exilic period, *halakhah* has not had a centralising authority and has operated across numerous communities resulting in various divergent practices.[27] Notwithstanding several codifications of Jewish law, these codes did not have the coercive force of a state legislature and were thus viewed as restatements of the law which could be challenged by *halakhic* authorities.[28] While on this basis a comparison with a State legal system may seem inappropriate, Walter Kamba argues that irrespective of the different evolutionary stages of two legal systems, where worthwhile aims can be met, there is still value in comparing their aspects when it can provide guidance in relation to those objectives.[29] It would appear that in the context of this study and the aims laid out

[25] Isaac Herzog, *Pesakim u'Ketavim* (Mosad HaRav Kook, 1991) 405 [Hebrew]; quoted in Amiḥai Radzyner, 'Between Scholar and Jurist: The Controversy over the Research of Jewish law Using Comparative Methods at the Early Time of the Field' (2007) 23 *Jewish Law & Religion* 189, 189-190; Radzyner explains the differences between the use of the terms *Mishpat Ivri* and *Mishpat HaTorah* whereby the former term is used to encapsulate the research that Rabbi Herzog critiqued as 'secularising' Jewish law while the latter was the term used to describe his own research.

[26] See Radzyner (n 25), where he contrasts the various scholars who sided with Rabbi Herzog critiquing a comparison between Jewish law and secular law (beyond illustrative purposes) and those who embraced such comparisons.

[27] See Ḥanina Ben Menahem, 'Postscript: The Judicial Process and the Nature of Jewish law' in Neil Hecht et al (eds) *An Introduction to the History and Sources of Jewish law* (Oxford University Press, 1996) 420, 430-431.

[28] See Chaim N Saiman, *Halakhah: The Rabbinic Idea of Law* (Princeton University Press, 2018) 167-170; Saiman lists a number of aspects of the *halakhic* system which render it ill-suited as a state legal system in its present form at 216-235.

[29] Kamba (n 18) 507-508.

below, there is much to be gained from contrasting Jewish and secular law, irrespective of their developmental differences.

1.3.2.3 Jurisprudential Outlook

Kamba guides the researcher to be self-aware of what he terms as their 'jurisprudential outlook'.[30] In performing comparative research, the researcher will often utilise a particular lens through which they interpret the relevant legal systems which they are studying, examples of which may include sociological, historical and philosophical perspectives.

Previously Rabbi Herzog's concerns with regards to subjecting Jewish law to a comparative study were outlined, insofar as it runs the risk of presenting it as 'human' rather than 'Divine' law and thus alienating it from the way in which it is conceived by its practitioners. Taking this into account, I am conscious that a jurisprudential outlook that is internal to the Jewish law system and its philosophical underpinnings as elucidated by its indigenous scholars, will be far more fruitful then a study that focusses on its history or sociology which are external to the Jewish law texts and thus not native to the viewpoint of its practitioners.[31] This choice of outlook is bolstered by Kahn-Freunds' analogy of the challenges of legal comparison as being akin to those of organ transplantation. For a comparative study to be successful it is vital that it recognises and respects the axioms of each system that it attempts to contrast.

The study is focussed on a micro-comparison of specific differences between Jewish and Western Law that have emerged in the context of Battei Din operating as commercial arbitration bodies in common law countries. This stands in contrast to a macro-comparison, which looks to analyse two entire legal systems.[32] However, in dealing with these specific differences it is instructive to zoom out and explore some of the key jurisprudential underpinnings of both Australian and Jewish law. These philosophical foundations could be the subject of a study independent of the present research, and as such, it is not my intention to present them with the degree of completeness that they deserve. Notwithstanding the scope of the present study, elements of these broader differences will be explored to the extent necessary for the proposal of a cogent theory that illuminates the micro-comparison between the two legal systems.

[30] Kamba develops this idea from the writings of Schlesinger et al; see Kamba (n 18) 513.
[31] Saiman (n 28) 12-13 similarly argues for the importance of viewing Jewish law (and indeed, any legal system) from an 'internal' rather than 'external' viewpoint.
[32] See De Cruz (n 17) 233-234.

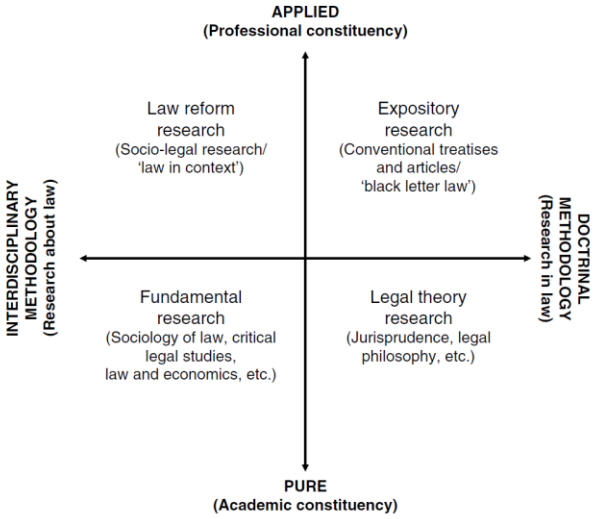
1.3.3 Legal Research Methodology

While the comparative law methodology outlined above provides guidance in terms of the interplay between legal systems, much of the research conducted in this study has taken place within a specific legal system, be it Australian or Jewish law. The methodology utilised for the research within a legal system has been described by scholars as difficult to articulate and 'picked up by a process akin to osmosis'.[33] This form of research has underpinned the independent studies within each of Jewish and Australian law which forms components of Parts 2 and 3 of the thesis which examine the broader context and development of both Jewish and Australian law in relation to commercial arbitration, as well as the specific research in areas of potential conflict that are articulated in Parts 5 and 6.

1.3.3.1 The Four Quadrants of Legal Research Methodology and their Application to this Study

A significant step towards developing a coherent methodological framework for legal research was articulated in the Canadian *Arthurs Report (1982)*.[34] A similar study was undertaken by the Pearce Committee in Australia in 1987 ('*Pearce Report*')[35]. In the *Arthurs Report*, the authors proposed a useful taxonomy which illustrates the various methodologies which had been latent, though unspecified, in legal research generally. The categories of the various methodological avenues of research are illustrated by the Cartesian plane below:[36]

[33] Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 *Melbourne University Law Review* 1066.
[34] Harry W Arthurs, *Law and learning: report to the Social Sciences and Humanities Research Council of Canada* [Le droit et le savoir] (Ottawa: The Council, 1983).
[35] Denis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987).
[36] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2009) 28, 29.



Elements of the theoretical research performed in this study corelate with all four of the quadrants illustrated by the above figure. The limited conceptual study of Jewish law in Part 2 which ascertains the jurisprudential underpinnings of Jewish law and would be classified as 'legal theory research' which amalgamates pure[37] and doctrinal[38] elements of legal research to explore the jurisprudential underpinnings of each system. Part 3 which traces the evolution of arbitration law against the historical backdrop of the rise of the nation-state and the gradual shift towards multiculturalism would be classified as 'fundamental legal research' which involves both pure and interdisciplinary[39] research.

Parts 5 and 6 which focus upon Jewish law accommodation, involved researching the specific areas of Jewish law that were in potential or actual conflict with secular law, and assessing their potential for evolution and adaptation in line with the expectations of Australian law is categorised as 'law reform research' which combines applied[40] and interdisciplinary research methodologies.

An important caveat on the use of the phrase 'law reform research' is that the intention of this study is not to change the Jewish law in order to conform with the secular law expectations, but rather to discover approaches, or work-arounds, that harness extant Jewish law doctrines to enable their

[37] Pure research is academic study focusing on the 'underlying philosophical, moral, economic and political assumptions' of the law; see ibid 31.
[38] Doctrinal research is the classical method of legal research and is described in the *Pearce Report* as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'; Pearce, Campbell and Harding (n 35) 307-308.
[39] Interdisciplinary research is described as 'research *about* law', and explores the way in which law interacts with influential external factors. Examples of this would include the historical backdrop against which a law is born, or the nature of the technology or industry to which the law relates; see Chynoweth (n 36) 30.
[40] Applied research is 'knowledge of the same kind [as pure research] which has been produced with a particular purpose in mind'; see ibid 31.

alignment with the secular law and to advocate that these approaches within the indigenous Jewish law tradition are adopted by Australian Battei Din that engage in commercial arbitration. The notion of reforming Jewish law has historical and cultural connotations that would alienate the Orthodox Jewish community. As such, it is imperative that it is stated clearly that while this study seeks to propose accommodations by Jewish law to ensure it aligns with the secular arbitral framework, in doing so it draws on sources within the Orthodox Jewish tradition that would be deemed acceptable by mainstream practitioners, and evaluates their acceptability in the interviews conducted with Orthodox *dayanim* in reputable Battei Din in the USA, Israel and Australia.

Additionally, the limited study of the caselaw in which Australian Battei Din have been found to have fallen foul of the secular law expectations, and its application in the form of evaluating the strength of the working model proposed in Part 8 would be an example of 'expository legal research' sitting at the intersection of applied and doctrinal legal methodologies.

1.3.3.2 Shortcomings of the Legal Research

In achieving the objectives of this study, I am aware of the many shortcomings that could prevent the research from being considered complete, and the manifold possibilities of error. The systems of law that are brought into dialogue through this doctorate, are independently mammoth bodies of knowledge that evade mastery both in terms of the breadth of their written content and the depth of their historical and jurisprudential foundations. The literature that was surveyed for the purpose of the research needed to be carefully selected for relevance and authority, and drawing the line at a particular point in the reading, while necessary, limited its complexity and nuance. This is especially the case in Part 2 which aims to provides a macro-comparison of Jewish and common law, and touches upon unsettled areas of legal jurisprudence which are the subject of debate among philosophers of law. While I felt it necessary to include a limited conceptual study to contextualise the micro comparisons that would follow in Parts 5 and 6, it is not comprehensive, and I have been careful to ensure clear attribution to the relevant *halakhists* and jurists of both the Jewish and common law traditions, upon whom my assertions rely.

Additionally, I am aware of the limitations in my training and knowledge in both Jewish and common law. I have received qualifications in both Jewish and Australian law,[41] however, I appreciate the limitations of my knowledge in both fields. In mitigating this shortcoming, I have ensured that my

[41] I was granted rabbinic ordination (*smikhah*) from Machon Ariel Institute in Israel as well as from the Machon L'Hora'ah Rabbinical Academy, Pretoria, South Africa. Additionally, I have a Master of Laws (Juris Doctor) from Monash University, Melbourne, Australia.

analysis of areas of Jewish law and proposals for accommodation have aligned with authoritative and relevant rabbinical and academic sources and have been discussed in the interviews with *dayanim* of international repute. In terms of secular law, I have leaned heavily on primary and secondary legal sources and have kept my analysis conservative, as well as obtaining advice and guidance from senior legal academics and judges within the Australian community where such expertise was required.

A further challenge in the research was finding the correct balance between the use of academic and indigenous Jewish texts in relation to the exposition of Jewish law. As discussed earlier, the audiences of this paper include both the rabbinic and academic communities, who may differ in terms of which sources they each deem as authoritative or influential. The Jewish law scholarship in this research stems from both traditional and academic sources, and thus exposes itself to the tension raised in the writings of Rabbi Herzog referenced earlier in this section. The potential pitfall that this study meets neither the standards of acceptability of the academic nor rabbinic community is appreciated, however it is precisely a hybrid of the rabbinic and the academic that is most likely to achieve the objective of ensuring that decisions of a Beth Din performing commercial arbitration are acceptable to both the rabbinic as well as the lay elements within the Jewish and Australian community.[42]

1.3.4 Empirical Research

The empirical research took the form of twenty-one interviews which took place in Australia, the USA and Israel. The findings pertaining to the interviews with the *dayanim* and administrators of best practice Battei Din in the USA and Israel are found in Part 4 as well as in the context of evaluating the proposed Jewish law accommodations in Parts 5 and 6 as well as in providing support for the working model devised in Part 8. The information collected from historiographers and prominent members of the Melbourne Jewish community is utilised in the depicting of the history of the Melbourne Beth Din in Part 7. Lastly, the data stemming from the interviews with *dayanim* of Australian Battei Din assisted in the evaluation of the working model proposed in Part 8 of the thesis. Additionally, a range of primary and secondary sources have been referenced.

1.3.4.1 Ethical Considerations

The participants in this research were sophisticated individuals, many of whom held leadership positions within their communities and/or organisations. In accordance with the university policy,

[42] A model for the integration of the academic and traditional texts can be found in the writings of Maimonides, who states with regards to the inclusion in his works of ideas extraneous to Jewish traditional texts that 'one should accept the truth from whatever source it proceeds'; Maimonides, Eight Chapters, Introduction (translation from sefaria.org).

approval for this research project was sought from, and granted by, the VU Human Research Ethics Committee and reports were submitted in accordance with the committee's requirements at various stages of the study. Interviews which had occurred prior to the application for ethics approval were brought to the attention of the Chair of the VU Human Research Ethics Committee who provided guidance with regards to their inclusion in the project.

Each interviewee was provided with an overview of the research project entitled 'Information to Participants Involved in Research' which provided context for the interview as well as a personalised form entitled 'Consent Form for Participants Involved in Research' which they signed to signify their consent to take part in the research.[43]

A challenge that emerged from the documentation was that the consent form included the assurance that 'I have been informed that the information I provide will be kept confidential' while the information form made it explicit to the interviewees that 'I may include answers that you have given to questions in my thesis in terms of proposing potential solutions to some of the procedural issues that the Beth Din is facing in Australia'. It further stated in the context of the potential risks of participating in this project that '[i]n the event that you say something that you don't want to be published in your name, please ensure that I am made aware.'

Being that individuals interviewed were selected due to the authority that they bring to this study, based on personal expertise or their local or international standing, the inclusion of their names adds weight to the research. As such, I have chosen to follow up with the interviewees to ensure that they are comfortable with having their responses attributed to them. Transcripts of each interview have been written up and shared with the interviewee and where they have responded with corrections or amendments, they have been accepted and incorporated into an updated transcript which has been used instead of the original. Additionally, where requested, a copy of the PhD will be sent to the interviewees prior to it being made accessible to the public, to grant an opportunity for them to raise any concerns they might have relating to confidentiality.[44]

A further ethical consideration stems from the fact that I am a director of the Melbourne Beth Din, and have held a position on its board of governance since 2017. This position of authority may have influenced the types of answers that *dayanim* of the Melbourne Beth Din provided, possibly making them more conciliatory, given the imbalance of our relationship. One way in which this has been

[43] These forms are included in Appendix 10.5.
[44] A version of Part 7 of this PhD has previously been published with the reference made to the interviews relevant to that segment. See Chaim Cowen, 'The Evolution of the Melbourne Beth Din' (2020) 33 *Australian Journal of Jewish Studies* 193.

mitigated is through clear communication as to the private capacity in which I am performing the research, as well as the clear understanding that the board of governance does not have a say with regards to matters that require *halakhic* expertise, but is rather tasked with administrative oversight. As such, the *dayanim* likely would not have felt compromised with regards to the matters discussed in the interview, which were largely *halakhic* in nature.

A further ethical consideration is that being a fellow rabbi, *dayanim* might have felt a sense of closeness to me as a cultural insider which might have led them to share information that they would not want on the public record. This concern was mitigated by ensuring that it was made clear to participants that the interview formed part of a formal research project, providing documentation to this effect in advance of the interview, informing the participants that the interview would be recorded and the sharing of the transcripts with the parties to review and amend following the interview. Further, at times when an interviewee explicitly stated that something that they were sharing was to be 'off the record' it was respected, and any such materials were not included in the research.

1.3.4.2 Qualitative Research Methodology

The methodological worldview within which the research was carried out would best be described as pragmatism. Defined as 'problem centred' and 'real world practice oriented'[45] the focus of the research was geared at addressing the problems encountered by Battei Din operating in Australia that seemed to be at loggerheads with the secular legal system and providing real-world solutions that draws upon international Battei Din who have successfully aligned themselves with the requirements of the broader legal system. Analogous Battei Din were sought out which navigated the complexities of providing faith-based dispute resolution in a secular society, and their personnel were interviewed in order to mine their experience in dealing with the complexities and difficulties that have come to the fore in navigating a potential clash of cultures.

The research design, which will be explained more fully in the following sections, utilised the descriptive method which 'stays close to the data and uses limited frameworks and interpretation for explaining the data and catalogues the information into themes.'[46] This research design promoted an openness to whatever findings might emerge from the interviews and observations, and suited an inductive approach to finding appropriate accommodations that could be thoughtfully applied to the Australian context.

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[45] John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (SAGE Publications, 4th ed, 2013) 11-12.
[46] Ibid 15.

1.3.4.2.1 Interviewees

The interviewees, twenty-one in total,[47] are outlined in the table below, which includes the manner that each interview is referenced in the thesis. The full transcript of each interview is included in the appendix. The roles of the various personnel interviewed include *dayan* (rabbinical judge, qualified to preside on a Beth Din), *Av Beth Din* (the most senior *dayan* on the Beth Din, akin to the Chief Justice of a court) and *menahel* (director of the Beth Din, whose role is to oversee its internal operations and community relations).

Interviewee	**Role**	**Date & location**	**Referenced as**	**Transcript**
Rabbi Daniel Rapp	*Dayan*, Beth Din of America	23 November 2022, Yeshiva University, New York	Interview with Rabbi Rapp	Appendix 10.1.1 – USA Interviews
Rabbi Shlomo Weissmann	*Menahel* and *dayan*, Beth Din of America	23 November 2022, Beth Din of America, New York	Interview with Rabbi Weissmann	Appendix 10.1.2 – USA Interviews
Rabbi Mordechai Willig	*Av Beth Din*, Beth Din of America	25 November 2022, Riverdale, New York	Interview with Rabbi Willig	Appendix 10.1.3 – USA Interviews
Mrs Jodi Goldberg[48]	Administrative Assistant, Chicago Rabbinical Council Beth Din	29 November 2022, Chicago Rabbinical Council, Chicago	Interview with Mrs Goldberg	Appendix 10.1.4 – USA Interviews
Rabbi Aaron Kraft	*Dayan*, Chicago Rabbinical Council Beth Din	29 November 2022, Chicago Rabbinical Council, Chicago	Interview with Rabbi Kraft	Appendix 10.1.5 – USA Interviews
Rabbi Yisroel Langer	*Dayan*, Chicago Rabbinical Council Beth Din	29 November 2022, Chicago Rabbinical Council, Chicago	Interview with Rabbi Langer	Appendix 10.1.6 – USA Interviews
Conversation with Chaim Cowen and Rabbi Levi Mostofsky, Executive Director of the cRc; Rabbi Daniel Racca, Senior *Dayan* at the cRc Beth Din; Rabbi Yonah Reiss, *Av Beth Din* of the cRc Beth Din		29 November 2022, Chicago Rabbinical Council, Chicago	Conversation with RLM, RDR, RYR	Appendix 10.1.7 – USA Interviews
Rabbi Yona Reiss	*Av Beth Din*, Chicago Rabbinical Council Beth Din	29 November 2022, Chicago Rabbinical Council, Chicago	Interview with Rabbi Reiss	Appendix 10.1.8 – USA Interviews

[47] Additional to the 21 interviews, there was also a four-way conversation in which notes were taken but not a complete transcription, which is included in the table below.

[48] This interviewee preferred to remain anonymous and her name has been changed to a pseudonym.

Rabbi Ronnie Warburg	Former *dayan*, Beth Din of America; *dayan*, International Beth Din	25 November 2022, Kehillat Bnei Yeshurun, New Jersey	Interview with Rabbi Warburg	Appendix 10.1.9 – USA Interviews
Rabbi Yosef Carmel	*Av Bet Din* and Rabbinical Dean, Eretz Hemdah Gazit	19 January 2023, Eretz Ḥemdah Gazit, Jerusalem	Interview with Rabbi Carmel	Appendix 10.2.1 – Israel Interviews
Rabbi David Lau[49]	Ashkenazi Chief Rabbi of Israel	14 November 2017, Melbourne	Interview with Rabbi Lau	Appendix 10.2.2 – Israel Interviews
Rabbi Daniel Mann	*Av Beth Din*, Eretz Ḥemdah Gazit (Jerusalem branch)	18 January 2023, Eretz Ḥemdah Gazit, Jerusalem	Interview with Rabbi Mann	Appendix 10.2.3 – Israel Interviews
Rabbi Dr Ido Rechnitz	*Menahel*, Eretz Ḥemdah Gazit	18 January 2023, Eretz Ḥemdah Gazit, Jerusalem	Interview with Rabbi Rechnitz	Appendix 10.2.4 – Israel Interviews
Rabbi Yaakov Warhaftig	*Av Beth Din*, Neve Nof Beth Din	22 January 2023, Makhon Ariel, Jerusalem	Interview with Rabbi Warhaftig	Appendix 10.2.5 – Israel Interviews
Rabbi Mordechai Berman	*Dayan*, Melbourne Beth Din	31 August 2022, Zoom	Interview with Rabbi Berman	Appendix 10.3.1 – Australia Interviews
Rabbi Yisroel Greenwald	*Dayan*, Melbourne Beth Din	16 August 2022, Zoom	Interview with Rabbi Greenwald	Appendix 10.3.2 – Australia Interviews
Rabbi Mordechai Gutnick	*Av Beth Din*, Melbourne Beth Din	20 October 2022, Melbourne	Interview with Rabbi Gutnick.	Appendix 10.3.3 – Australia Interviews
Rabbi Shabsi Tayar	*Dayan* and Proprietor of the Mehadr Beis Din Tribunal	6-7 September 2022, Zoom	Interview with Rabbi Tayar	Appendix 10.3.4 – Australia Interviews
Rabbi Yehoram Ulman	co-*Av Beth Din*, Sydney Beth Din	8 November 2022, Zoom	Interview with Rabbi Ulman	Appendix 10.3.5 – Australia Interviews
Reverend Yossi Aron	Historiographer of the Melbourne Jewish Community	8 September 2019, Melbourne	Interview with Reverend Aron	Appendix 10.3.6 – Australia Interviews
Rabbi John Levi	Historiographer of the Melbourne Jewish Community	5 September 2019, Melbourne	Interview with Rabbi Levi	Appendix 10.3.7 – Australia Interviews
Professor Louis Waller	Professor of Law and member of the Melbourne	11 September 2019, Melbourne	Interview with Professor Waller	Appendix 10.3.8 – Australia Interviews

[49] Rabbi Yehoram Ulman, co-*Av Beth Din* of the Sydney Beth Din, was also a contributor to this interview.

	Jewish Community			

1.3.4.2.2 Interview method

The interviews were performed in a semi-structured manner. For Battei Din personnel, a list of questions was compiled combining open-ended questions geared at discovery, as well as more focused questions to elicit concrete responses as to how their Beth Din navigated particular challenges that arose from its operation within a secular law milieu. Additionally, questions were tailored to the knowledge and experience of the interviewee, be they a *dayan*, *Av Beth Din*, administrator or *menahel*.

With the Melbourne Jewish community historiographers, opportunity was granted for them to share their vast knowledge, with verbal prompting to keep the discussions on topic. Follow up questions were used as a tool to gain a deeper or more comprehensive understanding where a matter was unclear, or was especially pertinent to the research.

While information for the purposes of providing context and consent were provided to interviewees in advance, the questions that would be asked were not sent to the interviewees unless it was specifically requested. This was done with the aim of preventing a rigid or scripted interview process, and allowed the interviews to be more natural and for the conversation to adapt as needed.

In general, my preference was to conduct interviews in person either at the interviewee's office or home, or another place of their convenience. Based on their communal and professional responsibilities, the interviewees tended to have busy schedules and as such their choosing of the location and timing of the interview minimised the inconvenience to them. Additionally, given that the interviews were at my initiation, it was important to me that interviewees would accept the invitation which was more likely to be the case when they had control over its location and timing. While the option of zoom meetings might have added to their convenience, in-person meetings were strongly preferred to enable rapport building with the interviewee as well as to enable the reading of body language and subtle nuances which are not as easily conveyed over a screen. In achieving this, I travelled to New York and Chicago in 2022 and to Israel in 2023 to conduct in-person interviews with the personnel of the relevant USA and Israeli Battei Din in their offices and homes. While some interviews did need to be on zoom, this occurred only with Australian *dayanim* with whom I had a prior, in-person relationship.

The interviews were recorded on a smartphone. Rough notes were also taken on computer, to aid in the future transcribing process and to note any pertinent non-verbal aspects of the interview as well

as to demonstrate active listening. Transcripts were typed up in the ensuing months following the interview and then sent by email to the interviewee to verify their accuracy and ensure that they felt comfortable with what was being placed on the record. Some interviewees sent back changes that they wished made to the transcript, others didn't respond, and one asked to see the final processed work.

Two of the interviews occurred in several segments which were then threaded together into one transcript, either due to us running out of time, or due to time-sensitive matters that came up in the middle of the interview.

For two of the interviewees, Hebrew was their preferred language. The interviews were nonetheless conducted predominantly in English and where the interviewee would express themselves in Hebrew, the transcript reflected the exact words used by the interviewee and then in brackets the translation was added. My Hebrew language skills proved sufficient, having lived for several years in Israel as well as from decades of engagement with Hebrew texts, and I had no trouble understanding the Hebrew of these interviewees. Where the English used by these interviewees required grammatical correction, this was done using square brackets. Additionally, concepts and terms, in Hebrew, Yiddish or Aramaic, were often referenced in interviews with *dayanim*. These terms were preserved in their transliterated form with translations supplied in brackets as appropriate.

The duration of each interview varied according to the constraints of the interviewees' and my own schedules, as well as based on when the conversation came to a natural end. They ranged from 13 minutes to 73 minutes with an average length of 43 minutes. Four interviews were conducted in under 30 minutes, eight interviews were between 30-45 minutes in length, five interviews took between 46-60 minutes and four interviews spanned 61-73 minutes in length. Among other things, the differences in the duration of interviews reflected the interviewees' time constraints, and the economy of their spoken word.

1.3.4.2.3 Processing the Interviews

The interviews conducted were broken down into logical subgroups, separating between the interviews relating to (A) the history of the Australian Battei Din, (B) those that dealt with the operation of Battei Din overseas and (C) those with Australian *dayanim* that explored the applicability of the proposed working-model. Within category (B), there was a further division made

between interviews pertaining to the various overseas Battei Din, which included Chicago, New York and Israel.[50]

The interview transcripts were manually coded,[51] and tables were produced for each category mentioned above, enabling a comparison between the interviewees in relation to the various themes relevant to the research. The themes used for coding the interviews were primarily those which underpinned the prepared questions for the semi-structured interviews,[52] as well as those that emerged spontaneously in the conversation which added greater depth or breadth to the study.

In tabulating the various interviews in each sub-group, triangulation of the data naturally occurred when the interviews of different personnel belonging to the same Beth Din could be cross-referenced. Additionally, the data emerging from the interviews was compared to the available documentation relevant to each sub-category. For the history of Australian Battei Din, documentation that was used to cross reference the interviews included published books and articles, contemporaneous newspapers that reported on the affairs in the Australian Jewish community,[53] as well a range of primary sources that included historic letters between the Victorian Jewish community's lay and rabbinic bodies, minutes of their meetings as well as correspondence between these bodies and the Chief Rabbi of the Commonwealth.[54] Documentation relating to the various USA and Israeli Battei Din was readily available on each of their websites, and further internal documents were supplied by their directors upon request. In addition, specifically in relation to the BDA, current and former *dayanim* had published articles on its procedures which provided helpful background information, as did my attendance at courses offered by the Beth Din for American lawyers, both of which assisted in the triangulation of the relevant interview data.

A further aspect of the data collection that assisted with the triangulation of data, was the inclusion of outside voices, which were not a part of the Battei Din that were the focus of this study. In the Israeli context, Rabbi Yaakov Warhaftig, *Av Beth Din* of Har Nof and former rabbinical leader at the

[50] The cRc Beth Din (Chicago) and the BDA (New York) were further subdivided, being that they are distinct entities – despite enjoying a close relationship which includes the sharing of documentation and even personnel. In terms of Israeli Battei Din, Eretz Ḥemdah Gazit network was focused upon, although an interview with the *Av Beth Din* of Har Nof was used to assist in understanding the Israeli context and to provide support for certain Jewish law accommodations. See further in Parts 4, 5 and 6.

[51] While excellent software exists for this task, given the manageable number of interviews in each sub-group, I opted to go through the process manually.

[52] These are themes that had emerged as pertinent based on research contained in the theoretical components of this study.

[53] This included newspapers such as the *Australian Israelite*, the *Jewish Herald*, the *Australian Jewish Herald* and the *Australian Jewish News*.

[54] I am grateful to Reverend Yossi Aron for providing me these important primary documents. These are referenced as 'Private Collection' in the Bibliography, Part 9.6.2.

Makhon Ariel Institute, provided an alternate perspective to that of the personnel of Eretz Ḥemdah Gazit. Likewise in the USA, Rabbi Ronnie Warburg, who is a former *dayan* of the BDA and now an independent *dayan*,[55] brought a different view to that provided by the personnel of the BDA and the cRc Beth Din. Additionally, in the Australian context, Rabbi Shabsi Tayar, who founded the Mehadr Beth Din Tribunal, was able to provide an alternative voice to the *dayanim* of the establishment Battei Din in Melbourne and Sydney. These individuals who did not have the same vested interest in the Battei Din that were focal in this study, played an important role in corroborating the data of the other interviewees and shared a fresh perspectives on the subject material.

1.3.4.2.4 Shortcomings of the Empirical Research

In processing and interpreting the interview data, there are a range of shortcomings of which I am aware, as well as those of which I am unaware, which may have impacted the quality of the data as well as its analysis. I am a Jewish person who strives to live a *halakhic* lifestyle and I have great respect for the tradition of which I am a part. Additionally, I have experience in a variety of leadership roles with the Melbourne Jewish community, including as a leader in a Modern Orthodox Jewish day school, a community rabbi and a director of the Melbourne Beth Din. These factors generate a bias favouring an outcome whereby the religious expression of my community is accommodated by its secular environs, resulting in a more optimistic viewpoint towards the possibility of overcoming the hurdles and challenges that arise in the pursuit of this aim. Mitigating this outlook is difficult, and I have relied on my supervisors to battle-test ideas as well as, in the context of the published elements of this thesis, peer-review to ensure my analysis is rigorous and grounded. Additionally, where possible, I have tried to preserve the original language of interviewees where possible, letting them speak for themselves and removing myself as interlocutor between them and the reader.

Further, the interviewees are overwhelmingly sophisticated individuals, many of whom are community leaders, who have both their professional and personal reputations to preserve. This factor would likely have impacted the candidness of their responses in the interviews as well as veracity of the data, which could be aspirational rather that reflective of reality, in order to present themselves and their institutions in the best light possible. To mitigate against this, data has been triangulated, as described above, through the comparison of multiple personnel within each

[55] He is also the author of a series of books which document the reasoning of Beth Din awards in selected commercial cases; see A Yehuda Warburg, *Rabbinical Authority: The Vision and the Reality* (Urim Publications, 2013-2020) vols 1-5.

organisation, the referencing of relevant available documentation as well by including voices from outside of the Battei Din that are the subject of this study.

An area of triangulation that does not feature in the research, is the inclusion of the voice of Beth Din clients and their representatives. The challenges in including these voices related primarily to accessing such individuals, for confidentiality precluded the Battei Din involved in this study from sharing client information, and those that they reached out to on my behalf were not motivated to take part in research and discuss their experience with an outsider. While I did observe a commercial arbitration performed by Eretz Ḥemdah Gazit, I declined to include it in my study, due to the difficulties in obtaining consent from the parties. Interviews with Beth Din clients and further research into their experience at the Battei Din who are the subject of this study, would provide important data that would complement this dissertation.

The fact that I am a director of the Melbourne Beth Din forms a double-edged sword. On the one hand, it was pivotal in opening doors at Battei Din abroad, who viewed me not just as an interested individual, but as someone who belonged to a familiar organisation, and an insider in the community of rabbis and *dayanim*. On the other hand, I speculate that it may have generated caution in the exposing of trade-secrets or concerns of their being judged by an informed colleague. While the geographic distance between Australia and both the USA and Israel would no doubt have mitigated the concern of Australian Battei Din being in competition with USA or Israeli Battei Din, insofar as client crossover would be unlikely, the knowledge that the data collected would be published as a thesis and that it might be made public could have stifled their willingness to share certain information. Overall, while I acknowledge the potential pitfalls that flow from my role at the Melbourne Beth Din, I have little doubt that these are outweighed by the benefits it provided in terms of access to a wide range of senior and internationally reputed *dayanim*.

1.4 Citation, Translations and Transliteration

The referencing format of this thesis is based on the Australian Guide to Legal Citation ('AGLC').[56] It was awkward to apply its style to classic Jewish texts, many of which predate the printing press and are organised in sections, or linked to particular Biblical verses rather than having fixed pagination. In such instances, the AGLC advises that one prioritise 'clarity and consistency' which has been achieved by referencing sufficient detail for one who is familiar with Jewish texts to be able to locate the source with precision, and ensuring that the format was consistent among similar works. In

[56] Australian Guide to Legal Citation (Melbourne University Law Review, 4th ed, 2020).

addition, the bibliography contains a section dedicated to these 'classical Jewish texts',[57] which includes all texts used in studies associated with Jewish religious devotion. The descriptor '[Hebrew]' follows a reference to an academic Hebrew text as well as Israeli legislation and case law but does not follow classical Jewish texts.

Many texts used in this research are written in Hebrew (both classical and modern) as well as in Aramaic. Their titles are transliterated, utilising the *General Transliteration Rules* found in the Jewish Encyclopaedia[58] with some minor changes, reflected in the transliteration rules tabulated at the start of this document. At times the transliteration will not accord with these rules, such as in the transcripts recorded in the appendices where the transliteration is less formal,[59] as well as where the transliteration is quoted from another source, or refers to an entity or organisation, which has applied different transliteration rules to those followed in this thesis.

Use of translations to Hebrew and Aramaic texts are attributed in the referencing, and in instances where no translation was readily available, the translation provided is my own. In addition, I have translated the title of many Hebrew texts and legislation that are cited in the research in square brackets following the transliterated text. I have used discretion to provide the translations of some titles and not others, depending on the degree to which the meaning of the title itself would be relevant to the reader.

In this research, Hebrew and Aramaic terms are ubiquitous. So as not to disturb the flow of the reader, a short translation of the Hebrew or Aramaic term is brought in brackets the very first time that the term is used, and where the definition requires a lengthy explanation, it is provided in a footnote. Further instances of that term will not necessarily have an accompanying translation and as such the Glossary section[60] of this document is an important resource for a reader who has forgotten the meaning of a term, or is reading the thesis out of order.

1.5 CONCLUSION

The overview of the thesis outlined at the beginning of this chapter, summarises the components of this study which have required the application of a range of research methodologies in achieving their outcome of proposing accommodations at Jewish law which would promote the successful implementation of commercial arbitration in Battei Din operating in Australia. The theoretical

[57] See Bibliography, Classical Jewish Texts, Part 9.5.
[58] *Jewish Encyclopaedia* (Macmillan Reference USA, 2nd ed, 2006) vol 1, 197.
[59] However, where direct quotes from the interviews are quoted in the body of the thesis, the *General Transliteration Rules* are applied.
[60] Glossary, p xii.

component of the research, which comprises Parts 2, 3, 5 and 6 include both comparative law methodology as well as legal research methodologies. The latter methodologies are further subdivided into categories (or quadrants) each of which is relevant to this thesis. Additionally, the thesis contains a significant empirical component in Parts 4, 5, 6, 7 and 8 which draws on interviews with a range of Australian historiographers, overseas *dayanim* and Beth Din personnel as well as local *dayanim*. As has been discussed, the empirical qualitative data has been approached with a pragmatic worldview and its research design has aligned with the descriptive method.

In the following chapter, comparative law methodology is utilised to examine the theoretical underpinnings of Jewish law as they relate to Battei Din performing commercial arbitration in a common law setting.

2 JEWISH LAW IN CONTEXT

2.1 INTRODUCTION

As adept as the Jewish people have become at adjusting to their shifting environs over the course of a tumultuous history, so too has their *halakhic* system learned to relate, and to integrate, with a variety of foreign systems of law.[61] The focus of this chapter is to explore the unique milieu that Jewish law presently interfaces within Australia; a common-law legal tradition which reserves a place for alternate forms of litigation under the rubric of its arbitration laws.

In fleshing out the unique challenges, and potential resolutions, presented by the encounter between these two systems, it is necessary to achieve a basic understanding of their jurisprudential underpinnings, which shed light on some of their pertinent differences and similarities.

In his *Religious Law in the Israel Legal System*, former Justice of the Supreme Court of Israel, Izhak Englard, discusses disparate perspectives of the function of Rabbinical Courts in the State of Israel.

> "[T]he state regards the religious courts as acting under authority granted by it and subject to its laws. The religious judges see their role in a different light; for them the applicability of religious law is not conditional upon the secular lawmaker's will. They look upon their courts as autonomous bodies which derive their authority primarily from a separate, independent normative system."[62]

While his comments were made in the context of State of Israel where religious courts form a part of the judiciary with respect to matters relating to personal status, they nonetheless contain a truth that is relevant for the interaction between Jewish law and the secular legal systems in the diaspora. In achieving harmony between conflicting cultures, one must first seek to understand each perspective on its own terms. Solutions that are built on such a foundation are more likely to elicit the good-will of relevant stakeholders and be long-lasting insofar as they accord with, and are respectful of, the principles indigenous to each system. The present study aims to take some steps in

[61] For an overview of the ways in which *halakhah* has navigated various political circumstances over the ages see Moishele Fogel, 'Synagogue and State: The Evolution of the Relationship between the Jewish People, Halacha, and the State' (Research Report, Cardus Religious Freedom Institute, February 2019) <https://www.cardus.ca/research/faith-communities/reports/synagogue-and-state/>.

[62] Izhak Englard, *Religious Law in the Israel Legal System* (The Hebrew University Magnes Press, 1975) 46; see also Brian Z Tamanaha, *Legal Pluralism Explained: History, Theory, Consequences* (Oxford University Press, 2021) 117 where the difference between how the state views the BDA is contrasted with how the BDA views itself.

the direction of promoting such understanding between practitioners of Jewish and Australian law, and to thus pave a path forward for their mutual accommodation.

2.1.1 The Purpose of Comparison

Comparative law scholars have outlined a range of objectives that ordinarily drive their research.[63] Utilising Kamba's terminology, the research of this study aligns with two broad categories: that of 'the unification and harmonization of laws' as well as the promotion of 'international understanding'.[64]

The unification and harmonisation of laws is relevant where there is a desire or need to coordinate 'different legal provisions or systems by eliminating major differences and creating minimum requirements or standards.'[65] This may occur at the international level, at the regional level and at the national level. While Kamba does not mention this example when discussing harmonization at the national level, religious arbitration is another such area where such alignment is required. By understanding the nature of religious law, and the potential conflicts with the law of country in which it operates under the aegis of its arbitration laws, measures can be implemented to ensure greater harmony between the two.

The second objective, that of promoting international understanding, is described as the function of comparative law 'in reducing international tensions and the promotion of international understanding and peaceful relations'. One comparative law scholar, Andrew Papale, posits that 'the lawman who is called upon to solve our international problems must have the knowledge of the political philosophy and of the legal systems of foreign nations. Such knowledge is vital to the maintenance of friendly relations with foreign countries and to the removal of tension areas.'[66] This logic certainly extends to the objective of reducing multicultural tensions *within* a single society. The State has a significant interest in ensuring good relations and mutual understanding between the minority groups residing within it who share a differing world-view and operate subject to both their own norms as well as those of the legal system of the State.[67]

Aside from the two primary objectives outlined above, it is noteworthy that comparative law is also utilised in the formation of legislation and law reform. Looking to other jurisdictions where similar challenges have been faced, one is able to assess the efficacy of legislation in dealing with problems

[63] See e.g. Kamba (n 18) 490-505; Kahn-Freund (n 23) 2-5; Alan Watson, 'Comparative Law and Legal Change' (1978) 37 *Cambridge Law Journal* 313, 321.
[64] These ideas are found in Kamba (n 18) 501-505.
[65] Ibid 501.
[66] Andrew E Papale, 'Why Comparative Law?' (1951) 3(3) *Journal of Legal Education* 384, 384; quoted in ibid 505.
[67] Further discussion about legal pluralism and multiculturalism will be discussed in the following chapter.

faced by society.[68] In this vein, the study of how the Beth Din and Jewish law have been integrated in the jurisdictions of the United States and Israel is informative in terms of the prospect of harmonious integration of Australian law and Jewish law as it is applied in the Beth Din context.

2.2 JEWISH LAW: A LIMITED CONCEPTUAL STUDY

In seeking to understand the differences that exist between Jewish and Western law, one must first ask the question 'What is Jewish law?' While a comprehensive answer to this question is well beyond the scope of this study, a basic outline is in order if one is to gain an understanding of the 'organism' to which its laws belong. The simple route to addressing this question is to provide an outline of the major works that comprise Jewish law and to outline, in broad brush strokes, how it has evolved over the ages. This is an important aspect of the question, however it provides little, if any, guidance in terms how *halakhah* might interact with the norms of another legal system. In achieving the latter objective, it is beneficial to 'remove the mask'[69] of the law by exploring its jurisprudential underpinnings. To use the analogy of organ-transplantation,[70] an understanding of how the Jewish and Western legal system differ at a philosophical level is akin to revealing the blood-type of the organism, which provides a greater indication of what sorts of transplantations – or adaptations – are possible, in achieving the goal of harmonizing the two systems in the arbitration context.

While De Cruz's methodology has provided the behind-the-scenes process which has guided the preparation of this comparative study, Kamba's three stages of description, identification and exploration will guide its written structure, albeit in reverse order.[71] After providing a basic outline of Jewish law texts as well as their evolution and interplay, we will explore some of the jurisprudential differences between Jewish and common law. This will in turn lead to the description of a theory about Jewish law which will be relevant to the explanation of certain differences between Jewish and common law in the context of religious arbitration.

2.2.1 An Overview of Jewish law

Jewish law is referred to as *halakhah* which is a cognate of the Hebrew root *h-l-kh* which means 'to walk.' This term is described by scholars as referring to the dual qualities of Jewish law, insofar as it acts as a guide, directing its practitioner down the path by which they should proceed as well as

[68] Kamba (n 18) 495-499.
[69] Jeremy Bentham referred to law as wearing a mask, by which it obscures certain fundamental aspects of its true self; see H L A Hart, 'Bentham and the Demystification of the Law' (1973) 36 *Modern Law Review* 2, 4.
[70] Organ transplantation is employed as a metaphor for comparative law by Sir Otto Kahn-Freund; see Part 1.3.2.2.
[71] See methodological outline in Part 1.3.2.1.

referring to the system itself as one that 'moves' in the sense that it is a dynamic entity that develops over time.[72]

The key texts of Jewish law are divided into two categories: the Written and the Oral tradition. The former incorporates the Pentateuch, the Prophets and the Writings ('*Tanakh'*) and the latter contains a vast body of texts which include additional laws received alongside the *Tanakh* through the medium of prophecy as well as later works of Rabbinic scholarship that applied hermeneutical methods to Biblical scripture, laws that are of rabbinic origin and customary laws which derive from popular practice. The primary *halakhic* works that encapsulate the Oral tradition of Jewish law include the *Mishnah* (redacted in the late 2nd Century CE), the Jerusalem and Babylonian Talmuds (redacted in the early 5th Century CE and late 5th Century CE respectively),[73] the codifications of Rabbi Isaac Alfasi, Maimonides and Rabbeinu Asher ben Yeḥiel in the Middle Ages and the *Shulḥan Arukh* of Rabbi Josef Karo (1563 CE).

The transition of authority from prophet to sage during the Second Temple era formed a watershed event in the history of Jewish law. Following the Biblical era, prophecy came to a close,[74] and the role of the sage replaced the role of the prophet to the extent that rational principles of *halakhic* derivation and application were preferred over a protesting Heavenly voice.[75] This shift could be described as the 'humanization' of Divine law,[76] insofar as rabbinic scholars were promoted to partnership with the Divine in developing Jewish law. In line with this the Talmud states that 'a scholar is superior to a prophet.'[77]

A further watershed took place at the time of the completion of the Babylonian Talmud. Due to the Babylonian Talmud's universal acceptance among the Jewish community at the time, it formed a unified system of law which was deemed binding.[78] Subsequent to this event, Jewish law continued to evolve but in a manner that was local and not universal, leading to a differences in its observance among various regions, but underpinned by their mutual acceptance of the Babylonian Talmud as the foundational text of Jewish law.[79]

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[72] Francois-Xavier Licari, *An Introduction to Jewish law* (Cambridge University Press, 2019) 7.
[73] Regarding the dates of the redaction of the Mishna and both Talmuds, see Elon, *Mishpat Ivri* (n 24), 858, 896-897, 901-902.
[74] Babylonian Talmud, *Sanhedrin* 11a.
[75] Babylonian Talmud, *Bava Metzia* 59b.
[76] Haim H Cohn, 'Secularization of Divine Law' in Haim H Cohn (ed) *Jewish law in Ancient and Modern Israel* (Ktav Publishing House, 1971) 1, 22-26.
[77] Babylonian Talmud, *Bava Batra* 12a.
[78] While it does contain pluralistic aspects, its practitioners are limited to select from between them and could not posit otherwise; see Ben Menahem (n 27) 425-7.
[79] Cohn (n 76) 31-35; Ben Menahem, ibid 430-431.

Although no longer centralised, *halakhah* continued to guide Jewish life throughout the exilic period and its evolution and application was overseen by 'individuals, who, by reason of their greatness in Torah scholarship, achieved wide spiritual authority.'[80] These figures were often the leaders of local Battei Din where the Jewish communities resided and they authored responsa literature, in which they penned answers to questions of Jewish law that were posed by their co-religionists. Since the 8th Century an estimated 300,000 responsa have been written, reflecting the Jewish communities' continued application of *halakhah* to day-to-day life.[81]

The Enlightenment period saw a significant change in the role of *halakhah* within Jewish society, especially with regards to commercial matters. With the acceptance of Jewish people as part of the nation-state, many members of the community abandoned the practice of *halakhah* and assimilated into the dominant culture. Additionally, the fact that State law no longer openly discriminated against Jewish litigants, coupled with the forces that were pushing towards legal monism and the resultant reduction in Jewish judicial autonomy, many practicing Jews began to seek redress for their civil disputes at State institutions.[82] This shift bears out in the proportion of responsa directed towards commercial disputes before and after the Enlightenment. Over the course of the Middle Ages, nearly 80% of responsa dealt with matters pertaining to criminal, commercial and public administration law while the remaining 20% dealt in aspects of ritual law.[83] Following the Enlightenment a drastic shift has been noted with regards to the topics of *halakhic* responsa: ritual matters became their dominant subject with only a negligible portion dealing in commercial matters.[84]

In present times, it is estimated that approximately 20% of the Jewish community claims to observe *halakhah*.[85] In line with the shift in responsa towards ritual matters, and as is evident in the interviews with *dayanim* in both the United States and Israel,[86] it would appear that even among

[80] Englard (n 62) 29.
[81] Elon (n 21) 231, this number would have increased significantly since 1985 when the essay was published.
[82] Fogel (n 61) 15-16.
[83] Elon (n 21) 232, referencing a study performed by the *Institute for Research in Jewish law* in 1965.
[84] Elon (n 21) 238.
[85] Saiman (n 28) 215.
[86] See e.g. Interview with Rabbi Dr Ido Rechnitz, *menahel* of Eretz Ḥemdah Gazit (Chaim Cowen, Eretz Ḥemdah Gazit, Jerusalem, 18 January 2023) ('Interview with Rabbi Rechnitz') 'Even now… many people in Israel, *dati'im* (religious people) know about Eretz Ḥemdah, but not all of them. There are areas in Haifa and the South where no one heard about it. There are people who didn't hear about Beth Din at all, people who learn *Masekhet Sanhedrin* and think it is about the past, not today"; and Interview Rabbi Shlomo Weissmann Esq., *menahel* of Beth Din of America (Chaim Cowen, Beth Din of America, New York, 23 November 2022) ('Interview with Rabbi Weissmann') with regards to whether it was the norm in the Jewish community in the USA to litigate in a Beth Din, 'in more *Ḥaredi* communities yes, but in more modern communities I don't know that it is necessarily, that's an educational problem. Part of our job is to educate the community that that is not where you should be litigating your cases.'

those who claim adherence to *halakhah,* only a small proportion would consider seeking out a *halakhic* forum for the resolution of their commercial disputes.

2.2.2 Underpinnings of Jewish law

Attempting to understand how any legal system operates presents a formidable task insofar as it requires a knowledge of the vast corpus of law as well as the ability to classify its manifold aspects, some of which may appear contradictory. This is all the more challenging in the context of Jewish law which, since the completion of the Babylonian Talmud, has not had a centralising authority. *Halakhah* is 'the law of a people, not of a place'[87] and as such – up until the attempts to formulate *Mishpat Ivri* as the legal system for the State of Israel – it has lacked many of the elements that one takes for granted in the context of a State legal system.

Two ways in which *halakhah* can be quite readily distinguished from Western law, is the fact that it has a religious quality to it and, perhaps as an offshoot of this, it has an inherent moral character.

2.2.3 Religious Law

Jewish law is religious in nature insofar as 'it is based on the assumption that G-d is its legislator'.[88] As a religious legal system it differs drastically from secular conceptions of law in numerous ways. An example of this is the devotional study of the law by its adherents.[89] Unlike the study of secular law, which is the province of the legal profession, Jewish law is studied by the mainstream religious community and parents are obligated to involve their children in its study.[90]

Further expressions of Jewish law as religious law are expounded upon by Eliot Dorff who references the notions that its observance provides purpose to its adherents, that self-sacrifice will not stand in the way of its fulfilment and that it forms a way in which Jewish people reach out to G-d in their covenantal relationship.[91] In addition, although it contains disparate components of *issura* (lit. prohibitions, i.e. ritual law) and *mamona* (lit. monetary, i.e. commercial law) it seamlessly integrates the two and legalistic comparisons and derivations are drawn from one field to the other in the Babylonian Talmud.[92]

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[87] Saiman (n 28) 4.
[88] Eliot Dorff, 'Judaism as a Religious Legal System' (1978) 29 *Hastings Law Journal* 1331, 1348.
[89] See Saiman (n 28) 145-146 where he distinguishes between functional and devotional approaches to Torah study and different trends within the Jewish community in this regard.
[90] The command to study and teach one's child Torah is predicated on several Biblical verses including Deuteronomy 5:1 and 11:19 as well as Joshua 1:8; see Maimonides, *Mishneh Torah, Hilkhot Talmud Torah* 1.
[91] Dorff (n 88) 1348-1349.
[92] See examples and discussion in Elon (n 21) 222-223 and Moshe Silberg, *Talmudic Law and the Modern State*, tr Ben Zion Bokser (United Synagogue Book Service, 1973) 65-66.

This notion is eloquently articulated by Rabbi Yeḥiel Yaakov Weinberg, in the context of critiquing a *Mishpat Ivri* researcher which sought to draw a wedge between the fields of *issura* and *mamona*:

> "The divisions accepted among the nations of the world do not exist in Israel. For them, religion is a separate realm, consisting exclusively of matters that are between man and G-d; matters between man and his fellow are in the hands of the temporal authority. We have no schism; everything is connected and unified in the Torah [as it is said in the Babylonian Talmud, *Berakhot* 6a]: 'justice is also Torah.'"[93]

Moreover, the source of law being the Divine will has meant that no other source of law has the same authority according to the perspective of its adherents.[94] As such, the mechanism of *dina demalkhuta dina* (lit. the law of the sovereign is law) is needed to render State law binding, and enabling its adoption under the umbrella of Jewish law, provided that it fits within the ambit of that *halakhic* principle.[95] As such, just as from a secular jurisprudential outlook one may query whether religious law could rightfully be called 'law'[96] a similar question can be posed from the vantage point of Jewish law with respect to the validity of a non-Divine legal system.[97]

Notwithstanding the above, Jewish law does not seem to fit a typical conception of religious law. As quoted from Rabbi Weinberg, the Jewish approach to religion is not one that is limited to interactions between humans and G-d, but extend to dealings between fellow human beings – hence the significant of the field of *mamona*. In his article *Is Talmudic Law a Religious Legal System?* Ḥanina Ben Menahem argues for the recognition of a spectrum between 'secular' and 'religious' law in which Jewish law reflects aspects of what would typically constitute religious law in certain respects, but differs markedly in others to the extent that it would appear more comparable to secular law.[98] In a similar vein, in an article assessing the nature of various faith-based dispute resolution formats, R. Seth Shippee found that '[c]ompared to the ADR traditions of Christianity and Islam, the Jewish approach to faith-based dispute resolution is the most formal and can often be conducted very much like a secular trial, firmly rooted in process and law.'[99]

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[93] Translated and quoted in Amiḥai Radzyner (n 25) 232.
[94] Cohn (n 76) 2-6.
[95] This concept will be discussed in greater detail in Part 5.3.
[96] As will be discussed below in Part 2.2.5.
[97] Englard (n 62) 24.
[98] Ḥanina Ben Menahem, 'Is Talmudic Law a Religious Legal System? A Provisional Analysis' (2009) 24 *Journal of Law and Religion* 379.
[99] R Seth Shippee, 'Blessed Are the Peacemakers: Faith-Based Approaches to Dispute Resolution' (2009) 9 *ILSA Journal of International & Comparative Law* 237, 249.

2.2.4 Jewish law and Morality

Law and morality share a complex relationship, the dynamics of which are well beyond the scope of this study. Notwithstanding this, an elementary understanding of their similarities and differences and an understanding of how this plays out in the conceptions of Jewish and common law is pivotal to an attempt to compare the two and understand their jurisprudential underpinnings. In the positivistic sense, law dictates what one *is* to do, while morality might dictate what one *ought* to do.[100] Put differently, positivistic law is a social creation that directs itself to the citizen with the proximate aims of creating social order. Morality on the other hand, is something which wells within the depths of man's heart, creating a sense of personal obligation and a sense of duty.[101]

From a strictly positivistic standpoint, morality is not to be equated with law: 'a reason for a law, even a good reason – so Bentham warns us – is not itself a law'.[102] From a Jewish law perspective however, the line between law and morality, what one *is* to do and what one *ought* to do would appear to be less distinct. Examples of Jewish law going beyond what one would typically find in a Western legal system includes its legislation on matters that are strictly moral or personal such as the prohibitions on speaking gossip, or on asking for the price of an item where one has no intention to buy it, the obligations of loving one's fellow as well as the conjugal duties of a husband towards his wife.[103]

While the examples above show a penchant towards incorporating a greater ambit of moral activity into the realm of *halakhah*, the nuance that Jewish law shows with regards to behaviours which contravene the spirit of the law, further illustrates its moral focus. In his *Moral Rights and Duties in Jewish law*, Rabbi Herzog lists forms of conduct that are not outlawed in *halakhah* but attract its disapproval to varying degrees.[104] For actions such as interfering with a purchase that has been completed but for the formal mode of transfer, one is denounced in the synagogue as a *rasha* (wicked person).[105] For other actions, such as *grama b'nezikin* (indirectly causing damage) the perpetrator would not be deemed liable in earthly Beth Din, but is encouraged to pay damages *latzet yedei shama'im* (in order that he may be acquitted by Heaven).[106] All in all, close to ten such

[100] See e.g. Scott J Shapiro, *Legality* (Harvard University Press, 2011) 35-50; in this sense 'morality' is aligned with natural law which will be discussed in the following section.
[101] Paraphrased from Silberg (n 92) 61.
[102] Hart (n 69) 4.
[103] These and other such examples are discussed in Dorff (n 88) 1357-1358.
[104] Isaac Herzog, 'Moral Rights and Duties in Jewish law' (1929) 41 *Juridical Review* 60, 63-66; see also Bernard Jackson, 'Judaism as a Religious Legal System' in Andrew Huxley (ed) *Religion, Law and Tradition: Comparative Studies in Religious Law* (Routledge, 2002) 34.
[105] Herzog, ibid 65.
[106] Ibid.

forms of disapproval are listed by Rabbi Herzog, illustrating the broad swathe of activities for which Jewish law provides moral, but not strictly legal, guidance.[107]

An interesting example of the direct contrast between Jewish and Western law in this regard, featured in the Israeli court case of *Kitan v Weiss*[108]. The factual scenario concerned an individual who was in a depressive state after his son was killed in a car accident. The perpetrating driver was acquitted of criminal charges and the insurance payout fell well below what the victim's father had expected. In his employment as a watchman, he was provided a gun by his employer which he used to murder his lawyer, whom he felt had failed him. The family of the lawyer sought compensation from the employer whom they felt was negligent in providing a gun to the emotionally unstable watchman. The court found the employer to not be liable, but in his judgement, Elon J referred to an offer of compensation that the employer had made voluntarily during the litigation and under the rubric of the Jewish law concept of *lifnim mishurat hadin* (beyond the letter of the law) argued that such payment be enforceable in this case. Shamgar J, in his leading judgement strongly disagreed with this point, arguing against what he perceived to be 'the systematic blurring of the border between law and morality in a system of a positive law such as Israeli law.'[109] The notion of incorporating moral elements into a system of Western law such as Israeli law, conflicted with the core idea of what law *is* in a positivistic sense.

One way in which this difference plays out in the contemporary Beth Din experience, is with regards to the enforceability of a civil contract in circumstances where it concerns an illegal act. At common law the doctrine *ex turpi causa non oritur actio* (of an illegal act there can be no lawsuit) renders certain actions, for example the non-fulfilment of the contractual terms of an illegal drug deal, as non-justiciable.[110] At Jewish law however, such a contract would be enforced, notwithstanding its unfavourable context.[111] Moshe Silberg proposed that a possible way of explaining the difference in the positions of each legal system is via their respective approaches to law and morality. From a Jewish law perspective, the repayment of a debt is a not just a legal duty (in the positivistic sense), but also a moral duty, and as such the fact that a contract was made in the context of an illegal act (a

[107] It is noteworthy that this notion is not entirely absent from secular law. Rabbi Herzog draws an analogy to the notion of an 'imperfect right' at English law, which cannot be actioned in court, but if self-help measures are taken peaceably, it will be sufficient to successfully defend a claim for recovery; see ibid 62-63.
[108] CA 350/77 *Kitan v Weiss* (1979) (Israeli Supreme Court) [Hebrew].
[109] Daniel B Sinclair, 'Beyond the Letter of the Law' (1987) 6 *The Jewish law Annual* 203, 205.
[110] See Jonathan Law and Elizabeth A Martin, *Oxford Dictionary of Law* (Oxford University Press, 7th ed, 2014) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095806471>.
[111] *Shulḥan Arukh, Ḥoshen Mishpat* 208:1; the UK case of *Soleimany v Soleimany* [1999] QB 785 turned on this issue; a Beth Din upheld a contract between a father and son relating to the illegal smuggling of carpets out of Iran. The UK Court of Appeal revoked the award arguing that an illegal contract should not be upheld based on public policy.

drug deal), does not remove the moral imperative to pay back a debt (what one party pledged to pay for the drugs). Hence by refusing to adjudicate the case, one immoral act (the drug deal) would become two immoral acts (the drug deal and the non-payment of a debt). From a common law perspective however, the illegal nature of the act, renders the plaintiff no longer fitting to seek the courts assistance in remedying their alleged loss – the fact that this may cause a second 'immoral' act is less of a concern from a positivistic perspective.[112]

It is interesting to note, that notwithstanding the right to advance a claim in Jewish law, the Beth Din of Eretz Ḥemdah Gazit will not adjudicate a dispute which involves an illegal act. In an interview with the *menahel* of Eretz Ḥemdah Gazit he explained:

> "if two people make a drug deal, and one didn't pay for the drugs to the other and they came to the Beth Din and the Beth Din said you have to pay and gave a ruling, this ruling will be turned over in the courts. So, my *dayanim* will never say to someone to pay for drugs – it never will be in our Beth Din – this is the way they think."[113]

A cognisance of the fact that in the modern age Jewish law operates under the aegis of arbitration laws within a common law framework has led to the non-enforcement of this aspect of Jewish law. As will be further discussed in later chapters,[114] this is one example of the forms of accommodation that are required for religious arbitration to ensure the enforceability of their awards by State courts.

2.2.5 What is (Jewish) law?

In their *Major Legal Systems in the World Today*, David and Brierley group Jewish law together with Muslim and Hindu law which share in common that they are all 'based upon conceptions of law and the social order which are altogether different from those prevailing in the West'.[115] Without entering into the discussion of whether Jewish law should rightfully be called a legal system,[116] a basic comparison of the question 'what is law?' reveals some important differences between Jewish and Western concepts of law which have a bearing on some of the traditional practices of a Beth Din, which may need to be re-evaluated as they come into dialogue with the common law systems under the rubric of their arbitration laws.

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[112] Silberg (n 92) 66-83.
[113] Interview with Rabbi Rechnitz.
[114] See Parts 5 and 6.
[115] René David and David Brierley, *Major Legal Systems in the World Today* (Simon and Schuster, 2nd ed, 1978) 420.
[116] See e.g. Jackson (n 104); David Daube, 'Jewish and Roman Philosophies of Law' in Andrew Huxley (ed), *Religion, Law and Tradition: Comparative Studies in Religious Law* (Routledge, 2002) 157.

The Western concept of law has its roots in ancient Greek philosophical understandings of natural law, which sees a coalescence of what law *is* and what the law *ought* to be, informed by the nature of things, the nature of man or the nature of G-d.[117] In the Enlightenment age, this conception of law was challenged by the theory of legal positivism, propounded by Jeremy Bentham, which drew a sharp distinction between what the law *is* what it *ought to be*. For Bentham, 'laws are simply expressions of the will of the human lawgiver' and the existence of 'natural and rational principles' is relevant only insofar as they provide for the 'guidance of legislators and the criticism of law'.[118] Since that time, much debate has ensued with regards the practical implications of legal positivism, and the reconciliation of anomalous aspects of the law, resulting in a diversity of approaches to legal positivism.[119]

Australia has been described as a 'Benthamite society' insofar as its political ideology has many of the hallmarks of Jeremy Bentham's philosophy. In his compelling article on the subject, Hugh Collins traces the origins of how early days of white settlement in Australia were dominated by adherents to Bentham's theories of utilitarianism, legalism, and positivism.[120] While the Western world can generally be described as having adopted a positivistic outlook towards law, this is especially the case in Australia where 'positivism has reigned, almost without challenge'.[121] This idea, which also has ramifications for the approach to multiculturalism that Australia has adopted,[122] is an important backdrop in understanding the context within which Jewish law aspires to operate under the *Commercial Arbitration Acts* of the various Australian states.

In attempting to assess Jewish law in terms of natural law or legal positivism, one must bear in mind the words of caution offered by Menachem Elon:

> "Jewish law must be interpreted according to accepted jurisprudential principles and the accepted categories of legal classifications and terminology. This approach is essential for the understanding and teaching of Jewish law as a legal system comparable to other modem legal systems. At the same time, great care must be exercised to avoid forcing Jewish law into the framework of another legal system and thereby to prevent the adoption into Jewish

[117] Lon L Fuller, *The Law in Quest of Itself* (The Lawbook Exchange, 1940) 5-6.
[118] Hart (n 69) 4.
[119] For an overview of some of the challenges to legal positivism, see Scott J Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed* (Cambridge University Press, 2012) <https://ssrn.com/abstract=968657>.
[120] Hugh Collins, 'Political ideology in Australia: the distinctiveness of a Benthamite society' (1985) 114(1) *Daedalus* 147, 148-149. I am grateful to Professor Neil Andrews for pointing out this article, and to Rabbi Dr Levi Cooper who raised Bentham's philosophy as a possible lens through which to understand the Australian attitudes towards minority cultures generally.
[121] Ibid 156.
[122] See further discussion below in Part 3.5.

legal thought of alien legal principles, classifications, and terminology which have no place in the structure and basic concepts of Jewish law."[123]

As Elon argues, there is an important benefit that comes through aligning Jewish law with 'accepted jurisprudential principles' especially when one is seeking to understand the interplay between Jewish law and common law, as is the objective of the present study. In line with his words of caution however, I am conscious of the importance of aligning any proposed theories with the writings of accomplished scholars and academics who are sensitive to the true nature of Jewish law and thus avoid crude analogies.

It would seem fair to say that Jewish law contains elements that reflect a positivistic conception of law, as well as those that align with theories of natural law. Much like Jewish law differs from a stereotypical conception of religious law,[124] likewise it eschews a neat categorisation in terms of its jurisprudential principles.

Viewpoints which would attempt to negate conceptions of natural law in Judaism include those of Yeshayahu Leibowitz, Marvin Fox and José Faur. Leibowitz asserts based on the Biblical verse 'seek not after your own heart and your own eyes'[125] that 'there are no moral precepts based on perception of reality or perception of duty: there is only the command of the Creator'.[126] A similar view is propounded by Fox[127] who asserts that natural law is entirely absent from Jewish scholarship[128] and finds justification for his assertion that '[t]here is no natural moral law, only the laws of G-d' in the works of Maimonides.[129] Likewise, Faur contends that 'man and G-d are two irreducible and independent categories.. [and no] religion based upon a criterion common in G-d and man [can] serve as the ground for their relationship', a view which eschews a natural law perspective which lends credence to human rationality and embraces a more positivistic perspective of Jewish law.[130]

While strong arguments are made to differentiate Jewish law from natural law, there are likewise cogent reasons for distinguishing it from theories of legal positivism. As discussed, Jewish law

[123] Elon (n 21) 241.
[124] See above in Part 2.2.1.
[125] Numbers 1:39.
[126] Yeshayahu Leibowitz, (1959) 9 *De'ot* 15, 20 [Hebrew] quoted in Izhak Englard, 'The Interaction of Morality and Jewish law' (1988) 7 *Jewish law Annual* 114, 120.
[127] Marvin Fox*, Interpreting Maimonides: Studies in Methodology, Metaphysics, and Moral Philosophy* (University of Chicago Press, 1995) 124-151.
[128] Beside for the writings of Rabbi Josef Albo, which Fox puts down to influences from Christian thought; see Fox, ibid 129-130.
[129] Ibid 150.
[130] José Faur, 'Understanding the Covenant' (1968) 9(4) *Tradition* 33, 40-41; this view is adopted by Dorff (n 88) 1352.'

incorporates aspects of morality which would not normally feature in a positivistic legal system. Moreover, as Bernard Jackson argues, Jewish law – and religious law generally – cannot fit with regular conceptions of legal positivism insofar as Bentham's positivism supposes social sources for the law which requires its authority to found in human beings, such as the sovereign of a state, or in Austinian terms, the law being 'set by *political* superiors to *political* inferiors'.[131] Additionally, one of the Kelsian criteria for positive law is that it must be enforced 'using socially immanent rather than transcendental sanctions'. Religious law, which incorporates ideas of Divine reward and punishment, fails to align with such a classification.[132]

On this basis, one can understand why David and Brierley chose not to classify Jewish law alongside contemporary secular legal systems. While the ongoing jurisprudential debates seem to evidence that secular legal systems need some cajoling if they are to fit within prevailing theories of legal positivism,[133] Jewish law seems to negate classification in terms of either positive or natural law. While this could point to the futility of an attempt to classify Jewish law in secular jurisprudential terms, a more nuanced approach towards Jewish law, which distinguishes between its various aspects could produce a theory which could create a language through which each system can communicate, and better integrate, with one another.

2.2.6 *Issura* and *Mamona*

While one cannot pigeonhole Jewish law into theories of natural or positive law, an argument could be made that sections of Jewish law do have characteristics that seem to reflect positivistic theories of law and others that seem to more closely reflect the approaches of natural law theorists. Proponents of such thinking find ways in which to delineate aspects of Jewish law that comport with different jurisprudential schools of thought.[134] One manner, which seems to be widely supported by a range of scholars, and provides substantial assistance in understanding some of the differences

[131] Bernard Jackson, 'Mishpat Ivri, Halakhah and Legal Philosophy: Agunah and the Theory of Legal Sources' (2002) 1 *Jewish Studies, an Internet Journal* 69, 76-77 (quotes and emphasis in the original).
[132] Ibid 80.
[133] See e.g. the debate between Hart and Dworkin, summarised in Shapiro, *The Hart-Dworkin Debate* (n 119).
[134] See e.g. Aharon Lichtenstein, 'Does Jewish Tradition Recognize an Ethic Independent of Halakhah?' in Marvin Fox (ed) *Modern Jewish Ethics* (Ohio State University Press, 1975) 62-88, who argues for the differentiation between *din* (strict law) and *lifnim mishurat hadin* (going beyond the letter of the law) in terms that could reflect a positivistic approach to *din* and a natural law approach to *lifnim mishurat hadin*; David Novak, 'Judaism and Natural Law' (1998) 43 *The American Journal of Jurisprudence* 117, finds aspects of natural law within *halakhah* and provides ten propositions as to where and how this integration occurs.

between Jewish and common law in the arbitration context, is the distinction between the aspects of *issura* and *mamona* along the lines of positivistic and naturalistic law.[135]

In certain respects Jewish law does not draw any bright lines between the areas of *issura* and *mamona* and, as discussed, it readily interweaves one with the other. However, there are several important distinctions that are made between these two areas of Jewish law, both in the Talmud itself and by later scholars.[136] One important example is the notion that within *mamona* one is able to contract privately even in opposition to the specific rules laid out in Jewish law, which one is not permitted to do in matters of *issura*.[137] A reason proposed for this distinction by the medieval scholar Naḥmanides is that matters of *issura* are between humans and G-d and as such one cannot independently 'contract out' of one's covenantal relationship with G-d. This is not the case in *mamona* which govern matters between one human and another and as such the religious law aims to serve the parties, and thus can be altered where both have granted their mutual consent.[138] Additionally, with regards to the verse 'do what is right and good in the sight of G-d,'[139] Naḥmanides explains that 'this is a great principle, for it is impossible to mention in the Torah all aspects of man's conduct with his neighbours and friends, and all his various transactions, and the ordinances of all societies and countries'[140] These comments give rise to the view that *mamona* allows for human input both in terms of adjustments to, and the full explication of, Jewish law, unlike *issura* where such latitude is not granted.

In a similar vein, medieval scholar Rabbi Jacob Anatoli picks up on the fact that 'there are many [commercial] laws regarding which the Torah did not mention at all, even via allusion… for the commandments regarding [commercial] law are ancient (i.e. they proceeded Revelation) and are not like other commandments in the Torah.'[141] He uses this as a basis to explain the broad discretion that judges have in this regard as we see that 'some judges in the days of the Talmudic sages would use their intellect to determine what was the appropriate conduct between people,' by which 'G-d

[135] I use the suffix '–istic' in the sense that it means 'of or pertaining to'; see <https://en.wiktionary.org/wiki/-istic>. Neither positive, nor natural, law have agreed upon definitions and as such when comparing sections of Jewish law to them, it is in the sense that they reflect certain general qualities of these terms.
[136] The sources brought here are based on those found in Elon (n 21) 223-227.
[137] This follows the view of Rabbi Judah in Babylonian Talmud, *Ketubot* 56a; codified in *Shulḥan Arukh, Even HaEzer* 38:5.
[138] Based on the commentary of Naḥmanides on the Babylonian Talmud, *Bava Batra* 126a.
[139] Deuteronomy 6:18.
[140] Naḥmanides commentary to Deuteronomy 6:18 (translation from sefaria.org).
[141] Rabbi Jacob Anatoli, *Malmad HaTalmidim* (L. Silbermann, 1866) 71b.

agrees with him, and the Divine presence rests between the judges, in accordance with the verse: G-d stands in the divine assembly, among the Divine beings He pronounces judgment.'[142]

Similar ideas pertaining to the role of human logic in explicating the laws of *mamona* are found in the writings of the Rabbi Judah Lowe in the early modern period.[143] The resultant dependence on broad judicial discretion is discussed by Rabbi Israel Lifschitz, author of the *Tiferet Yisrael* commentary on the *Mishnah* where he writes that:

> "[n]owhere in ritual law did the Torah allow human intelligence to soar as high as it can, to penetrate, to investigate, and to decide as it sees fit as it did in civil law. In that branch, the Torah has given man an unlimited field to weigh, to judge, and to draw conclusions according to his discretion to such an extent that most of the laws of litigation, on which there is a great mass of material like a harvest wagon full of sheaves, were encapsulated in the Torah in one sentence: 'You shall judge your fellow in justice'."[144]

These sources and others,[145] have led to vibrant discussions around whether one may align the theories of positive law with the category of *issura* and natural law with *mamona*.[146] In the context of this study, in which the elements of Jewish law that are being categorised as *mamona*[147] are being brought into dialogue with common law under its arbitration laws, the contrast between Jewish and Western law is quite stark: Jewish law in the realm of *mamona* appears to reflect a conception of natural law, while Western law aligns itself with the prevailing theories of legal positivism.

2.2.7 Jewish and Western Law: Role of the Judge

From the above, a practical distinction emerges between the role of a judge applying the *mamona* component of Jewish law and the role of a judge applying Western law. Due to its positivistic nature, which in theory leaves limited scope for a judge to be creative outside of clear sources of legislation and precedent, Western law presents itself as being subordinate to the 'Rule of Law'. Jewish law

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[142] Ibid 72a; Anatoli is quoting Psalms 82:1 where 'Divine beings' (*Elo-him*) is a euphemism for judges, cf Exodus 22:8 and 22:27 and Babylonian Talmud, *Sanhedrin* 66a.
[143] Rabbi Judah Lowe, *Derekh Ḥaim*, Avot 1:1.
[144] Rabbi Israel Lifschitz, *Tiferet Yisrael* on *Mishnah, Bava Batra* 10:8; translation is from Elon (n 21) 225.
[145] See e.g. Rabbi Shimon Shkop, *Sharei Yosher* 5:1; referenced in Elon (n 21) 226.
[146] See Lamm and Kirschenbaum (n 22) 111-115, where they discuss the difference between rational and revelatory laws in terms of positive and natural law; David Novak (n 134) 129-130, who argues that natural law underpins the rabbinic ability to legislate in civil matters. See also J David Bleich, 'Judaism and Natural Law' (1988) 7 *Jewish law Annual* 5, 41, who cautions against the alignment of 'natural law' with rational aspects of *halakhic* law insofar as there are many shades of rationality, many of which don't amount to the universal standard required for a pure conception of natural law.
[147] While it is true that there are certain areas of *issura* that are dealt with in a commercial Beth Din, such as the prohibition on *ribbit* (giving or taking interest), by and large a commercial Beth Din will operate within the realm of *mamona* and adopt the jurisprudential outlook relevant to that field of Jewish law.

however, in the realm of *mamona*, asserts the opposite notion, recognising judicial creativity as an important ingredient in arriving at the *halakhah*.[148]

The Biblical conception of a judge speaks to the qualities of judge primarily in terms of character rather than their knowledge of the law.[149] In Exodus and Deuteronomy, key characteristics of a judge include that they are 'trustworthy', 'spurn ill-gotten gain,'[150] are 'wise' and 'experienced.'[151] They are counselled to 'decide justly between one party and the other', 'not be partial in judgment, hear out low and high alike [and] fear neither party.'[152] It is apparent from these verses that more significant than knowledge of the law is personal integrity and an incontrovertible impartiality.[153] This notion appears to be reflected in the statements of several *dayanim* from best practice Battei Din in the USA and Israel who were interviewed as part of this study. Several *dayanim* independently shared their assessment that 80% of the success of a *dayan* stem from their character, the other 20% from their knowledge of the law.[154]

The role of judicial creativity in the application of Jewish law, has led one scholar to paint a caricature which contrasts the Western legal system as 'governed by rules, not by judges' with the Jewish law system as 'governed by judges, not by rules.'[155] It is a caricature in the sense that Western judges will often engage in judicial activism, interpreting law in a way that aligns with certain ideologies they hold dear, and thus elevating the authority and creativity of judges. In a similar vein, despite the broad discretion that a Jewish law judge would have in matters of *mamona*, this should not result in arbitrariness. There are limitations on judicial discretion and decisions

[148] As such, one concern relating to the *Mishpat Ivri* movement was that 'the attempt to make [Jewish law] subject to forms of public accountability deriving from a secular ideology of the Rule of Law, is tantamount to desacralisation'; Bernard Jackson, 'Internal and External Comparisons of Religious Law: Reflections from Jewish law' (2006) 1 *Journal of Comparative Law* 177, 182-183.
[149] See Ben Menahem, *Postscript* (n 27) 423; Bernard Jackson, *Judaism as a Religious Legal System* (n 104) 37-40.
[150] Exodus 18:21 (translation from sefaria.org).
[151] Deuteronomy 1:15 (translation from sefaria.org).
[152] Ibid 1:16-17; see also ibid 16:18-20 where judges are charged to 'govern the people with due justice', 'show no partiality' and 'not take bribes'.
[153] It is noteworthy that this is not an either/or proposition. Learnedness is key, however it is not the defining aspect of a judge, as is character. Rabbi Isaac Abarbanel illustrates the importance of knowledge of the law in his commentary on the Bible explaining why Moses acted as a sole judge of the people prior to Revelation, 'for no one else knew the G-dly law and [Moses] did not want judges who would make assumptions based on their own logic as to what the law should be'; see Abarbanel commentary to Exodus 18:13 (translation is my own).
[154] Interview with Rabbi Yaakov Warhaftig, *Av Beth Din* of Neve Nof (Chaim Cowen, Makhon Ariel, Jerusalem, 22 January 2023) ('Interview with Rabbi Warhaftig'): '*shmonim aḥuz mahadiyun zeh sekhel yashar* [80% of the judgement is common sense], after this you have to know the law'; Interview with Rabbi Aaron Kraft, Dayan at cRc Beth Din (Chaim Cowen, Chicago Rabbinical Council, Chicago, 29 November 2022) ('Interview with Rabbi Kraft'): 'Rabbi Schwartz said 80% of being a dayan is having the interpersonal skills and that type of sensitivity to people and the other 20% is applying the *halakhah*.'
[155] Ben Menahem, *Postscript* (n 27) 422.

typically stay close to the body of law, leading Lamm and Kirschenbaum to characterise 'the *halakhic* attitude towards precedent… as one of extreme reverence but not of absolute allegiance'.[156] As such, it is helpful to view Western and Jewish law (i.e. *mamona*) as sitting on a spectrum, in the which the Western conception of law places more significance on the body of rules, and viewing the judge as a tool in its application, while Jewish law in matters of *mamona* sees the judge themself as a source of law, who must utilise the body of rules in arriving at justice.[157]

2.2.8 Practical Outcomes of the Jurisprudential Differences

Jewish law has traditionally differed from secular law with respect to certain procedural aspects, including the right of appeal, the necessity of producing written judgements and the rights of parties to legal representation. While each of these – and several other – areas of difference will be explored in greater detail in the coming chapters,[158] for our present purposes it is sufficient to note the basic position that each system of law takes on these matters and the way in which their positions can be accounted for via understanding their differing conceptions of the role of the judge, informed by their respective jurisprudential underpinnings.

According to traditional Jewish law, one Beth Din cannot revisit the ruling of another Beth Din.[159] This stands in contrast to the position of the common-law legal system which does permit a party to appeal the decision of a lower court for review by a higher court.[160] Considering the jurisprudential differences between the two legal systems, one can readily understand this point of difference. If rules are supreme, and the judge's role is to interpret and apply the rules with accuracy, it follows that another court should have the ability to review the way in which the rules has been interpreted and applied. This serves the function of ensuring that the rules, and not the judge, is the source for the decision. By contrast, in Jewish law, where the 'Divine presence rests between the judges'[161] the decision is not one that can be appealed, insofar as it is not simply a question of whether the judge interpreted the rules correctly, given that the judge has a broad discretion in its application.[162] To

[156] Lamm and Kirschenbaum (n 22) 130.
[157] Jewish law is 'mediated through inspired texts and inspired people'; Bernard Jackson, *Internal and External Comparisons* (n 149) 185.
[158] See Parts 5 and 6.
[159] Babylonian Talmud, *Bava Batra* 138b; codified in Maimonides, *Mishneh Torah, Hilkhot Eidut* 6:5. Appeals do take place in rabbinic courts, both in the State Rabbinic Courts in Israel as well as in Battei Din, such as those surveyed in this study. The manner by which they navigate this law will be discussed in Part 6.5.
[160] 'All legal systems permit a losing party to appeal the adverse judgment to another court'; see Encyclopedia Britannica Online, 'Appeals and other methods of review' <https://www.britannica.com/topic/procedural-law/Appeals-and-other-methods-of-review>.
[161] See Anatoli (n 141).
[162] See Bernard Jackson, *Mishpat Ivri, Halakhah and Legal Philosophy* (n 131) 40.

put it differently, where it is the law coupled with the personage of the judge which jointly forms the law, there is nothing to appeal.[163]

The same rationale would explain the lesser impetus for written judgements in Jewish law. The basic position at Jewish law is that a judge need not supply a reason for their judgement, unless it something requested by the parties,[164] or the judge has reason to believe that a party suspects him of not judging fairly.[165] By contrast, the common-law system requires *ab initio* that judicial decisions are put into writing and presented to the parties. Again, this difference can be explained with reference to the differing jurisprudential underpinnings of each system. As regards the common law system, a written judgement ensures 'that all concerned may understand what principles and practice of law and logic are guiding the courts… which provides… a powerful protection against any tendency to judicial autocracy'.[166] The relative breadth of judicial discretion in matters of *mamona* renders a written judgement less necessary, insofar as the judge is not as limited by the letter of the law, and in certain instances is even required to deviate from it.[167]

Again, one can explain the different approaches to the litigants' right to representation by reference to these differing conceptions of law. Traditionally, in Jewish law the notion of legal counsel has been frowned upon, manifest in the dictum of the 1st Century BCE Jewish scholar, Judah ben Tabai, who instructed his students 'not to act as a lawyer.'[168] This stands in stark contrast to the right of representation at secular law, regarding which one academic posited that '[t]he right to legal assistance is of such fundamental importance that all other rights which are relevant for the due conduct of a fair trial may be worthless if this right is not respected.'[169] While Jewish law does allow representation so as to ensure the facts of the case are fully detailed and organised before the

[163] However, one can appeal to the *same* judge with a claim that they erred in a matter of applying Jewish law; see *Shulḥan Arukh, Ḥoshen Mishpat* 25.
[164] *Shulḥan Arukh, Ḥoshen Mishpat* 14:1.
[165] Ibid 14:4.
[166] Sir Frank Kitto 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 790; the written judgement also provides a basis for the appeal and is essential for the doctrine of precedent, both of which play a less significant role in Jewish law. Regarding the relative roles of precedent in Jewish and common law see Menachem Elon et al, *Jewish law (Mishpat Ivri): Cases and Materials* (LexisNexis, 1999) 91-96.
[167] See Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 24:1 where he writes, "[a] judge may adjudicate cases involving monetary law bases on factors that he is inclined to regard as true and concerning which he feels strongly in his heart are correct even though he does not have proof of the matters… these matters are solely given over to the heart of the judge to decide according to what he perceives as being a true judgment" (translation from chabad.org); see also Rabbi Benzion Meir Hai Uziel, Sephardi chief rabbi of Mandatory Palestine who described among the qualities of a judge that they 'must also be a vigorous individual with the courage to deviate from the law, to acquit or convict, when the circumstances call for this' in B M Uziel, 'Dayan Umishpat' (1945) *Sinai* 17, 107 [Hebrew] (translation is quoted from Ben Menahem, *Postscript* (n 27) 433).
[168] *Mishnah, Avot* 1:8; notwithstanding traditional resistance to lawyers, they do feature in contemporary best practice Battei Din, and the *halakhic* basis for this will be discussed in Part 6.3.
[169] Charika Marasinghe, 'The Right to Legal Assistance in International Law, with Special Reference to the ICCPR, the ECHR and the ACHR' (1997) 5 *Asian Yearbook of International Law* 15, 15.

dayanim, it resists attempts by the representative to present their interpretation of the *halakhic* position.[170] As one of the *dayanim* who was interviewed explained,

> "the lawyers' job is two-fold, they have to prove the facts and they have to prove the law. In a Beth Din they only have to prove the facts, we aren't interested in what [they] have to say about the law, that's our job."[171]

Some have put this down to Jewish law sharing more in common with an inquisitorial, as opposed to adversarial, form of proceedings, the role of a judge being far more active in the latter than in the former.[172] However, based on the analysis with regards to the jurisprudential underpinnings of Jewish law which see it as far less positivistic, and thus less beholden to the rule of law compared with its secular counterpart, the limitations on representation can be understood in another manner. In secular law, where the battle is ostensibly about *what the law is*, the lawyer is challenged to dig up compelling precedents, or offer cogent interpretations of legislation, to which judge is beholden. In Jewish law however, it is the *halakhic* texts *in conjunction with* the inspired judge that determines the appropriate outcome. As such it is the judge, and their combined character and knowledge that is key, and may in fact be misguided by representation that pushes a strictly *halakhic* rules-based argument in favour or their party.

These examples of practical differences between Jewish and secular law, which appear to stem from the differing jurisprudential underpinnings of each system, forms a potential source of conflict between them which is exacerbated when Jewish law is applied within the secular law arbitral framework. As will be discussed in the chapters pertaining to Jewish Law accommodation, *halakha* can and does accommodate to secular law expectations in each of these areas. While in some instances the Beth Din may view these changes as artificial insofar as they are implemented only because of secular expectations, the necessity of ensuring the enforceability of awards which is contingent on their being upheld at secular law, provides an overriding pragmatic motivation for these changes.

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[170] *Shulḥan Arukh, Ḥoshen Mishpat* 17:9.

[171] Interview Rabbi Daniel Rapp Esq., Dayan of the Beth Din of America (Chaim Cowen, Yeshiva University, New York, 23 November 2022) ('Interview with Rabbi Rapp'); a similar sentiment was expressed in Interview with Rabbi Weissmann.

[172] See Dov I Frimer, 'The Role of the Lawyer in Jewish law' (1983) 1(2) *Jewish law Journal of Law and Religion* 297, 298.

2.3 CONCLUSION

The intention of this aspect of the study is to promote greater understanding between practitioners and adherents of both Jewish and secular law. This brief comparative law study draws on both primary and secondary sources to demonstrate some of the jurisprudential differences between these two legal systems and how they translate into defining the role of a judge in each of these legal traditions. In line with this, the default position of each legal system has been explored with regards to its position on the role of an appeals system, written judgements and legal representation.

While this is an important exercise in creating mutual understanding between proponents of each legal system, it is far from the end of the journey. As will be further explored, the fact that Jewish law did not historically incorporate an appellate system, nor mandated written judgements or encouraged representation, has changed in in recent times. As will be discussed,[173] best practice Battei Din in the USA and Israel have incorporated all these elements into their Battei Din. An awareness of the secular milieu and its impact upon religious communities in contemporary society has given rise to the need to seek accommodations that maintain the integrity of the Jewish law system, whilst ensuring its eternal relevance and appeal in the modern age. In the next chapter, we will discuss the evolving relationships between religious communities and their secular host countries and how this has seen a renaissance of interest in religious autonomy generally, and commercial arbitration in particular.

[173] See Part 4 which describes International Best Practice.

3 RELIGIOUS ARBITRATION IN CONTEXT

3.1 INTRODUCTION

In addressing the interplay between Jewish and secular law within the Australian arbitral context, it is helpful to step back and view their interaction in the context of arbitration generally and religious arbitration specifically. Trends relating to arbitration, legal pluralism, and multiculturalism assist in gauging the momentum of society in relation to religious arbitration and allow for the application of contemporary theories that address the challenges of competing interests that arise between a minority and majority culture.

It will be argued that we have reached a point in the maturity of the nation-state in which prevailing attitudes have increasingly become more sensitive to the desires of minority cultures. Arbitration has earned greater acceptance, and in line with this, openness to legal pluralism has advanced in a similar manner to multiculturalism.[174] Indeed, the correlation between legal pluralism and multiculturalism frames the growing interest in judicial autonomy, within the limitations of arbitration law, as a manifestation of a desire for greater religious freedom.[175] On this basis, sociological theories pertaining to forms of accommodation between minority groups and their host cultures will be explored and assessed in terms of their suitability to the context of Australian Battei Din; including transformative, consensual, and contingent accommodation.[176]

3.2 LEGAL PLURALISM: THE COURTS AND ARBITRATION

Legal Pluralism is a concept with regards to which there are competing definitions.[177] John Griffiths in his influential article *'What is Legal Pluralism?'* states that legal monism, or as he calls it, legal centrism, refers to an ideology where 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.'[178] Griffiths goes on to distinguish between 'strong' and 'weak' legal pluralism. 'Strong' legal pluralism exists where two or more systems of law operate independently of one another within the same society, or where the State has one law for certain citizens and another law for others.[179] 'Weak' legal pluralism, on the other hand, denotes a circumstance whereby State law allows another form of law

[174] See Gary F Bell, 'Multiculturalism in Law Is Legal Pluralism - Lessons from Indonesia, Singapore and Canada' (2006) 2 *Singapore Journal of Legal Studies* 315.
[175] See Fogel (n 61).
[176] See Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge University Press, 2001).
[177] See John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1.
[178] Ibid 3.
[179] Ibid 13.

to operate, but it is deemed inferior to the State's supreme legal system insofar as it requires the dominant legal system's imprimatur in order for it to operate.[180]

An example of this 'weak' form of legal pluralism would include the permitting of an alternate legal system to utilise arbitration law to render its decisions as binding. Subject to the arbitral body's compliance with the relevant arbitration legislation, State law will provide for its enforcement as it does for other such areas of contract, or private, law. As will be outlined below, even this 'weak' form of legal pluralism has not been one that the proponents of the nation-state readily accommodated, and its rise seems to reflect changing attitudes in recent history towards the acceptance of alternate systems of law.

Arbitration is defined as 'the voluntary agreement of states or persons to submit their differences to judges of their own choice and to bind themselves in advance to accept the decisions of judges, so chosen, as final and binding.'[181] The practice of arbitration pre-dates the use of the courts for adjudication, with scholars pointing to examples of this practice in Biblical times.[182] In the medieval era, merchants would often settle disputes via appointing fellow merchants, using *lex mercatoria*, merchant law that sat outside of any specific legal system. They preferred arbitration over utilising the established courts which they found to be slow and lacking in the relevant expertise. In addition, the fact that many merchants were foreigners meant that they did not always have standing in the local courts.[183]

In Australia, the system of law utilised by the indigenous population likewise reflected the principles of arbitration, whereby Elders would be selected by the parties to render a ruling with regards to disputes. The British settlers who colonised Australia, likewise utilised arbitration, as they were accustomed back in England, and in fact what came to be known as the first parliamentary sitting of the Australian colonies determined that arbitration was to be *the* accepted dispute-resolution method.[184]

Common law courts were used sparingly in early 19th Century England, whereby a majority of civil cases would be determined by local 'courts of requests.'[185] Harry Arthurs describes the nature of these courts in the following terms:

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[180] Ibid 5-8.
[181] Frank D Emerson, 'History of Arbitration Practice and Law' (1970) 19 *Cleveland State Law Review* 155, 157.
[182] See ibid 155-6; Doug Jones, *Commercial Arbitration in Australia* (Thomson Reuters, 2nd ed, 2012) 4-5.
[183] Jones, ibid 5.
[184] Ibid 6.
[185] Harry W Arthurs, 'Without the law: Courts of Local and Special Jurisdiction in Nineteenth Century England' (1984) 5(3) *The Journal of Legal History* 130, 130-131.

> "Cases were to be decided upon according to 'equity and conscience'. Judges or 'commissioners' were laymen, sometimes aldermen, burgesses or mayors ex officio, usually appointed by local authorities, and occasionally co-opted by a self-perpetuating bench. Lawyers, other than 'low attorneys', seldom participated in cases, either because they were explicitly excluded, or because there was no provision for the payment of costs. Court fees were relatively low, pleadings simple, fact-finding informal; the parties had no difficulty in representing themselves."[186]

These courts, which reflect certain qualities of arbitration, particularly in terms of their less formalised and more efficient approach to dispute resolution, as well as the wide discretionary powers of their judges, were ultimately reigned in and absorbed into the 'superior courts'. Attempts to 'professionalise' these courts crystalised in the *County Court Act* in 1845 which gave higher courts the ability to review their judgements, ensured that judges underwent training and that only lawyers were permitted to represent litigants.[187]

The eclipse of these quasi-judicial courts and arbitration fora, aligned with the rise of the modern nation-state which aimed to strengthen the courts and assert the supremacy of the legal profession. Significant impositions placed upon arbitration bodies rendered their benefits in terms of efficiency moot, and caused them to fall into disuse.[188] The *Civil Procedure Act 1833* (UK) granted increased scope to the courts to review arbitral awards and a few decades later, the *Common Law Procedure Act 1854* (UK) granted the courts wide powers which included their ability to appoint arbitrators in certain circumstances as well as to remit, set aside and enforce arbitral awards. These laws formed the bedrock of the *Arbitration Act 1889* (UK) which formed the basis upon which the Australian States modelled their arbitration laws in the subsequent decades.[189]

Over the course of the 20th Century, the interventionist approach of the courts towards arbitration gradually subsided. In the USA, despite legislative attempts to grant arbitration greater freedom from judicial review, the Supreme Court narrowly construed the limitations on its power, begining to embrace these changes only in the 1960s.[190] In a similar vein, Australian law followed a gradual process of strengthening the place of arbitration. Between 1984-1990 it adopted the *Superseded Uniform Acts* ('SUA') which aimed to align the states and ensure the consistent application of arbitration law throughout the country. The SUA was deemed too formalistic in terms of the

[186] Ibid 131.
[187] Ibid 141-142.
[188] Emerson (n 181) 157-158.
[189] Jones (n 182) 8-9.
[190] See Michael C Grossman, 'Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process' (2007) 107 *Columbia Law Review* 169, 173-174.

procedural expectations that it placed on arbitral bodies and the scope for judicial review was considered too broad. Calls to reduce the inefficiencies of arbitration in Australia resulted in its adoption of the *UNCITRAL Model Law* with the aims of providing 'a quicker, cheaper and less formal method of finally resolving disputes than litigation'.[191] Between 2010 and 2017 versions of the new legislation, known as the *Commercial Arbitration Acts* ('CAAs'), were subsequently adopted in Australia by all States and Territories.[192] In the foreword to Doug Jones' *Commercial Arbitration in Australia*, former Chief Justice of the New South Wales Supreme Court, James Spigelman summarised the shift in attitude of the judiciary towards arbitration over the past century:

> "[i]n the jurisdictions with which I am most familiar, the longstanding tension between judges and arbitrators has disappeared. Most judges no longer consider arbitration as some kind of trade rival. Courts now generally exercise their statutory powers with respect to commercial arbitration by a light touch, supervisory jurisdiction directed to maintaining the integrity of the system. Insofar as arbitrators sometimes express dissatisfaction in this respect, such commentary is, or at least should be, diminishing in frequency."

It is possible to frame this shift in terms of Griffith's 'strong' and 'weak' legal pluralism. Prior to the nation-state, 'strong' legal pluralism flourished in many Western countries insofar as a multiplicity of courts and arbitration fora existed alongside the common law courts. These included the courts of requests and merchant arbitration fora in England, as well as the Aboriginal and Colonial arbitration methods in use in Australia. These and other such dispute resolution bodies were reigned in as the state judiciary began to assert itself as the central authority of the nation-state, and maintained legal monism which stood in tension with quasi-judicial bodies that threatened its exclusive rule. Over time, as the nation-state matured, its initial rigidity softened, and an openness to 'weak' legal pluralism emerged in which arbitration was granted more independence, but with the awareness that it was secondary to State law, and subject to its authorisation.

3.3 Resistance Towards Religious Arbitration

In the previous section, we briefly tracked the fall and rise of arbitration over the last few centuries in Western society. While one might naturally view religious arbitration as simply another form of arbitration, whose trajectory follows that of arbitration generally, an argument can be made to

[191] Jones (n 182) 14-18.
[192] See Australian Centre for International Commercial Arbitration website, *Commercial Arbitration Acts* <https://acica.org.au/commercial-arbitration-acts/>.

distinguish it from other forms of arbitration which explains the greater resistance it has encountered compared to other forms of arbitration.

One significant difference between religious and other forms of arbitration is the legal system with which they apply. Typically, an arbitrator will render a decision based on their understanding of the prevailing law of the country or with regards to broad principles of equity.[193] In religious arbitration however, the arbitrators utilise an entirely different legal system. This factor accentuates the perceived challenges associated with legal pluralism. Whilst advocates for legal monism might be willing to soften their position with regards to allowing a non-judicial officer to arbitrate based on their understanding of common law and equity, there is greater reticence to forms of arbitration where a foreign legal system is being applied, whose values are not aligned with those of the majority culture.

Moreover, since the state's willingness to permit arbitration takes the form of 'weak' legal pluralism, the arbitration bodies are beholden to the state and are meant to see themselves as secondary to its legal system. In the case of religious arbitration however, from an internal perspective, the arbitrators and litigants generally view their law as supreme, over state law.[194] While this may be a cause for concern for some, it is unlikely that such a viewpoint has any practical bearing insofar as irrespective of it, the enforcement of arbitral awards is subject to its compliance with State arbitration laws. As such, while the hierarchy of legal systems that exist in the eyes of the state may not be reflective of the hierarchy of laws in the eyes of its citizens, attempts by the state to outlaw such thinking would be futile,[195] and the fact that religious arbitration is beholden to the State for enforcement of its awards reduces the possibility that an ideological position of legal supremacy will precipitate detrimental practical outcomes.[196]

In addition to concerns around taking legal pluralism too far, there is a related challenge to religious arbitration stemming from its potential for oppression of certain elements within the minority group, such as women. Between 2003-2005, public outrage at the prospect of Sharia courts seeking to offer services in the family law context, under Canadian arbitration laws, resulted in the outlawing

[193] Michael A Helfand, 'Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders' (2011) 86 *New York University Law Review* 1231, 1246-1247.
[194] Tamanaha (n 62) 116-117; Cohn (n 76) 2-6.
[195] Tamanaha, ibid 127.
[196] See Rabea Benhalim, 'Religious Courts in Secular Jurisdictions: How Jewish and Islamic Courts Adapt to Society and Legal Norms' (2019) 84 *Brooklyn Law Review* 745, 792-799. The author contrasts the Beth Din of America which services a minority population and is differential towards secular law with the Rabbinical courts in Israel who service a majority population and have a more defiant attitude towards the secular Israeli courts. Based on her analysis, where a religious court acts as an arbitration body for a minority community, as is the case in Australia, there is less concern of defiance towards State law.

of religious arbitration in Canada. Concerns regarded the inferior rights of women in Islamic law and that permitting Sharia tribunals would result in their oppression, which would ultimately be sanctioned by the State under its arbitration laws.[197] As a result of these protests, religious arbitration was outlawed and the Premier of Ontario famously stated, '[t]here will be no religious arbitration in Ontario. There will be one law for all Ontarians.'[198] While his choice of words seemed to reflect a desire for legal monism, in fact what lay behind them was the concern relating the promotion of values pertaining to women that conflicted with Western society, which the community did not wish to endorse.

While outrage with regards to Jewish law has been less vociferous,[199] there are still concerns that the women are treated differently in *halakhah*, particularly with respect to divorce law where the man must willingly provide the *gett* (bill of divorce) and without it a woman is unable to remarry and is thus rendered an *agunah* (lit. chained woman). While this is an important subject for the Jewish community to navigate, it is not the subject of the present study as it does not relate to the Beth Din as an arbitration body in commercial disputes. However, in the USA, where Battei Din have the ability to litigate end of marriage settlements, the difference between the rights of women and men in end of marriage matters could well be a cause for concern. [200] However, this is again not the case in the UK or Australia where family law matters are the exclusive domain of the Family Courts or Family Dispute Resolution (FDR) arbitrators.[201]

A further area where the rights of women may be impacted in the context of Jewish law arbitration pertains to the status of female testimony. While this will be more fully discussed in Part 6.4, for the purpose of our present context it is noteworthy that female testimony is not accepted according to traditional *halakhah*.[202] Were this to be the practice of contemporary Battei Din, this would cause significant concern regarding the fairness of a trial where evidence is treated differently based on

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[197] See discussion and sources in Caryn Litt Wolfe, 'Faith Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and their Interaction with Secular Courts' (2006) 75 *Fordham Law Review* 427, 448-450.

[198] Anne McIlroy, 'One law to rule them all', *The Guardian* (online, 14 September 2005) <https://www.theguardian.com/world/2005/sep/14/worlddispatch.annemcilroy>.

[199] This is noted in Tamanaha (n 62) 121.

[200] See Litt Wolfe (n 197) 450-468 where she puts forward the pros and cons of faith-based dispute resolution in the family law context, which is commonly used in the USA.

[201] See Bernard Jackson, 'Transformative Accommodation and Religious Law' (2009) 11 *Ecclesiastical Law Journal* 131, 149 where he notes that for this reason the London Beth Din will not deal in any family law matters. In Australia, the Family Law Courts will generally require arbitration regarding custody prior to attending court, however this can only be done via accredited Family Dispute Resolution (FDR) practitioners, see Australian Government Attorney General's Department website, *For Family Dispute Resolution Practitioners* <https://www.ag.gov.au/families-and-marriage/families/family-dispute-resolution#for-family-dispute-resolution-practitioners>.

[202] *Shulḥan Arukh, Ḥoshen Mishpat* 35:14.

gender.[203] In allaying this concern, it is noteworthy that without exception, in all interviews with *dayanim* from the BDA, the cRc Beth Din and Eretz Ḥemdah Gazit, where I posed the question of whether female testimony is accepted in their Beth Din, they were unequivocal that it is accepted in the commercial arbitration context and that it is treated no differently to other forms of testimony.[204] While the *halakhic* rationale will be explored later, it is clear that this poses no concern in the contemporary setting for the Battei Din that were part of this study. It is however understandable that considering the traditional position on the matter, ignorance of the present-day practice to acceptance female testimony could mistakenly give rise to concern.

3.4 MULTICULTURALISM IN LAW

As we have seen, proponents of legal monism have softened their position to entertain a 'weak' legal pluralism in which the State granted the ability to an alternate legal system to operate with its imprimatur, subject to the values of the subordinate law not offending its sensibilities. This notion is predicated on the idea that the nation-state is the supreme authority of law, which has been challenged by scholars in the growing field of legal pluralism. Griffiths argues that '[l]egal pluralism is a fact. Legal centralism is a myth, an ideal, a claim, an illusion'.[205] He bases this assertion on the ideas of Austrian sociologist of law, Eugen Ehrlich, who opines that law does not only take the form of positive law emanating from the State. Rather, it is an ordering force in all aspects of society, including within families, clubs, schools and religions, whereby certain benefits conferred by these entities depend on adherence to certain norms, which often attract a stronger allegiance than State law.[206] This view accords with an internal perspective of Jewish law. Over the course of Jewish history, adherents to *halakhah* have seen it as the ultimate form of authority, and as such it was only in reference to the Jewish law principle of *dina demalkhuta dina* (the law of the land is the law), that obedience to the laws of an alternate regime were mandated.[207]

This recognition of the perspective of the citizen who is also an insider of a minority group, living in a web of multiple legal regimes, can be aligned with a new perspective on multiculturalism that dawned in the latter half of the 20th Century. In an article addressing the appearance of diminishing legal pluralism in Canada following its outlawing of religious tribunals, Gary Bell argues that 'multiculturalism in law is legal pluralism'.[208] Bell asserts that law is part of culture, and as such, with

[203] The *Commercial Arbitration Act 2011* (Vic) s 1AC states that the paramount object of the Act is to 'facilitate the *fair* and final resolution of commercial disputes' (emphasis added).
[204] See Part 6.4.3.
[205] Griffiths (n 177) 4.
[206] Referenced in ibid 23-25.
[207] See further discussion of *dina demalkhuta dina* in Part 5.3.
[208] Bell (n 174).

an increased focus on preserving and celebrating the cultures that make up contemporary society must also come an increased recognition in other forms of law.[209] As such he criticises the apparent hypocrisy in Canada where on the one hand multiculturalism is enshrined as a doctrine of State ideology, yet on the other hand legal pluralism was denied under the 2005 outlawing of religious arbitration.[210]

The alignment between multiculturalism and legal pluralism, is echoed in the fact that the term 'legal pluralism' only began to be used in the 1960s and its usage rapidly accelerated in the ensuing decades.[211] Over the same time period, the term multiculturalism was likewise coined and gained popularity,[212] as Western countries began moving away from assimilationist mentalities which put the majority culture at the centre, towards an identity that was more ethnically plural. In Australia for example, the prevailing attitude to migrant settlement up until the latter part of the 20th Century was 'that migrants should shed their cultures and languages and rapidly become indistinguishable from the host population'.[213] This shifted in the mid-1960s when the 'White Australia' policy was fully rescinded and over the following half century a slew of initiatives, policies, appointments and councils were enacted to promote multiculturalism.[214] The alignment of legal pluralism and multiculturalism, in terms of their coinage and popular adoption, buttresses Bell's argument that the two are in fact one and the same, with legal pluralism an expression of multiculturalism in the context of law.

3.5 Trends in Multiculturism: Jews in Australia

In this section, some of the multicultural shifts, specifically relating to the Australian Jewish community which have given rise to an increased desire for cultural autonomy will be outlined. While limited research exists with regards to the Australian Jewish community *per se*, one is able to more readily track the shifts in attitudes towards the indigenous people of Australia, which can be correlated with general multicultural trends, of which the Jewish community are also a beneficiary.

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[209] Ibid 320.
[210] Ibid 328.
[211] Tamanaha (n 62) 1-2.
[212] See Ronald L Jackson (ed), *Encyclopedia of Identity* (SAGE Publications, 2010) 480; this is reflected in a Google Books Ngram search which shows the usage of this term 'multiculturalism' beginning in the mid-1960s and growing rapidly in the ensuing half century; see <https://books.google.com/ngrams/graph?content=multiculturalism&year_start=1920&year_end=2022&corpus=en&smoothing=3&case_insensitive=false>.
[213] See Australian Government Department of Home Affairs website, *A brief history of Australia's multicultural policies* <https://www.homeaffairs.gov.au/about-us/our-portfolios/multicultural-affairs/about-multicultural-affairs/our-policy-history#:~:text=Multiculturalism,and%20heritages%20within%20mainstream%20institutions>.
[214] See ibid where these initiatives are listed.

The early Australian attitude towards native and immigrant minority cultures has been described By Geoffrey Levey as 'mild and integrationist compared to worldly conceptions of cultural pluralism'.[215] There is data which evidences high levels of assimilation among ethnic groups in Australia,[216] as well as the readiness to label immigrants as new-Australians rather than accommodating for 'hyphenated identities.'[217] Hugh Collins, speaking of the Benthamite influence on Australian political ideology goes so far as to say that Australia has 'been notably intolerant of minorities.'[218]

Perhaps the starkest expression of this intolerance towards minorities, is found in the treatment of the indigenous Australians by the European settlers. Unlike in other colonies where British settlers gave official recognition to existing customary law, either formalising it as part of their new laws or simply letting it continue to operate as it did prior to their arrival, in Australia (as well as in Canada and New Zealand), the native population was deemed as having no customary law worth preserving and it was thus deemed as superseded by British law.[219] This lack of recognised indigenous law resulted in the dispossession of their property rights and effectively deeming Australian as *terra nullius*. Additionally, the *Constitution of Australia* excluded Aboriginal people from being counted in the census as well as from the heads of power under which the Commonwealth could legislate, leaving them to the mercy of the States which could, and did, introduce oppressive and discriminatory policies.[220]

An important milestone in the recognition of indigenous Australians was achieved in the 1967 referendum, when more than 90% of Australians voted to change the constitution in the two sections that denied their equal recognition.[221] A few years later in 1971, the first native title case was brought to the Northern Territory Supreme Court. While the court ruled against the Yolngu people who were disputing the government's sale of their traditional land to a mining company, in the judgement Blackburn J took steps towards a recognition of indigenous law:

> "The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free

[215] Geoffrey B Levey, 'Multiculturalism and Australian National Identity' in Geoffrey B. Levey (ed), *Political Theory and Australian Multiculturalism* (Berghahn Books, 2008) 254, 258.
[216] Ibid 258-259.
[217] Ibid 261.
[218] Collins (n 120) 157.
[219] See Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report 31, June 1986) <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC31.pdf>.
[220] See The Australian Institute of Aboriginal and Torres Strait Islander Studies website, *The 1967 Referendum* <https://aiatsis.gov.au/explore/1967-referendum>.
[221] Ibid.

> from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me."[222]

This was the first 'crack' in the hitherto maintained view of monistic colonial law in Australia that widened two decades later, giving way to the reversing of *terra nullius* and the recognition of native title in the case of *Mabo v Queensland (No 2)*[223] and the legislation of the *Native Title Act 1993* (Cth) the following year.

The change in sentiment towards the indigenous community which was reflected in the 1967 referendum can also be seen in shifting attitudes regarding another minority community in Australia, the Australian Jewish community. In a sociological study of the Melbourne Jewish community conducted by Peter Medding in 1968, he describes the perception within the Jewish community that Australians held themselves 'aloof from people with foreign accents.'[224] Addressing the influx of 15,000 immigrant Jews in 1939, Medding quotes the following words of caution found in the *Australian Jewish News* at the time:

> "Above all, do not speak German in the streets and in the trams. Modulate your voices. Do not make yourself conspicuous anywhere by walking with a group of persons, all of whom are loudly speaking a foreign language. Remember that the welfare of the old-established Jewish communities in Australia, as well as of every migrant, depends on your personal behaviour. Jews collectively are judged by individuals. You, personally, have a grave responsibility." [225]

Acting in a way that culturally separated the Jewish community from the mainstream was perceived as strengthening antisemitic impulses among non-Jews.[226]

However, as propounded in the title of his study *From Assimilation to Group Survival*, Medding tracks a change in attitude that seems to align with the multicultural winds that gathered strength in the 1960s. While Medding found that '[i]n 1920 the emphasis was upon the participation of the individual Jew in the general community,' he noted at the time of publication that 'Melbourne Jewry in the 1960's has rejected this approach, and is searching for a new ideology which will define its minority situation. It is slowly moving in the direction of cultural pluralism.'[227] He defines this cultural

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[222] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, [267].
[223] *Mabo v Queensland (No 2)* [1992] HCA 23.
[224] Peter Medding, *From Assimilation to Group Survival: A Political and Sociological Study of an Australian Jewish Community* (Cheshire Group Publishers, 1968) 195.
[225] Ibid 160 referencing *Australian Jewish News* (Melbourne, 19 May 1939).
[226] Ibid 165-166.
[227] Ibid 270-271.

pluralism as 'emphasiz[ing] group distinctiveness, enabling the contributions to society as a whole, of different groups as groups. It stands in direct contrast to sociological theories of assimilation… the complete integration of minorities into the larger society, their acceptance of the majority norms, values and attitudes, in other words, their disappearance[.]'[228] As mainstream Australian society was re-adjusting its attitude towards its native minority, other minorities – such as the Jewish community – were also beginning to re-evaluate their relationship with the majority culture.

While Medding's sociological study has not been updated to reflect more recent trends, there is evidence that the shift towards greater cultural autonomy within the Melbourne Jewish community has strengthened and borne fruit.[229] In the sphere of education, more than eight Jewish day schools were opened in Melbourne between 1949 and 1978.[230] In the field of emergency medical assistance, Hatzolah Melbourne was established in 1994 following a worldwide trend, initiated in New York in 1973, to provide a culturally nuanced first responder agency for the Jewish community.[231] A further example, in the sphere of security, was the establishment of the Community Security Group ('CSG') which protects Jewish life and the Jewish way of life.[232] These institutions do not operate in a vacuum, but are interlinked with State resources: the schools come under the ambit of the Ministry of Education, Hatzolah work in tandem with Ambulance Victoria and the CSG share a close relationship with Victoria Police. Together, these and other such communal initiatives represent the fleshing out of the 1960s aspiration towards cultural pluralism, which Medding noted in his study of the Jewish community at the time.

This trend would naturally translate into the desire for a fuller expression of Jewish law and its extension into the realm of commercial disputes, as was the case in the millennia prior to the Enlightenment and the rise of the nation-state. In the US, where according to Levey[233] and Medding[234] there is a stronger and more vibrant multiculturalism than in Australia, Battei Din are

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[228] Ibid.

[229] I thank Dr Adina Bankier-Karp for her suggestions of institutions that reflect the increased autonomy of the Melbourne Jewish community.

[230] Andrew Markus, Miriam Munz and Tanya Munz, *Gen17 Australian Jewish Community Survey: Jewish Education in Melbourne* (Monash University, 2020) 2.

[231] See Chevra Hatzolah Melbourne website, *About Us* <https://www.hatzolah.org.au/about-us/>.

[232] See CSG website, *About the CSG* <https://vic.thecsg.org.au/about-the-csg/>.

[233] Levey (n 215) 271 writes 'even allowing for its overstatement in the American context, one can scarcely say of Australia what Michael Walzer… has opined about the United States: "What has always struck me as the most remarkable feature of American history, impossible to imagine in any 'old world' nation-state, is that the Anglo-Americans allowed themselves to become a minority in—what they must have imagined to be—their country."'

[234] Medding (n 224) 272 reflects on the Australian appetite for cultural pluralism: 'Cultural and religious pluralism are of basic importance in American society, but is this true of Australia? Many would argue that certain aspects of Australian society, culture and attitudes stand in strong opposition to theories of cultural pluralism.'

already well established, and bodies such as the Beth Din of America and the Beth Din of the Chicago Rabbinical Council have gained the trust of the community and have largely enjoyed positive interactions with the secular courts. According to American academic Michael Helfand, 'religious arbitration courts serve as the quintessential institution of the new multiculturalism, providing religious groups with the law-like autonomy that has been withheld under public law.'[235] Arbitration law is thus the natural vehicle through which multiculturalism in law (legal pluralism) continues to develop and flourish in the West.

3.6 Forms of Accommodation

3.6.1 Problems with Multiculturalism

The growth of cultural pluralism has been accompanied with a range of challenges. David Cameron famously criticised State multiculturalism in his first speech as British Prime Minister, drawing attention to Islamic extremism and the erosion of a collective identity:

> "Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. We've failed to provide a vision of society to which they feel they want to belong. We've even tolerated these segregated communities behaving in ways that run completely counter to our values."[236]

Surveys have bolstered this assessment, finding that a large minority of Britons felt that policies furthering multiculturalism, instead of advancing social harmony, have created deep divisions between communities.[237]

In his critique of multiculturism, Cameron broached the question of whether a liberal society should embrace cultures that do not share certain values with the majority:

> "we should properly judge these organisations: do they believe in universal human rights – including for women and people of other faiths? Do they believe in equality of all before the

[235] Michael A Helfand (n 193) 1237.
[236] David Cameron, (PM's Speech, Munich Security Conference, 5 February 2011) <https://webarchive.nationalarchives.gov.uk/ukgwa/20130102224134/http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/>.
[237] Mark Townsend, 'Multiculturalism has failed, believe substantial minority of Britons' *The Gaudian* (online, 14 April 2018) <https://www.theguardian.com/world/2018/apr/14/multiculturalism-failed-substantial-minority-britons-integration-rivers-blood-enoch-powell>; interestingly a Google Books Ngram Viewer for the term 'multiculturalism' shows the term rising steadily from about 1960 to 2010 after which it shifts into decline.

law? Do they believe in democracy and the right of people to elect their own government? Do they encourage integration or separation?"[238]

These questions are ones that are not unique to the UK, but are the same ones that resulted in the outlawing of religious tribunals in Canada in 2005, based on public outcry relating to Sharia courts. Likewise, in the USA certain states have acted to pre-emptively outlaw Sharia courts, and academics have called for a closer monitoring of all faith-based religious arbitration.[239]

3.6.2 Consensual, Contingent and Transformative Accommodation

Scholars have grappled with the question of how to promote cultural pluralism without the promoting the negative by-products of separatism and internal discrimination.[240] Ayelet Shachar, in her text *Multicultural Jurisdictions* presents a range of approaches towards the 'paradox of multicultural vulnerability'[241] that position both the State and the minority culture, which she refers to as a *nomoi* group, as having joint-governance over the relevant aspects of the lives of those citizens who identify as part of that group. In this section we will explore, in the context of Beth Din arbitration, the approaches known as contingency and consensual accommodation, and compare them with Shachar's preferred approach, that of transformative accommodation.

Shachar's joint-governance approach stands in contrast to the two stereotypical models of multiculturalism. One, which she refers to as 're-universalised citizenship' or the 'secular absolutist' model is where the State tolerates the existence of minorities but relates directly to the individual within the *nomoi* group and supports them in instances where their rights are infringed upon by their community. In this model, the religion or culture that the citizen belongs to is considered their private business and has no real independent authority.[242] The other, which she refers to as the 'unavoidable costs' or 'religious particularism' model is where the State does not intervene in the minority groups affairs, even when they systematically violate a members basic rights, as long as the member has 'a formal right of exit' from the *nomoi* group. This model respects the citizens choice to align themselves with a particular community and is non-interventionist so long as the member has the ability to leave the group.[243]

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[238] See Cameron (n 236).
[239] See Helfand (n 193) 1238-1239.
[240] This includes philosophers and multicultural theorists such as Will Kymlicka, Charles Taylor and Iris Young; see Ayelet Shachar (n 176) 6.
[241] Ibid.
[242] Ibid 65-78.
[243] Ibid 78-85; One could relate these models to the experiences of the Melbourne Jewish community that Peter Medding (n 224) describes; initially the community felt that they participated as 'individuals' in the Australian community and they shifted to wanting to participate as a 'group'.

It is quite easy to understand why neither of these approaches are ideal. The former fails to properly promote its constituent cultures and supresses their full expression, while the latter fails to protect the vulnerable members of the relevant culture who may find it challenging to exit their group. As such, Shachar rejects this either/or approach which pits citizens allegiance towards the State against their allegiance towards their group, and instead opts for a win/win approach in which one moves away from such binary options and recognises the 'situational complexity faced by individuals who are culturally and legally tied to both the group and the state.'[244] Rather than pitting culture against rights, Shachar proposes a number of approaches founded on the idea of joint-governance whereby both State and the minority group shares jurisdiction over the citizen-insider, recognising that some people 'will bear rights and obligations that derive from more than one sense of legal authority'.[245]

Two examples of joint governance that Shachar references that would appear to have relevance in the Beth Din in the secular arbitral context are 'consensual accommodation' and 'contingent accommodation'.

- Consensual accommodation is described as a model which allows minority groups to opt-in to being governed by their *nomoi* group in relation to personal matters (or in the case of societies that adopt the model of religious particularism, to opt-out of being governed by their *nomoi* group). Under consensual accommodation, the State and the *nomoi* group form two parallel streams of jurisdiction, and predicated on the individual's consent, either stream can be selected. Challenges that emerge from this option include the difficulty in gauging consent, particularly when there may be a range of factors pressuring an individual to select the governance of their *nomoi* group. Additionally, this method fails to bring the group and the State into a constructive dialogue, insofar as it promotes a 'winner takes all' approach to governance without necessarily recognising the complexity of identity whereby a citizen-insider may share allegiance with both the State and the *nomoi* group.[246]
- Contingent accommodation is an alternate form of joint-governance whereby the State relinquishes authority to the *nomoi* group, subject to its meeting of certain 'minimal state-defined standards'. This method brings the State and the *nomoi* group into dialogue and is an effective method by which the State can set its 'non-negotiables' and the *nomoi* group can operate within that framework. Challenges to this form of governance include the ensuring that the minimal standards are adequate to protect the vulnerable members of the

[244] Shachar (n 176) 85-87.
[245] Ibid 88.
[246] Ibid 103-109.

nomoi community as well as ensuring adequate oversight that these minimum standards are in fact being maintained.[247]

Shachar finds faults with these and other approaches to joint-governance, and proposes a novel model which she calls transformative accommodation. In brief, it is built on three pillars: the splitting up of matters into sub-matters, the no-monopoly rule and the inclusion of clearly delineated choice options.[248] The divisions of matters into sub-matters takes an area typically governed by either the State or the *nomoi* group and dissects it into components. Under the no-monopoly rule, its governance is then divided between the two, forcing a dialogue between State and *nomoi* group and ensuring that neither has an exclusive hold over the citizen-insider. Last, the insertion of clearly delineated choice options, ensures that at various points the individual has the ability to opt-out of being jointly governed by the State and *nomoi* group. This prevents individuals from being 'locked-in' to their initial decision to grant authority to their *nomoi* group where they feel that they have not been treated appropriately.[249]

The purpose of transformative accommodation is to facilitate negotiation not only between the State and the *nomoi* group, but also the citizen-insider who identifies with them both. Placing the power in the hands of the citizen-insider to choose to be jointly governed, is thought to incentivise the *nomoi* group to review and discard practices that are discriminatory if it wishes to maintain its sought-after governance. In Shachar's words, 'generat[ing] dialogue between non-monopolist power-centers, ultimately empowers disproportionately burdened group members caught in the cross fire between competing jurisdictions.'[250] This shifting of the balance seems to address the challenges associated with both the secular absolutist and religious particularism models, paving a path forward by which the State can embrace cultural pluralism whilst actively protecting the vulnerable within those cultures.

3.6.3 Challenges to Transformative Accommodation

Transformative accommodation speaks to an ideal in which the State and the *nomoi* group are brought into a dialogue, via the individual, with the aim of bringing about certain transformations with regards to discriminatory practices. While it has been lauded by some,[251] others have described

[247] Ibid 109-113.
[248] Ibid 119.
[249] Ibid 118-126.
[250] Ibid 131.
[251] Notably in the 2008 lecture by the Archbishop of Canterbury; see Rowan Williams 'Civil and Religious Law in England: A Religious Perspective' (2008) 10 *Ecclesiastical Law Journal* 262.

it as 'vague and idealistic'[252] and have drawn attention to the weakness of some of its underlying assumptions, as well as the challenges of implementing such a model in practice.

Sandberg *et al* draw attention to several assumptions in Shachar's work which did not align with their empirical study of religious tribunals in Britain.[253] They found that demarcation of sub-matters did not necessarily bring the State and the *nomoi* group into dialogue, evidenced in the realm of matrimonial law whereby religious leaders shared joint governance with the State, yet focused exclusively on their religious sub-matter, and reported little dialogue with the State authorities who had jurisdiction over the sub-matters of child custody and the allocation of property.[254] Additionally they found that contrary to the assumption that the *nomoi* group was trying to usurp State authority, which the no-monopoly rule comes to address, their empirical studies revealed among the religious leaders surveyed, a shared deference towards State law and an awareness that their work was religious, rather than legal, in nature.[255]

Practical challenges with transformative accommodation include its reliance on State bargaining with minority groups. Shachar sets out the appropriate conditions by which State and *nomoi* group negotiate the allocation of sub-matters, including the need for the State recognising that it is 'the more powerful entity [and thus] the presumption in the negotiations must be in favor of the group.'[256] Sandberg *et al* point to the unlikeliness of the State engaging in such a debate, with the objectives of long term cultural transformation, given the short-term thinking that defines contemporary politics.[257] The challenge for the State is accentuated by the burden of needing to go through this negotiation process with a potential vast range of minority groups seeking joint governance.[258] Moreover, as Marie Failinger points out in the American context, the focus on individual liberty in popular political ideology renders the State averse to reducing the cultural autonomy of insular communities, even if protection of the vulnerable is at stake.[259]

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[252] Russell Sandberg et al 'Britain's Religious Tribunals: Joint Governance in Practice' (2013) 33 *Oxford Journal of Legal Studies* 263, 289.
[253] Their study 'focused on the matrimonial jurisdiction of three tribunals, namely: the Family Division of the Jewish London Beth Din… the Shariah Council of the Birmingham Central Mosque... and the Catholic National Tribunal for Wales in Cardiff'; ibid 266.
[254] Ibid 284-285.
[255] Ibid 285.
[256] Ayelet Shachar (n 176) 129.
[257] Sandberg et al (n 252) 289.
[258] Marie Failinger, 'Finding a Voice of Challenge: The State Responds to Religious Women and their Communities' (2012) 21 *South California Review of Law and Social Justice* 137, 184.
[259] Ibid 183; One could make the argument that transformative accommodation would have greater traction in Australia which has a weaker cultural pluralism compared to the USA, as discussed above in Part 3.5.

Additionally, in the context of arbitration, the notion of 'delineated choice options' seems to be a non-starter. As discussed, the purpose of these exit options are to enable individuals 'to reverse the jurisdiction of a given authority in relation to a particular sub-matter of authority if that authority has already failed to offer them meaningful remedy.'[260] As Helfand points out, in the dispute resolution context, discontent may be a product of the decision not going the way in which a party had hoped. As such, enabling their exiting from the arbitration on the basis that they don't find the remedy to be meaningful, deprives it the necessary components of finality and enforceability.[261]

3.6.4 Consensual and Contingent Accommodation in the Beth Din context

Considering the challenges with transformative accommodation outlined above, a strong argument could be made for the application of consensual and contingent accommodation, two forms of joint governance that Shachar considered and rejected, being applied to ensure the balance between State and minority group interests in the context of Beth Din arbitration, without the need for the more elusive transformative accommodation.[262] Consensual and contingent accommodation are presently supported by Australia's current arbitration laws, and can be harnessed to promote best-practice as has been achieved in the overseas Battei Din that are the subjects of the following chapter.

Arbitration law is contingent on the voluntary agreement between parties to have their dispute resolved by a body of their own choosing. In essence, it is the legislative safeguard to uphold a private law contract between the parties.[263] As such, it is contingent on the existence of an arbitration agreement which evidences the party's voluntary acceptance of this form of dispute resolution.[264] While at face value, the presence of such an agreement seems to meet the criteria for consensual accommodation, it is notoriously difficult to assess consent in this area. In circumstances where a party's refusal to attend a Beth Din or to sign an arbitration agreement gives rise to the issuance of a *seruv* (writ of contempt for refusing a Beth Din summons) which may include communal sanctions, their consent to the arbitration may be called into question.[265] The pressure associated with a *seruv* and its role in gaining parties' compliance in attending Beth Din arbitration has been the subject of a number of cases in the USA. Consistently, the American courts have refused to strike down an award on the bases of the threat of a *seruv*, insofar as 'a mechanism by

[260] Ibid 124.
[261] Helfand (n 193) 1284.
[262] Sandberg et al (n 252) conclude in a similar fashion, that other forms of joint governance would be more effective and practicable than transformative accommodation.
[263] Helfand (n 193) 1253.
[264] *Commercial Arbitration Act 2011* (Vic) ss 7-8; under s 34(2)(a)(i) recourse to the courts to set aside an award is possible where 'a party to the arbitration agreement referred to in section 7 was under some incapacity.'
[265] The *seruv* will be discussed in detail in Part 6.2.

the religious law to which the petitioner freely adheres cannot be deemed duress' or on the basis that it constituted pressure but not the level of coercion necessary to make a contract void.[266] A number of American academics have railed against these decisions, arguing that while in theory a minority group member might be free to leave their group, accusations of disloyalty as well as the fear of ostracism from family and friends, should warrant that internal community pressure be defined as duress.[267] In the Australian context, the courts have outlawed the use of a *seruv* on the grounds that it blocks the unimpeded access to the courts and it thus falls within the broad definition of contempt of court insofar as it 'coerc[es the litigant] to accept the exclusive jurisdiction of the Beth Din and not resort to a civil court to achieve the same result'.[268] As such, in the Australian context where the use of a *seruv* with sanctions has been outlawed, there is less concern regarding the voluntariness of parties in attending Beth Din arbitration.

Setting the *seruv* aside, there remains a difficulty in assessing consent in the context of vulnerable members of a minority culture. Pressures will always exist within the *nomoi* group to adhere to its values and laws, one of which, in the case of certain segments within the religiously observant Jewish community, will be to have matters litigated before the Beth Din rather than the courts. As Anne Phillips points out in *Multiculturalism without Culture* with regards to the difficulty of ascertaining consent in the context of social pressures, '*there is no answer to this that can catch all instances of coercion*' (emphasis in the original). To resolve this, she advocates that institutions are developed to help individuals articulate what they want.[269] One way that a Beth Din could achieve this, would be to include a State representative in their arbitration that can attest (as best they can) to the voluntary nature of the parties agreement.[270] Another more practical solution, is for the client's legal representation at the Beth Din hearing to play the role of ascertaining to the best of their ability that the client is acting voluntarily. Regardless, the case law to date does not indicate that mere pressure of acting in accordance with the ones religious norms (absent a *seruv*) would be considered duress to void an agreement.

The mutuality of the parties in agreeing to have their dispute litigated before a Beth Din, is but one example of many factors which arbitration law aims to promote. The CAAs in Australia, which are based on the *UNCITRAL Model Law*, are driven by the explicit purpose to 'improve commercial

[266] See e.g. *Greenberg v Greenberg* 238 AD 2d 420 (NY Appellate Division, 1997); *Lieberman v Lieberman* 149 Misc 2d 983 (NY Supreme Court, 1991); *Mikel v Scharf* 105 Misc 2d 548 (NY Supreme Court, 1980) referenced in Helfand (n 193) 1286-1287.
[267] Ginnine Fried, 'The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts' (2004) 31(2) *Fordham Urban Law Journal* 633, 652; Litt Wolfe (n 197) 463-463.
[268] *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759, [299] (Sackar J).
[269] Anne Phillips, *Multiculturalism without Culture* (Princeton University Press, 2007) 177-178.
[270] See Sandberg et al (n 252) where they propose this idea.

arbitration processes to facilitate the fair and final resolution of commercial disputes by arbitration without unnecessary delay or expense.'[271] A significant component of the CAAs address the conduct of arbitral proceedings,[272] which contains provisions that address the equal treatment of parties,[273] basic guidelines around practical aspects such as the procedures,[274] place,[275] language,[276] provision of adequate notice to parties with regards to the hearings,[277] and the right to representation,[278] among others. Likewise, the CAAs provide a baseline for a number of aspects relating to the making of an award and the termination of proceedings,[279] including the form and content of the award,[280] requests for corrections of interpretations of the award,[281] and decisions as to costs.[282]

Moreover, while there is significantly reduced scope for the appeal of an arbitral award in comparison to adjudication,[283] Part 7 of the CCAs delineate a range of circumstances where recourse against an award will be supported by the courts. Instances of this include where there is a fault in the arbitration agreement,[284] a party is not given proper notice of the appointment of the tribunal or were unable to present their case,[285] where the award goes beyond the scope of the matters submitted for arbitration,[286] or where the court finds the award to be in conflict with public policy of the state.[287] Doug Jones, in his commentary on the CAAs, found that cases in which arbitral awards had been successfully overturned on the grounds of public policy included instances of 'illegality of the underlying agreement, fraud or corruption on the part of the arbitrator, and a breach of the rules of natural justice'.[288] He quotes Sir John Donaldson MR in *Deutsche Schachtbau-ud Tiefbohrgesellscaft mbh v Ras Al Khaimah National Oil Company* who noted that:

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[271] *Commercial Arbitration Act 2011* (Vic) s 1AA(a).
[272] Ibid Part 5 (ss 18-27J).
[273] Ibid s 18.
[274] Ibid s 19.
[275] Ibid s 20.
[276] Ibid s 22.
[277] Ibid s 24.
[278] Ibid s 24A.
[279] Ibid Part 6 (ss 28-33F).
[280] Ibid s 31.
[281] Ibid s 33.
[282] Ibid s 33B.
[283] See Jones (n 182) 467 where he writes that 'the statement of Rogers CJ (Comm D) of the New South Wales Supreme Court in 1990 should be observed; "the Court should exercise the utmost in judicial restraint, and limit to the absolute minimum any interference with the arbitral process". Arbitral proceedings are not judicial proceedings. When the parties choose arbitration, they choose finality. They choose to have their dispute resolved once and for all by an arbitral tribunal, in preference to the interminable layers of appeal characteristic of the judicial process.'
[284] *Commercial Arbitration Act 2011* (Vic) s 34(2)(a)(i).
[285] Ibid s 34(2)(a)(ii).
[286] Ibid s 34(2)(a)(iii).
[287] Ibid s 34(2)(b)(ii).
[288] Jones (n 182) 489.

> "[c]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution… the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised."[289]

It is important to note in this context that the competing public policy which aims to promote the finality and enforceability of arbitration, could likewise be taken into account when determining whether to strike down an award on this basis.[290]

Additionally, s34A of the CAAs provides grounds for the appeal of an award based on 'a question of law' but only on an opt-in basis. Especially in the context of religious arbitration, this section would be read in combination with s28 which provides that '[t]he arbitral tribunal must decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.'[291] It is questionable whether parties to a religious arbitration would wish to opt-in to this right of appeal, insofar as a the secular courts would be able to provide only very limited guidance on the correct application of Jewish law.[292]

The aspects of the CAAs outlined above, would at face-value appear to provide the protections that contingent accommodation aims to achieve in ensuring that autonomy given to *nomoi* groups, is mitigated by 'minimal state-defined standards.' One challenge with contingent accommodation that Shachar identifies is ensuring that these standards adequately protect the vulnerable members of the *nomoi* group. Arguments have been made in the American context that the limitations placed on the courts by the First Amendment render religious arbitration less prone to the safeguards of arbitration laws.[293] Additionally, the ability for parties to waive aspects of arbitration law from which

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[289] *Deutsche Schachtbau-und Tiefbohr-Gesellschaft mbh v Ras Al-Khaimah National Oil Co* [1990] 1 AC 295, 316; referenced in Ibid 488.
[290] Discussed in Helfand (n 193) 1287-1294.
[291] *Commercial Arbitration Act 2011* (Vic) s 28(1).
[292] See comment by McColl JA in the dissenting judgement in *Ulman v Live Group Pty Ltd* [2018] NSWCA 338 at [248] 'Furthermore, it should be recognised as Murphy J explained in Grant that, "[j]udicial determination of religious doctrine and practice is as much state interference in religious affairs as legislative and administrative measures are". That does not mean that churches (using that expression broadly) are immune from judicial scrutiny, but, generally "only marginal inquiry into church government is permissible"[…] As Kirby P recognised in *Uniting Church in Australia Property Trust (NSW) v Vincent*, judges' "competence to determine disputed issues of religious belief is highly doubtful."'
[293] Grossman (n 190).

they are able to derogate, by not objecting to its non-compliance,[294] might likewise impact vulnerable members of the minority group who are not fully cognisant of their rights.[295]

Concerns relating to the lack of court oversight with regards to religious arbitration in America would appear to have limited bearing in the Australian context. The division between Church and State have been applied in a far narrower manner in the Australian context,[296] and have not prevented appeals relating to Beth Din awards in Victoria and New South Wales. [297] In addition to the narrower interpretation given to s116 of the *Constitution of Australia* (Commonwealth not to legislate in respect of religion), unlike in America where the First Amendment binds both the Federation and the States, in Australia s116 of the Constitution binds only the Commonwealth and not the States.[298] As such, given that the CAAs are State legislation, they don't attract the (limited) protection of s116 of the *Constitution of Australia*, and thus concerns relating to the lack of judicial oversight in the US context are not as significant in the present study.

Further concerns relating to whether the CAAs provide adequate protection to vulnerable parties in the context of religious arbitration could be mitigated internally by the Beth Din itself. One area of significant vulnerability where fears of discrimination against women were raised in the Sharia law context in Canada, is that of family law. In the Australian context, family law is not within the domain of the CAAs and as such settlements relating to child custody and marital property, where there would be increased concern for vulnerable members of the minority group would not be within the ambit of Beth Din arbitration. With regards to the potential for clients to unwittingly waive certain rights that they possess under arbitration law, it would be advised that a Beth Din actively counsels clients as to their right to legal representation.[299] Once the parties have the benefit of a lawyer, the lawyer will likely reduce potential vulnerability by calling attention to any other rights that their client has according to secular law. In addition, a resource that provides recommendations for further safeguards in religious arbitration (albeit focussing on family law and inheritance) is the report prepared by Marion Boyd in the context of the Canadian outcry with regards to Sharia law in

[294] *Commercial Arbitration Act 2011* (Vic) s 4.
[295] See Fried (n 267).
[296] See Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53(2) *The Australian Quarterly* 214, 219.
[297] These concerns came up in the dissenting judgement of McColl JA in *Ulman v Live Group* (n 292) [248] where her Honour referred to the 'body of United States jurisprudence [that recognised that] "the decisions of the governing body of the church should be accepted on issues of practice and procedure of ecclesiastical government, as well as issues of doctrine" and "controversial questions of doctrine (or departure from doctrine) or practice or procedure in ecclesiastical government … however forceful … arguments [on these issues] appear to be … are outside the judicial sphere."'
[298] Hogan (n 296) 219.
[299] See Fried (n 267) 645, who makes this argument.

2005. Her report was prepared in a failed attempt to provide further safeguards that would enable Sharia law to operate in a manner that allayed the concerns of the public. It included 46 recommendations, including legislative and regulatory amendments, provisions for independent legal advice to be provided to litigants who utilise religious arbitration, public legal education, training and education for professionals as well as oversight and evaluation of arbitrations.[300] While it is unlikely that the there is sufficient demand for religious arbitration at present to warrant the implementation of an extensive framework such as that proposed by Boyd, it would be wise for a Beth Din, or any religious arbitration body for that matter, to refer to these recommendations in striving to achieve best-practice and thus avoid the need for further State-imposed limitations.[301]

There is evidence that religious tribunals operating under arbitration law are differential to secular law and are willing to adhere to secular legal expectations, and even go beyond them.[302] The Beth Din of America is a model of such accommodation insofar as it has adopted six pillars, explicated by Michael Broyde *et al*,[303] by which it not only caters to the baseline of expectations under arbitration law, but goes above and beyond them so as to win the trust of the state and its potential litigants. These pillars include (i) the development of procedural rules, (ii) the establishment of an internal appellate process, (iii) respect for secular laws and its accommodation within the bounds of *halakhah*, (iv) respecting litigants' right to select their 'choice of law', (v) ensuring that legally trained arbitrators are part of each panel and (vi) providing governance for the religious community.[304]

Comments made during interviews with best practice Battei Din in the USA and Israel as part of this study, have also evidenced their desire to be viewed as an attractive forum, which is contingent on their awards being enforced by the courts and communal confidence in the transparency of their proceedings. In the words of the director of Eretz Ḥemdah Gazit:

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[300] Marion Boyd, 'Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion' (Report prepared for the Ministry of the Attorney General, Ontario, December 2004) <https://wayback.archive-it.org/16312/20210402062351/http:/www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html>; see Litt Wolfe (n 197) 467-468.

[301] Shachar provides an example of the Beth Din of Toronto who took measures to limit their own jurisdiction as a model for how other groups should self-limit rather than waiting for the government to impose limitations on their practice; see Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9 *Theoretical Inquiries in Law* 573, 603.

[302] See Sandberg et al (n 252); Benhalim (n 196); Michael J Broyde, Ira Bedzow, and Shlomo C Pill, 'The Pillars of Successful Religious Arbitration: Models for American Islamic Arbitration Based on the Beth Din of America and Muslim Arbitration Tribunal Experience' (2014) 30 *Harvard Journal of Racial & Ethnic Injustice* 33.

[303] Broyde, Bedzow and Pill, ibid; these pillars are comprehensively detailed in Michael J Broyde, *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious Arbitration in America and the West* (Oxford University Press, 2017).

[304] See Broyde, Bedzow and Pill, ibid 46-66.

> "we have to convince, especially the lawyers, that we are good. We are under, *anaḥnu bashuk haprati* [we are in the private market] we have to fight, *lehokhiaḥ* [to prove] that we are good. When you deal [well] with the case, people will say…'Eretz Ḥemdah is a very good Beth Din'. When you deal bad[ly] you lose them. I can tell you that parties, the first thing that is important to the parties is that you are professional, the second is if they win or lose."[305]

3.7 CONCLUSION

Understanding the context of religious arbitration in Australian society, and Western society more broadly, is a vital step in any attempt to promote a framework for its successful operation. As has been demonstrated, trends relating to arbitration, legal pluralism and multiculturalism have coalesced in favour of religious arbitration and have steadily gained momentum from the second half of the 20th Century.

The ascendancy of cultural and legal pluralism has not been without its problems, most significantly its accentuation of rifts within society, expressing itself in a clash of values where there is a perceived inequality within a minority culture. Methods of accommodation formulated by Ayelet Shachar, that seek to create dialogue between minority and majority cultures, and bring about a greater alignment of values, have been applied to the context of Battei Din in Australia. While transformative accommodation appears overly idealistic and likely unattainable, other forms of joint-governance such as consensual accommodation and contingent accommodation appear well-suited as a framework for assisting the integration of Jewish law arbitration within the Australian context.

The broader theoretical context of Battei Din performing commercial arbitration in Australia, including the relevant jurisprudential aspects of Jewish and common law have been discussed in the previous chapter, and its relationship to trends in arbitration and multiculturalism in the present one. The following chapter will turn to the international scene to examine empirical data emerging from analogous best-practice Battei Din in the USA and Israel, focusing on their context, structure and processes.

[305] Interview with Rabbi Rechnitz.

4 INTERNATIONAL BEST PRACTICE: BATTEI DIN IN THE USA AND ISRAEL

4.1 INTRODUCTION

Battei Din that offer commercial arbitration, operate in places where there is demand by religiously observant Jewish people to litigate their disputes using *halakhic* principles. The largest populations of Orthodox Jewish people are found in the United States of America and Israel.[306] The Jewish communities in both countries have developed significant infrastructures to facilitate the fullness of religious practice, including many Battei Din that deal with disputes among co-religionists. That it is a duty incumbent on Orthodox Jews to litigate in commercial matters is sourced in the Biblical verse 'and these are the laws that you shall set before them,'[307] which is interpreted as an imperative – that matters pertaining to civil disputes, which is the context of that textual portion, should be 'set before them' i.e. determined by Jewish judges utilising *halakhic* principles.[308]

In determining which Battei Din dealing in commercial arbitration would serve as the most appropriate models for best practice, several factors were taken into consideration. One such element was the relative caseload of the Beth Din, which evidences its standing within the community that it serves. Another factor was its relationship to secular law, including its awareness of the law that pertained to its operation and the inclusion of legal experts in its operations. A further factor is the transparency of the Beth Din, evidenced in published rules and procedures, written judgements, an appeals process as well as the information with regards to its services available to the public on its website. In addition, all Battei Din investigated act in the capacity of arbitrators and not courts of jurisdiction, which ensures that they can serve as a model for other Battei Din in legal contexts that permit private arbitration, including Australia. These factors informed the selection of three Battei Din, two in the United States of America and one in Israel which became the subject of investigation in determining the international standard of best practice in this area.

The Beth Din of America ('BDA') which is based in New York and the Beth Din of the Chicago Rabbinical Council ('cRc Beth Din') were identified as two of the dominant Battei Din servicing the East Coast and the Mid-West of the United States respectively. Both Battei Din are closely affiliated with the pre-eminent Rabbinical membership bodies in their State, namely the Rabbinical Council of

[306] Sergio DellaPergola, 'World Jewish Population, 2020' in Arnold Dashefsky, Ira M Sheskin (eds), *American Jewish Year Book 2020* (Springer, 2022) vol 120, 273-370.
[307] Exodus 21:1.
[308] *Midrash Tanḥuma, Mishpatim 3;* codified by Maimonides, *Mishneh Torah, Hilkhot Sanhedrin 26:7* and *Shulḥan Arukh, Ḥoshen Mishpat 26:1*.

America ('RCA') and the Chicago Rabbinical Council ('cRc') as well as sharing close ties to the preeminent Kashrut authorities of their area. As will be explored, while these two Battei Din are separate and independent entities, they share informal ties.

In Israel, Eretz Ḥemdah Gazit is a network of Battei Din that has developed a reputation of operating in a professional manner and works hard to earn communal confidence. There are countless Battei Din that operate throughout Israel with varying levels of transparency and accountability. Eretz Ḥemdah Gazit stands out from the masses by virtue of its clarity in rules and procedures, its publication of approximately five-hundred anonymised judgements and its published *halakhic* and ethical policies, all of which have contributed to its reputation as an institution that according to its Rabbinical Dean, Rabbi Yosef Carmel, secular Israeli courts feel comfortable to recommend to litigants as an alternate method of dispute resolution.[309]

All three Battei Din that were explored in the research belong to the Modern Orthodox, or *dati le'umi* (Religious Zionist) branch within the Orthodox community. The notion of multiple best practice Battei Din emerging from this particular community is not surprising insofar as in certain respects they form a bridge between the secular community on the one side and the ultra-Orthodox community on the other, and are unique in their mission to marry full observance of *halakhah* with awareness and respect for broader society.[310] In addition, as part of their ideology of *Torah u'madda*, which asserts the religious value of studying both Jewish holy texts as well as valuing secular knowledge,[311] they promote a cognisance of secular law and its expectations as well as a worldliness that is less common in other elements of the Orthodox community.

4.2 The Beth Din of America

The head office of the BDA is in Manhattan, New York. It is there that I met with Rabbi Shlomo Weissmann who is its *menahel*. Rabbi Weissmann continues in the tradition of the two directors who preceded him, Rabbi Professor Michael Broyde and Rabbi Yona Reiss, both of whom earned law degrees alongside their rabbinic qualifications. The head office is on the twelfth floor of a typical

[309] Interview with Rabbi Yosef Carmel, Rabbinical Dean of Eretz Ḥemdah Gazit (Chaim Cowen, Eretz Ḥemdah Gazit, Jerusalem, 19 January 2023), 1 ('Interview with Rabbi Carmel').
[310] Interview with Rabbi Daniel Mann, *Av Beth Din* of Jerusalem branch of Eretz Ḥemdah Gazit (Chaim Cowen, Eretz Ḥemdah Gazit, Jerusalem, 18 January 2023), 3 ('Interview with Rabbi Mann').
[311] Expressed by leading Modern Orthodox scholar, Rabbi Dr. Norman Lamm, in Norman Lamm, *Torah Umadda* (Jason Aronson, 1st ed, 1990) 236: 'Torah, faith, religious learning on one side and Madda, science, worldly knowledge on the other, together offer us a more over-arching and truer vision than either one set alone. Each set gives one view of the Creator as well as of His creation, and the other a different perspective that may not agree at all with the first ... Each alone is true, but only partially true; both together present the possibility of a larger truth.'

Manhattan high-rise and contains office space for the administrative arms of the Beth Din which includes the *menahel*, the *sgan menahel* (deputy director) Rabbi Michoel Zylberman who also acts as the *mesader gittin* (director of divorce proceedings) and oversees the *hazmanah* (summons) process. Supporting them are director of operations, Cindy Frenkel, who ensures the smooth running of the day-to-day functions of the BDA including scheduling and billing as well as a part-time secretary who assists with the *hazmanah* process. A small waiting area with a coffee table leads the way into the hearings room, in which there is a large wooden table, behind which the *dayanim* sit looking out to the two litigants' table where parties are seated together with their representation, facing the arbitrators. Aside from these furnishings, a single bookshelf of *halakhic* literature stands within easy reach of the *dayanim*'s bench. Arbitration is confidential, and as such there are no seats designated for the public as one might expect in a court of law.

Besides for its links to the RCA and the Orthodox Union, the BDA also shares an affiliation with Yeshiva University where many of its *dayanim* received their training and where the current *Av Beth Din*, Rabbi Mordechai Willig – with whom I held an interview in his hometown of Riverdale, New York – holds the position of Rosh Yeshiva and Rabbi Dr Sol Roth Chair in Talmud and Contemporary Halakhah.[312] The BDA has a satellite room for hearings at the Yeshiva University campus in Washington Heights which contains similar furnishings, although with more natural sunlight and the technological equipment needed to facilitate presentations via Zoom. Nearby on the same campus, is the office of Rabbi Daniel Rapp, a law graduate and former attorney who is the Visiting Assistant Professor of Talmud at the Irving I. Stone Beit Medrash Program of Yeshiva University and Associate Dean of Students of Undergraduate Torah Studies.[313] It is there that I interviewed Rabbi Rapp, who has been a *dayan* on the BDA since 1998, and frequently serves both on panels together with two other *dayanim* for larger monetary disputes as well as on his own in the capacity of a *dayan yaḥid* (single arbitrator) when the stakes are smaller.

4.2.1 The Context and Structure of the BDA

The BDA was originally formed by the Rabbinical Council of America in 1960[314] with the intention that it be the premier English speaking Beth Din servicing matters pertaining to personal status.[315] In the early 1990s Rabbi Mordechai Willig took a leading role in the development of a *halakhic* prenuptial agreement, which served to financially disadvantage a husband who refused to provide his wife with a *gett* (*halakhic* divorce, pl. *gittin*) once regular domestic residence ceased between the

[312] See Beth Din of America website, Staff, *Rabbi Mordechai Willig* < https://bethdin.org/staff/rabbi-mordechai-willig/>.
[313] See Beth Din of America website, *Leadership* <https://bethdin.org/about/#rabbis>.
[314] See Beth Din of America website, *About* <https://bethdin.org/about/>.
[315] Interview with Rabbi Weissmann.

couple. This initiative was spearheaded by Mr Sheldon Rudoff who was president of the Orthodox Union at the time as well as a group known as the Orthodox Caucus that persisted for about ten years before becoming defunct. Subsequent to this watershed document which aimed to reduce cases of *agunah* (a chained woman, referring to one who could not remarry due to not having received a *gett*), it was deemed necessary to equip the BDA with the abilities to arbitrate cases relating to prenuptial agreements.[316] Rudoff and the Orthodox Caucus appointed Rabbi Michael Broyde, who was a professor at Emory University to organise the Beth Din and ensure it was fit to handle commercial arbitration. Rabbi Broyde took time off from his academic position and, with the help of administrative support, established the rules and procedures for the BDA which are utilised to this day. Rabbi Gedaliah Dov Schwartz was *Av Beth Din* at the time, and Rabbi Mordechai Willig, given his credentials having gained *yadin yadin* (qualification for *dayanut*) and having had some Beth Din experience dealing in commercial arbitration, was asked to take on the position of *sgan Av Beth Din* in 1997.[317] While Rabbi Willig formally took over the role of *Av Beth Din* in recent years, since Rabbi Schwartz lived in Chicago and the BDA is based in New York, and due to Rav Schwartz's ill health late in his leadership, Rabbi Willig was practically fulfilling the duties of *Av Beth Din* many years prior to taking on the official title.

Following the first full year of the BDA having been reorganised for commercial arbitration, Rabbi Broyde returned to his post at Emory and Rabbi Reiss replaced him in the role of director. In addition to his rabbinic qualifications, Rabbi Reiss had graduated at Yale Law School and practiced law for six years at an international law firm.[318] He remained in the role for ten years until he was promoted to the role of Dean of the Rabbi Isaac Elchanan Theological Seminary ('RIETS') at Yeshiva University, at which point the present director, Rabbi Weissmann, assumed the position. Like his predecessors, Rabbi Weissmann has both rabbinic and legal qualifications, having studied law at Columbia Law School and practiced at several law firms in addition to holding *yadin yadin* ordination.[319]

The BDA has a board of governance, comprised of 12 rabbinic leaders and 18 lay leaders. While the BDA was spun off from the Rabbinical Council of America at the point that it was reorganised in the mid-1990s, the Rabbinical Council of America retains the authority to appoint the rabbinic leaders to the BDA board, and the remaining lay leaders are appointed and voted on by the board itself.[320] The board meets once or twice yearly and provides the BDA with some of its funding, certain advice and

[316] Ibid.
[317] Interview with Rabbi Mordechai Willig, *Av Beth Din* of the Beth Din of America (Chaim Cowen, Riverdale, New York, 25 November 2022), 3 ('Interview with Rabbi Willig').
[318] See Beth Din of America website, Staff, *Dayanim/Arbitrators* <https://bethdin.org/about/#dayanim>.
[319] Ibid.
[320] Interview with Rabbi Weissmann.

expertise and provides female representation among its leadership, as well as a diversity of political viewpoints.[321] The executive board, comprised of about five individuals, meet several times a year with the Rabbi Weissmann and share their expertise and advice concerning arbitration law, provide procedural guidance and take part in the *seruv* review process, which is signed off by the president of the board.

Formally, the director reports to the president of the board and the *Av Beth Din*. The director is the face of the BDA to its prospective clients, ensures that the procedures of the Beth Din are complied with, selects the panellists who will sit on a particular hearing, manages the website and BDA initiatives, deals with matters that arise and acts as a *dayan* when required. The *Av Beth Din*, Rabbi Willig, and the *sgan Av Beth Din*, Rabbi Reiss, rarely act as commercial arbitrators in the first instance – there are approximately twelve other *dayanim* who may be called on to arbitrate a case. As needed, the director will reach out to the associate director to assist in these tasks. The *Av Beth Din* has ultimate authority over *halakhic* and substantive matters, although the practice of the present *Av Beth Din* is to invite advice from others including lawyers[322] and *dayanim* who have areas of specific expertise.[323] Were an issue to arise pertaining to the conduct or performance of the *Av Beth Din* – which has not occurred during the tenure of the present director – it would be dealt with in consultation between the *sgan Av Beth Din*, the director and the board.[324]

4.2.2 Best Practice

The BDA senses that its reputation is stellar within the community. While they don't presently seek feedback in any formal way, Rabbi Weissmann's interactions with the clients involved with the BDA inform his view that their rules and procedures are effective in allaying concerns that often emerge in other Battei Din:

> "[W]hen people call and we speak to them, the sense you get is that people who are sceptical about Battei Din… view the Beth Din of America as heads and shoulders above other Battei Din in terms of integrity and in terms of process. There's no other Beth Din that has our level of professionalism in terms of the… staffing of the dayanim, in terms of the rules and procedures… litigators understand that the Beth Din of America is different to other Battei Din in that respect."[325]

[321] Interview with Rabbi Willig.
[322] Interview with Rabbi Weissmann.
[323] Interview with Rabbi Rapp.
[324] Interview with Rabbi Weissmann.
[325] Interview with Rabbi Weissmann.

The BDA's record in terms of how its decisions have been dealt with when challenged in the courts bolsters this perception. In two instances, an award of the BDA was challenged in the secular courts but was ultimately upheld. One related to a prenuptial agreement where the disgruntled party sought to have the BDA's decision overturned on a few bases, including that the judgement was irrational.[326] The circuit judge and the judge of appeal both upheld the award, determining that the BDA had acted rationally and was in compliance with the relevant arbitration law.[327] In another case, pertaining to the termination of a tenured employee at a Jewish day school, the BDA's decision to reinstate the employee was challenged by the school, on the basis of irrationality and contravention of public policy. The challenge was successful in the first instance where the trial judge overturned the BDA's decision. On appeal however, five justices of the appellate division re-instated the BDA's award determining that their award was appropriate and conformed to the requirements of arbitration law.[328] While their record is not perfect, having had several decisions overturned or sent back for re-adjudication on the basis of procedural irregularities[329] their decisions are routinely confirmed, to the extent that the common sentiment is that it is 'a waste of time' to challenge a decision of the BDA in the courts.[330]

An important indicator of the BDA's reputation is the degree to which clients seek them out to arbitrate their disputes. The Journal of the Beth Din of America asserts that the BDA is 'the most active rabbinical court in North America'.[331] The BDA are aware that they perform more *gittin* than any Beth Din in the USA. Additionally, while it is unclear how many commercial cases are taken to the ultra-Orthodox Battei Din many of which are not meticulous in record keeping, of those that the BDA shares a professional relationship, including all the centrist Battei Din in the USA, the amount of commercial cases that they arbitrate is the highest.[332] On average, the BDA will have approximately 170 files opened each year. Two-thirds of these cases will be dealt with outside of arbitration –

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[326] Under the *New York Civil Practice Laws and Rules* § 7511(b)(1)(iii) (2023) an arbitration award may be vacated on the basis that 'arbitrator… making the award exceeded his power.' This has been interpreted to include where it 'violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power'; see *In Matter of Falzone v NY Ctrl. Mut. Fire Ins.*, 15 NY 3d 530, 534 (NY, 2010).

[327] *Lang v Levi*, 198 Md App 154 (Maryland Court of Special Appeals, 2011).

[328] *Brisman v Hebrew Academy of Five Towns & Rockaway* 70 AD 3d 935 (NY, 2010).

[329] In one such case the disgruntled party claimed that they did not speak a fluent English and had not been offered interpretive services. The *dayanim* argued that the party had spoken a perfect English throughout the case. This served as the basis for updating the rules and procedures to ensure that all cases are recorded – see Beth Din of America, *Rules and Procedures* (2018) s 10 <http://s589827416.onlinehome.us/wp-content/uploads/2015/07/Rules.pdf> *('BDA rules')*; Interview with Rabbi Rapp; Interview with Rabbi Weissmann.

[330] Interview with Rabbi Weissmann.

[331] Introduction, (2014) 2 *The Journal of the Beth Din of America* 7 <https://bethdin.org/wp-content/uploads/2015/07/JBDAVol2.pdf>.

[332] Interview with Rabbi Weissmann.

either by one party opting to have the matter litigated in court or at another Beth Din, with the parties settling, or with the refusal of one party to cooperate resulting in the issuance of a *seruv*. As such, each year, approximately 50 of those files will result in a formal hearing before the *dayanim* of the BDA.[333]

4.2.3 The BDA Process

The process that the BDA employs in ensuring that the parties are treated equally and fairly in accordance with the mandates of natural justice, is based on their rules and procedures which are made publicly available on their website.[334] Normally a plaintiff will apply to commence a case by selecting the link for a 'Din Torah (Arbitration)' on the BDA website.[335] The claim will be reviewed and if it appears bona fide, a *hazmanah* will be issued to the defendant with a due date for response of 10 days. If there is no response, another letter will be sent out with a further 10 days granted for the defendant to respond. Where this too is ignored, a final letter will be sent together with a *hatro'at seruv* (warning of imminent issuance of a *seruv*) which provides a further 10 days of response time, after which a *seruv* may be issued to the defendant.[336]

There are a variety of responses that a defendant may provide to a *hazmanah* of the BDA, including that they wish to have their case adjudicated at an alternate Beth Din, or via the process of *zabla* (where each litigant selects a *dayan*, and the two *dayanim* select a third to join their panel) or that the matter sits outside the jurisdiction of the Beth Din.[337] The *Av Beth Din* will assess the validity of these responses and determine whether the response is legitimate, in which case the matter will shift to another religious arbitration forum or a *heter arka'ot* (*halakhic* permission for the plaintiff to take the matter to a secular court) will be issued, as appropriate.[338] The BDA will also issue a *heter arka'ot* in an instance where it senses that the plaintiff is only coming to the Beth Din due to the fact that the matter no longer has standing in a secular court, such as where the statute of limitations has expired on the claim. Likewise, no *seruv* will be issued where the defendant agrees to attend another Beth Din but will not attend a *zabla* forum, and the plaintiff does not agree to the forum chosen by the defendant. This is based on a *halakhic* view that the defendant holds the ultimate

[333] Interview with Rabbi Weissmann.
[334] See Beth Din of Americal website, *Rules and Procedure of the Beth Din of America* <https://bethdin.org/forms/>.
[335] See Beth Din of America website, *Opening a Din Torah (Arbitration) Case* <https://bethdin.org/open-case/>.
[336] Interview with Rabbi Weissmann.
[337] *BDA rules* (n 329) s 2(b).
[338] Interview with Rabbi Weissmann.

right to select the forum for their *din torah* (*halakhic* adjudication) where a venue cannot be agreed upon by both parties.[339]

Where the defendant responds to the *hazmanah* by accepting to litigate their claim before the BDA, the parties will be required to sign an arbitration agreement. Where one party refuses to sign the agreement, the BDA will not proceed with the hearing as without it the decision will not be enforced by the courts. Failure to sign may also provide cause for the issuance of a *seruv*.[340] The matter will be heard by a panel of three arbitrators if the amount in dispute is in excess of USD$20,000, and by a single arbitrator if it is less than that figure, although this arrangement may be waived by mutual agreement of the parties.[341] The fees associated with the hearings are tabled on their website.[342] Each hearing will typically last for 4-5 hours with a standard case lasting up to three hearings and a more complex case taking as many hours as is required for the matter to be fully aired before the arbitrators.[343] Upon completion of the hearings, the arbitrators will produce a written judgment in English, which may vary in length depending on the case – generally ranging between three to twelve pages – which is presented to both parties. According to the rules and procedures document, the *dayanim* are given up to three months to finalise the written judgment,[344] a time frame which can be challenging for the *dayanim* given that many have multiple occupations, but to which they generally adhere.[345]

4.2.4 Bias and *ex-parte* communication

One of the arms of natural justice recognised in common law is that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*).[346] The BDA takes precautions to ensure that its arbitrators are not conflicted by any vested interests in each case. Under its rules and procedures, any party may object to the appointment of a *dayan* based on a financial or personal interest in the case or a relationship they may have with a litigant. The *Av Beth Din* is charged with dealing with the objection, being mandated to remove a *dayan* who has a financial interest in the outcome of the case, but having some discretion in determining the materiality of an interest where it is personal or

[339] Rabbi Yaakov Lorberbaum, *Netivot Hamishpat (Bi'urim), Shulḥan Arukh, Ḥoshen Mishpat 14:3*.
[340] Interview with Rabbi Willig; see sources brought in Hillel Gefen, *Heter Pniyah LeArka'ot* (Position Paper No 9, *Makhon Mishpetei Eretz*, 2014) 13-15 [Hebrew].
[341] *BDA rules* (n 329) s 5(a-b).
[342] See Beth Din of America website, *Din Torah (Arbitration) Services* <https://bethdin.org/dintorah/>; presently (January 2025) the costs are USD$500 per hour, per side for a three-*dayan* panel (USD$1000 total) and USD$250 per hour, per side for a single-*dayan* case. There are additional fees for post-hearing work.
[343] Interview with Rabbi Weissmann.
[344] *BDA rules* (n 329) s 26(a).
[345] Interview with Rabbi Weissmann.
[346] S A de Smith, 'The Right to a Hearing in English Administrative Law' (1995) 68 *Harvard Law Review* 569, 569.

relating to a relationship with one of the parties.[347] Additionally, the names of the parties are shared with the prospective *dayanim* prior to the first hearing where they are required to flag any personal relationships with the parties. Any close relationships will disqualify the *dayan* from being selected for that case, and any distant relationships will be disclosed to the parties.[348]

Additionally, in the first hearing, it is customary for the *dayanim* to 'go through a round or two of Jewish geography'[349] disclosing any ties they may have with the litigants themselves or their family as well as any potential conflicts of interest. The parties can assess for themselves if there is any cause for concern and either proceed with the selected *dayan(im)* or to opt to have the panel reconfigured. One *dayan* mentioned an instance where he entered an arbitration and recognised one of the parties as someone who had invited him out to a restaurant ten years prior. The matter was disclosed and the parties were given the option to waive their concerns or have him replaced with another *dayan*.[350]

Ex-parte communications between the *dayanim* and the parties are avoided by virtue of the secretarial team that deals with scheduling and general correspondence with the parties. The administrative infrastructure of the BDA plays an important role in ensuring that the no party has direct correspondence with the *dayanim* in the absence of their fellow litigant. It is for this reason, one of the *dayanim* of the BDA shared, that when potential litigants approach him to take on a case independently that he is reticent to acquiesce:

> "[T]he Beth Din [of America] is a very well set up Beth Din with secretarial staff *et cetera*. If I was doing the case myself, just the scheduling leads to *ex parte* communications – are we meeting next Tuesday, are you available at 3 o'clock *et cetera* – inevitably I'm talking to one party and not the other party and its very difficult to keep that down to this, the fact that I have a secretary who is working in the Beth Din and keeping a calendar and saying this is the day we are meeting, this person is running late. That itself makes things much, much better. Documents are not given to me directly; they go straight to the secretary who confirms that the other party has a copy already and then passes it all on."[351]

4.2.5 Confidentiality

Some of the reasons that parties choose arbitration over having their dispute aired in the courts, include the confidentiality that arbitration provides, allowing sensitive matters to be dealt with away

[347] *BDA rules* (n 329) s 6(a-c).
[348] Interview with Rabbi Weissmann.
[349] Interview with Rabbi Rapp.
[350] Ibid 5.
[351] Interview with Rabbi Rapp.

from the public eye, as well as preserving the relationship between the litigants.[352] From his experience, one of the *dayanim* remarked that often when parties who share an ongoing business relationship get into a dispute they feel that they:

> "want to get past this in a way that the relationship lives on… When you go to court and you bring in the lawyers, the animosity just builds up as it gets dragged out… so [they say] let's bring in somebody from the outside, lets deal with this and move on with our lives. Its quicker, it's cheaper and it's a lower profile."

Operating within the Jewish community where there are fewer degrees of separation between litigants than in broader society, the BDA needs to be cognisant of ensuring that the parties' rights to privacy are protected. The hearings are not open to public viewing and the judgements that are provided to the litigants are not publicised. This provides a unique challenge for the BDA who are working to build communal confidence in their institution and feel that an effective way to do so would be through the publication of what their director describes as a 'library of really good *psakim* (*halakhic* decisions) that cover a whole gamut of cases and have good legal reasoning'. A few years back they went through the laborious task of anonymising certain judgements to make them fitting for public consumption, but their legwork went unrewarded as many parties remained averse to their publication on the BDA website.[353] While a small number of judgements have been anonymised and published, by and large the judgments remain out of the public eye.

Additionally, the BDA ensures that the board does not know names or details of cases which they arbitrate. The only instance in which clients name are divulged is in the *seruv* review process in which the president and select board members review the *hazmanah* history, ensuring that adequate warnings were provided prior to sending out an edict stating that a party is not in compliance with their *halakhic* duty to attend the Beth Din. In all other matters the board provides the personnel of the BDA with the independence needed to ensure the confidentiality of its clientele.[354]

4.2.6 Appeals Process and Alignment of Awards

The rules and procedures of the BDA provides an opportunity for a disgruntled litigant to challenge an award handed down by its *dayanim*. An appeal may be based on a mathematical error, a mistake in the description of any person, thing or property, that the award is based on an issue not

[352] See Michael Collins, 'Privacy and Confidentiality in Arbitration Proceedings' (1995) 30 *Texas International Law Journal* 121 for further discussion on the right to privacy in arbitration under English, American and Australian law.
[353] Interview with Rabbi Weissmann.
[354] Ibid.

submitted before the Beth Din or that the award was in contravention of Jewish law.[355] Appeals are presented before the *Av Beth Din*[356] or his designee who determines them as a *yaḥid mumḥeh* (sole expert arbitrator). Appeals may occur only via submissions in writing and the *Av Beth Din* or his designee will either confirm the award, modify the award or remand it back to the panel for its reconsideration.[357] The internal appeals system, which has not historically been a typical feature of Battei Din, adds to the sense of confidence that litigants have in the BDA insofar as they are permitted a second chance to have their case reviewed, within the BDA system.[358]

As far as the alignment of awards is concerned, there is no formal oversight that ensures that the twelve or so *dayanim* are providing rulings in a congruous manner. Arbitrators are not expected to refer to previous judgments of the BDA in their determinations, but rather approach classical and contemporary *halakhic* sources using their own, independent judgement. This came to a head over the covid pandemic when multiple cases came before the BDA pertaining to families not wanting to pay tuition for their children whom they felt were receiving less than adequate education in the remote learning environment. A party came before one *dayan*, wishing to tender a judgement of another *dayan* of the BDA, which they had managed to obtain, as a support for their argument. Being that there is no formal hierarchy pertaining to judgements, the presiding *dayan* chose to approach the *Av Beth Din* with the tendered decision as well as his own which had been drafted, conscious of how it would reflect on the BDA if two of its *dayanim* ruled differently on ostensibly similar cases and an alignment between the rulings was reached in this particular case.[359] However, in broad terms – particularly given the fact that judgements are not publicised – there is no systematic way of ensuring consistency of *halakhic* rulings among *dayanim* of the BDA.

4.2.7 Inclusion of Experts

The BDA takes great pride in its reputation of combining secular and *halakhic* expertise in its arbitration panels. While other Battei Din may consult with experts as the need arises, the BDA has taken the additional step of ensuring that relevant experts are selected as arbitrators alongside its *dayanim*.[360] This approach attracted controversy initially, when the BDA installed onto its panel a respected psychologist who did not have any rabbinic qualifications, for cases that related to child custody. Notwithstanding the criticism received, the BDA doubled down on this practice, asserting

[355] *BDA rules* (n 329) s 31(a).
[356] Assuming the *Av Beth Din* did not sit on the case initially. Where the *Av Beth Din* did sit on the initial case, the appeal will go before the *sgan Av Beth Din*.
[357] Interview with Rabbi Willig.
[358] Ibid.
[359] Interview with Rabbi Rapp.
[360] The BDA website lists several professionals who are not rabbinically qualified among its arbitrators on its website; see Beth Din of America website, *Dayanim/Arbitrators* <https://bethdin.org/about/#dayanim>.

that the practice of other Battei Din, whereby the *dayanim* consult with a psychologist or other experts according to the circumstances, is inferior insofar as the relevant expert is gaining only a hearsay impression of the situation which is inferior to their having first-hand awareness in the capacity of arbitrator.[361]

In a similar vein, the BDA installs experienced businesspeople as well as legal experts on its panels as the need arises. In its rules and procedures, the BDA asserts that at least 'one panel member must be a rabbi' and that any non-rabbinic experts who are included among their panellists must be 'religiously observant'.[362] This assists the arbitral process in a climate of complex business scenarios in which, as an experienced *dayan* explained, '80% of the cases there is no *halakhah* to be decided, we just need to get to the bottom of the facts'.[363] Moreover, the *halakhah* itself often takes into account *dina demalkhuta* (the law of the country) as well as *minhag hasoḥerim* (common commercial practice), both of which require an understanding of secular law. As such, the inclusion of legally trained individuals on the arbitration panel is deemed essential in the *halakhic* process itself.[364] Indeed, the commercial arbitration arm of the BDA was setup by Rabbi Broyde whose expertise spans both secular law and *halakhah* and his successors, Rabbis Reiss and Weissmann, have had similar training. In cases that are determined by a *dayan yaḥid*, the director will aim to ensure that the sole arbitrator has both legal and rabbinic qualifications.[365]

4.2.8 Representation: lawyers and *to'anim*

Parties to an arbitration have the right to representation by an attorney under New York law.[366] The BDA enshrines this in its rules and procedures[367] and in practice, many litigants exercise this right. Typically, the lawyers will assist in the organisation of the facts and in presenting their client's case before the arbitrators and will at times also be called upon to provide their understanding of the secular law as it pertains to their client's case, for the *dayanim* to review and incorporate into their judgement, based on what *halakhah* requires in the circumstances.[368]

In contrast to their openness to legal representation, the BDA will in most cases refuse to accept representation by a *to'en rabbani* (rabbinical attorney, hereon referred to as a *to'en*, pl. *to'anim*). Their rules and procedures make reference only to permitting representation by a registered

[361] Interview with Rabbi Willig.
[362] *BDA rules* (n 329) s 1(c).
[363] Interview with Rabbi Rapp.
[364] Interview with Rabbi Weissmann.
[365] Interview with Rabbi Rapp.
[366] *New York Civil Practice Laws and Rules* § 7506(d) (2023).
[367] *BDA rules* (n 329) s 12.
[368] Interview with Rabbi Rapp; Interview with Rabbi Weissmann.

attorney, and where a party wishes to bring a *to'en* to represent them in their proceedings it will only be allowed if they are also represented by a lawyer and the other party consents to the *to'en*'s attendance. In practice, the present director of the BDA cannot recall the last time that a *to'en* represented a party at one of their hearings.[369] This practice of not allowing representation by *to'anim* puts the BDA in the minority of Battei Din in the USA, which typically allow for this form of representation.[370]

There are a variety of reasons provided for the effective exclusion of *to'anim* at the BDA. Unlike the legal profession, there is no oversight or licensing requirements for those who wish to pursue a career as a *to'an*. This translates into a reality whereby *to'anim* are unable to be dis-barred on the basis of unethical conduct. There is a strong perception that *to'anim* may misrepresent the facts or the *halakhah* in order to benefit their client, may delay or extend proceedings unnecessarily and generally prevent what should otherwise be a streamlined process. Unethical conduct by a *to'en*, rather than resulting in disqualification, can be incentivised by the fact that it will attract more clients, who may want to commission a *to'en* who they see is willing to go 'the extra mile' for their party. In addition, *halakhah* charges the *dayanim* themselves to be active in determining and applying the relevant Jewish law, and thus the *to'en*'s *halakhic* expertise is not seen as necessary in proper functioning of a Beth Din. Being that a *to'en* adds no further benefit than a lawyer, who is equally equipped to assist the litigants in presenting the facts, but suffers from the pitfalls associated with their belonging to an unregulated profession, they are effectively excluded from BDA hearings.[371]

4.2.9 Challenges

While the BDA appears to be a model for best practice among Battei Din in the USA, there are a range of challenges which they face in their effort to continually improve the service they offer to the community. The most significant challenge they face relates to funding. Presently they operate what the director refers to as a 'shoestring operation' in which their resources are spread thin relative to the caseload that they are attracting. Their income is comprised of fees for services, donations from board members and select others, as well as a subvention from the Orthodox Union. Raising fees is not an option insofar as there is concern that it will dry up demand for BDA's services which are accessed, in part, due to their cost-effectiveness in relation to other dispute resolutions methods. Public fundraising is likewise problematic insofar as it would create a litany of conflicts of interest and compromise the necessary arms-distance relationship required of an arbitral body with

[369] Interview with Rabbi Weissmann.
[370] Interview with Rabbi Rapp.
[371] Interview with Rabbi Rapp; Interview with Rabbi Willig; Interview with Rabbi Weissmann.

the community that it services. The key avenues for fundraising would thus be to approach private individuals for donations, who would then not be permitted to make use of the BDA's services for any of their dispute-resolution needs, or to seek greater financial input from the Orthodox Union.[372]

In addition, the BDA believes that community education could be significantly bolstered. Many potential parties do not know about their religious obligation to attend a Beth Din to have their commercial disputes litigated.[373] In addition, the BDA could be doing more to alert the community with regards to its professionalism in terms of its focus on due process as well as its secular sophistication; that it uniquely incorporates subject-matter experts among its arbitrators and has a keen awareness of secular law and its norms. In the past, the BDA has run continuing legal education ('CLE') classes geared at lawyers, which have also open to the public, in which it has showcased its *dayanim* and their broad expertise, and this has precipitated an increased caseload.[374]

Furthermore, the BDA could be providing greater professional development opportunities for their *dayanim* and office staff. Presently, there are regular opportunities for those involved in *gittin* to improve their practice, but in the realm of *dinei torah* there is little in the way of formal continued education. Junior *dayanim* take on apprenticeships with senior *dayanim*, and *dayanim* meet in an ad hoc manner to discuss mutual challenges, however with greater funding, the director feels that further necessary training and development could be taking place. [375]

4.3 The Beth Din of the Chicago Rabbinical Council

The heart of the rabbinical services of the Chicago community is contained within an unimposing double story building with a floor-to-ceiling glass façade. It is there that the administrative and rabbinical staff of the cRc reside. Its Kashrut operations, located on the lower level, has developed a strong brand that has gained the trust of the international Orthodox community. Upstairs, the Beth Din arm of the cRc is housed. In the reception area sits the executive director of the cRc, Rabbi Levi Mostofsky, together with two administrative assistants, Mrs Gavriella Bachrach, who works directly with him and Mrs Jodi Goldberg[376] who supports both the *Av Beth Din* Rabbi Yona Reiss, and Rabbi Alan Abramsom the Beth Din administrator, in ensuring the smooth running of the Beth Din's various operations. Behind the reception is a short hallway which leads to offices and study areas of the *dayanim* of the Beth Din; Rabbi Yisroel Langer, Rabbi Aaron Kraft and Rabbi Daniel Raccah.

[372] Interview with Rabbi Weissmann.
[373] Ibid.
[374] Ibid.
[375] Ibid.
[376] A pseudonym is used, at her request.

The room in which the Beth Din sits for its hearings is a solemn but inviting, space. The executive director invested efforts in ensuring that is receives plenty of natural light, and the room is decorated with various artifacts and framed certificates, including a black sandal with a lengthy leather strap which is used in for the rare *ḥalitzah* (disbanding of a levirate marriage duty) ceremony. A long table fills two-thirds of the room, with the remainder containing the bench and tall leather armchairs at which the *dayanim* sit during hearings. Emblazoned on the wooden panelling behind the *dayanim* is the Hebrew text of the Biblical mandate *'tzedek, tzedek, tirdof'* ('justice, justice, you must pursue').[377]

The *dayanim* and administrative team are inviting, open and unpretentious, and meetings were generously arranged with the *Av Beth Din*, Rabbi Yona Reiss, as well as *dayanim* Rabbi Yisroel Langer and Rabbi Aaron Kraft in which interviews were conducted. In addition, I had the opportunity to interview a female administrative assistant, and over a sushi lunch, converse with Rabbis Raccah, Mostofsky and Reiss the hearings room.

4.3.1 The Context and Structure of the cRc Beth Din

The cRc Beth Din was established in the 1960s as a rabbinical court for the Chicago community and its environs. Its initial focus was primarily upon *gittin* as well as *geirut* (conversion to Judaism) and the verification of Jewish status. Over the years it has come to include the function of providing arbitration for commercial disputes which increased in volume over the tenures of its two most recent *Av Beth Din*s, Rabbi Gedaliah Dov Schwartz and Rabbi Yona Reiss. Disputes that come to the Beth Din range from commercial disputes between individuals and businesses, employment matters pertaining to communal organisations, as well as end of marriage property settlements and child-custody and visitation disputes.[378]

While there is no formal link between the BDA and the cRc Beth Din, there is significant sharing of information, resources, and ideas between the two organisations. This unofficial relationship is a product of Rabbi Schwartz previously serving simultaneously as the *Av Beth Din* of both Battei Din, as well as the fact that the current *Av Beth Din* of the cRc Beth Din, Rabbi Reiss, having been both a former director of the BDA as well as a its current *sgan Av Beth Din*.[379] The two Battei Din share a similar religious ethos, representing centrist Orthodoxy with many of their *dayanim* having affiliations with its academic stronghold, Yeshiva University.

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[377] Deuteronomy 16:10.
[378] Interview with Rabbi Yona Reiss Esq., *Av Beth Din* of cRc Beth Din and *sgan Av Beth Din* of Beth Din of America (Chaim Cowen, Chicago Rabbinical Council, Chicago, 29 November 2022) ('Interview with Rabbi Reiss').
[379] Ibid.

Approximately 30-40 cases are opened at the cRc Beth Din each year. While many come from the Chicago community, it also deals with matters across much of the Midwest of the United States, particularly in places where there are no recognised Battei Din. It is common for the *dayanim* of the cRc Beth Din to travel to the surrounding states, including Missouri, Kansas, Ohio, Florida, Tennessee and Texas to assist their Jewish communities with Beth Din services as required, or to have cases from these States brought before them in Chicago.[380]

Unlike the BDA which only shares nominal links with its affiliated rabbinical and kashrut authorities, the cRc Beth Din shares close structural and proximal ties to the parallel institutions in Chicago. All three arms of the cRc are under the aegis of the same executive board and executive director.[381] The *Av Beth Din*, Rabbi Reiss, also serves as the *halakhic* authority for matters pertaining to kashrut and works closely with the executive director, Rabbi Mostofsky, in ensuring the smooth running of the organisation.[382] Rabbi Abramson, the Beth Din administrator, who is also a qualified *dayan*, is responsible for the operations of the Beth Din and he works closely with a colleague who provides practical secretarial support, from scheduling cases to issuing *hazmanot* to communicating with parties and ensuring compliance with the processes of the Beth Din. Mrs Jodi Goldberg is also empowered to assist women who use the Beth Din services, by providing them the comfort of female company in an otherwise male-dominant environment.[383] When the workload gets out of hand, she is able to lean on Mrs Gavriella Bachrach who also services aspects of the Beth Din such as its regular publications, marketing and events, in addition to her role in assisting the executive director.[384]

On the rabbinic side, there are four *dayanim* who are considered *kavua* (permanent) insofar as they are contracted to serve in either a full or part time capacity at the cRc Beth Din. This differs from the BDA setup in which the dozen or so *dayanim* that are called upon to make up their arbitral panels, serve in a casual capacity. Both Rabbi Reiss, the *Av Beth Din*, and Rabbi Raccah, referred to as 'senior *dayan*' due to the length of his experience at the cRc Beth Din, are full-time employees of the Beth Din. Rabbis Kraft and Langer both serve part-time, sharing the morning and afternoon shifts. As such, throughout the week, there is always a panel of three *dayanim* available for a hearing, in addition to Rabbi Abramson who is qualified to serve in that capacity. [385] The *dayanim* are expected

[380] Ibid.
[381] Ibid.
[382] Interview with Rabbi Kraft.
[383] Interview with Mrs Jodi Goldberg (pseudonym), Assistant to the cRc Beth Din and to Rabbi Yona Reiss, *Av Beth Din* (Chaim Cowen, Chicago Rabbinical Council, Chicago, 29 November 2022) ('Interview with Mrs Goldberg).
[384] Interview with Rabbi Kraft.
[385] Interview with Rabbi Reiss.

to touch base every couple of weeks with the *Av Beth Din* to discuss any challenging areas of *halakhah* with which they are grappling,[386] and matters pertaining to the *dayanim's* terms of employment are fielded by Rabbi Mostofsky who would in practice, collaborate with Rabbi Reiss in achieving their resolution.[387]

4.3.2 Best Practice

The Chicago Jewish community is described by one of the *dayanim* as relatively tight knit and homogeneous and, in contrast to the New York Jewish community, it is far less centralised. As such, unlike the proliferation of Battei Din in the New York area, there are few alternatives to the Chicago Beth Din. Individuals from across the spectrum of religious observance and ideology frequent the cRc Beth Din for its services, primarily *gittin* and *geirut*.[388] Speaking with the Rabbi Reiss, he made it clear that an important objective of the cRc Beth Din is that it follows the Talmudic imperative to *justly* pursue justice, meaning that the process of seeking justice must itself be patently fair and equitable.[389] Methods through which this is achieved include the setting of clear expectations via the publication of set rules and procedures as well as ensuring enforcement of their decisions via ensuring the Beth Din strictly adheres to local arbitration law.[390] This ethic has resulted in a near 100% enforcement rate of cRc Beth Din awards when challenged in secular court.[391]

The culture at the cRc Beth Din is one which fosters trust, openness and sensitivity. A theme that emerged from the various interviews of its personnel is the sense of respect and trust that exists between the *dayanim* and the *Av Beth Din* as well as between the rabbinic and administrative staff.[392] In the words of one of the office assistants:

> "it happens to be that we have a beautiful group of people… The communication between everyone is very straightforward and everyone really wants to do their best… everyone is on board… The people are so committed and genuine, they are good people, they know how to communicate, they are sensitive."[393]

[386] Interview with Rabbi Yisroel Langer, Dayan at cRc Beth Din (Chaim Cowen, Chicago Rabbinical Council, Chicago, 29 November 2022) ('Interview with Rabbi Langer').
[387] Interview with Rabbi Reiss.
[388] Interview with Rabbi Kraft.
[389] Babylonian Talmud, *Sanhedrin* 32b.
[390] Interview with Rabbi Reiss.
[391] In one instance the cRc Beth Din dealt with a landlord-tenant dispute. There were two tenants of which only one signed the arbitration agreement, which allowed the one who did not sign to file a separate claim in court being that they were not bound by the arbitration decision. The cRc Beth Din learned a valuable lesson from this instance; see Interview with Rabbi Reiss.
[392] Interview with Rabbi Kraft; Interview with Rabbi Langer.
[393] Interview with Mrs Goldberg.

This workplace culture spills over into their interactions with clients. Rabbi Reiss is careful to repeat the position of each litigant after they have presented their side of the case, ensuring that they feel reassured that their arguments have been heard and understood.[394] In cultivating this environment, the *Av Beth Din* often repeats the dictum of his predecessor, Rabbi Schwartz, that '80% of being a *dayan* is having the interpersonal skills and… sensitivity to people and the other 20% is applying the *halakhah*'.[395]

4.3.3 The cRc Beth Din Process

The rules and procedures of the cRc Beth Din, made available on their website[396] is modelled on those of the BDA with various minor modifications. As such, much of what has been discussed in relation to the BDA in this regard is equally relevant to the cRc Beth Din. Communication with litigants outside of the hearing itself is handled by the administrative staff of the Beth Din, who ensure that that the clients are made aware of the rules and procedures, sign the arbitration agreement and pay the requisite fees. They also ensure that the *dayanim* have printed copies of any documents needed for the hearing. [397]

Cases are all recorded, which besides for the benefit of reducing potential differences of opinion as to what was said, also enables the *dayanim* to review the previous hearing when there is an extended break between sessions.[398] Judgements are written in English, which include all relevant *halakhic* sources that have been relied upon. In addition, close attention is paid towards the grammar and formatting – notwithstanding the fact that the awards are not for public consumption and in all likelihood will only be viewed by the litigants and their representatives.[399]

The cRc Beth Din will issue a *seruv* to a party that refuses to participate in the proceedings, unless the party declines on valid grounds akin to those described previously in relation to the BDA process.[400] In practice, due to the cRc Beth Din's standing in the community it is very rare for a party to refuse a *hazmanah* and a *seruv* is issued on average only once in three years.[401]

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[394] Interview with Rabbi Langer.
[395] Interview with Rabbi Kraft.
[396] cRc Beth Din, *Rules and Procedures of the Beth Din Zedek of the Chicago Rabbinical Council* <https://crcbethdin.org/wp-content/uploads/2019/08/Beth-Din-Rules-and-Procedures.pdf> *('cRc rules')*.
[397] Interview with Mrs Goldberg.
[398] Interview with Rabbi Kraft.
[399] Interview with Rabbi Langer.
[400] *cRc rules* (n 396) s 2(b).
[401] Conversation with Rabbi Levi Mostofsky, Executive Director of the cRc, Rabbi Daniel Racca, Senior Dayan at the cRc Beth Din and Rabbi Yonah Reiss, *Av Beth Din* of the cRc Beth Din (Chaim Cowen, Chicago Rabbinical Council, Chicago, 29 November 2022) ('Conversation with RLM, RDR, RYR').

4.3.4 Bias and *ex parte* communication

The Beth Din Administrator and secretarial staff handle all communication with clients, and are fastidious in ensuring that both parties are copied into all correspondence. Nothing is ever sent directly from the litigants to the *dayanim*.[402] More complex however, is the challenge of dealing with bias and the perception of bias given the tight-knit nature of the Chicago community, in which, according to one *dayan* 'if you're from here, you're not just from here, you are related to half the community.'[403] As it happens to be, all the *dayanim* who serve on the cRc Beth Din are not originally from Chicago, however some have been there many decades or are married to locals. Additionally, three of the *dayanim* hold rabbinical posts at various synagogues within the community which brings them into close contact with members of the Chicago Jewish community.[404]

In dealing with this issue, the cRc Beth Din has a practice, initiated by Rabbi Schwartz during his tenure, that the *Av Beth Din* does not take on a rabbinical position so as to avoid developing a relationship with one segment of the community more so than with others.[405] Additionally, the cRc Beth Din is careful to adhere to their rules and procedures which dictate that 'an arbitrator (*dayan*) shall disclose confidentially to the *Av Beth Din* any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties.'[406] This disclosure does not automatically disqualify them from the proceedings, as the *Av Beth Din* explained:

> "There is a distinction in Jewish law between disclosure and disqualification. If there is any knowledge of the litigants or even of those who may be close to the litigants that the Beth Din has, we always disclose it and if somebody is uncomfortable with the fact that we know somebody or we know their brother-in-law or whatever the case may be, then the *dayan* in question will recuse himself. But generally speaking, we find the parties aren't uncomfortable as long as there is no built-in disqualification, like of somebody being a good friend of the *dayan*, or the *dayan* having a monetary interest in the outcome of the case. As long as those features are not present, where there is no disqualification, we simply disclose any associations and as long as the judges feel they can be objective and the parties trust the *dayanim* to be objective, then as long as the disclosures have been rendered appropriately and responsibly, we can go on and hear the case."[407]

[402] Interview with Mrs Goldberg.
[403] Interview with Rabbi Kraft.
[404] Interview with Rabbi Kraft.
[405] Ibid.
[406] *cRc rules* (n 396) s 6(b).
[407] Interview with Rabbi Reiss.

If a *dayan* is disqualified, another will be selected in their place, and where there are no others available, other rabbinic figures in the Chicago Jewish community, who are not employees of the Beth Din, who will be asked to arbitrate.[408]

4.3.5 Confidentiality

The cRc Beth Din is careful to ensure that privacy of their *dinei torah.* Despite their close informal relationship with the BDA which results in much collaboration around processes and policies, the staff are careful not to share any personal details of their litigants and cases.[409] In addition, although written judgements are edited and formatted carefully, and contain *halakhic* novellae that could be of valuable contribution to international Torah scholarship, they are not published so as to preserve the confidentiality of the parties.[410]

4.3.6 Appeals Process and Alignment of Awards

While the cRc Beth Din does permit appeals, it does so in more limited circumstances than the BDA. While their rules and procedures generally align with that of the BDA, in s31(a) which details the grounds for modification of an award, the clause in the BDA rules allowing for modification where 'the *Av Beth Din* determines that a provision of the Award is contrary to Jewish law' is omitted in the cRc Beth Din rules. The reason for this is a pragmatic one, being that in the BDA the *Av Beth Din* generally does not sit on cases due to the large number of available *dayanim*, he is able to then review challenges based on Jewish law which are posited by disgruntled parties. In the cRc Beth Din, where there is a smaller pool of *dayanim* and they enjoy the luxury of a full-time *Av Beth Din*, the *Av Beth Din* will generally sit on cases in the first instance. As such appeals are limited to errors on the face of the record, but not to substantive *halakhic* analysis in which the *Av Beth Din* was previously involved. This position is buttressed by the fact that the Beth Din has a broad scope of discretion in terms of how it determines *halakhah* insofar as matters may be determined in accordance with equitable, and not strictly legal, considerations under the framework of *pshara krova l'din* (equitable considerations that may diverge from the strict *halakhah*).[411]

As far as alignment of awards is concerned, the cRc Beth Din has the advantage of being a smaller entity with fewer *dayanim* than the BDA which results in a greater consistency between its judgements. However, on their website, the cRc Beth Din makes it clear that unlike secular courts which are bound by precedents set by higher courts, this is not true of the *halakhic* system insofar as

[408] Interview with Rabbi Kraft.
[409] Interview with Mrs Goldberg.
[410] Interview with Rabbi Langer.
[411] Interview with Rabbi Reiss.

'the judges in a *Din Torah* apply their understanding of Jewish law, and not all judges understand the law in the same manner.'[412]

4.3.7 Inclusion of Experts

The cRc Beth Din is led by Rabbi Reiss, who has both the *halakhic* training required of a *dayan* and holds a law degree from Yale University, where he was the senior editor of their Law Journal, in addition to having had experience in legal practice.[413] While legal training may not be *sine qua non* for being an effective *dayan*, Rabbi Reiss believes that:

> "it is certainly helpful in terms of being able to identify certain parameters of Jewish law that intersect with the secular law, like for example if the parties have made a condition that their transactions will follow secular law which will often be a binding condition according to *halakhah* because we have a principle that *kol tenai shebemamon kayam*, any monetary condition is considered to be binding, or if the Beth Din makes a determination that the transaction in question is subject to *minhag hasoḥarim*, to the custom of the market place, it's important to know what are the customs of the marketplace and often they will coalesce with secular law. Or if a particular dispute falls within the category of *dina demalkhu[t]a dina*, the law of the land, if something was enacted for the purpose of *takana[t] hamedinah*, a broad sweeping economic regulation that requires compliance from everybody in order for the regulation to be effective, like the order of collection of bankruptcy creditors in a bankruptcy case, or the implementation of rent control laws to mention a couple of examples, then it's important for the Beth Din to be well informed of what would fall within that category and what the rules and regulations of that specific law would be so that it could be applied properly."[414]

This expertise can come from a range of sources, including board members, administrators, and legal interns. When an understanding of secular law is required according to the *halakhic* criteria for arriving at a ruling, the *dayanim* on the cRc Beth Din will consult with Rabbi Reiss or with other legal experts in the community.[415]

In addition, legal expertise allows for better understanding between the arbitrators and the lawyers who often represent litigants at the cRc Beth Din. The executive director shared an anecdote to illustrate this, whereby on one occasion an irate lawyer called the cRc Beth Din and accused them of

[412] cRc Beth Din website, *Din Torah – Halachic Arbitration* <https://crcbethdin.org/din-torah/faq/>.
[413] Beth Din of America website, *Rabbi Yona Reiss. Esq.* <https://bethdin.org/about/#dayanim>.
[414] Interview with Rabbi Reiss.
[415] Interview with Rabbi Kraft; Interview with Rabbi Langer.

being in breach of legislation in their dealings with his client who was litigating at the Beth Din. The call was passed to Rabbi Reiss who listened patiently whilst the lawyer repeated the tirade, after which he calmly responded by clarifying whether the lawyer was referring to a particular clause within the legislation which he proceeded to recount verbatim. The lawyer, not expecting that the personnel of the Beth Din would have such proficiency in the law, calmed down significantly, shifting his approach to a more respectful dialogue around possible interpretations of the relevant statute.[416]

4.3.8 Representation: lawyers and *to'anim*

Like the BDA, the rules and procedures of the cRc Beth Din allow for representation 'by an attorney who must be licensed to practice law in any jurisdiction in the United States'[417] While it may not be a formal requirement under Jewish law, the fact that it is mandated by secular law[418] means that the cRc Beth Din must ensure that parties are afforded their rights in this regard. Lawyers play the role of assisting parties in organising and formulating their presentations before the Beth Din which is helpful for the proceedings.[419]

To'anim however, are generally not permitted at the cRc Beth Din. In addition to the reasons provided by the *dayanim* of the BDA relating to the lack of professional oversight, Rabbi Reiss added the concern that the rabbinical advocate's knowledge of Jewish law can provide a disservice in the Beth Din context insofar as rather than assisting with the clear presentation of the facts, they may be tempted to skew the facts in order to ensure that they fall on the correct side of their understanding of Jewish law in the circumstances.[420]

4.3.9 Challenges

As the communally recognised Beth Din of Chicago and its environs, the cRc Beth Din faces challenges in terms of ensuring that it maintains its appeal to the range of demographics within the Jewish community that it services. It has an established reputation for *geirut*, and candidates will often seek out a Beth Din that is well regarded to ensure the universal acceptance of their conversion to Judaism. However, when it comes to *gittin* and *dinei torah* it relies on community members understanding their *halakhic* obligation to seek out a religious divorce, which cannot be taken for granted within the non-observant Jewish community, and to arbitrate according to

[416] Conversation with RLM, RDR, RYR.
[417] *cRc rules* (n 396) s 12(a).
[418] *Illinois Uniform Arbitration Act* 710 ILCS § 5-6.
[419] Interview RYR.
[420] Ibid.

halakhic principles, which cannot be taken for granted even among members of the observant Jewish community.[421]

In addressing communal awareness around the *halakhic* duty to have commercial disputes litigated before a Beth Din, the cRc Beth Din has run CLE courses and promoted an initiative for rabbis in the community to discuss this obligation with their community on the Sabbath each year that coincides with the Torah reading from which this duty has its source.[422]

Additionally, while *dinei torah* are fewer than *geirut* and *gittin* in terms of the quantum of clients requesting these services,[423] they tend to take up more time as they involve scheduling with multiple parties and often require multiple hearings. It can often be a drain on resources and is a contributing factor in the cRc Beth Din not being a profitable enterprise.[424] The fact that the Beth Din operates alongside the profitable Kashrut arm of the cRc enables it to keep its fees low and remain viable, despite operating at a loss.[425]

4.4 ERETZ ḤEMDAH GAZIT

The Eretz Ḥemdah Institute for Advanced Jewish Studies is nestled in one of the more quiet, suburban neighbourhoods of the otherwise bustling city of Jerusalem. Its pulsating heart is its book-lined study hall, brimming with students engaged in discussions over the tomes of the *Shulḥan Arukh*, the classical text of codified Jewish law. It is there that I met Rabbi Daniel Mann, *Av Beth Din* at the Jerusalem branch of Eretz Ḥemdah Gazit and Rabbi Dr Ido Rechnitz, its *menahel* who oversees its network of eight[426] Battei Din around Israel. Our interviews took place in the hearings room, which is located adjacent to the study hall, equipped with two separate tables at which the litigants sit, facing the *dayanim's* bench behind which were three empty armchairs.

On the other side of the study hall sits the administrative arm of Eretz Ḥemdah Gazit. The office space is open plan, where four women attend to their duties with the assistance of phones and computers. To the left of this hub is the office of Rabbi Yosef Carmel, the Rabbinical Dean and one of the two visionaries behind the organisation that has earned a reputation for best practice. He is a thoughtful man, who is deliberate and succinct in his choice of words. It is there that I interviewed

[421] Interview with Rabbi Kraft.
[422] Conversation with RLM, RDR, RYR.
[423] Interview with Mrs Goldberg.
[424] Ibid.
[425] Conversation with RLM, RDR, RYR.
[426] These Battei Din are located in Jerusalem, Ramat Gan, Haifa, Beit Shemesh, Katzrin, Ofra, Petaḥ Tikva and Kiryat Gat; see Eretz Ḥemdah Gazit website, *Odot Reshet Batei HaDin Eretz Ḥemdah Gazit* [About the Eretz Ḥemdah Gazit Beth Din network] <https://www.beitdin.org.il/About> [Hebrew].

Rabbi Carmel and gained an understanding of the history and vision of Eretz Ḥemdah, which he founded together with Rabbi Moshe Ehrenreich.

4.4.1 The Context and Structure of Eretz Ḥemdah Gazit

The Israeli landscape of Battei Din is singular in the world. In the words of Ashkenazi Chief Rabbi David Lau, it is a *balagun* (chaos). Each neighbourhood in the ultra-Orthodox community has its own Beth Din, or sometimes multiple Battei Din, which align with the various family groups, traditions and ideologies espoused by its differing segments.[427] In addition, the Rabbinate which forms an arm of the Israeli judicial system, having jurisdiction over matters pertaining to personal status,[428] would nonetheless litigate commercial matters in cases where the parties elected them as their arbitrators or conferred upon them jurisdiction by virtue of their agreement.[429] Judicial criticisms of this practice culminated in the 2006 case of *Simah Amir v. Beit Din HaRabbani HaGadol BeYerushalayim*[430] (‘*Simah Amir’*) in which the High Court of Justice prohibited the Rabbinical Courts from acting in the capacity of arbitrators on the bases of the principal of legality which confers no further jurisdiction than that expressly granted by statute, the misuse of public funding for what was essentially a private endeavour, and the potential misleading of the public in terms of the scope of the Rabbinical courts’ jurisdiction. From this point, the only legitimate venues for *halakhic* arbitration were the private Battei Din established by segments within the Orthodox community.[431]

Eretz Ḥemdah did not originally form as a Beth Din. Its founders, Rabbis Carmel and Ehrenreich, sought to form an institute of advanced studies for the Religious Zionist community, formulating an eight-year program focusing on the study of *dayanut*. To qualify for entry, candidates had to have completed *smikhah* (rabbinic ordination) and have served in the Israeli Defence Force. Under the guidance of Rabbi Shaul Yisraeli, a leading Zionist figure and a *dayan* on the Supreme Rabbinical Court, Eretz Ḥemdah was formed in 1987. As time elapsed, new projects were sought out, including

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[427] Interview with Rabbi David Lau, Ashkenazi Chief Rabbi of Israel (Chaim Cowen, Melbourne, 14 November 2017) (‘Interview with Rabbi Lau’).

[428] *Ḥok Shifut Battei Din Rabani’im (Nisu’in v’Geirushin)* [Rabbinical Courts Jurisdiction (Marriage and Divorce) Law] *5713-1953* [Hebrew].

[429] Under the British Mandate, the Rabbinic court was empowered to act as arbitrators by means of *Takanot Knesset Yisrael* [Israel Knesset Regulations] 1927 s 10(d) [Hebrew]. Once the State of Israel was established these regulations ceased to exist and no longer had any force or effect; see HCJ 8638/03 *Simah Amir v Beit Din HaRabbani Hagadol b’Yerushalayim* [2006] (Israeli High Court of Justice) [Hebrew].

[430] *Simah Amir,* ibid.

[431] In the period immediately following this decision, the Rabbinical Courts continued to provide arbitration even after this decision, with 257 new cases opened in the reporting period from May 2006 (the *Simah Amir* judgement was published in April 2006) arguing that the judicial remarks pertaining the Rabbinical courts inability to arbitrate could be construed as *obiter dictum*. The State Comptroller criticised their breach of the ruling; see State Comptroller of Israel*, Duaḥ Shnati 56B L’Shnat 2007 U’lḥeshbonot Shnat Haksafim 2006* (*2008), 944-945* <https://www.mevaker.gov.il/sites/DigitalLibrary/Pages/Publications/293.aspx> [Hebrew].

the 'Ask the Rabbi' project in which the students of Eretz Ḥemdah used their research prowess to answer challenging religious questions that were sent to them from communities in the diaspora. In the early 2000s, the idea of establishing a Beth Din was raised, aimed at providing a practical outlet for the graduates of Eretz Ḥemdah's *dayanut* program.[432]

This new Beth Din was founded in 2006, and named *Beit HaDin Mishpat v'Halakhah b'Yisrael* (Beth Din of Justice and *Halakhah* in Israel). Its aims were to cater to the Religious Zionist community who wanted a venue for litigation that both acknowledged and respected the State, unlike the many ultra-Orthodox Battei Din which were not Zionistic, and adhered to *halakhah*, unlike secular Israeli law which is not bound by traditional Jewish law. In the words of Rabbi Carmel, the Beth Din would provide an:

> "opportunity to Israeli citizens to solve the problems and disputes in monetary cases according to *halakhah* taking into consideration that we are living in a State with the law of the State which every citizen must obey as well."[433]

In the same year, the Gazit network of Battei Din was founded by Rabbi Dr Moshe Be'eri with the intention of making commercial arbitration based on *halakhic* law a viable option for the Religious Zionist public within Israel. Exposing a fault-line of religious-secular tension at the heart of the modern State of Israel, Be'eri challenged that 'it is a shame that a nation with such a rich legal tradition turns to English law and Ottoman law instead looking to its own profound culture.'[434] These two initiatives, which coincided with the decline in the Rabbinate's authority to offer arbitration in commercial matters, shared similar ideological standpoints, and ultimately merged in 2009 to form the one network of Battei Din, rebranded as Eretz Ḥemdah Gazit.

Rabbi Rechnitz, who had previously managed the Gazit network of ten Battei Din, became the *menahel* of the newly formed Eretz Ḥemdah Gazit, and notwithstanding a hiatus of a few years while he practiced as *dayan*, remains in this capacity. Additionally, Rabbi Rechnitz co-heads the research team at Mishpetei Eretz, an institute based in Ofra that operates a rabbinic seminary for teaching *dayanut*, a research department focused on the advancement of *Mishpat Ivri* and produces publications and conferences.[435] Under his leadership, Eretz Ḥemdah Gazit has developed close ties

[432] Interview with Rabbi Mann.
[433] Interview with Rabbi Carmel.
[434] Matthew Wagner, 'Rabbis tout Jewish option to courts', *The Jerusalem Post* (online, 18 October 2006) <https://www.jpost.com/israel/rabbis-tout-jewish-option-to-courts>.
[435] See Mishpetei Eretz website <https://www.dintora.org/> [Hebrew].

with Mishpetei Eretz, with the former putting into practice much of the theoretical research and innovation of the latter.[436]

Eretz Ḥemdah Gazit is overseen by a rabbinic board, and is run by the chairmen and visionary founders of Eretz Ḥemdah, Rabbis Carmel and Ehrenreich, who aspire to guide it in accordance with the values and ideology of the late Rabbi Yisraeli.[437] Each branch of the network of Battei Din, has either single or multiple *Av Beth Din*s and the *menahel* is charged with the responsibility of staffing *dayanim* to sit on cases and supporting them with issues that arise with regards to the parties or the application of the *halakhah*. Secretarial support is provided by Mrs Tzippy Gilinsky who interfaces with clients of the Beth Din, supporting them and the *dayanim* in ensuring that all relevant documentation is in order.[438]

4.4.2 Best Practice

The concentration of observant Jewish people in the State of Israel has naturally resulted in the flourishing of private Battei Din. Attempts by the Rabbinate to impose any form of regulation on these Battei Din has met with little success, except for those that operate under the *Moatzot Hadatit* (Religious Councils) which have certain requirements pertaining to the qualifications of the *dayanim* as well as relating to their procedural rules.[439] Eretz Ḥemdah Gazit, being a private organisation, has no standards imposed on it by the Rabbinate or by any governmental body, besides for those required of all arbitrators under the relevant secular statute. Thus, its internal efforts to achieve best practice are to be credited for distinguishing it from other Battei Din and earning it the reputation of a respected and trusted organisation.

Areas of best practice include its pioneering of transparent and publicly available procedural rules.[440] At its inception, its rabbinical chairmen compiled these rules referencing *halakhic* sources including the works of Professor Eliav Shoḥetman[441] as well as the rules of the BDA.[442] In the words of the *Av Beth Din* of the Jerusalem branch of Eretz Ḥemdah Gazit, 'the rules are more of a *siman* [outcome]

[436] Interview with Rabbi Rechnitz.
[437] Interview with Rabbi Carmel.
[438] Interview with Rabbi Rechnitz.
[439] Interview with Rabbi Lau.
[440] Eretz Ḥemdah Gazit website, *Sidrei HaDin Eretz Ḥemdah Gazit* [Rules and Procedures of Eretz Ḥemdah Gazit] <https://www.beitdin.org.il/Page/9> [Hebrew].
[441] Eliav Shoḥetman, *Seder Hadin B'vet Din HaRabbani* [Rules and Procedure in the Rabbinical Courts] (AS Sidrei Mishpat, 2011) [Hebrew]. Previously published as a single volume and now expanded into three volumes, Professor Shoḥetman's work examines both classical sources as well as judicial rulings, mostly emanating from the of the Supreme Rabbinical Court of Appeals to provide a comprehensive guide to procedural practice in the realm of *Mishpat Ivri*.
[442] Interview with Rabbi Rechnitz; Interview with Rabbi Mann.

than a *sibah* [cause]' .[443] The terminology of *siman* and *sibah* is germane to the Talmudic context where a distinction is made between an outcome and a cause, insofar as the former is not what propels a certain quality but is rather only an indicator that the quality exists, while the latter refers to the very cause itself of the particular quality. As such, the rules and procedures of Eretz Ḥemdah Gazit, in the eyes of its Jerusalem *Av Beth Din*, are not what makes it a best practice institution, but rather are evidence of the professionalism of the organisation from which such rules and procedures would naturally emerge.

Alongside these rules are ethical guidelines to which the *dayanim* of the Eretz Ḥemdah Gazit network are required to adhere.[444] Ethics forms part of the training over the course of the eight-year program at Eretz Ḥemdah manifesting in short presentations multiple times during the week from its Rabbinical Dean exploring values that are key to proper conduct as a *dayan* and community leader.[445] While he does not doubt that errors in the understanding or application of *halakhic* have been made by *dayanim*, the *Av Beth Din* of Jerusalem cannot recall a time where the *dayanim* of Eretz Ḥemdah Gazit were accused of acting without integrity or impartiality towards their litigants.[446]

Moreover, to ensure *halakhic* certainty for litigants, Eretz Ḥemdah Gazit publishes a list of policies relating to areas of *halakhah* that have not achieved consensus in the wider Orthodox world so that parties are aware of the position that its *dayanim* will take on these matters. While for other Battei Din, a potential litigant may have to suss out on their own what the position of some or all of the *dayanim* are on a controversial *halakhic* matter, at Eretz Ḥemdah Gazit, litigants can view these policies on the organisations' website[447] and can then enter into business arrangements with a clear sense of what *halakhic* position the *dayanim* will take in the event that such a matter will require arbitration. Policies range from the ways in which costs are allocated between the parties, to the breadth of which the principles of *dina demalkhuta dina* or *minhag hasoḥerim* will be applied.

In supporting *dayanim* to adhere to the set *halakhic* policy, Eretz Ḥemdah Gazit ensures that all written judgements undergo an editing process. Whilst the editors are not empowered to change the ruling of a *dayan*, they will provide feedback when it seems that a policy has been overlooked. Additionally, being that all rulings are subject to an appeals process, *dayanim* are aware that if they

[443] Interview with Rabbi Mann.
[444] Eretz Ḥemdah Gazit website, *Klalei HaEtika Eretz Hemdah Gazit* [Eretz Ḥemdah Gazit Ethical Guidelines] <https://www.beitdin.org.il/Page/15> [Hebrew].
[445] Interview with Rabbi Mann.
[446] Ibid.
[447] Eretz Ḥemdah Gazit website, *Mediniyot Hilkhatit Eretz Hemdah Gazit* [Eretz Ḥemdah Gazit *Halakhic* policy] <https://www.beitdin.org.il/Halacha_policy/> [Hebrew].

choose to give a ruling in contravention of a published policy, it will unlikely be upheld if it is challenged using their internal appeals process.[448]

The policies themselves are often proposed by the research team at Mishpetei Eretz. A yearly conference is held in which *dayanim* from various Battei Din, including Eretz Ḥemdah Gazit, explore areas of *halakhah* pertaining to commercial litigation that are either emerging or have not yet achieved consensus within the Orthodox community. Following this, the *dayanim* of Eretz Ḥemdah Gazit will determine the *halakhic* policy that their organisation will adopt on the matter.[449]

Another area of best practice relates to their publishing of arbitral judgements. Unlike in the Battei Din of the United States that were the subject of this research, where the task of anonymising cases has been deemed too onerous to justify the largescale publication of *halakhic* rulings, Eretz Ḥemdah Gazit takes enormous pride in anonymising and publishing approximately five hundred judgments on its website in fully searchable format, complete with 'tags' to enable searching via common terms and subjects as well as a ranking system that promotes cases that have been referenced in subsequent judgements.

The *menahel* of Eretz Ḥemdah Gazit invests significant efforts in fine-tuning its organisational culture. To ensure that the culture remains uniform and prevent pockets of independence that don't reflect the values of the organisation from developing among its eight branches, *dayanim* are regularly rotated between the different locations among the network so there is rarely a fixed group of three *dayanim* who sit together.[450] In addition, many of the *dayanim* are salaried which enables the network to call on them during specific hours of the day that are convenient for clients, rather than having to be dependent on the availability of the *dayanim* as would be the case in a casual employment arrangement. Another important outcome of this arrangement is that attendance at professional development sessions can be mandated as a contractual requirement for the *dayanim*.

The number of cases that have been arbitrated at Eretz Ḥemdah Gazit has ballooned over the past decade and a half since its merger, and currently it attracts approximately 200 cases per year. These cases are litigated among its network of eight Battei Din, half of which occur at the Jerusalem branch. Of these cases 10-25% of cases are appealed using their internal appeals process, in accordance with their rules and procedures. The *menahel* estimates that no more than 5% of their awards would be challenged in the secular Israeli courts, and of these, only a small number

[448] Interview with Rabbi Rechnitz.
[449] Ibid.
[450] Interview with Rabbi Rechnitz; in one of their Battei Din in the north of Israel there is a fixed panel of three *dayanim*, however this is an exception to the rule, and the *menahel* will allocate other *dayanim* where he determines that specific expertise is needed for a particular case which is lacking in the fixed panel.

succeed.[451] These statistics provide evidence for the success of the measures put in place to ensure best practice and the positive reputation Eretz Ḥemdah Gazit has developed in the community.

4.4.3 The Eretz Ḥemdah Gazit process

The process by which cases in the Eretz Ḥemdah Gazit network operate, is laid out in the policy document *Sidrei HaDin Shel Reshet Battei HaDin Eretz Ḥemdah Gazit* [Procedure of the Beth Din Network Eretz Ḥemdah Gazit] 5783 (2023) which can be found on their website.[452] The document contains eleven sections, including the makeup of the panel (ss1-2), the process for initiating a proceeding, summoning the defendant and the signing of the arbitration agreement (ss3-5), expectations of how the hearings will run (s6), the inclusion of expert opinion (s7), written judgements (s8), temporary injunctions (s9), appeals (s10) and other general rules (s11). Rabbi Carmel, who was intimately involved in the construction and evolution of these procedures, describes them as being sourced 'especially [in] *halakhah* but also [in] common sense and experience' and emphasises the organisations' strict adherence to these rules.[453]

The procedures document appears more limited than the parallel documents of the BDA and cRc Beth Din and from the interviews conducted, there appears to be many additional measures taken that are not expressly listed therein. In addition, the document includes a catch-all clause allowing the *dayanim* to determine any procedural aspects not expressly mentioned in the policy based on their evaluation of what will increase 'the efficiency of the hearing and the administration of righteousness and justice'.[454] An example of a measure that is not expressly written in the policy, but appears to be instituted in practice is the recording or transcribing of all cases, which are subsequently sent to all litigants.[455]

In addition, the process for dealing with the refusal of a defendant to obey a summons request by the Beth Din is not included in the Eretz Ḥemdah Gazit procedures document. Whilst the BDA rules provide a comprehensive guide as to possible forms of response or non-response of a summoned defendant and how their Beth Din will respond to each, the Eretz Ḥemdah Gazit rules are entirely silent on the matter. From discussions with their leadership, it appears that the approach taken by Eretz Ḥemdah Gazit is to simply provide a *heter arka'ot* to the plaintiff if the defendant refuses the summons. This approach, which differs from the American approach of issuing a *seruv* to a non-complying party is rooted in the Israeli secular law's approach to the issuing of a *seruv*. In *Yosef Katz*

[451] Ibid.
[452] Eretz Ḥemdah Gazit website, *Sidrei HaDin Shel Reshet Battei HaDin Eretz Ḥemdah Gazit* (2023) <https://www.beitdin.org.il/Page/9> *('EHG rules')*.
[453] Interview with Rabbi Carmel.
[454] *EHG rules* (n 452) s 11(3).
[455] Interview with Rabbi Carmel.

v Beit HaDin HaRabbani HaEizori B'Yerushalayim[456] (*'Katz'*) the High Court of Justice determined in relation to state Rabbinical courts that one may not coerce a party to attend arbitration, rather it may only occur in instances where an arbitration agreement is signed willingly by both parties.[457] It is likely that for this reason any reference of the defendant refusing to attend is not included in the Eretz Ḥemdah Gazit rules and procedures insofar as typically a defendant is not duty-bound to attend arbitration and any indication to the contrary may fall foul of the legal position in relation to *seruvim* in Israel. This leadership of Eretz Ḥemdah Gazit does not seem overly perturbed by their inability to harness communal pressure in bringing parties to their Beth Din. In the words of the Rabbinical Dean 'we are not enforcing people to [perform] mitzvot. It's not a good idea. So if [they] don't want to come, [they are] losing a golden opportunity and please, go to the [secular] court.'[458]

Moreover, even with regards to the issuance of a *heter arka'ot*, there is a heightened sense of awareness that such a document may be used to embarrass a defendant in the eyes of the religious community – and may be sought by a plaintiff for this very purpose.[459] As such, at Eretz Ḥemdah Gazit a *heter arka'ot* will include the details of what has occurred, including what summons were sent, what form the summons took, the nature of the response or lack of response etc., in order that any potential publicization of the *heter arka'ot* by the plaintiff in an attempt to shame the defendant will be given proper context.[460]

4.4.4 Bias and *ex parte* communication

The rules and procedures address the issue of bias, providing that any familial relationship with any of the parties results in an automatic removal of a *dayan*.[461] When *dayanim* are selected to arbitrate for a specific case, the names of the parties are shared with the *dayanim* in advance so that they can

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[456] HCJ 3269/95 *Yosef Katz v Beit HaDin HaRabbani HaEzori B'Yerushalayim* [1996] (Israeli High Court of Justice) [Hebrew] ('Katz').

[457] It appears that despite this ruling, many private Battei Din in Israel will still issue *seruvim*; Interview with Rabbi Mann; Interview with Rabbi Warhaftig.

[458] Interview with Rabbi Carmel.

[459] From *Katz* (n 456) it appears that even the issuance of a *seruv* without sanctions is prohibited. It would thus seem that removing the sanctions is not enough, rather the *heter arka'ot* would need to be phrased in a way that it is clearly permitting the plaintiff to pursue their case in secular court and not in any way seeking to put pressure the defendant. It is unclear if the process used by Eretz Ḥemdah Gazit conforms with this insofar as a future court may deem a *heter arka'ot* to be implicitly pressuring the defendant, who might feel communal shame at being the cause for the plaintiff to have use a non-*halakhic* venue to pursue their rights. At the same time, for a court to rule that even a *heter arka'ot* is illegal would result in a head-on clash with religious principles, insofar as there is a religious obligation to have commercial cases vented according to *halakhah* and as such some form of pressure and/or communal shame will exist as long as there is such a religious precept. This raises a question in relation to Jewish religious arbitration: from the secular perspective, it is arbitration which requires the free consent of both parties. From the faith perspective however it is an obligation and as such cannot be said to be absolutely voluntary. See further discussion in Parts 3.6.4 and 6.2.

[460] Interview with Rabbi Mann.

[461] *EHG rules* (n 452) s 1(5).

flag any potential conflicts of interest. One *dayan* shared an anecdote whereby they were sitting on a case, and a litigant mentioned her fathers name at which point he realised that he was a distant relative of hers. He divulged this to both parties, and upon hearing that the relationship was distant and that they had not even met one another, both parties were happy to proceed with the arbitration.[462] This incident reflects the practice of ensuring that *dayanim* are upfront in disclosing any form of conflict that could potentially impact or appear to impact the litigants' sense of their impartiality.

In terms of ensuring that there is no *ex-parte* communication between the *dayanim* and the litigants, the rules provide that in the context of the hearing any requests made by the court for further information from the parties, as well as the parties' responses to such requests will be provided to all litigants.[463] This rule does not address *ex parte* communication more broadly, however it is clear from the summons process that the secretarial staff, and not the *dayanim* themselves, are responsible for communications and administrative follow up which would prevent direct contact between litigants and the *dayanim*.[464] Moreover, the setup of Eretz Ḥemdah Gazit as a network that employs dozens of *dayanim* with a robust administrative arm would mitigate against issues of *ex-parte* communication arising as compared to a smaller Beth Din in which the *dayanim* must also take on administrative responsibilities.

4.4.5 Confidentiality

Eretz Ḥemdah Gazit takes on a number of measures to protect their litigants' confidentiality, but balances this value with its desire to demonstrate transparency and build capacity among *dayanim*. Under their rules, they require that litigants and judges ensure the privacy of all matters discussed within the proceedings.[465] This is also reflected in the fact that members of the public are not permitted to attend their hearings and that written judgements are anonymised. However, there are certain instances in which students, particularly those training to become *dayanim* will be permitted to observe hearings of the Beth Din.[466] In addition, unlike the BDA and the cRc Beth Din which will not publish anonymised judgements unless the parties agree to this, Eretz Ḥemdah Gazit include in their rules a disclaimer that the Beth Din will publish their rulings after removing the names of the parties from the decisions. There are instances however, where they will not publish an anonymised rulings, such as where the nature of the case is particularly sensitive. However on the whole, they

[462] Interview with Rabbi Mann.
[463] *EHG rules* (n 452) s 6(4.2).
[464] Ibid s 4(1-3).
[465] Ibid s 11(4).
[466] Interview with Rabbi Mann.

pride themselves on the approximately five hundred published rulings that the public can access via their website.[467]

4.4.6 Appeals Process and Alignment of Awards

Much like the other best practice Battei Din that were explored in this research, Eretz Ḥemdah Gazit provides an internal appeals process. Their broad pool of *dayanim* allows for an appeal to take place with one or more *dayanim* who were not on the initial panel. As such, like the BDA which has a range of *dayanim* that it can call on – but unlike the cRc Beth Din – they will take appeals on matters pertaining to Jewish law, in addition to errors on the face of the record or procedural irregularities that could have impacted the outcome of the case.[468] Appeals are held either in the Jerusalem or Petaḥ Tikvah branches of their Beth Din network.

The appeals process also serves the purpose of ensuring that there is alignment between awards made by the *dayanim* of the various branches of Eretz Ḥemdah Gazit. As discussed previously, on appeal, rulings will be reviewed with an eye to the agreed-upon *halakhic* policies to which Eretz Ḥemdah Gazit binds itself, as well as precedents that have gained influence via having been referenced multiple times by later decisions, in addition to aspects of secular law that *halakhah* takes into consideration.[469] In addition, as discussed, prior to publication all judgements undergo an editing process, with one of its objectives being to ensure that *dayanim* have considered these factors before issuing a ruling.[470] Likewise, *dayanim* are rotated throughout the network's venues to prevent fixed panels from forming an approach that is significantly different to that of the broader organisation.[471]

4.4.7 Inclusion of Experts

The vision of Eretz Ḥemdah Gazit is one which embraces the modern State of Israel and looks favourably upon the inclusion of its laws and commercial practices to the extent permitted by *halakhah*. As such, there are a range of legal professionals whom the *dayanim* will call on when they have a question relating to secular law.[472] Additionally, Eretz Ḥemdah Gazit consults with an expert in arbitration law, who provides guidance to ensure that proceedings are in line with the secular law requirements. The *menahel* credits this as the cause for Eretz Ḥemdah Gazit's impressive record

[467] Interview with Rabbi Rechnitz.
[468] *EHG rules* (n 452) s 10(4).
[469] Interview with Rabbi Rechnitz.
[470] The editors are careful not to interfere with the *dayan's* autonomy to rule as they deem appropriate, and as such while they will submit matters for the *dayan's* further consideration, the *dayan* has the freedom to reject or accept them as they see fit; ibid.
[471] Ibid.
[472] Interview with Rabbi Mann.

when its awards have been challenged in the courts.[473] In addition, whilst training in relevant areas of secular law is not presently part of the *dayanut* course offered at Eretz Ḥemdah, the *menahel* sees the value in the inclusion these studies and has incorporated such training into the conferences for *dayanim* run by Mishpetei Eretz.[474]

Expert opinion is sought out by the *dayanim* as the circumstances require, and a section of the rules and procedures lays out the manner in which this takes place.[475] However, Eretz Ḥemdah Gazit does not permit such experts to sit on the panel of *dayanim*, which is restricted to those with *yadin yadin* ordination who are formally qualified to render *halakhic* decisions.[476] This position differs from that of the BDA which permits, and indeed seeks out, the adoption of experts onto its arbitral panel in instances where the case requires specialised knowledge that is not possessed by the available *dayanim*.

4.4.8 Representation: lawyers and *to'anim*

While a right to representation is not directly referenced in the policy document, it is referred to implicitly in the section pertaining to decisions relating to costs, which refers to the allocations of expenses for the representation of the parties.[477] In practice, parties are permitted to bring representation as long as they have informed one another in advance, and parties tend to exercise this right in approximately half the cases that are brought to Eretz Ḥemdah Gazit.[478] Representation may come in any form, be it lawyers, family members, friends or *to'anim*. In contrast to the BDA and cRc Beth Din which limit the presence of *to'anim*, Eretz Ḥemdah Gazit is not concerned by their inclusion in the proceedings. Rabbi Mann who served at both the BDA and Eretz Ḥemdah Gazit explained that in Israel they have a much better experience with *to'anim* insofar as there is formal training and registration that they undergo to be qualified under the Israeli Rabbinate.[479] Notwithstanding the state-sponsored accreditation process that exists, unqualified *to'anim* are permitted to represent litigants at Eretz Ḥemdah Gazit, and there are no bars in terms of whom a litigant may choose to bring with them as representation, provided that the other side is informed.[480]

[473] Interview with Rabbi Rechnitz.
[474] Ibid; Interview with Rabbi Mann.
[475] *EHG rules* (n 452) s 7.
[476] Interview with Rabbi Rechnitz; Interview with Rabbi Mann.
[477] *EHG rules* (n 452) s 8(1.5).
[478] Where the amount in dispute is larger, the proportion of litigants who bring representation is higher; Interview with Rabbi Mann.
[479] Regarding Rabbinic *to'anim* in Israel see <https://www.gov.il/he/departments/topics/toanim/>.
[480] Interview with Rabbi Rechnitz.

While any form of representation is permitted at the hearings, the *dayanim* at Eretz Ḥemdah Gazit are charged with ensuring that they do not overstep certain boundaries. Rabbi Carmel describes the role of *to'anim* and lawyers in a Beth Din as less significant than their role in a regular court.[481] The primary players in the Beth Din are the *dayanim* and the litigants themselves. When the litigants' representative assumes an overly assertive stance in the hearings, the *dayanim* are trained to sideline them and address the litigants directly. Where the representation fails to comply, the *dayanim* are authorised to remove them from the hearings room. As such, the Eretz Ḥemdah Gazit system balances a freedom of representation, with an expectation that its *dayanim* will ensure the litigants are front and centre and their representation plays only a supplementary role. The role of the *dayan* is likewise to ensure decorum during the proceeding. Since there can be a tendency for litigants and their representation to express themselves forcefully at times, the *dayanim* are charged to maintain decorum so that all parties feel safe and comfortable in the hearings room and are supported to express themselves confidently and respectfully.[482]

4.4.9 Challenges

The number of cases that come before Eretz Ḥemdah Gazit has steadily increased each year, however there are many observant Jews who they feel could join their clientele, but prefer to use the secular courts. The leadership of Eretz Ḥemdah Gazit feel the constant need to prove themselves to the public and to convince them that they are 'not as bad as… the *Beit Din HaRabani* [the Rabbinical Court]'. From their experience, many members of the Religious Zionist community tend to neglect the *halakhic* duty to litigate cases in accordance with Jewish law, seeing this notion as a historic reality rather than an obligation in contemporary times. The exception to this rule is the Religious Zionist communities in Jerusalem as well as in Judea and Samaria who tend to be more fastidious in their observance of this precept.[483]

In addition, there is a sense that the secular Israeli courts are more willing to scrutinise not only the procedural, but also the substantive aspects of their awards. Unlike in the United States which observes a strict separation between Church as State,[484] no such separation exists within the State of Israel which is inextricably linked with the Jewish religion. One outcome of this reality is that in the United States, the review of matters pertaining to religious arbitration is approached cautiously by the judiciary, which is not the case in Israel. An example of a grounds by which the Israeli courts will

[481] Interview with Rabbi Carmel.
[482] Interview with Rabbi Rechnitz.
[483] Interview with Rabbi Rechnitz; Interview with Rabbi Mann.
[484] *United States Constitution* amend I.

overturn an award is where it contravenes *takanant hatzibur* (public policy)[485] which provides a wide discretion. This is a factor that plays into the mind of *dayanim* in instances where the *halakhah* in a particular instance would likely fall foul of a policy matter with which the Israeli judicature would likely take issue.[486]

Funding is likewise a challenge, with Eretz Ḥemdah Gazit relying on fees from clients, as well as a small grant from the State, to survive financially. Significant resources are needed to enable the Beth Din to operate professionally, such as the employment of quality administrative staff and the use of dedicated spaces for hearings, which provides a professional environment for the hearing. In addition, the cost associated with paying the salaries of the *dayanim* and ensuring their professional development are all crucial to building and maintaining a reputation that will entice more clients to make use of the Beth Din.

A further challenge is the tension that exists between the religious and secular aspects of Israeli society. Their differences express themselves in a variety of contexts including the judiciary, where the Rabbinical courts and secular courts sit side by side. The judgement in *Simah Amir* reflected a sentiment in Israeli society which is concerned by the prospect of an expanding rabbinic authority seeking co-jurisdiction in civil matters alongside secular courts. In a similar vein, there is opposition to the proliferation of Battei Din in Israel, especially those established by the Religious Zionist camp, insofar as their providing alternative venues to the courts is seen as an act of defiance against the authority of the state, which they proport to support.[487] It is unlikely that this challenge poses an existential threat to Eretz Ḥemdah Gazit insofar as they operate under arbitration law which is a standard feature of Western secular society. However this political reality is noteworthy in terms of foreshadowing some of the driving forces that could influence future governments in amendments to arbitration legislation as well as how elements within the judiciary might approach challenges to Beth Din awards.

[485] *Ḥok HaBorerut* [Arbitration Law] 5728-1968 s 24(9) [Hebrew] provides grounds to overturn an arbitral award where the content of the decision contravenes public policy.
[486] Interview with Rabbi Mann; Interview with Rabbi Rechnitz.
[487] In Adam Hofri-Winogradow, 'A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State' (2010) 26(1) *Journal of Law and Religion* 101, 123-124, the establishment of the Gazit network of Battei Din is viewed as a response to the disengagement from Gaza, which greatly disturbed conservative elements within the Religious Zionist movement. Thus, their Beth Din system is seen as an attempt to break away from their reliance on the governmental institutions which had betrayed their ideals. While his analysis is compelling and may explain the proliferation of Battei Din at that time, it is relevant to note that Religious Zionist Battei Din existed well before the disengagement, as does the disappointment in the fact that *Mishpat Ivri* was not used as the basis for the Israeli legal system; see Interview with Rabbi Warhaftig.

4.5 American and Israeli Battei Din: Socio-Political Differences

Examining best practice Battei Din in the American and Israeli context has brought to light numerous areas of confluence that provide guidance for the setting up of a future Australian Beth Din in a manner that will gain public confidence and ensure compliance with arbitration law. However, there are also a few areas in which these Battei Din differ significantly, including their approach towards the use of a *seruv*, representation by *to'anim*, their approach to the publication of rulings as well as towards inviting experts on the panel who do not have *halakhic* qualifications and expertise.[488]

One theory which could explain much of the difference between the Israeli and American Battei Din, is that in Israel the commercial Battei Din see themselves as being in competition with the secular courts, which is not the case in the United States.[489] Given that Israel is the nation-state of the Jewish people, many of its Orthodox constituents hold strong views with regards to *halakhah*, in particular the aspects that makeup *Mishpat Ivri*, having a stronger place in the legal system of the country.[490] Indeed, up until the *Simah Amir* case in 2006, there was an illusion of this in fact being the case with the Rabbinical court taking on commercial cases between willing parties under arbitration law, but with the appearance of having jurisdiction in this arena.[491]

As such, with the Rabbinical courts no longer permitted to take on these cases, private Battei Din have usurped this position, modelling themselves on the State courts. On its website, Eretz Ḥemdah Gazit gives the distinct impression that it views itself as court, rather than an arbitral body when it writes:

> "The shunning of the rabbinical courts is not only a severe *halachic* problem; rather it is also a cultural-social problem. One of the ingredients of the Zionist vision – the renewal of a sovereign Jewish nationalism – expressed a desire that the judicial system reflect the Jewish judiciary tradition and Jewish values of justice….

[488] While the cRc Beth Din seem to align with Eretz Ḥemdah Gazit with regards to not having non rabbinically qualified experts on their panel, it seems that the cRc Beth Din is not opposed to this practice but rather does not require it, being that their *Av Beth Din* is a legal expert and will generally sit on the panel. For Eretz Ḥemdah Gazit on the other hand, this it is a matter of principle that one without *yadin yadin* is not permitted to sit as a *dayan*.

[489] I am grateful to Arye Edrei, Professor of Law at Tel-Aviv University, who proposed this idea to me in a conversation regarding this research.

[490] The Eretz Ḥemdah Gazit website expresses this sentiment when it writes 'one component of the Zionist vision of the restoration of Jewish sovereignty was an aspiration for the judicial system of the Jewish state to reflect the principles of justice and cumulative wisdom of this ancient people's legal tradition'; see <http://www.eretzhemdah.org/content.asp?pageid=194>.

[491] See *Katz* (n 456) where Zamir J wrote that the Rabbinical court 'sits in judgement beneath the symbol of the State and it writes its judgements on State paper; the orders that it issues speak in the name of the State and are enforced by the State' (translation is my own).

> With this in mind, the "Eretz Ḥemdah" institutes have decided to establish *a new rabbinical court*, which will provide a venue for the resolution of disputes and will serve the broad Israeli public, according to Torah law and within the constraints of civil law" (emphasis added).[492]

This would explain the insistence of Eretz Ḥemdah Gazit on only having qualified *dayanim* on the panel, akin to a court which could only allow a qualified judge to sit at its bench, with expert testimony admitted as needed for their consideration, unlike the BDA who readily place such experts on the arbitral panel, irrespective of their *dayanut* qualifications. In addition, their publication of written judgements in readily searchable format, including the recognition of often cited cases as being more persuasive, is reminiscent of the way in which the State courts operate in terms of the publication of their decisions and the doctrine of precedent. In a similar vein, the admission of a *to'en* which is allowed in the State Rabbinical courts, is thus *ipso facto* permitted in the private Battei Din which have come to replace the Rabbinical courts who can no longer take on commercial arbitration.

In contrast, the American Battei Din do not in view themselves as being in competition with the State courts. They cater to a small minority of the American populace and have no aspirations of American commercial law conforming to *halakhah*. As such, they prioritise the aspects of arbitration that provide it an advantage over the court system, which include both expediency and confidentiality.[493]

In the interest of confidentiality, the American Battei Din that were studied, will not publish anonymised decisions without extensive consultation with the litigants concerned, which results in the publication of very few of its judgements. This promotes the values of privacy and confidentiality which is a hallmark of arbitration,[494] as opposed to judicial litigation where the competing value of transparency is paramount.

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[492] Eretz Hemdah English website, *Overview* <http://www.eretzhemdah.org/content.asp?PageId=36&lang=en>.

[493] That expediency and confidentiality are aspects of arbitration that make it more attractive than the courts, see Richard Naimark and Stephanie Keer, 'What do parties really want from international commercial arbitration?' (2002-2003) 57(4) *Dispute Resolution Journal* 78*;* See also Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) 22 *Harvard Negotiation Law Review* 275 who argue that confidentiality is a hallmark of arbitration forum.

[494] Privacy can be defined as ensuring that the hearing itself is closed to participants, whilst confidentiality includes the guarantee that the information relating the hearing will not go further. The latter cannot be guaranteed insofar as awards may need to be provided to the courts if challenged and as such cannot be guaranteed in the context of arbitration; see Amy J Schmitz, 'Untangling the Privacy Paradox in Arbitration' (2006) 54 *University of Kansas Law Review* 1211.

Likewise, the value of expediency would support the inclusion of non-*halakhically* qualified experts on the arbitral panel which results in a more streamlined process for taking into consideration factors that are beyond the expertise of the *dayanim*. Admitting expert testimony to the hearings or having the *dayanim* consult with experts involves a more drawn out and tedious process, which in the mind of the BDA's *Av Beth Din* is also one that invites the possibility of error insofar as the expert is further removed from the facts of the case in comparison to the arbitrators themselves.[495] Arbitration, as opposed to the judicial litigation, is beneficial specifically in this regards insofar as it has the flexibility to appoint arbitrators with the agreement of the parties, that ensure the right mix of expertise that can best serve in providing an informed, efficient and accurate outcome for its participants.

In a similar vein, the limits on representation which have the practical impact of excluding *to'anim* from the BDA and cRc Beth Din, seems to cater to a more expedient and streamlined process, which is another desirable aspect of arbitration that the courts do not provide. As the *menahel* of the BDA explained regarding *to'anim*, 'unfortunately they have built a reputation of themselves instead of streamlining the process and… being useful in the process, they tend to cause problems, they tend to stall cases, they tend to come up with all sorts of procedural things that result in delays and confusion'.[496] While expediency is also a factor for Eretz Ḥemdah Gazit, who train their *dayanim* to effectively deal with the conduct of unruly *to'anim*, their desire to mimic the court system, results in their allowing *to'anim* to represent litigants, in line with the State Rabbinical courts.

While the differences between the American Battei Din and Eretz Ḥemdah Gazit can be viewed within their respective socio-political contexts, they also reflect different approaches to arbitration more broadly. There is a tension between the values of confidentiality and transparency which are both sought out by participants to arbitration. Confidentiality serves to reduce the animosity between the parties and thus can preserve business relationships, as well as ensuring that disputes are concealed from the media or competitors.[497] Transparency on the other-hand, addresses misuse of power and promotes fairness, due process, the rule of law and ensures decisions are properly researched.[498] It has been argued that in more recent times, the value of transparency has taken on greater significance to those who participate in arbitration, for whom their primary concern is in

[495] Interview with Rabbi Willig.
[496] Interview with Rabbi Weissmann.
[497] See further reasons provided in Poorooye and Feehily (n 493) 278.
[498] Ibid 285.

obtaining a fair and just result.[499] As such, while there may be ulterior socio-political factors driving Eretz Ḥemdah Gazit's decision to act more court-like in certain regards, their approach seems to reflect a prioritisation of these values that is also desirable within the arbitral ream.[500]

4.6 CONCLUSION

The Unites States and Israel contain the largest Jewish populations and have developed significant infrastructure to cater to their observant communities. The Battei Din explored in this article provide important guidance that can be utilised by Battei Din around the world who are seeking to improve in their provision of commercial arbitration. This included a study of how their rules and procedures are applied as well as the way in which they mitigate against bias, how they ensure confidentiality and the operation of their appeals mechanism. In addition, the ways in which these Battei Din include subject-matter experts and deal with various forms of client representation has highlighted differences between the Israeli and American socio-political contexts and touched upon the inherent tension between confidentiality and transparency in the field of commercial arbitration.

The empirical data processed and analysed in this chapter, merges with the theoretical backdrop outlined in Parts 2 and 3 to provide the context for specific accommodations that would need to be made to ensure Australian Battei Din wishing to engage in commercial arbitration are able to achieve this objective successfully. Considering this theoretical and empirical research, the ensuing chapters will focus on areas of Jewish law accommodation within the secular arbitral setting.

[499] See Cindy Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' (2003) 14 *American Review of International Arbitration* 121, 122 who makes this argument, referencing the study outlined in Naimark and Keer (n 493).

[500] See Buys, ibid 136-138 where she presents cogent arguments for why transparency in the form of published awards should trump any concerns regarding confidentiality of the proceedings.

5 JEWISH LAW ACCOMMODATION: JUDICIAL ASPECTS

5.1 INTRODUCTION

The interviews with *dayanim* in both Israel and the USA outlined in the previous chapter and the case law critiquing certain cases arbitrated at Australian Battei Din,[501] have highlighted areas in which Jewish law accommodation to secular law is necessary. This chapter will focus on three such areas which are categorised as 'judicial aspects' insofar as they relate to the composition of the arbitral panel and how they arrive at and produce their award.

In this chapter, Part 5.2 will look at a process of selecting the *dayanim* known as *zabla*, Part 5.3 will explore the way in which Jewish law integrates with aspects of secular law in accordance with the doctrine of *dina demalkhuta dina* and Part 5.4 will look at the Jewish and secular law position on supplying a reasoned judgement to the litigants.

In exploring these topics, the development in Jewish law from their source in the Talmud through to their contemporary application will be outlined. Additionally, the relevant Australian law will be referenced, and areas of potential conflict identified. Following this, the empirical research conducted in best practice Battei Din in the USA and Israel will be used to propose and evaluate methods of accommodation between Jewish and common law. Recommendations will then be brought for navigating these potential conflicts in the Australian arbitral context.

5.2 *ZABLA*

A form of dispute resolution in monetary cases, known as *zabla v'zabla* (an acronym for *zeh borer lo eḥad v'zeh borer lo eḥad* meaning 'this one chooses for themselves one [judge] and the other chooses for themselves one [judge]', henceforth *zabla*) is first raised in the *Mishnah*.[502] This model is one in which each litigant chooses a *borer* (*dayan* selected by the parties in a *zabla* arrangement, pl. *borerim*) and the *sholish* (third judge in a *zabla* arrangement) is chosen by the two *borerim*.[503] In this section, we will explore two viewpoints on *zabla* that can be traced to Talmudic times with regards to whether *zabla* is simply another format of Jewish law adjudication, and plays the same function as would a regular 'fixed' Beth Din in which judges are not selected by the parties, or whether it

[501] An overview of the relevant Australian case law will be provided in Part 8.4.
[502] *Mishnah*, *Sanhedrin* 3:1.
[503] Whether the mutual consent is of the two *borerim* or of the two litigants, or of all of them together is debated in the Mishnah and interpreted differently by the Amoraic scholars in the Jerusalem and Babylonian Talmud. *Shulḥan Arukh, Ḥoshen Mishpat* 13:1 makes a *halakhic* determination in accordance with the view that it is the *borerim* and not the litigants who select the *sholish*.

represents an alternate form of dispute resolution, which embraces the partiality of its *borerim* in providing a resolution grounded in peace and compromise, rather than objective justice. These viewpoints will provide a context for understanding the attitudes that the Battei Din in Israel and the USA surveyed in this study take towards the institution of *zabla*, as well as the viability of *zabla* Battei Din in Australia considering the expectations of the CAAs and relevant common law.

5.2.1 *Zabla*: Judicial or Bipartite?

5.2.1.1 The Talmudic Period

Scholars from the Talmudic period through to the present day have disagreed in their categorisation of *zabla*. Already in the Mishnah itself, a debate between Rabbi Meir and the Sages is recorded whereby Rabbi Meir posits that the litigants are allowed to set much of the tone of the proceedings, granting them the ability to select the *sholish*, disqualify a judge and to exclude witness testimony. The Sages, on the other hand maintain that the selection of the *sholish* is in the hands of the two *borerim*, and disqualification of either a judge or witness can only occur where a party is able to demonstrate an established flaw in their admission that has a basis in established Jewish law doctrine.[504] These differing attitudes towards the institution of *zabla*, pivot on whether, besides for the initial selection of the *borerim, zabla* is a judicial body which is essentially impartial or a form of bipartite arbitration of which judicial advocacy and partiality is a defining feature. The Sages appear to equate *zabla* with a classical Beth Din and thus, besides for the litigants' initial selection of the *borerim*, they are otherwise a judicial body that is subject to regular Beth Din procedure. Rabbi Meir, on the other hand, views *zabla* as fundamentally different to a fixed Beth Din, and as a bipartite arbitration in which the litigants, beyond their initial selection of the *borerim,* lend their hand to shaping various aspects of the procedure.

This debate concerning the very nature of *zabla* as being either like a regular Beth Din, or fundamentally different, expresses itself in the differing treatment that the Mishnah receives in the Jerusalem and Babylonian Talmud. The rationale behind the institution of *zabla* is provided by Rabbi Ze'ira in each Talmud, but the reason quoted in his name differs. In the Babylonian Talmud, the reason provided is that 'as result of [the fact] that this [litigant] chooses one judge for himself, and that [litigant] chooses one judge for himself, and the two [litigants] choose one more [judge] for themselves, the true judgement will emerge.'[505] However, in the Jerusalem Talmud, the rationale for *zabla* brought in the name of Rabbi Ze'ira is that 'because he selected [the judge], [the judge] will

[504] *Mishnah*, *Sanhedrin* 3:1.
[505] Babylonian Talmud, *Sanhedrin* 23a (translation from sefaria.org).

take care of his interests'.[506] The fundamental difference between these two reasons is that the former views the institution of *zabla* as focused on finding the objective *truth* whilst the latter has at its core, the bridging of the parties' subjective *interests*.[507]

The respective views of each Talmud, lend colour to a debate as to the historical development of the institution of *zabla*. Asher Gulak, in his *Yesodei HaMishpat HaIvri* argues that *zabla* was established in response to the loss of Jewish sovereignty under Roman occupation in the 2nd century CE whereby jurisdiction over commercial matters was forfeited and rabbinic ordination was outlawed.[508] In the absence of a formal Battei Din, the Jewish communities had no choice but to resort to voluntary arbitration in the form of *zabla* which was established by Rabbi Meir and his contemporaries who lived at that time.[509] While this view is adopted by several scholars,[510] Gedaliyahu Alon argues that whilst *zabla* proliferated during the period of Roman occupation, there is evidence that it existed earlier in the Second Temple period.[511]

The debate as to *zabla*'s historical origins, can explain the differing positions of the Babylonian and Jerusalem Talmud. Rabbi Professor Simḥa Assaf posits that the Jerusalem Talmud, whose scholars felt the brunt of Roman occupation, appreciated that *zabla* was a concession to the less-than-ideal reality within which they lived in which no permanent Battei Din were operational and thus only

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[506] Jerusalem Talmud, *Sanhedrin* 3:1. See Avraham Weiss, *Seder HaDiyun* (Horev Press, 1958) 1-34 [Hebrew] where he elaborates on the respective viewpoints of each Talmud.

[507] For a detailed analysis of how the respective viewpoints of each Talmud influences its interpretation of the views of Rabbi Meir and the Sages, see Mordekhai Sabato, '*Bet Din Shel Borerim*' in Moshe Bar-Asher (ed) *Sefer HaYovel L'Rav Mordekhai Breuer* (Acadmon Press, 1992) vol 2, 463 [Hebrew]; see also Daniel B Sinclair, 'Advocacy and Compassion in the Jewish Tradition' (1993) 21 *Fordham Urban Law Journal* 99 where he distinguishes between the Babylonian and Jerusalem Talmud with the regards to their respective views on the role of an advocate in Jewish law, with the former being more restrictive than the latter. The different perspectives of the Babylonian and Jerusalem Talmud in relation to judicial advocacy within a *zabla* court would align with his thesis.

[508] Asher Gulak, *Yesodei HaMishpat HaIvri* (Dvir Press, 1922) vol 4, 30-32 [Hebrew]; citing Jerusalem Talmud, *Sanhedrin* 1:1 (loss of jurisdiction in monetary matters) and Babylonian Talmud, *Sanhedrin* 14a (loss of rabbinic ordination).

[509] Gulak, ibid 31-32 contends that *zabla* was based on the Roman model of arbitration that was extant at that time, although it was granted a 'Jewish flavour' insofar as it required three arbitrators (as is required on a Beth Din) rather than one (which was typical of Roman arbitration). Additionally, he explains the view of the Sages who grant less discretion to the parties in setting the terms of *zabla* as belonging to a slightly later age than Rabbi Meir by when the *zabla* institution had stabilised to take on more of the formalistic aspects of the classical Beth Din. See also Zoraḥ Warhaftig, *Meḥkarim b'Mishpat HaIvri* (Bar-Ilan Press, 1985) 23-34 [Hebrew] who argues that *zabla* has no precedent in Jewish law sources and is a product of Roman conceptions of justice as peace-making which are at odds with classical Jewish views on justice as focused on truth-finding. See also Boaz Cohen, *Arbitration in Jewish and Roman Law* (Bruxelles, 1958) 167, 192-193 who explains how litigants would select arbitrators under Roman law.

[510] Simḥa Assaf, *Bet HaDin v'Sidreihem Aḥar Ḥatimat HaTalmud* (Jerusalem, 1924) 54-57 [Hebrew]; Warhaftig, ibid 25-26.

[511] Gedaliyahu Alon, *Toldot HaYehudim B'Eretz Yisrael B'Tkufat HaMishnah v'haTalmud* (Tel Aviv, 1953) vol 1, 138 [Hebrew].

bipartite voluntary institutions, in the image of Roman arbitration, were permitted to function. The Babylonian Talmud on the other hand, approached *zabla* in the context of the permanent Battei Din that remained in force in Babylonia, and thus saw *zabla* in the image of these institutions: besides for the initial selection of *borerim* by the litigants, it was otherwise judicial in nature, akin to a classic Beth Din.[512]

5.2.1.2 Approaches to Zabla by Medieval Scholars

The debate as to the nature of *zabla* outlined above, as to whether its primary focus is to find objective truth as a judicial body or to cater to the parties' subjective interests as a bipartite arbitration is evident in the differing views found in the classic commentaries of the medieval period. Rashi, in his commentary on the Babylonian Talmud, explains the meaning behind its assertion that *zabla* causes 'the true judgement to emerge' in the following manner:

> "For the litigants will accept [the verdict], for the losing side will think that 'I myself selected one [of the judges] and if [the judge] was able to investigate as to my merit he would have done so.' And the judges themselves are more comfortable to investigate into the merits of each party for both were selected [to do so]."[513]

The plain meaning of Rashi's comment lends support to an interpretation of *zabla* that is focussed on the parties' interests, so much so that the *borerim* are charged to actively research on behalf of their litigant. Indeed, such an approach is taken by fellow medieval scholars, Rabbi Yehudah ben Natan[514] and Maimonides.[515] However, Rabbeinu Asher ben Yeḥiel rails against such an interpretation of Rashi, asserting that:

> "There are those who lack understanding who err in interpreting Rashi and infer from [his words] that a judge may investigate into the merits of the litigant who selected him, and stand in his stead to mislead and act unjustly. It has become customary for people to select a conniving [judge] and justify it based on Rashi, inferring from him that [the *borer*] may investigate in their [litigant's] merit.

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[512] Assaf (n 510) 54; Sabato (n 507) 471-472; Assaf furthers this thesis, bringing evidence that *zabla* Battei Din generally operated in communities where there were no permanent Battei Din.
[513] Commentary of Rabbi Shlomo Yitzḥaki (*Rashi*) to Babylonian Talmud, *Sanhedrin* 23a s.v. *yatzah din emet l'amito* (translation is my own).
[514] Commentary of *Tosefot* to Babylonian Talmud, *Sanhedrin* 23a s.v. *kdei sheyatzah hadin l'amito*.
[515] The notion that each *borer* is partial to the litigant that selected them is stated in no uncertain terms by Maimonides, *Pirush HaMishnayot*, *Sanhedrin* 3:1 where he explains that 'the reason for that which the Sages say that it is the two judges who select the third, is due to the fact that the judge selected by one litigant will investigate their merit, and likewise the second judge will investigate the second litigants merit, and the third judge will decide between them' (translation is my own).

> G-d forbid, they have not imputed correctly from his words, for he writes 'for [the losing side] will think' i.e., they will *think* that the judge [they selected] has investigated into their merits more so than the other [litigants' merits] and due to this, they will accept the verdict. But the judge themselves, G-d forbid for them to find any arguments to vindicate the party [that selected them] if it is not absolutely just. For if he can fool his fellow [judge] to accept his reasoning, where he himself is not convinced [that it is valid] he is considered one who perverts justice."[516]

The difference of view between those scholars who view a *borer* as an advocate, as opposed to an impartial judge, could align with the understanding that *zabla* is a form of bipartite arbitration, rooted in the interests of the parties. The Rosh and those who interpret Rashi not as condoning such advocacy, might view *zabla* in the image of the classic Beth Din, and thus subject to its standards of justice and impartiality.

5.2.1.3 Approaches to Zabla in the Modern Era

The debate as to the essence of *zabla* has continued into the Modern period, although the position that *zabla* is a judicial institution that aligns with the formalities of a classical Beth Din have gained ascendancy. Two expressions of this viewpoint are found in the responsa, one which seeks to suppress the use of *zabla* on the basis of its being misused by *borerim* who do not live up to its formal, justice-oriented expectations and instead seek to advance the interests of their litigants and the other which seeks to defend *zabla* from those who discredit its value as a judicial body, arguing for its consideration as a viable option which can in certain ways be viewed as equivalent or superior to a Beth Din of fixed *dayanim*.

Concern as to the lived reality of *zabla* falling short of its purported status as a judicial body are found in a variety of rabbinic responsa during the Modern period. Rabbi Meir Eisenstadt, living in the 18th Century, decries the prevalence of *ex-parte* communications between litigants and *borerim* as well as the additional financial benefits being offered to *borerim* if they are successful in procuring a verdict in favour of their appointee.[517] Bringing Rabbeinu Asher ben Yeḥiel's interpretation of Rashi, he asserts that a *borer* is a fully-fledged *dayan* and is thus prohibited from being partial towards either party. *Borerim* taking money from a party are thus guilty of accepting bribes, and those who engage in advocacy on behalf of their appointee transgress the Biblical prohibition of perverting justice.[518] In a similar vein, Rabbi Shmuel Wosner, writing in the 20th Century, notes that many of the

[516] Rabbeinu Asher ben Yeḥiel in his commentary *Piskei HaRosh* to Babylonian Talmud*, Sanhedrin* 3:2 (translation and elucidation is my own).
[517] Rabbi Meir Eisenstadt, Responsa *Panim Me'irot* 2:159.
[518] Exodus 23:6.

zabla panels he was aware of acted contrary to the intentions of the Sages, and 'transform the words of the living G-d into partiality and profiteering'.[519]

Coming from a different angle, but with a similar understanding of *zabla* as an institution that had at its heart a focus on finding truth rather than advocating the parties' interests, Rabbi Jacob Reischer penned a responsa in the early 18th Century regarding a movement in Metz, France to replace the *zabla* method that had been operated there with the appointment of *dayanim* to a fixed Beth Din.[520] He argues against the appointment of fixed *dayanim* insofar as community leaders have a tendency to appoint ill-suited *dayanim* on nepotistic bases and as such, the *zabla* method whereby a party may offset this risk by the appointment of their own *borer* provides a greater likelihood of attaining true justice.[521] While Rabbi Reischer acknowledges the dangers inherent in the *zabla* method, he nonetheless found it more ideal than a regular Beth Din, due to the corruption that pervaded the appointment of *dayanim* by community leaders.

One authority in the 19th Century who seems to go the furthest in permitting a degree of partiality in the context of *zabla* is Rabbi Yeḥiel Mikhel Epstein. In his *Arukh HaShulḥan*, Rabbi Epstein comments on the practices of his day, stating that:

> "Even though the ones chosen [to judge] have all the laws of being a judge, and therefore it should be forbidden for any of the litigants to propose his claims before the one he chose without the other litigant present, nevertheless, it has become the *minhag* (custom) that each one proposes his claims before the [judge] he chose. And since each of the two parties does this, and the *minhag* is such, it is as if each party has accepted upon themselves this process in this mode, and there is no prohibition. However, the chosen [judge] must be careful to make sure the litigant who chose him promising him money for his work will give it to him whether he wins or loses. For were this not so, it would be prohibited for him to sit in judgement, since he has a bias, and his heart is turned even to falsity so that he can take from his party what was promised him."[522]

While Rabbi Epstein accepts the reality of *ex parte* communication in *zabla*, and considers the prohibition of such conduct effectively waived by the parties, he does not go so far as promoting the view espoused by the Jerusalem Talmud and the medieval commentaries who view advocacy as an

[519] Rabbi Shmuel Wosner, Responsa *Shevet HaLevi* 8:300.
[520] Rabbi Jacob Reischer, Responsa *Shevut Yaakov* 2:143.
[521] Rabbi Reischer uses the term *kdei sheyatza hadin la'amito*, quoting the words of the Babylonian Talmud, which views *zabla* as focused on truth rather than advocacy, as discussed previously.
[522] Rabbi Yeḥiel Mikhel Epstein, *Arukh HaShulḥan, Ḥoshen Mishpat* 13:4 (translation from sefaria.org).

positive, defining feature of *zabla*. Instead, he maintains the ideal view of *zabla* as a judicial forum, with the caveat of permitting *ex parte* communications, based on an imputed waiver by the parties.

In the Modern State of Israel, while remnants remain of the view of *zabla* as a bipartite arbitration predicated which permits the advocating of party interests,[523] the dominant position with regards to *zabla* is that it is a form of impartial arbitration, and other than the parties' ability to choose a *borer,* it maintains all the strictures of a regular Beth Din. However, given the inherent challenges that a *borer* selected by a party may experience in maintaining their impartiality throughout arbitration, *zabla* has been viewed by some as a fraught institution that is best avoided when a fixed Beth Din is available.[524] Others maintain that it is an institution that can be on par with a fixed Beth Din and advocate for its greater adoption as a preferred arbitration forum in Israel.[525]

5.2.2 *Zabla* in Best Practice Battei Din

The private Battei Din that were the subject of this study, operate under secular arbitration law in Israel and the USA which require the arbitrator to be impartial in rendering their decision.[526] As such, the model of *zabla* which would stand up to scrutiny in this setting is the one which views it as a fundamentally impartial and judicial body, whereby besides for their initial appointment, the *borerim* do not act as advocates for their respective litigants. However, the experience of the *Av Beth Din* of the BDA, Rabbi Mordechai Willig, is that *borerim* often fall short of the standard of impartiality required of them:

> "*Zabla* is not inherently problematic, when it's done properly, according to the *Rosh* and *Shulḥan Arukh*, it's the best thing. I emphasise when done properly. But when done properly means no *ex parte* communication… And then there's the question of who gets paid, how do

[523] Smadar Ottolenghi, *Arbitration* (Tel-Aviv: Da-Port, 4th ed, 2005) 463 writes '[i]n fact, the expression "*zabla* arbitration" is identical both in the Arbitration Law and in Jewish law, but from that point onwards the law applying to *zabla* arbitration is different. *Zabla* Arbitration in Jewish law is more similar to a bipartite commission set up in order to bridge the differences between litigants, as distinct from a body which actually rules on their disputes, whereas the Israeli *zabla* arbitration is arbitration in the full sense of the word'; cited in Yuval Sinai, 'Arbitration as an Ideal Judicial Procedure' (2008) 18 *Jewish Law Association Studies* 279, 282.
[524] See Rabbi Ben Zion Meir Ḥai Uziel, Responsa *Mishpetei Uziel* 4:1; referencing Rabbi Moses Isserles, *Haga'ah, Ḥoshen Mishpat* 3:1.
[525] See Ḥaim David HaLevi, *'Din oi Borerut'* (1994) 14 *Teḥumin* 141 [Hebrew] who argues based on classical sources that *zabla* in on par with a fixed Beth Din; see also Yuval Sinai, (n 523) who notes that *zabla* is often viewed as a second-tier dispute resolution format and argues that with regulation it can be a viable form of arbitration that can assist with reducing the burden on the courts.
[526] See e.g. *New York Civil Practice Laws and Rules* § 7511(b)(1)(ii) (2023) which provides 'partiality of an arbitrator appointed as a neutral' as a grounds for vacating an award; *Ḥok HaBorerut* [Arbitration Law] 5728-1968 s 11 [Hebrew] provides for an arbitrator to be deposed where they are unable to gain the trust of the parties or pervert justice.

> they get paid… there's nothing wrong with being *borer* and a *dayan*, but ideally there should be no previous relationship either… It's a toxic mix of *borerim* and *to'anim*. A toxic mix."[527]

Rabbi Willig went on to explain that the BDA avoids involving itself in *zabla* except in certain unique instances, where it will put in place safeguards to mitigant against potential pitfalls:

> "If we summon someone to a *din torah* and they say they want to go to a different Beth Din they have a right to do that. So sometimes we, although it's too rare, we take one judge from our Beth Din and one judge from that Beth Din and pick a third judge from a different Beth Din and everyone is honest with no *ex parte* et cetera. That can be a legitimate *zabla*, with our rules, with our rules, no *ex parte* and everything is recorded… that can work. But if it's not with our rules… sadly I don't know of any other Beth Din that insists on [no] *ex parte* in *zabla*."[528]

Similar sentiments regarding the mismatch between the theory of how *zabla should* operate, and the reality on the ground was expressed by other *dayanim* who were interviewed.[529] Rabbi Yosef Carmel of Eretz Ḥemdah Gazit explained that:

> "*Zabla* is very problematic especially where the sides are paying the salary of the one they choose. In such a case it's not a Beth Din, its two lawyers with one *dayan* and the majority are the lawyers. Even though they are under the title of *dayan* because they were chosen by one side, and he is paying for them. It's very problematic."[530]

Despite these concerns, as is the case in BDA, Eretz Ḥemdah Gazit will allow for *zabla* in certain instances with the proviso that it is beholden to their rules and procedures.[531] Additionally, where a defendant refuses a summons of Eretz Ḥemdah Gazit and proffers a *zabla* Beth Din instead as their desired arbitral avenue, unless the *zabla* the defendant proposes will be overseen by a reputable Beth Din, Eretz Ḥemdah Gazit will not consider it a viable alternative and present the plaintiff with a *heter arka'ot*, deeming the defendant as though they had *carte blanche* refused the summons.[532]

[527] Interview with Rabbi Willig.
[528] Ibid.
[529] Interview with Rabbi Rapp; Interview with Rabbi Rechnitz.
[530] Interview with Rabbi Carmel.
[531] Interview with Rabbi Mann.
[532] Interview with Rabbi Rechnitz.

5.2.3 *Zabla* in the Australian Context

5.2.3.1 Statutory Law

As in the USA and Israel, the CAAs provide a grounds for challenging arbitration on the basis of actual or apprehended bias.[533] An arbitrator is charged in the first instance to 'disclose any circumstances likely to give rise to justifiable doubts as to the person's impartiality or independence.'[534] A party to an arbitration may also challenge the arbitrator 'if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.'[535] The CAAs go on to limit the definition of impartiality to 'only if there is a real danger of bias on the part of the person in conducting the arbitration.'[536] At face value, unless expressly waived by the parties, the notion of a *borer* acting as an arbitrator would almost certainly give rise to 'justifiable doubts as to the person's impartiality or independence', or apprehended bias, offending the common law principle that 'justice must not only be done, but should be manifestly and undoubtedly seen to be done'.[537]

5.2.3.2 Case Law

The case law that has been generated in Australia, has brought to light the challenges of *zabla* in achieving the standard of impartiality required by arbitration law.[538] Both *Mond and Mond v Dayan Rabbi Isaac Dov Berger*[539] *('Mond v Berger')* and *Thaler v Amzalak (No 2)*[540] *('Thaler v Amzalak')* involved Battei Din set up using the *zabla* method, and in both cases the court found the *borerim* to be partial in favour of their appointees.

In *Mond v Berger*, Dodds-Streeton J summarised the submission of the defendants:

> "That the arbitral tribunal constituted a *zabla*, pursuant to Jewish law, in which a *borer* (the *dayan* appointed by one party) may advise and freely communicate with the appointor both prior to and during the Din Torah and may properly be 'partial' and act in the interests of the

[533] Actual bias is more difficult to make out, and normally challenges will be made based on apprehended bias; see Jones (n 182) [5.210].
[534] *Commercial Arbitration Act 2011* (Vic) s 12(1).
[535] Ibid s 12(3).
[536] Ibid s 12(5); this standard of a 'real danger of bias' provides arbitrators a higher threshold for impeachment than that which applies to judges, an accommodation which takes into account the reality of more frequent affiliation between parties and an arbitrator; see Jones (n 182) [5.210].
[537] *R v Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256, 259 (Lord Hewart CJ); cited in Jones, ibid.
[538] Both cases referred to occurred prior to the enactment of the CAAs, however the standard of impartiality has not changed significantly from the SUAs that preceded the CAAs where partiality was an element of 'misconduct' by which an award could be challenged; see Jones, ibid [5.190].
[539] *Mond and Mond v Dayan Rabbi Isaac Dov Berger* [2004] VSC 45.
[540] *Thaler v Amzalak* (No 2) [2013] NSWSC 632.

client both prior to and during the hearing, although he must ultimately decide the dispute honestly and in an unbiased way."[541]

She added that:

> "The fourth to twenty -fourth defendants allege that Rabbi Berger was their appointed *borer* and that according to Halacha, the *borer* may demonstrate partiality during the course of the arbitral hearing although he must be impartial in the determination of the dispute."[542]

Setting aside a *halakhic* analysis of the defendant's claims, which seem to rely on the bipartite interpretation of *zabla* promoted in the Jerusalem Talmud and does not factor the move away from this interpretation in the modern era,[543] it was found that the kinds of advocacy that occurred in *Mond v Berger* went far beyond what Victorian law could permit under arbitration law. Her Honour explained:

> "[I]f under Halacha, a *borer* may legitimately during the course of the hearing threaten his appointor's opponent with a particular adverse outcome (which the arbitral tribunal may have no jurisdiction to order) unless the party agreed to a proposed settlement, it would be a major divergence from the concepts of fairness and natural justice as understood under common law, and hence, the Act. Such conduct would violate the fundamental principles of natural justice. A Victorian Court would not enforce, or would set aside, on the ground of public policy, an award produced in such circumstances."[544]

A similar scenario occurred in *Thaler v Amzalak* whereby the *borer* for Mr Thaler was accused of partiality towards his appointee by Mr Amzalak. There was discussion as to whether Amzalak had waived his right to object, but evidence of waiver was missing from the transcript of the arbitration that was submitted to the court.[545] Schmidt J, found that '[t]he rules of natural justice require that an arbitrator must… be disinterested and unbiased,'[546] and that in the circumstances, communications shared between the *borer* and his appointee did not adhere 'to a requirement of impartiality, a requirement which must extend beyond the actual hearing.' Likewise, '[t]he transcript revealed that a similar lack of impartiality continued during the course of the hearing.'[547]

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[541] *Mond v Berger* (n 539) [117] (Dodds-Streeton J).
[542] Ibid [168].
[543] Dodds-Streeton J seems to have recognised this, commenting at ibid [235] 'I am far from persuaded that such conduct would accord with Halacha'.
[544] Ibid [234].
[545] *Thaler v Amzalak* (n 540) [110].
[546] Ibid [175].
[547] Ibid [199].

Like in *Mond v Berger*, an argument was presented that Jewish law permits partiality in *zabla*, captured in the cross-examination of the *borer* for Mr Thaler:

> "Q. One thing, sir, I suggest to you, you adopted a role in the arbitration as being some form of advocate for Mr Thaler?
>
> A. That's not exactly true because when we have the *zabla* every borer is supposed to make the maximum for his side. Even though we don't allow to do more, the law is allowed to do it, not advocate to him just a borer, not middle man. I was on his side because he appointed me. I am not his advocate. I told him also something is going to be against the law or something I am not advocating for you."[548]

Referring to this quote, Schmidt J concluded, 'that he was partial to Mr Thaler and acted in pursuit of that partiality at the Beth Din, cannot be doubted on his evidence'.[549]

5.2.3.3 Recommendations

Zabla is an inherently problematic practice. Regardless of whether it aspires to be an impartial quasi-judicial institution, without oversight it can and has been misused as a vehicle for judicial partiality and advocacy. Additionally, nothing prevents *borerim* from justifying their partiality with reference to *halakhic* sources that allow for judicial advocacy of party interests.

Much of the unfortunate reputation that Australian Battei Din have earned, is a product of *zabla* falling short of the common law standard of natural justice. This has reflected poorly on the general standard of justice under Jewish law, smearing the name of classic, non-*zabla*, Battei Din among those who are that is not aware of their differences.

While the BDA and Eretz Ḥemdah Gazit utilise *zabla* when pressed, it is recommended that Australian Battei Din refrain from utilising this method. Australian Battei Din have the task of proving themselves and solidifying their reputation as avenues that deliver justice for their litigants, including the implementation of a robust and carefully adhered to set of rules and procedures. Only under exceptional circumstances might *zabla* be utilised with careful administrative oversight, to ensure that it manifests the qualities of a body that promotes true, and impartial, justice.

5.3 *Dina Demalkhuta Dina*

A mechanism within Jewish law which provides a means for accommodating secular law is that of *dina demalkhuta dina* ('the law of the kingdom is law'). This principle is referenced on four occasions

[548] Ibid [204]; the wording is that of the verbatim transcript, quoted in the judgement.
[549] Ibid [205].

in the Babylonian Talmud, in the name of the first generation Amoraic sage, Samuel.[550] The Talmud is silent on the origins and justification for this undisputed principle, which has proven to be of immense significance to the adaptation of Jewish law over the millennia of Jewish dispersal under foreign rule, providing them what Leo Landman terms 'a *modus vivendi* in the exile'.[551]

At face-value, *dina demalkhuta dina* appears problematic in terms of its threat towards the integrity of the *halakhic* system. Several medieval scholars referenced this concern, none more forcefully than Rabbi Solomon ibn Aderet ('*Rashba'*) who wrote in a responsa dealing with an inheritance dispute in which Jewish law and foreign law were in conflict, and one party asserted *dina demalkhuta dina* as a basis for adopting at Jewish law the foreign law legal position:

> "one who relies on this to say that it is permitted on the basis of *dina demalkhuta [dina]* is mistaken and a thief, and must return the stolen item, for if one says such a thing… they have uprooted all of the Torah's laws, and what need do we have for our holy texts… we should teach our children the laws of the nations… far be it such a thing in Israel, Heaven forfend that the Torah should be garbed in sackcloth"[552]

In mitigating this concern, *halakhic* scholarship has been strongly divided, both in terms of the underlying justification for the principle, as well as with regards to its limitations. As will be demonstrated, while there are aspects of consensus, including certain base-line exceptions and inclusions which have achieved wide acceptance among *halakhic* decisors, there remains significant debate both with regards to its application as well as with regards to its underlying justification.

The flexibility that *dina demalkhuta dina* afforded the various Jewish communities over the past two millennia, has also been its shortcoming. As Kirschenbaum and Trafimow explain, '[t]he variegated conditions under which Jews lived, the vast geographic, social, and economic differences, render a unified theory governing *dina demalkhuta dina* and its application a well-nigh impossibility.'[553] Indeed, one of the greatest of *halakhic* authorities of the 20th Century describes 'the disorder

[550] See Babylonian Talmud, *Gittin* 10b; Babylonian Talmud, *Nedarim* 28a; Babylonian Talmud, *Bava Kama* 113a-b and Babylonian Talmud, *Bava Batra* 54b-55a.
[551] Leo Landman, *Jewish law in The Diaspora; Confrontation and Accommodation: A Study of the Development, Composition and Function of the Concept of Dina D'malkhuta Dina – the Law of the Kingdom (The State) Is the Law* (Philadelphia, 1968) 22.
[552] Rabbi Shlomo ibn Aderet, *Teshuvot HaRashba* 6:254 (translation is my own).
[553] Aaron Kirschenbaum and Jon Trafimow, 'The Sovereign Power of the State: A Proposed Theory of Accommodation in Jewish Law' (1990) 12 *Cardozo Law Review* 925, 932.

between the *halakhic* decisors and manifold contradictions' which riddle this topic, requiring 'much time and analysis, if G-d is to assist, in arriving at [accurate] *halakhic* conclusions'.[554]

Significant steps have been taken by modern scholars such as Leo Landman[555] and Shmuel Shiloh[556] to trace the *halakhic* and historical development of *dina demalkhuta dina*, as well by Rabbi David Shlomo Shor[557] to align the variety of viewpoints and demonstrate how contemporary *halakhic* authorities apply this principle today. Building upon their research, I will briefly lay out the various justifications for the principles as well as its significant exceptions, which will provide a basis for two approaches to *dina demalkhuta dina*, one of which provides fertile grounds for a better integration of Battei Din within the context of secular arbitration law.

5.3.1 Justifications for *Dina Demalkhuta Dina*

There appears to be no fixed tradition as to the *halakhic* basis for the principle that Samuel asserts in the Talmud that *dina demalkhuta dina*. In the literature of the five hundred years following the conclusion of the Talmud, known as the Geonic period, little was discussed of this principle, which can be attributed to the autonomy that the Jewish community was granted at the time in relation to foreign powers.[558] In the Middle Ages however, vibrant debate sprang up between European scholars as to the rationale behind Samuel's principle. From the fact that teachers and students were often in stark disagreement as to the justification for *dina demalkhuta dina*, Shiloh concludes that each scholar was attempting to rationalise what they understood to be the basis for Samuel's principle, rather than claiming a definitive oral tradition in relation to its origin.[559]

Broadly, the justifications for *dina demalkhuta dina* can be divided into two categories, those that see it as an expression of an indigenous *halakhic* notion and those who instead find its basis elsewhere.[560] Justifications that are rooted within a *halakhic* framework include the view of Rabbi Shlomo Yitzḥaki ('*Rashi*')and Rabbi Jacob Anatoli both of whom attribute its origins to the Noahide law incumbent on all of humanity to set up courts of justice.[561] This Noahide command effectively

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[554] Rabbi Moses Feinstein, *Igeret Moshe, Ḥoshen Mishpat* 1:72 referencing with approval the responsa of Rabbi Moses Teitelbaum of Ujhel (translation is my own).
[555] Landman (n 551).
[556] Shmuel Shiloh, '*Dina Demalkhuta Dina*' (PhD thesis, The Hebrew University, 1969) [Hebrew].
[557] David Shlomo Shor, *Dina Demalkhuta Dina* (Tzuf, 2017) [Hebrew].
[558] Landman (n 551) 26-34; Shiloh (n 556) 77.
[559] Shiloh, ibid 83.
[560] See ibid 78-97 where Shiloh employs this distinction.
[561] See commentary of Rabbi Shlomo Yitzḥaki (*Rashi*) to Babylonian Talmud, *Gittin* 9b s.v. *ḥutz m'gittei nashim* [Hebrew]. It is noteworthy that while Shiloh (n 556), Shor (n 557) and '*Dina Demalkhuta Dina*', *Encyclopedia Talmudit* (Yad HaRav Herzog, 1956) vol 7, 299 [Hebrew] interpret *Rashi*'s commentary in this way, Naḥum Rakover argues that *Rashi* is not attempting to provide a justification for *dina demalkhuta dina* in his commentary; see Naḥum Rakover, *Shilton Haḥok B'Yisrael* (Moreshet HaMishpat B'Yisrael, 1989) 66-68 <https://www.daat.ac.il/daat/vl/tohen.asp?id=414> [Hebrew]; Anatoli (n 141) 12b, 72a.

renders the system of laws of any nation as a fulfilment of a Torah command which is then embraced by Jewish law under the principle of *dina demalkhuta dina*. An alternate *halakhic* framework is employed by Rabbeinu Jacob Tam and Rabbeinu Jonah Gerondi, both of whom employ the notion of *hefker bet din hefker* (lit. 'that which is rendered ownerless by Beth Din is deemed ownerless') which they determine to be a power that is likewise granted to a foreign sovereign, or what the Jewish sages utilise in making effective the actions of a foreign sovereign.[562] These medieval scholars thus utilise pre-existing *halakhic* mechanisms to underpin the principle of *dina demalkhuta dina*.

Other scholars employ justifications that provide a novel rationale for the potency of the *dina demalkhuta dina* principle without connecting them to a pre-existing *halakhic* principles. Examples of these include the notion of the social contract advanced by Rabbi Samuel ben Meir ('*Rashbam'*) and Maimonides, which understands the principle as stemming from notion that citizens are deemed to have accepted the rules of their sovereign in exchange for the benefits of citizenship.[563] Others, such as Rabbeinu Yitzḥak, Naḥmanides and Rabbi Yom Tov of Seville ('*Ritva*') justify the principle based on the right of a king to act extra-judicially, which is derived according to one view in the Talmud,[564] from the events in I Samuel 8, whereby the prophet warns the Israelites of the arbitrary powers that a king would wield over them, in an attempt to discourage them from transitioning to a monarchy.[565] A further justification is provided by Rabbi Eliezer of Metz,[566] who asserts that due to the fact that the land belongs to the sovereign who is able to deport citizens if they so desire, the inhabitants are obligated to fulfil the laws of the sovereign as a condition of their subsistence on the land.

Building on Shiloh's division of the reasons behind *dina demalkhuta dina* into those that align with a pre-existing *halakhic* principle and those that require more creative justifications, it is proposed that this distinction reveals the underlying attitudes of the scholars towards this principle. Those for whom *dina demalkhuta dina* naturally segues within the pre-existing *halachic* framework might be

[562] The former understanding of the application of *hefker bet din hefker* to this context appears to be that of Rabbeinu Jonah Girondi in his commentary *Aliyot D'Rabbeinu Yona* to Babylonian Talmud, *Bava Batra* 55a; and the latter to be that of Rabbeinu Jacob Tam, *Teshuva* 12 in *Teshuvot M'Baalei HaTosefot* (Yeshiva University Press, 1954) 60 <https://hebrewbooks.org/1445>.
[563] See commentary of Rabbi Samuel ben Meir (*Rashbam*) to Babylonian Talmud, *Bava Batra* 54b s.v. v*eha'amar Shmuel;* Maimonides, *Mishneh Torah, Hilkhot Gezeila Ve'aveida* 5:18.
[564] See commentary of Rabbi Yom Tov of Seville, *Ḥiddushei HaRitva*, to Babylonian Talmud, *Bava Batra* 55a s.v. *hani telat milei* where he brings this view in the names of the aforementioned scholars. Interestingly, this view is brough in the name of the Talmudic scholar, Samuel, who is the source for the principle of *dina demalkhuta dina*; see Babylonian Talmud, *Sanhedrin* 20b.
[565] This section, known as *parashat hamelekh* was said in relation to a Jewish king, and as such its application to a non-Jewish sovereign requires *halakhic* creativity; see Shiloh (n 556) 82.
[566] Quoted by Rabbi Yitzchak ben Moshe of Vienna, *Or Zarua, Piskei Bava Kama* 3:447.

more embracing of the principle, as one that is in fact indigenous to Jewish law and thus acts to enhance and fully actualise it, while those for who see it as not native to *halakhah*, but rather a product of expedience and necessity – most starkly expressed in the view of Rabbi Eliezer of Metz who sees the adoption of foreign law as bulwark against eviction from the land[567] – will naturally view it with caution, attempting to limit its breadth as long as its proximate aims can still be achieved.

An example of such a divergence in attitude towards the principle of *dina demalkhuta dina* can be found by contrasting the sentiments of two medieval scholars, the *Rashba* and Rabbeinu Nissim of Girona ('*Ran*'). *Rashba*, who adopts a similar creative justification for *dina demalkhuta dina* to Rabbi Eliezer of Metz,[568] was previously quoted as highly critical of an expansive interpretation of the doctrine, lest 'the Torah should be garbed in sackcloth'. In striking contrast to these sentiments, Ran, a Spanish scholar in the century following *Rashba*, wrote a remarkable essay reflecting on the symbiotic relationship between Jewish law and foreign law, in which the latter is said to complement the former and fulfil an important function within Jewish law:

> "[I]n light of the fact that our Torah is distinguished from the ethical codes of the nations by *mitzvot* and *ḥukim* [statutes], it follows that these *mitzvot* and *ḥukim* have nothing whatsoever to do with societal structure at all, but that their sole purpose is to effect the investiture of the Divine Immanence within our nation and to cause it to cleave to us…. And our holy Torah is herein distinguished from the ethical codes of the nations, which have nothing to do with such things, but only with the regulation of society.
>
> Therefore, I hold (and it should, indeed, be believed) that just as the statutes do not enter at all into the societal area but are exclusively confined to the investiture of the Divine Immanence — in like manner, the judgements [*mishpatim*] of the Torah enter, to a great extent, into this last area, so that they are divided, as it were, between effecting the investiture of the Divine Immanence among us and furthering the societal common good. And it is possible that they are more greatly oriented to the more sublime area than they are to the ordering of society, for this last function is completed by the king that we appoint over us… *It is therefore possible that some of the judgements and laws of the nations will be*

[567] This is also the case in the more 'palatable' social contract whereby the citizens are giving up on their ability to fully self-govern based on Jewish law for the benefits of being under the sovereign, and is certainly the case for those who derive it from *parashat hamelekh* in which the kings laws are painted as oppressive.
[568] *Rashba* argues that by dint of the king's conquest, he 'owns' the bodies of all of his subjects and as such they must act in accordance with his will; see commentary of *Rashba* to Babylonian Talmud, *Yevamot* 46a s.v. *veyehavei zuzi*.

found more effective in furthering societal order than some of the laws of the Torah."[569] (emphasis added)

These contrasting viewpoints reflect a fundamental difference of opinion with regards to the posture that Jewish law assumes towards foreign law. The school of thought that *Rashba* adopts appears to view the adoption of foreign law under the rubric of *dina demalkhuta dina* as a necessary evil, which is to be viewed with caution and applied only to the extent necessary, while the school of thought that *Ran* represents, views foreign law as playing a vital function in ensuring that Jewish law not only achieves its spiritual aims but also provides an effective framework to ensure societal order.[570]

Recent academic commentary that has attempted a comparative law analysis on the doctrine of *dina demalkhuta dina* likewise illuminates these latent approaches to the doctrine. In a fascinating article, Kirschenbaum and Trafimow compare *dina demalkhuta dina* to the secular notion of conflicts of laws. Citing various approaches to dealing with conflicts of laws in the American context, they demonstrate that Professor William Baxter's method of interest analysis in which the legal system that is more invested in the outcome of the case wins out, provides a good basis for understanding in which circumstances either foreign or Jewish law will give way to the other under the rubric of *dina demalkhuta dina*.[571] In response to this piece, Chaim Povarsky argues against the notion of comparing *dina demalkhuta dina* to conflicts of laws, insofar as Baxter's interest analysis relies on 'roughly equal bargaining power' between the two systems, which Jewish law fundamentally

[569] Rabbeinu Nissim of Gerona, *Derashot HaRan*, Chapter 11 (translation from sefaria.org); a similar sentiment is shared by Rabbi Ḥaim Ibn Atar where he explains the reason for why the Torah records that a non-Jew, Jethro, advised Moses on an element of the proper administration of justice: 'G-d wanted to show the Jewish people already at that time and for all future generations that there are great and intelligent men to be found amongst the nations of the world. [Jethro] was an example of an enlightened Gentile who demonstrated this point beyond question'; see his commentary *Ohr HaḤaim* to Exodus 21:18 (translation from sefaria.org); this point is elaborated upon by Rabbi Nathan Lopez Cardozo, 'Parshat Yitro: Racism and the Wisdom of a Gentile' (Web article) <https://www.cardozoacademy.org/thoughtstoponder/parashat-yitro-gentile-wisdom/>.

[570] Notwithstanding *Ran*'s embracing attitude towards *dina demalkhuta dina*, in his commentary to Babylonian Talmud, *Nedarim* 28a, s.v. *bemokhes ha'omed me'eilav* he attributes to *Tosefot* the justification for the principle referred to previously in the name of Rabbi Eliezer of Metz i.e. 'since the land is his and he can say that if one doesn't obey his command, he will expel them from the land' (translation from sefaria.org). This could be explained in a number of ways:

(i) *Ran* is bringing a viewpoint that he does not necessarily agree with; or

(ii) *Ran* agrees with this view in relation to the sovereign's taxation system (which is the subject of discussion in section of Talmud that he is commenting on) which fulfils only the expedient aspect of *dina demalkhuta dina* but sees in a more positive light the foreign law aspects that pertain to societal order; or

(iii) that irrespective of the justifications posited for *dina demalkhuta dina* there remains the capacity to view it in either a more narrow (i.e. expedient) or broader (i.e. embracing) manner.

[571] Kirschenbaum and Trafimow (n 553).

eschews insofar as it views itself as a Divine legal system which is superior to State law.[572] Rather Povarsky settles on a comparing *dina demalkhuta dina* to an element of constitutional law – similar to the way in one legal system may enshrine another legal system into its constitution as the go-to place for deriving law in the case of lacunae, so does Jewish law utilise foreign law to fill certain gaps.[573] According to this comparison, *dina demalkhuta dina* is not a principle which assists in navigating a collision of legal systems, but rather a doctrine of accommodation whereby 'the integrity of Jewish law is… preserved even while state law is being applied.'[574]

The approach taken by Kirschenbaum and Trafimow can be aligned with that of *Rashba*, and that taken by Povarsky with *Ran*. These contemporary scholars, wittingly or not, seem to be debating the fundamental attitude that *dina demalkhuta dina* prescribes towards foreign law – be it with the caution afforded to a foreign legal system in a conflicts of laws scenario, or with the embrace afforded to a complementary arm of Jewish law as would be the case where foreign law is constitutionally imported to fill lacunae. As will be discussed below, these attitudes would likely dictate the breadth provided to the doctrine of *dina demalkhuta dina* and it is the more embracing view that underpins best practice Battei Din in both America and Israel.

5.3.2 The Scope of *Dina Demalkhuta Dina*

As discussed, the principle of *dina demalkhuta dina* seems at face value to render all Jewish law null and void in circumstances where a Jewish community lives under foreign rule. Such a position has not been adopted historically, and there have been a range of limitations advanced with regards to the scope of the doctrine, some of which enjoy a full consensus of *halakhic* authorities and others which are the subject of debate.

First and foremost, the principle of *dina demalkhuta dina* applies only to areas of commercial law (*mamona*) and not to ritual law (*issura*). This distinction was seen as so obvious to the medieval scholars that it was barely mentioned.[575] All the references to *dina demalkhuta dina* in the Talmud are in the context of *mamona*[576] and there is no dissenting opinion on Maimonides' assertion that

[572] Chaim Povarsky, 'Jewish law v. the Law of the State: Theories of Accommodation' (1990) 12 *Cardozo Law Review* 941.
[573] 'For instance, in the State of Israel until 1980, the law provided that in the case of *lacuna,* English common law and equity principles should apply'; ibid 945.
[574] Ibid 950.
[575] Shiloh (n 556) 113.
[576] In fact, it is almost explicit in the Babylonian Talmud, *Gittin* 10b which distinguishes between documents of sale or gifts produced by non-Jewish courts which are binding and documents of divorce or release of slaves which are not binding. The obvious difference between these categories is that the former pertains to *mamona* – and thus *dina demalkhuta dina* applies – while the latter includes aspects of *issura* – and as such *dina demalkhuta dina* does not apply.

'we rule according to all the *financial laws* of the governing sovereign' (emphasis added).[577] As such, foreign law impositions that interfere with ritual religious performance are not given any credence by Jewish law.[578] Included under the umbrella of ritual law to which *dina demalkhuta dina* does not apply, are the laws that exist within the realm of prohibitions (*issura*) but also some that pertain to commercial matters (*mamona*) such as the prohibition of lending with interest between Jews, the laws of inheritance and the laws pertaining to ruinous competition.[579]

Other limitations upon *dina demalkhuta dina* have received differing levels of consensus among *halakhic* authorities. With few exceptions, one such limitation that has achieved a broad consensus is that it only applies to laws that are equally mandated upon all subjects of the king. Laws that are applied in an unequal manner upon subjects are deemed not to be *dina demalkhuta* (laws of the sovereign) insofar as they don't apply to the entire kingdom (*malkhuta*) and thus are not mandated under the doctrine.[580] Similarly, there are a majority of scholars who limit the principal to well-established laws and not to new edicts that a king enacts.[581] Again, this limitation is derived from the use of the word *malkhuta* (kngdom) and not *malkah* (king) meaning that an enactment must be entrenched in the laws of the kingdom and not just in the will of a particular monarch.[582]

Further limitations adopted by certain scholars are that *dina demalkhuta dina* applies only to those laws from which the king does not permit his subjects to derogate. Shiloh explains that in Middle Ages, there was a wealth of customary law that did not have statutory weight and judges had significant discretion in their application.[583] Further narrowing the doctrine, there are those who

[577] Maimonides, *Mishneh Torah, Hilkhot Zekhiya U'Matanah* 1:15 (translation from sefaria.org).
[578] Notwithstanding this, reformist elements within the 19th Century Jewish community justified the desecration of the Sabbath based on *dina demalkhuta dina*. The misapplication of the doctrine was protested by the Chief Rabbi of Dresden; see Landman (n 551) 143.
[579] Re laws of inheritance and *dina demalkhuta dina* see Herschel Schachter, 'Dina De'malchusa Dina: Secular Laws as a Religious Obligation' in Alfred S Cohen (ed) *Halacha and Contemporary Society* (Ktav Publishing House, 1984) 110-114; regarding laws pertaining to ruinous competition see Aaron Levine, *Free Enterprise and Jewish law* (Ktav Publishing House, 1980) 24-32.
[580] See discussion in Shiloh (n 556) 109-112; despite this being a consensus view, over the exilic period *halakhic* authorities have refrained from writing that their communities need not pay unfair taxes meted out to them by anti-Semitic sovereign powers, likely as a result of the consequences they would face as a result, and have even justified it where the extra tax has been evenly placed upon all Jews. An example of such an exception is also quoted in Landman (n 551) 50.
[581] While most medieval scholars take this view, the works of two significant *halakhic* authorities (Rabbeinu Asher ben Yeḥiel and Maimonides) infer a position contrary of the majority view, which resulted in this exception not being included in the *Shulḥan Arukh*; see Shiloh (n 556) 140.
[582] Shiloh provides some fascinating analysis on this exception, basing the idea of 'old' and 'new' law on the conception of law in the Middle Ages as only being 'good' if it were 'old' insofar as law was seen as always having existed and law-making was the process of its 'discovery'. As such any 'new' law was by definition not law at all unless it proved itself to be good, and in that case it was then rendered as 'old' law; see Shiloh, ibid 141.
[583] See ibid 129-130.

exclude any law that does not provide a direct benefit to the king, essentially excluding all interpersonal law between citizens from the ambit of *dina demalkhuta dina*.[584] One scholar even limits its application to only cover laws that directly pertain to land.[585] While there are further limitations derived by various scholars, the above serves as a brief summary of the main limitations – some of which are strongly contested – of the principle of *dina demalkhuta dina* in the Diaspora.[586]

In the context of the modern democracy where the government structure includes officials elected by the public, and not a 'sovereign' in the historical sense of the term, the consensus among *halakhic* authorities is that *dina demalkhuta dina* remains in force.[587] In terms of the limitations on the doctrine, the majority *halakhic* view of contemporary decisors is that *dina demalkhuta dina* applies to all laws in which there is a public policy interest in their being upheld, such as laws pertaining to labour, unfair dismissal, severance compensation, mandatory pension, tenant protection and copyright.[588]

5.3.3 *Minhag Hamedinah* and *Minhag Hasoḥerim*

A discussion concerning *dina demalkhuta dina* is incomplete without reference to the separate, although complementary principles of *minhag hamedinah* (custom of the region) and *minhag hasoḥerim* (commercial custom, also referred to as *situmta*).[589] These terms are used to refer to the *halakhic* recognition of marketplace norms of a particular region. *Minhag hamedinah* is used to describe wide ranging norms that can override *halakhah* in matters of *mamona*, including the

[584] Ibid 115-129.
[585] Ibid 108-109.
[586] The application of *dina demalkhuta dina* in Israel is also contested, with many ultra-Orthodox Battei Din in Israel ruling in accordance with the view that it does not apply; see Ron Kleinman, 'The Interplay between Halakhah and Ideology: Characteristics of Rulings of Israeli Ḥaredi (Ultra-Orthodox) Rabbinical Judges in Monetary Disputes' (2018) 1 *Mishpat Ḥevra v'Tarbut* 107 <https://ssrn.com/abstract=3665969>.
[587] Shor (n 557) 375-380.
[588] Ibid 198-200; while this is a majority view, that does not make it binding on the contemporary *dayan* who may align themselves with elements of the minority who defend their positions on the basis of the various limitations to *dina demalkhuta dina* expounded by the medieval scholars.
[589] There is one view among the medieval scholars who appears to advance a justification for *dina demalkhuta dina* based on it being a form of marketplace custom; see Rabbeinu Jonah Girondi in his commentary *Aliyot D'Rabbeinu Yona* to Babylonian Talmud, *Bava Batra* 55a s.v. *v'arisa d'parsa'I.* Shiloh (n 556) 85 challenges this position on the basis that these are two distinct areas of *halakhah* and attempts to resolve this by arguing from the language of Rabbeinu Jonah that he is simply comparing the two and not making on the basis of the other. However from a close reading of the text reveals that Rabbeinu Jonah is using the notion of *minhag* to explain how *dina demalkhuta dina* can affect an acquisition, which is not prima facie something that can be achieved by the doctrine of *hefker bet din hefker* which is the justification he advances for it, as it only removes ownership, and does not effect it. It is in resolving this issue that he brings the notion of *minhag* which can effect acquisition (see Babylonian Talmud, *Bava Metzia* 74b) with which *dina demalkhuta dina* shares sufficient similarities. This reading of Rabbeinu Jonah is also evident in '*Dina Demalkhuta Dina*', *Encyclopedia Talmudit* (Yad HaRav Herzog, 1956) vol 7, 299 [Hebrew].

determination of employee rights,[590] the meaning of terms in a contract,[591] and terms of a rental arrangement.[592] *Minhag hasoḥerim* refers to various forms of acquisition such as a handshake, the signing of a contract or the handing over of keys to a car or house, which although not indigenous to *halakhah,* are nonetheless adopted as binding forms of transfer on the basis that they represent a meeting of the minds between commercial transactors or a mutually agreed deviation from *halakhah* which is permitted in matters of *mamona*.[593]

Unlike *dina demalkhuta dina* which is enacted 'top-down' by the sovereign or legislature, *minhag hamedinah* and *minhag hasoḥerim* are determined 'bottom-up' by what people do in-fact, and what conventions they adopt in their interactions. Interestingly, *minhag hasoḥerim* and *minhag hamedinah* have a broad utility in the Beth Din context, insofar as they are subject to fewer limitations than *dina demalkhuta dina* and form a less controversial area of Jewish law.[594]

A significant example of where *minhag hamedinah* or *minhag hasoḥerim* act to import foreign law into Jewish law where *dina demalkhuta dina* does not, is in the State of Israel. While there are conflicting views as to whether *dina demalkhuta dina* applies within the State of Israel,[595] even those who take the view that it does not apply, will nonetheless take into consideration any laws that have become normative in the citizen's commercial customs.[596] Additionally, those who posit that *dina demalkhuta dina* does not apply to interpersonal laws between citizens unless they directly benefit the sovereign, or other such limitations which prevent certain laws from being *halakhically* valid under that doctrine, will nonetheless incorporate into Jewish law any aspects of *minhag hamedinah* or *minhag hasoḥerim* that have become mainstream in commercial interactions between citizens.[597]

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[590] *Mishnah, Bava Metzia* 7:1.
[591] Maimonides, *Mishneh Torah, Hilkhot Mekhira* 26:8.
[592] *Shulḥan Arukh, Ḥoshen Mishpat* 308:3.
[593] These and other justifications for the effectiveness of *minhag hasoḥerim* are discussed in '*Situmta'*, *Encyclopedia Talmudit* (Web resource) <https://www.yeshiva.org.il/wiki/index.php/%D7%90%D7%A0%D7%A6%D7%99%D7%A7%D7%9C%D7%95%D7%A4%D7%93%D7%99%D7%94_%D7%AA%D7%9C%D7%9E%D7%95%D7%93%D7%99%D7%AA:%D7%A1%D7%99%D7%98%D7%95%D7%9E%D7%AA%D7%90> [Hebrew].
[594] For an understanding of *minhag hasoḥerim* and its application in the contemporary Beth Din, see Rabbi Itamar Rosenzweig, 'Minhag Ha-Sochrim: Jewish law's Incorporation of Mercantile Custom and Marketplace Norms' (Web article, 30 November 2022) <https://bethdin.org/minhag-ha-sochrim-jewish-laws-incorporation-of-mercantile-custom-and-marketplace-norms>.
[595] Due to the notion at Jewish law that irrespective of the sovereign, the Jewish *people* have a Divine right to the land; see discussion in Shiloh (n 556) 102-107.
[596] See Ron Kleinman (n 586)124.
[597] Ibid.

5.3.4 Application to Commercial Battei Din Operating under Arbitration Law

The overview of the doctrine of *dina demalkhuta dina* outlined above provides the context for understanding how a Beth Din operating under secular arbitration laws might accommodate the expectations of that legal framework. Considering the preceding discussion, one can gain insight into how a Beth Din will use Jewish law principles to approach aspects of arbitration law that aim to protect public interest, the role of secular legal counsel as well as honouring the litigants' choice of law for the arbitration.

As discussed, even a narrow approach to *dina demalkhuta dina* would require Jewish law to adopt any foreign law elements that are for the benefit of the sovereign. In the democratic setting, where the sovereign is the representative of the citizens, most *halakhic* authorities are of the view that this would translate to the adoption at Jewish law of any laws that have as their aim the protection of public interest.[598] A grounds for setting aside an award under the *Commercial Arbitration Act 2011* (Vic) is where an 'award is in conflict with the public policy of this State.'[599] While arguments have been made in the US context that such a provision limits religious freedom,[600] it would appear from the discussion above that this grounds is not in conflict with Jewish law, which via the *dina demalkhuta dina* principle requires adherence to any legislation in the realm of *mamona* that is designed to protect the public interest.

Moreover, even were one to adopt a narrow conception of *dina demalkhuta dina* it is evident that a *dayan* of a Beth Din operating in a secular law context, would be required to understand the relevant secular law which must be applied. Besides for laws that act to protect public interest, this would also include a large swathe of laws that have filtered into commercial practice and are thus *halakhically* binding under the rubrics of *minhag hamedinah* and *minhag hasoḥerim*. As is evident from the research into best practice Battei Din in the USA and Israel, incorporating lawyers or subject matter experts into the Beth Din panel or consulting extensively with legal counsel is crucial, not only in ensuring that the procedural aspects of the arbitration are in accordance with the secular law, but also in ensuring that the substantive Jewish law is applied correctly in terms of the application of relevant elements of secular law and commercial custom.

Emerging from the analysis of the justifications behind *dina demalkhuta dina*, it was noted that there one can impute two schools of thought with regards to this doctrine: one which views the adoption of foreign law into Jewish law narrowly such as in the context of 'conflict of laws' and another which

[598] See (n 588).
[599] *Commercial Arbitration Act 2011* (Vic) s 34(2)(b)(ii).
[600] See Helfand (n 193).

takes on a broader approach, viewing the relationship between the legal systems as symbiotic, akin to the a constitutional provision to import foreign law to fill lacunae. While each approach is *halakhically* legitimate, and a given Beth Din can select their preferred perspective on the doctrine, it is noteworthy that the best practice Battei Din that were examined as part of this research all evidenced a more expansive approach to the doctrine.

An example of such difference of opinion in the application of *dina demalkhuta dina* between Battei Din was referenced by the *Av Beth Din* of the BDA who described a case prior his joining the BDA when he sat on a panel together with *dayanim* from the ultra-Orthodox community, and a disagreement arose in relation to the adoption of secular law:

> "[T]he parties agreed to have their case… heard by our Beth Din, but applying Ohio law – I think it was Ohio. A case came to the Beth Din and one of the [ultra-Orthodox] judges felt 'I don't do that, can't do it' whereas we felt that you can do it and you should do it, maybe you should do it even if they didn't write it in because if that's the meeting of the minds…"[601]

In the context of this dispute, the *Av Beth Din* recounted the challenge posed to him by his fellow *dayanim,* and his response:

> "[I]f you are right, we should go to law school, why should we go to Yeshiva? So, I said no, you have to go to Yeshiva, and you have to know what the law is anyway because the law is relevant. They didn't accept my argument, that's one of the reasons I got involved in [the BDA] – they did accept my argument."

While the argument made in this case for the inclusion of secular law was based on *minhag hamedinah* which is underpinned by the 'meeting of the minds', rather than *dina demalkhuta dina*, it nonetheless reflects divergent *halakhic* positions in terms of their adopting a narrow/cautious or broad/embracing approach to Jewish law principles relating to the adoption of secular law.

Likewise, Eretz Ḥemdah Gazit, in contrast to many ultra-Orthodox Battei Din in Israel, adopts an expansive view on *dina demalkhuta dina*, asserting its application to the laws of the State of Israel.[602] As an example, their director explained that:

[601] Interview with Rabbi Willig.
[602] See Eretz Ḥemda Gazit website, '*Ma'amadam Shel Ḥukei Hamedina'* [Standing of State Law] <https://www.beitdin.org.il/assets/files/85701594649181.pdf> [Hebrew].

> "in Eretz Ḥemdah we rule according to the labour law of Israel, because we believe it's right. I know that if I will not rule according to the labour law they will turn over the ruling. But the thing that my *dayanim* believe, really believe, [is] that the labour law is *dina demalkhuta*."[603]

Given the debate within *halakhic* authorities on this topic, Eretz Ḥemdah Gazit publishes their approach to *dina demalkhuta dina* on their website, alongside their other *halakhic* policies, to enable potential litigants to have some certainty as to the position taken on this matter by the Beth Din and so that they can order their affairs accordingly.[604]

As mentioned above in relation to the BDA, choice of law is an important aspect of arbitration and is a factor in why people choose arbitration over mediation.[605] Given the complexity inherent in the principles of *dina demalkhuta dina*, *minhag hamedinah* and *minhag hasoḥerim* and the lack of communal awareness as to the fact that Jewish law may adopt aspects of secular law, providing potential litigants with guidance in this regard would likely alleviate concerns and uncertainty. An example of such communal education is apparent on the cRc Beth Din website, where under its 'Din Torah FAQ' page it explains:

> "In deciding a dispute arising under a contract that contains a "choice of law" provision, the Beth Din will respect that provision and apply secular law, except to the extent it runs afoul of a specific Jewish law prohibition (such as the collection of prohibited forms of interest). Even without a written choice of law provision, the Beth Din will apply secular law if it is clear, based on the circumstances and the context of their business dealings, that the parties intended for their transactions to be governed by secular law."[606]

In addition to making clear to potential litigants that secular law will be factored into its decisions, it is noteworthy that it highlights that this will only apply to *mamona* aspects of a case, and as such the collection of interest, which is under the rubric of *issura*, will be determined using exclusively Jewish law principles.

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[603] Interview with Rabbi Rechnitz.
[604] Ibid; their policies can be found on the Eretz Ḥemdah Gazit website, *Mediniyot Hilkhatit Eretz Ḥemdah Gazit* [Eretz Ḥemdah Gazit Halakhic Policies] <https://www.beitdin.org.il/Halacha_policy> [Hebrew].
[605] See Cindy Buys, 'The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration' (2005) 79 *St Johns Law Review* 59.
[606] cRc Beth Din website, *Din Torah – Halachic Arbitration* <https://crcbethdin.org/din-torah/faq/>.

5.4 REASONED JUDGEMENTS

The CAAs require an arbitrator to provide reasoning for their award in written form.[607] This section will outline the general Talmudic position that *dayanim* of a Beth Din need not provide reasoning for their decision and the exceptions to this rule. Post-Talmudic approaches to this aspect of Beth Din procedure will be discussed as will its application to State Rabbinical Courts in Israel. This will provide context to the research conducted into the provision of reasoned judgements in best practice Battei Din acting as arbitration in both the USA and Israel and lead to recommendations for the Australian context.

5.4.1 Reasoned Judgements: from the Talmud to the Modern State of Israel

The *Mishnah* in *Sanhedrin* describes the process by which litigating parties are informed of the verdict of a Beth Din:

> "[After the judges] finish the matter [and reach a decision,] they bring in [the litigants.] The greatest of the judges says: So-and-so, you are exempt [from paying; or:] So-and-so, you are liable [to pay.]"[608]

The brevity by which the final decision is conveyed to the litigants, reflects the reality which pervades the accounts of Beth Din decisions that are mentioned in the Talmud, whereby a final ruling, is provided to the parties in dispute without any reasoning.[609]

Two exceptions are discussed in the Talmud in which a litigant has the right to request the reasons for the decisions of the Beth Din. One, mentioned in *Sanhedrin* 31b is a circumstance whereby the litigants are in conflict regarding which Beth Din to attend:

> "One says: Let us go to court here, and one says: Let us go to the place of the Assembly,[610] [the latter litigant] is compelled to [appear and] be judged [in a court that presides] in his [own] city… And if [one of the litigants] says [to the court:] Write for what reason you judged me [in this manner] and give [it] to me, [the judges] write [it] and give [it] to him."[611]

The other exception is referred to in the Babylonian Talmud where Rav Pappa sat in judgement of two business partners, who over the course of several years had brought for his adjudication two

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[607] *Commercial Arbitration Act 2011* (Vic) s 31.
[608] *Mishnah*, *Sanhedrin* 3:7 (translation and elucidation from sefaria.org).
[609] See Eliav Shoḥetman, *Ḥovat haHanmakah b'Mishpat haIvri* [The duty to provide reasons at Jewish Law] (1980) 6-7 *Shenaton haMishpat haIvri* 319, 327-329 [Hebrew] where he brings a variety of instances from the Talmud which evidence this fact.
[610] This refers to a place where more Torah scholars are available; see commentary of Rabbi Shlomo Yitzḥaki (*Rashi*) to Babylonian Talmud, *Sanhedrin* 31a s.v. *hatokef et ḥaveiro badin*.
[611] Babylonian Talmud, *Sanhedrin* 31b (translation and elucidation from sefaria.org).

cases which ostensibly shared the same facts but received inconsistent rulings. The losing party in both instances felt that he had been the victim of injustice and turned to Rav Pappa stating 'I see that the Master pursues me [in order to harass me, since last year, when we came with what appears to be essentially the same case, you gave a different ruling in favour of the other.]'[612] Rav Pappa responded that '[in] a case like this [it is] certainly necessary to inform [the litigant of the reasons for the decision. Although a judge is not always obligated to explain the reasons for his decision to the litigants, in a case like this, where there is room for suspicion, he must.]'[613]

It emerges that, while a Beth Din judge generally need not provide reasons for their decisions, in instances where there is compulsion to attend the Beth Din (as was the case in *Sanhedrin* 31b) or where there is cause to suspect a judge of mishandling a case (as occurred in *Bava Metzia* 61a-b) the litigants request for a reasoned judgement must be honoured.

Later scholars interpret these exceptions to the general rule that reasons need not be provided by a Beth Din in ways that alternatively expand or narrow their application.[614] For example, Naḥmanides limits the duty to provide reasons to cases where there is cause for suspicion. However, where litigants are compelled to attend the Beth Din, he writes that the judges:

> 'do not write [the reasons] why they were found liable, rather they write that such-and-such was claimed, and such-and-such was said in response [to the claim] and that they were found liable for such-and-such [an amount]. [From this information] the Torah scholars in the place of Assembly will know if they were correctly found to be liable or not. The reasons for the ruling are not written.'[615]

Other commentaries limit the ability to request a written judgement in circumstances where a litigant is forced to attend a Beth Din to instances where there is a place of Assembly, i.e. a recognised Beth Din that is superior to the one before which the case was litigated.[616] Likewise, in defining what constitutes sufficient cause for suspicion that warrants a reasoned judgement, scholars distinguish between legitimate causes for suspicion and instances where a litigant is

[612] Babylonian Talmud, *Bava Metzia* 61a (translation and elucidation from sefaria.org).
[613] Babylonian Talmud, *Bava Metzia* 61b (translation and elucidation from sefaria.org).
[614] A broad range of commentaries on these Talmudic passages are collated in Shoḥetman (n 609) 333-337.
[615] Naḥmanides commentary to Babylonian Talmud, *Bava Metzia* 61b (translation is my own); see also Rabbi Josef ibn Ḥaviva's commentary *Nimukei Yosef* to Babylonian Talmud, *Sanhedrin* 10a (according to the pagination of the *Rif*).
[616] Commentary of Rabbeinu Nissim of Gerona (*Ran*) to Babylonian Talmud, *Sanhedrin* 31b.

attempting to mock or undermine a judge by questioning the verdict, in which case reasons need not be provided.[617]

Those who take a more expansive view with regards to the circumstances for which reasons need to be provided by judges, include *Tosefot* who state that where there is cause for suspicion even where a litigant does not ask for a reason, the judge must proactively provide them with a reasoned judgement.[618] Additionally, the definition of what constitutes the coercion of a litigants to attend a Beth Din, which gives rise to a duty to provide reasoning, is extended to include any circumstance whereby a party needs to be summoned to the Beth Din.[619] The verse 'you shall be clear before G-d and before Israel'[620] as well as the Jewish law principle that one may force compliance where an action that benefits another results in no loss to the actor,[621] underpin the viewpoints that broaden the duty of judges to provide reasons for their decisions. In this vein, *halakhic* authorities advocate that a *dayan* must provide reasoning for all decisions they render, with some going so far as to say that the very declination to provide reasoning when requested, is itself a cause for suspicion.[622]

The *Takanot HaDiyun b'Battei HaDin HaRabani'im b'Yisrael* 5753-1993 ('*Takanot HaDiyun')* which govern the operation of State Rabbinical courts in the Modern State of Israel mandates that reasons be provided for their decisions.[623] This provision has featured in the *Takanot HaDiyun* from its inception in 1943 and appears to have been an ancillary component to the requirement to establish a court of appeals placed upon the Rabbinate by the British who governed Mandatory Palestine.[624] The Sephardi chief rabbi at the time, Rabbi Ben Zion Meir Ḥai Uziel presented the rationale for mandating the provision of reasoned judgements on the basis that the *halakhic* baseline of not requiring the provision of reasoning was designed to protect *dayanim* from vexatious litigants who

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[617] Rabbi Josef ibn Ḥaviva's commentary *Nimukei Yosef* to Babylonian Talmud, *Sanhedrin* 40b (according to the pagination of the *Rif*); Rabbi Moses Sofer, Responsa *Ḥatam Sofer, Ḥoshen Mishpat* 12 goes further, arguing that a litigant may never question a judgement on the basis of suspicion, rather it is for the judge to determine where there may be cause for suspicion and decide when it is appropriate to present his reasoning.

[618] Commentary of *Tosefot* to Babylonian Talmud, *Sanhedrin* 31a s.v. *v'im amar kitvu*; this is brought as the *halakhah* in *Shulḥan Arukh, Ḥoshen Mishpat* 14:4.

[619] Rabbi Yeḥezkel Landau, Responsa *Nodah b'Yehudah, Mahadura Tinyana*, *Ḥoshen Mishpat* 1.

[620] Numbers 32:22; this verse is brought in the commentary of *Tosefot* (n 618) as the rationale for providing reasons where there is a cause.

[621] *'Kofin al Midat Sedom', Encyclopedia Talmudit* (Yad HaRav Herzog, 2006) vol 27, 527 [Hebrew]; see Rabbi Josef Karo, Responsa *Avkat Rukhel* 18 where this is brought as an argument to mandate that a *dayan* provide the parties with a reasoned decision.

[622] Rabbi Yeḥezkel Landau (n 619); see further references in Shoḥetman (n 609) 337.

[623] *Takanot HaDiyun* s 115 requires that every decision includes:

(i) a summary of the claims of each party;
(ii) a statement of the pertinent facts; and
(iii) the reasons for the decision;

s 116 provides that where parties waive their right to appeal, the Beth Din may issue a decision without providing their reasoning.

[624] Shoḥetman (n 609) 352-359; see further discussion in Part 6.5.

sought to harass judges who had ruled against them. However, despite this, a *dayan* retains the *moral obligation* to provide reasoning, notwithstanding the inability of a litigant to demand it of them. Moreover, Rabbi Uziel notes that the secular milieu in which reasoned judgements are the norm has brought about a greater desire for transparent justice, which should not be denied to those who are judged by Jewish law. Additionally, he refers to the necessity of reasoned judgements where there is an appellate system, as well as the function they play in disseminating Torah law.[625] Despite the *Takanot HaDiyun*, there are still instances in which district Battei Din fail to provide the reasoning for their decisions, and the Bet Din HaGadol has railed against these omissions where they have become apparent on appeal.[626]

5.4.2 Reasons for Providing Reasons

The provision of reasons for judicial decisions serves important functions.[627] By mandating a written judgement, a judge is forced to prove that their decision is well-founded in law. In turn, it provides grounds by which the judgement of a lower court can be reviewed on appeal. Further, it ensures that not only justice is done, but also that it is seen to be done, insofar as the litigants feel that their claims have been given due consideration. In addition, in certain legal systems such as common law,[628] case law acts to fill lacunae in the law, providing either influential or binding precedents for other courts and jurisdictions.

Taking these rationales into account, one can understand why Jewish law has not historically mandated the writing of reasoned decisions except for where a party is coerced into attending a second tier Beth Din, or where there is a cause for suspicion.

As discussed previously, Jewish law provides judges with greater discretion in their determination of matters pertaining to *mamona*, viewing the law as emerging from a composite of inspired texts and inspired people.[629] This notion mitigates against the need for a written judgement that is designed to either promote the judgement as well-founded in law or to allow for its appeal, both of which presume the notion of the exclusive Rule of Law, which is not the case in Jewish law jurisprudence.

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[625] Rabbi Ben Zion Meir Ḥai Uziel, Responsa *Mishpetei Uziel*, *Ḥoshen Mishpat* 4:1 s 13.
[626] Examples of this are referenced in Shoḥetman (n 609) 371-372; and in Zvi Yehudah Ben-Yaakov, *Ḥovat HaHanmakah Shel Piskei Din* [The obligation to provide reasoning for Beth Din decisions] (1999) 19 *Teḥumin* 223, 232-233 [Hebrew].
[627] The rationale for providing reasoned judgements outlined here are found in Shoḥetman, Ibid 321-322.
[628] See Elon et al, *Jewish law (Mishpat Ivri)* (n 166) 94 '[t]he common law has gone further than any other legal system in recognizing case law as binding precedent.'
[629] See Part 2.2.7.

Additionally, in Jewish law, precedent does not attract the same level of influence as it does under common law and there is no doctrine of *stare decisis*.[630] This aligns with the Talmudic dictum that 'a judge has only what his eyes see'[631] and thus cannot 'blindly' follow a ruling of a previous judge when it does not accord with his understanding of what is considered to be just under the circumstances. As such, while responsa literature play a significant role in the development of Jewish law,[632] the requirement that a Beth Din write the reasoning for its decision does not have the same imperative force as it does in legal systems which rely on precedent as a source of binding law.

Despite the above, the rationale for providing reasoned decisions as a way of ensuring that not only justice is done, but that it is seen to be done, does play an important role in Jewish law. As outlined in the previous section, the Biblical imperative that 'you shall be clear before G-d and before Israel' is applied by scholars to mandate the provision of reasoned decisions in instances where there is cause for suspicion that a judge is acting inconsistently or with partiality. Indeed, an argument has been advanced that in an age of greater transparency, whereby the conduct of authorities is regularly scrutinised by the media and public, every judge is suspect in the eyes of the people.[633] This is certainly the case in Australia where Beth Din awards have been criticised by the courts and the practices of certain *dayanim* have been sanctioned.

As such, considering its differences to common law one can appreciate the lack of requirement for reasoned decisions in the theoretical context of Jewish law. However, given the increased grounds for suspicion in contemporary times, the importance of ensuring that not only justice is done but that it is seen to be done – which is both a value shared both by Jewish and common law – would provide a strong *halakhic* basis for mandating that Battei Din provide reasoning for their decisions.

5.4.3 Reasoned Judgements in Best Practice Battei Din

The provision of written, reasoned judgements to litigants is a feature of the BDA, cRc Beth Din and Eretz Ḥemdah Gazit.[634] The rationale behind the provision of reasons was provided by a *dayan* of the BDA as follows:

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[630] See Elon et al, *Jewish law (Mishpat Ivri)* (n 166) 94-96 for a comparison of the notion of precedent in Jewish and other legal systems.

[631] Babylonian Talmud, *Bava Batra* 131a (translation from sefaria.org).

[632] It is noteworthy that Rabbinic responsa are not Beth Din decisions, insofar as the authors of responsa were not acting in the capacity of a Beth Din, and provided Rabbinic opinions rather than Beth Din verdicts; see Shoḥetman (n 609) 338-352.

[633] Ben-Yaakov (n 626) 234.

[634] See discussion in Part 4.2.3 (BDA), 4.3.3 (cRc Beth Din) and 4.4.3 (Eretz Ḥemdah Gazit). This is the case despite neither the New York, Illinois nor Israeli Arbitration acts specifically requiring that reasons are stated in the award. See *New York Civil Practice Law & Rules* § 7507 (2023), *Illinois Uniform Arbitration Act* 710 ILCS § 5-8 and *Ḥok HaBorerut* [Arbitration Law] 5728-1968 ss 20 and 24(6) [Hebrew].

> "One of the reasons we do it is so that people shouldn't think we are flipping coins. It's a *ḥillul Hashem* (desecration of G-d's name) [not to provide reasons] as the loser will always say 'you didn't understand my case that's why you… as there no way logically you could have come to that.' So that's why we write decisions."[635]

BDA decisions are formatted so that both the litigants and a secular court reviewing the award would be able to understand them. Rabbi Shlomo Weissmann, director of the BDA explained:

> "[as] a rule of thumb when writing the decisions [we ensure] that any person reading this or a judge reading the decision at the enforcement stage, at the confirmation stage, [that it] should make perfect sense to that judge that this is the right decision. So, it includes a detailed description of the facts, and then the *halakhah* and sometimes the [secular] law where that is relevant and all the considerations that went into the *psak* (decision) spelled out in English so that an uninitiated reader should be able to read it."[636]

The process of writing the judgement in the cRc Beth Din was described by one of their *dayanim,* Rabbi Yisroel Langer, in the following manner:

> "There is one *dayan* who is picked to write it up and [he] sends it to the other *dayanim* and everyone has their input and it goes back and forth. It's interesting, Rabbi Reiss and Rabbi Raccah take it very seriously the way it is written up, to edit it and the grammar, as if it's something that's going to be published all over the world – and who's reading it already? It's the two litigants and maybe a lawyer if there is a lawyer involved. But it's done…very *medakdek* (precisely), very precise, nothing should be overlooked."[637]

Unlike in the USA Battei Din that were part of this study, where decisions remain confidential, in Eretz Ḥemdah Gazit the judgements also undergo editing to ensure they comply with their policies and are prepared for public consumption after which they are uploaded to their website.[638] The rationale behind the decision to publicise their judgements was explained by the co-founder of Eretz Ḥemdah Gazit, Rabbi Yosef Carmel, as arising out of an awareness that 'transparency is one of the most important thing in every legal system. Without written decisions there is no transparency.'[639]

[635] Interview with Rabbi Rapp.
[636] Interview with Rabbi Weissmann.
[637] Interview with Rabbi Langer.
[638] See discussion about the differences between the USA Battei Din and Eretz Ḥemdah Gazit regarding publication of their decisions in Part 4.5.
[639] Interview with Rabbi Carmel.

5.4.4 Reasoned Judgements in the Australian Arbitral Context

Unlike the arbitration statutes of New York, Illinois and Israel which govern the Battei Din discussed previously,[640] the CAAs specifically mandate the inclusion of reasons in the award. Section 31(3) of the *Commercial Arbitration Act 2011* (Vic) states that '[t]he award must state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given'. The standard of reasoning expected in arbitral awards was subject to a difference of opinion between the Victorian and New South Wales Supreme Courts of Appeal.[641] In the Victorian case of *Oil Basins Ltd v BHP Billiton Ltd & Ors*[642] ('*Oil Basins*') the plurality judgement determined that:

> "the requirement is for reasons sufficient to indicate to the parties why the arbitrator has reached the conclusion to which he or she has come. To that extent, *the requirement is no different to that which applies to a judge*. Of course it is understood that arbitrators may not always be skilful in the expression of their reasons. Consequently, it is accepted that a court should not construe an arbitrator's reasons in an overly critical way. But it is necessary that an arbitrator deal with issues raised and indicate the evidence upon which he or she has come to his or her conclusion."[643] (emphasis added)

Later in the judgement the onerousness of this standard was qualified:

> "what is needed to satisfy that requirement will depend upon the particular circumstances of the case. If a dispute turns on a single short issue of fact, and it is apparent that the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned, a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and from the facts to the conclusion… Contrastingly, however, in complex commercial arbitrations, it may appear that the determination of the dispute demands reasons considerably more rigorous and illuminating than the mere *ipse dixit* of a 'look-sniff' trade referee."[644]

Despite a lower standard of reasoning required of arbitrators being advanced by the New South Wales Supreme Court of Appeal in *Gordian Runoff Limited v Westport Insurance Corporation,*[645]

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[640] See Part 4.
[641] The cases discussed here were litigated prior to the implementation of the CAAs, however the standard for reasons is likely the same under the CAAs, as *UNCITRAL Model Law* (n 10) art 31 which served as a the basis for the subsequent CAAs was used in interpreting the Superseded Uniform Acts; see *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255, [51] and Jones (n 182) [9.320].
[642] *Oil Basins Ltd v BHP Billiton Ltd & Ors* [2007] VSCA 255.
[643] Ibid [50] (Buchanan, Nettle and Dodds-Street JJA).
[644] Ibid [57].
[645] *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57.

when appealed to the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd*[646] ('*Westport'*) the *Oil Basins* standard was, on the whole, adopted. However, it was noted that the notion of requiring reasoning to a judicial standard was 'an unfortunate gloss' and '[m]ore to the point were observations in *Oil Basins* to the effect that what is required to satisfy that provision will depend upon the nature of the dispute and the particular circumstances of the case."[647]

One of the bases on which the Beth Din award in *Thaler v Amzalak*[648] was vacated, was its failure to provide adequate reasons. The decision of the Beth Din, which is cited in full in the judgement,[649] did not deal with any of the arguments advanced by Amzalak before the Beth Din. Taking this into account, as well as the complexity of the commercial transaction which gave rise to a requirement of more rigorous reasoning based on *Westport*, Schmidt J found that 'given the brevity of the reasons given for the Beth Din's award and the limited matters there dealt with, in this case it cannot be concluded that the statutory obligation was complied with.'[650]

5.4.5 Recommendations for Australian Battei Din

It is evident from the above that the provision of reasoning by an arbitral body operating in Australia is mandatory unless the parties choose to opt out of this requirement. Additionally, the level of reasoning required of arbitrators, whilst not the same as that expected of judges, must nonetheless be rigorous in complex commercial cases. This requirement can be married with the *halakhic* position with little difficulty. As discussed previously, while the *halakhic* baseline is that no reasoned decision needs to be provided to the parties, the Talmud provides exceptions in cases where parties are forced to attend the Beth Din, which can be applied to circumstances where a party is summoned, as well as where there is cause for suspicion that the judge may have mishandled the case, which is the default position in an era of increased demand for judicial transparency, especially in the Australian context where misconduct by *dayanim* has been evidenced. As such, both the statutory requirement that reasons be advanced, as well as the Jewish law duty that that 'you shall be clear before G-d and before Israel' leave little room to question the imperative that a reasoned judgement be written and delivered to the parties.

Regarding the publication of reasoned judgements, which is a point of difference between the US and Israeli Battei Din studied, Australian Battei Din would be advised to follow the precedent of Eretz

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[646] *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.
[647] Ibid [51] (French CJ, Gummow, Crennan and Bell JJ). Although it was noted at [54] that 'no wholly satisfactory formula can be found to flesh out the requirement' to provide a reasoned award.
[648] *Thaler v Amzalak* (n 540).
[649] Ibid [20]; Schmidt J prefaced the award with the introduction that '[t]he Beth Din's decision of 15 September is so short that it is convenient to quote it in its entirety'.
[650] Ibid [143].

Ḥemdah Gazit and publish all judgements besides for those that are especially sensitive. While this will form a challenge in a relatively small Jewish community where litigants are more likely to want to keep their disputes out of the public eye, it is an important way of winning back the public's trust which has suffered as a result of the publicity that Beth Din misconduct has attracted over the past decades and the reputation of opacity that the Melbourne Beth Din earned due to the manner by which it operated in the latter half of the 20th century.[651] The regular publication of awards issued by the Beth Din, with the necessary changes made to preserve the privacy of the litigants, would serve as an important step in winning back public confidence and demonstrating the viability of the Beth Din as a venue for litigating commercial matters.

5.5 Conclusion

It is evident from the development of Jewish law in relation to the areas of *zabla, dina demalkhuta dina* and the provision of reasoned judgements that *halakhah*, while not coming from the same starting point as secular law, is able to accommodate its requirements. Concerns with the *zabla* method of appointing *dayanim* and its risk of partiality have resulted in its condemnation by Jewish law scholars in the modern period. *Dina demalkhuta dina* is a mechanism that together with *minhag hamedinah* and *minhag hasoḥerim* provide substantive accommodation to secular law and provide a mechanism of ensuring that *dayanim* honour the litigants' choice of law and incorporate matters of public policy into their awards. Likewise, the provision of reasoned judgements as required under Australian arbitration law, while not always mandatory in traditional Jewish law, dovetails with contemporary practice in State Rabbinical courts in Israel and the Biblical injunction that 'you shall be clear before G-d and before Israel'.

As such, in terms of the propriety of the *zabla* method of appointing *dayanim*, the ability to accommodate relevant areas of secular substantive law mandated by the CAAs and the provision of reasoned judgements, Jewish law provides ample room for accommodation. While these areas of accommodation, at least in the areas of *zabla* and the provision of reasoned judgements, do limit certain practices which some proponents of Jewish law would have otherwise permitted, they accord with the development of Jewish law in the modern period and thus do not compromise the authenticity of its application.

This chapter has focussed on accommodations relevant to the composition of the *dayanim* and their decision-making process. The following chapter will continue the theme of Jewish law accommodation, focusing on the litigants and their rights in the arbitral process.

[651] See Part 7.2.6.

6 JEWISH LAW ACCOMMODATION: PROCEDURAL ASPECTS

6.1 INTRODUCTION

Further areas of potential conflict that have emerged from the study of recent case law pertaining to Battei Din in Australia as well as the interviews conducted with *dayanim* in the USA and Israel, pertain to procedural aspects of arbitration. In this chapter, the issuance of a *seruv* for non-compliance with a Beth Din summons, the right to representation, the admission of female testimony and the right to appeal a Beth Din decision will be explored. These aspects relate to how the *dayanim* conduct the arbitration as well as to how they relate to the parties before, during and after the hearings.

As in the previous chapter, each of these four areas will be approached by setting out how Jewish law has developed in relation to each issue. The position in secular law will be explored, highlighting potential conflicts between the two legal systems and the ways in which best practice Battei Din in both Israel and the USA navigate them will be outlined. Building upon this, recommendations for the Australian setting will be proposed.

6.2 *KTAV SERUV* (WRIT OF REFUSAL)

The mechanism by which a Beth Din can pressure the attendance of a non-complying defendant is via issuing a *ktav seruv.* In this section, the nature and definition of *seruv* will be explored, including its meaning, the circumstances in which it may be issued as well as its aims. The role of a *seruv* in the arbitration context will then be explored, looking to cases in the USA and Israel where the courts have dealt with the issuance of a *seruv* by Rabbinical courts, and the Australian position on this matter in the case of *Live Group* will be examined. [652] This will lead to analysis of the key differences between the USA, Israel and Australia in terms of their approaches to multiculturalism and how this is reflected in their respective positions on the propriety of *seruvim* issued by Battei Din. Finally, the attitudes towards *seruvim* held by the *dayanim* in the USA and Israel who were interviewed in this study will be discussed, leading to recommendations for Australian Battei Din.

6.2.1 What is a *Seruv*?

The Babylonian Talmud describes the procedure for dealing with a defendant who refuses a summons of the Beth Din.[653] Biblical verses are brought to infer a two-staged process in which

[652] *Live Group v Ulman* (n 268).
[653] Babylonian Talmud, *Mo'ed Katan* 16a.

initially the defendant is subjected to certain forms of sanctions (*nidui*) and in the event of continued non-compliance, excommunication (*ḥerem*) may be added.[654] The *Shulḥan Arukh* codifies twenty-four circumstances in which such sanctions may be placed upon an individual, which include not only where one refuses a summons of the Beth Din, but also where they do not accept upon themselves the Beth Din's judgment. However, this latter cause for sanctions has less relevance in the modern context whereby enforcement of a Beth Din award can be pursued via the state courts.[655]

Aside from the sanctions effected by a *seruv*, it also plays the role of granting *halakhic* permission to the plaintiff to take the case to non-Jewish courts, known as a *heter arka'ot*. As discussed, there is a *halakhic* prohibition against attending a non-Jewish court to litigate commercial disputes between co-religionists. However, if the defendant refuses to obey the edict of the Beth Din, Jewish law permits taking the matter to a secular court.[656] As such a *seruv* plays the dual role of both penalising the defendant with religious and communal sanctions, as well as providing the plaintiff with permission have the matter adjudicated by the secular authorities.

The sanctions that may accompany a *seruv* can be severe. A firsthand account by the recipient of a *ḥerem* describes it as a 'prison with no key… chains of iron that no one can see but which the body [of the sanctioned individual] feels intensely.'[657] The purpose of these sanctions is best understood against the historical milieu whereby Battei Din were granted judicial autonomy by the sovereign in relation to the Jewish community and required coercive power to ensure compliance. However, even in those times, where *seruvim* played an important role in ensuring the effectiveness of the Jewish community's internal judicial system, they were used sparingly.[658] In the present day however, where law and order for all of society is maintained by secular authorities and as such the

[654] *Nidui* includes sanctions that disqualify the individual from forming part of a prayer quorum, as well limiting social interactions with the community, while *ḥerem* adds additional sanctions such as calling on the community not to do business with the individual besides for the basics required for their survival, see further restrictions and general discussion in, '*Ḥerem', Encyclopedia Talmudit* (Yad HaRav Herzog) vol 17, 325. The list of sanctions grew in the Geonic period of Jewish history and medieval authorities argued for the list to be reduced and for its more limited implementation, see Yaakov Shapira, '*Kitvei Siruv m'Kehilla l'Medina*' [Writs of *seruv* from the community and state] (2023) 28 *Mishpat v'Asakim* 1, 9-11 [Hebrew].

[655] When asked whether a *seruv* is given to a party who is non-compliant with the award of the BDA, Rabbi Shlomo Weissman stated 'we won't issue a *seruv* for non-compliance as you can go to court'; see Interview with Rabbi Weissmann. It is noteworthy that in *Thaler v Amzalak* (n 540) [10]-[15] Schmidt J details how, after the disgruntled litigant commenced proceedings to have their award vacated, a *seruv* was issued by the Beth Din 'in order not only to discourage Mr Amzalak from pursuing his rights, but also to pressure him to pay the award which had been made'. The propriety of the *seruv* was not discussed in the judgment.

[656] *Shulḥan Arukh, Ḥoshen Mishpat* 26:2.

[657] Rabbi David Freedman, *Emek Brakha,* Introduction (translation is my own); quoted in Shapira (n 654) 31 who brings evidence that the introduction was written by Rabbi Yeḥiel Mikhel Pines who was relating his firsthand experience of being put in *ḥerem.*

[658] See CA 807/77 *Sobol v Goldman* [1979] (Israeli Supreme Court) [Hebrew] (Elon J) who discusses rabbinic leadership's historic minimisation of the use of their power of excommunication.

need for Battei Din to garner independent coercive power unnecessary, the utility of sanctions has diminished and may in fact be counterproductive.[659]

6.2.2 The Status of *Seruvim* in Israel, the USA and Australia

The use of *seruvim* that include sanctions by Battei Din in both Israel and the USA has been reviewed by secular courts and have attracted academic discussion. In this section, we will provide an outline of the Israeli and American courts positions on the matter, together with some relevant academic commentary. This international backdrop will provide a reference point for the Australian position on *seruvim* that involve sanctions. Analysis of the various judicial positions on the subject will then be the focus of the following section.

6.2.2.1 Seruvim in Israel

The seminal case that dealt with the subject of *seruvim* in Israel is *Katz*.[660] In *Katz*, three separate claims were brought before the Supreme Court of Israel, all of which involved defendants who refused a summons to attend a State-sponsored Rabbinical Court for commercial arbitration and were issued a *seruv* that included sanctions for their non-compliance.[661] In the majority judgement, Zamir and Dorner JJ separated between the two functions of a *seruv*, one being to provide the plaintiff a *heter arka'ot* and the other to bring shame to the defendant for their non-compliance with their religious duties. The *heter arka'ot* aspect was not a matter of concern for the court, insofar as it provided the plaintiff with a clear conscience in approaching the secular courts.[662] However, the use of sanctions was outlawed insofar as it went beyond the powers of the state-sponsored Rabbinical courts who, based on the principle of legality, could do no more than they were authorised to do by statute.[663] Additionally, the court discussed its position with regards to any Beth Din operating under Israeli arbitration laws, asserting that:

> "It is obvious that arbitration, in accordance with the Arbitration Act, is dependant upon the agreement of both sides to engage in arbitration. It is clear that no arbitrator has any

[659] See ibid (Elon J); Tal J in his dissent in *Katz* (n 456) 2 agrees with Elon J, referencing Assaf (n 510) 34 who brings *halakhic* authorities who advocated against the use of sanctions, apart from in extreme circumstances. That they are counterproductive, see Haim H Cohn, '*Arka'ot shel Goyim v'al Erakhim shel Yehudim*' [Non-Jewish Courts and Jewish Values] (1997) 4 *Mishpat u'Memshal* 299, 323-327[Hebrew] who argues that use of sanctions reflects more on the ineffectiveness of the Beth Din to garner attendance by the religious community, than on the individual who is sanctioned, and results in the *dayanim* 'making themselves hated by the nation and causes the desecration of G-d's name'.

[660] *Katz* (n 456).

[661] While the ability of State-sponsored Rabbinical courts to go beyond matters of personal status, regarding which they have jurisdiction under Israeli law, and enter into commercial arbitration was called into question by the court, this matter was left undecided and was subsequently outlawed in *Simah Amir* (n 429); see Part 4.4.1.

[662] *Katz* (n 456) [2], [16] (Zamir J).

[663] Ibid [19] (Zamir J) and [5] (Dorner J)

> jurisdiction whatsoever under the Arbitration Act without an arbitration agreement. It is also clear that a person (or entity) that is requested by an individual to serve as an arbitrator for a specific dispute between them and another, has no jurisdiction to obligate, in any way, the other to agree to the arbitration. *A fortiori* that they have no jurisdiction to place pressure on the other if they don't agree to sign the arbitration agreement. This is the case for any arbitrator, and must be the case for a Rabbinical Beth Din that wishes to act as an arbitrator under the Arbitration Act. The Arbitration Act does not grant a Rabbinical Beth Din jurisdiction to put pressure on one who refuses to attend arbitration, not through a *ktav seruv* nor in any other way."[664]

Zamir J went further to rule that notwithstanding the fact that at Jewish law a *ḥerem* must be annulled by a Rabbinical court, this was not necessary under the circumstances 'since it was issued without jurisdiction, it is rendered *ab initio* as without any effect'.[665]

The final aspect of the judgement is peculiar to the Israeli context, insofar as an ostensibly secular court explicitly entered into a matter of religious law, ruling that the *ḥerem* was void. Tal J in his dissenting judgement in *Katz* critiqued the audacity of his peers to attempt to make a determination as to the efficacy of the Rabbinical Court's *ḥerem* which belongs to Jewish, and not Israeli, law:

> "Even if all the kings of the east and west, and this court among them, would [attempt to undo a ruling of Jewish law] they would not be able to nullify this decision [of the Rabbinical court]. It is only the mouth that prohibits – i.e. the religious Beth Din – that is the mouth that can permit. One who [is sanctioned for] refusing to attend a *din torah* and their sanctions are annulled by the Supreme Court of Israel is a strange creature that does not exist, and they remains with their sanctions. If their co-religionists had ostracised them, they will continue to do so, even after the sanctions have been annulled by the Supreme Court of Israel, and indeed with even greater fervour."[666]

Besides taking issue with their entry into religious doctrine, Tal J argued that the Rabbinical Beth Din's jurisdiction in matters of personal status was not one that limited the pre-existing jurisdiction of the Rabbinical court that preceded the modern state of Israel. While he acknowledged that sanctions are 'among those things whose proliferation are harsh and even their minimal use is not pleasant' he took issue with their being outlawed, arguing that the nature of the sanctions were as such that 'for one who is not religiously observant, the *seruv* has no impact and for one who

[664] Ibid [12] (Zamir J) (translation is my own).
[665] Ibid [20] (Zamir J) (translation is my own).
[666] Ibid [2] (Tal J) (translation is my own).

pretends to be observant [but does not comply with the religious obligation to litigate in Bet Din] they are not able to run from the religious and communal sanctions into the bosom of secular courts without fooling themselves'.[667]

While not part of the *ratio decidendi* in *Katz*, Zamir J raised a further ground for disallowing sanctions for non-compliance with a Beth Din summons, insofar as it obstructs the free access to the courts.[668] While this right does not appear explicitly in any Israeli statute,[669] it has been recognised as a foundational right upon which all of Israel's Basic laws are predicated. In the words of Ḥeshin J:

> "the right to access the courts… is superior to any foundational right (*z'khut yesod*). Moreover, its existence is a necessary and vital precondition for the existence of other foundational rights. The right to access the courts is the lifeline of the courts. It is the basis of the existence of the judiciary and the rule of law. The judiciary differs from its two siblings – the statutory and executive branches of government – for these latter two can take initiative and act, whether with regards to making laws or performing actions, while the judiciary must sit in its place and wait for those who will come to it to receive its opinions and decisions."[670]

As such, the position on *seruvim* in Israeli law is clear that whilst a *heter arka'ot* is permitted, any attempt to shame or sanction an individual with the aim of procuring their compliance in attending a Beth Din – private or governmental – for arbitration, will likely render the arbitration agreement void and possibly expose the arbitrators to criminal prosecution for inhibiting a citizen's right to access the courts.[671]

6.2.2.2 Seruvim in the USA

In contrast to Israel, the use of a *seruv* for non-compliance with a Beth Din summons have not been deemed as illegal by US courts. In *Mikel v Scharf* a dispute regarding the terms of a commercial lease resulted in the plaintiff being summoned to Beth Din, who initially refused to attend until they

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[667] Ibid.
[668] Ibid [17] (Zamir J).
[669] See Yoram Rabin, *Zekhut Hagisha l'Arka'ot k'Zekhut Ḥuktit* [The right to access the courts as a constitutional right] (Bursi, 1998) [Hebrew] for several ways in which this right can be derived.
[670] CA 733/95 *Arpel Aluminum Ltd v Kalil Ta'asiot Ltd* (1997) (Israeli Supreme Court) [Hebrew] (translation is my own).
[671] The application of this principle was confirmed in relation to private Battei Din in Israel in the case of HCJ 3584/13 *Amutat Ḥidush v Rav Ha'Ir Elad* (2016) (Israeli High Court of Justice) [Hebrew]. A clear guide on the matter of *seruvim* in the context of Battei Din was published by the Israeli Attorney General in Yehuda Weinstein, '*Darkhei HaTipul Shel Reshuyot HaMedina B'Kitvei Siruv HaMotziyim Al Y'dei Battei Din Dati'im*' (Instructions of the Attorney General, No 4.1111, March 2013) <https://www.gov.il/BlobFolder/dynamiccollectorresultitem/4-1111/he/historical-instructions_4.1111.pdf> [Hebrew]; see Shapira (n 654) 46-47.

received written notice that continued refusal would result in the issuance of a *seruv*.[672] Notwithstanding testimony that a *seruv* would subject the recipient to 'shame, scorn, ridicule and ostracism by his coreligionists,' Hirsch J found that although 'pressure was brought to bear to have them participate in the Din Torah,' nonetheless 'pressure is not duress'.[673]

The reasoning advanced in *Mikel v Scharf* was applied in the later cases, such as *Lieberman v. Lieberman*[674] and *Greenberg v Greenberg*.[675] In both cases the plaintiffs sought to appeal the determination of a Beth Din arbitration relating to end of marriage settlements, on the basis that they had only entered the arbitration due to the threat of a *seruv* for non-compliance. With regards to the *seruv* being construed as duress, both courts echoed the judgement in *Mikel v Scharf* that while it was pressure, it did not constitute 'duress'. This was elaborated upon by the judge in *Greenberg v Greenberg* who asserted that:

> "The record in the present case does not support a finding that the wife was subjected to any particular coercion greater than that which is intrinsic in the case of any member of a religious community who, as a matter of conscience, feels obligated to obey the laws of his or her religious organization, or to follow the decrees of a religious court, and who consequently exposes himself or herself to the ecclesiastical sanctions available for the enforcement of such decrees or such law… In sum, the release signed by the wife was, as a matter of law and fact, voluntary."[676]

Separate to the question of the impact of a *seruv* on the voluntariness of the signing of the arbitration agreement, is whether it may be considered an attempt to hinder the litigant's free access to the courts. This question was raised in *Grunwald v Bornfreund* where the plaintiff was threatened with excommunication if he did not withdraw his complaint in this court and submit his dispute to a rabbinical court.[677] The plaintiff brought evidence that the sanctions would include that he will 'be totally excluded from the community, he will not be able to shop at the stores of members of the community, his *zizzitt*, a fringed garment worn by observant Jews, may be cut off, the mezuzah, religious verses in a container, may be removed from his door, and there will be no religious prohibition on injury to his property or, indeed, his murder.'[678]

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[672] *Mikel v Scharf* 105 Misc 2d 548 (NY Supreme Court, 1980) 549.
[673] Ibid 552-3.
[674] *Lieberman v Lieberman* 149 Misc 2d 983 (NY Supreme Court, 1991).
[675] *Greenberg v Greenberg* 238 AD 2d 420 (NY appellate Division, 1997).
[676] Ibid 421.
[677] *Grunwald v Bornfreund* 696 F Supp 838 (EDNY, 1988) 839-840.
[678] Ibid 839.

Sifton J found that religious sanctions did not truly limit the plaintiffs ability to pursue a remedy in the courts and that 'the threat of excommunication is no different from any other legal, albeit grievous, consequence of litigation that one side may point out to another.'[679] In addition, invoking the first amendment which provides the basis for religious freedom in the USA, he explained that:

> "A long line of Supreme Court cases holds that, where a religious body adjudicates relations among its members, courts will not interfere with the decisions of those bodies made in accordance with those bodies' rules… Should plaintiff be threatened with a legally cognizable harm by defendants or a rabbinical court in trying to coerce him from pursuing his claims, he could come to this Court for a remedy… The mere expulsion from a religious society, with the exclusion from a religious community, is not a harm for which courts can grant a remedy"[680]

In relation to the threatened harm to his property and self, Sifton J did not find that there was a real risk that such damage would occur as a result of the sanctions, likely due to the fact that such actions were still criminalised by the state, and thus deemed them as too 'speculative' and 'hypothetical' to warrant an injunction against his excommunication on their basis.[681]

The US position that permits the use of sanctions by a Beth Din has been criticised as insufficiently recognising its coercive impact upon vulnerable members of the religiously observant community, especially women.[682] Some argue that the courts have not properly considered the economic harm which could result from the communal boycott of the recipient of the *seruv*.[683] Others point out that in certain insular communities excommunication can cause devastation to the individual who is 'cut off entirely from the only life they have ever known in a tight-knit community'.[684] Some take it further, arguing that even without explicit sanctions, 'simply being a member of that religious community can exert a tremendous amount of internal pressure' on the individual who does not wish to appear disloyal to their faith group.[685] While the case law recognises a *seruv* as legitimate pressure, voices in the American community are arguing that that there are circumstances which should give rise to it being deemed as duress.

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[679] Ibid 840.
[680] Ibid 840-841.
[681] Ibid 841.
[682] See Amanda M Baker, 'A Higher Authority: Judicial Review of Religious Arbitration'(2012) 37 *Vermont Law Review* 157, 188 referencing Ayelet Shachar, 'State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation' in Rex Ahdar and Nicholas Aroney (eds) *Sharia in the West* (Oxford University Press, 2010) 115 with regards to the unique vulnerability experienced by women in matters of family law.
[683] Grossman (n 190) 197-198.
[684] Fried (n 267) 652.
[685] Litt Wolfe (n 197) 464.

6.2.2.3 Seruvim in Australia

Australia, with its significantly smaller Jewish community compared to the USA and Israel has had only one case in which the threat of a *seruv* was litigated in the courts.[686] As will be discussed in further detail below,[687] in *Live Group* the director of Live Group Pty Ltd was summoned to the Sydney Beth Din ('SBD') for arbitration. Upon declining to attend the arbitration, the SBD threatened sanctions for the plaintiff's non-compliance, including that he would not be included in a religious quorum, nor receive honours at his synagogue.[688] Sackar J found the *dayanim* of the SBD to be criminally liable for contempt of court insofar as the threat of a *seruv* was an attempt to withhold from the plaintiff his 'unhindered access to the constitutionally established courts'.[689] In his judgement, he noted that merely 'assert[ing] that in accordance with Jewish law, members of the faith are obliged not to have their disputes determined by a civil court without the express permission of the Beth Din… cannot be considered improper pressure carrying the tendency of likely to interfere with the course of justice.'[690] However, the addition of sanctions in the *seruv* formed improper pressure resulting in the criminal charge.

The trial judge's ruling was affirmed by the majority judgment of the NSW Supreme Court of Appeal,[691] albeit with a reduced financial penalty imposed on the *dayanim,* and leave for appeal to the High Court of Australia was rejected.[692]

It is noteworthy that the dissenting voice in the appeal, McColl JA, leaned on 'a body of United States jurisprudence' which, under the rubric of freedom of religion, allowed the judiciary only 'marginal inquiry' into matters of ecclesiastical government.[693] Her Honour argued that members of a religion have the option to leave their faith, and as such the sanctions did not constitute undue pressure. In addition, she criticised her colleagues for having 'intrude[d] upon the rabbinical view of the Halacha' by determining that attending a Beth Din was *not* a fundamental tenet of Jewish law, despite evidence to the contrary being submitted by the appellants.[694]

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[686] While a *seruv* was discussed in the earlier Australian case of *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775 no decision needed to be made in that case as the application was interlocutory; likewise in *Thaler v Amzalak* (n 540) the propriety of the *seruv* that was issued for non-compliance with the Beth Din's award and the commencement of proceedings in a secular court was not addressed in the judgement.
[687] See Part 8.4.3.
[688] *Live Group v Ulman* (n 268) [53].
[689] Ibid [88].
[690] Ibid [262].
[691] *Ulman v Live Group* (n 292).
[692] Result of Applications Listed at Sydney (High Court of Australia, 17 May 2019) <https://www.hcourt.gov.au/assets/registry/special-leave-results/2019/17-05-19ResultsSRyd.pdf>.
[693] *Ulman v Live Group Pty Ltd* (n 691) [248].
[694] Ibid [272]-[283].

6.2.3 *Seruv*: Litmus Test for Multiculturalism

The differing positions taken with regards to *seruvim* that involve sanctions by the courts in Israel, the USA and Australia appear to reflect their underlying attitudes towards legal pluralism, or multiculturalism in law.[695] The *seruv* strikes at fault line between the values of democracy and freedom of religion. As discussed earlier, free access to the courts is described by Ḥeshin J as the foundational right, upon which all other basic rights depend. However, as Eric Posner argues, one of the defining features of a religion is its ability to 'coordinate behaviour through the use of nonlegal sanctions, such as exhortation, criticism, threat, and ostracism.'[696]

The weighing up of these competing values, which is at the heart of the differences between these jurisdictions, is a delicate one. On the one hand, as Sackar J argued with regards to his finding that the *seruv* issued by the SBD amounted to contempt of court:

> "This finding is not a restriction on their religious freedom, it is a restriction in our democracy of any person holding and acting upon the view a civil court is the appropriate place for the determination of commercial disputes between Jews, or for that matter gentiles."[697]

And on the other hand, as McColl JA asserted in her dissent, supporting the *dayanim's* ability to utilise religious sanctions:

> "it is acknowledged that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society.'"[698]

On finding the appropriate balance, the USA and Australia form a spectrum of approaches that accord with their relative approaches to multiculturalism. The rationale for Israel's approach, which aligns with that of Australia, will also be explored.

As touched upon earlier, compared to Australia, the USA has a far more vibrant multiculturalism.[699] One expression of this can be found by way of comparison between the way in which judges navigate the separation of church and state in both countries, enshrined in the first amendment of the *Constitution of the United States of America* and s116 of the *Constitution of Australia*. Despite sharing almost identical language, judges navigate religious questions in a far more cautious manner in the USA, guided by the view that they are not be answered, besides for limited circumstances

[695] See Part 3.4.
[696] Eric A Posner, 'The Legal Regulation of Religious Groups' (1996) 2(1) *Legal Theory* 33, 35.
[697] *Live Group v Ulman* (n 268) [271].
[698] *Ulman v Live Group* (n 292) [245] (footnote in the original is omitted here).
[699] See Part 3.5.

where the doctrines of neutral principles or polity deference are employed.[700] In contrast to the first amendment, s116 of the *Constitution of Australia* is only binding on the federal government, and thus does not limit state law, and even at the federal level, it is applied narrowly,[701] and there has been almost no discussion as to how judges navigate this principle.[702]

The intervention of Australian courts to limit the Beth Din's ability to utilise religious sanctions in compelling adherence to their summons' in contrast to the hands-off approach in the USA is further expression of their differing approaches to multiculturalism at law. To utilise the terminology adopted by Ayelet Shachar, Australia tends towards a 'secular-absolutist model' whereby the state takes the side of the individual in instances where their rights are infringed by their *nomoi* group, whilst the USA tends towards a 'religious particularist model' in which the state is more hesitant to intervene into minority groups affairs, even where their members rights are infringed.[703] While each jurisdiction has its dissenting voices, it would appear that their attitudes towards *seruvim* act as a litmus test for the dominant approach of each country towards balancing the rights of individuals against the autonomy granted to minority groups.

In contrast to the USA and Australia, Israel has no separation of religion and state.[704] As such, there are judges on the Supreme Court of Israel who will decide on matters that involve religious questions.[705] The case of *Katz* is one such example, where not only did the court outlaw the use of sanctions by a Beth Din, but it went so far as to invalidate the *seruv* itself. While the Australian courts also deemed the issuance of sanctions as illegal in the circumstances, and entered their own evaluations based on the conflicting views of the parties as to whether attending Beth Din for commercial litigation is considered a 'fundamental tenet of *halakhah'*, they did not go so far as the Supreme Court of Israel in attempting to rule on a matter of religious law.[706] As such, while the distinctions between Australia and USA can be put down to differing multicultural attitudes, the

[700] Neil J Foster, 'Respecting the Dignity of Religious Organizations: Courts Deciding Theology?' (2020) 47 *University of Western Australia Law Review* 175, 178.
[701] Carolyn Evans, 'Legal Aspects of the Protection of Religious Freedom in Australia' (2009) 65 <https://humanrights.gov.au/sites/default/files/content/frb/papers/Legal_%20Aspects.pdf>.
[702] Foster (n 700); see Hogan (n 296) 219 who writes 'Religion has not been an important constitutional issue in Australian law'.
[703] Ayelet Shachar, *Multicultural Jurisdictions* (n 176) 65-85.
[704] It is the nation-state of the Jewish people. See *Ḥok Yesod: Yisrael – Medinat Hale'om shel HaAm HaYehudi* [Basic Law: Israel - The Nation-state of the Jewish People] (2018) [Hebrew]; for an unofficial translation see <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawNationState.pdf>.
[705] It is noteworthy that the dissenting judge, Tal J, took issue with his colleagues making a Jewish law determination regarding the validity of the *seruv*. For a fascinating analysis of the jurisprudential underpinnings of decision in *Katz* and its dissenting view, see Issachar Rozen-Zvi, '*Sobyekt, Kehilah v'Pluralizm'* (2000) 23 *Iyunei Mishpat* 539 [Hebrew].
[706] For a discussion of the willingness of Australian courts to enter matters of religious doctrine, see Neil J Foster (n 700) 194-201.

situation in Israel where Jewish and secular law are interlinked had the paradoxical result in *Katz* of aligning with the secular-absolutist approach taken by Australian judges, prioritising the individual over the religious group.

6.2.4 Use of the *Seruv* in Best Practice Battei Din

The use of a *seruv* that involves sanctions in the Battei Din that were the subject of this study, aligns neatly with the positions taken by the courts on the permissibility of their use. In Eretz Ḥemdah Gazit, Rabbi Yosef Carmel explained 'we are not enforcing people to [perform] mitzvot. It's not a good idea. So, if he do[es]n't want to come, he is losing a golden opportunity and please, go to the court.'[707] Not referencing the illegality of issuing a *seruv* in Israel, Rav Carmel puts forward a rationale that speaks to the concern of religious coercion, which he believes is not an approach that is desirable in the modern State of Israel. However, Rabbi Daniel Mann, the *Av Beth Din* of the Jerusalem branch of Eretz Ḥemdah Gazit, expressed their position on *seruvim* with direct reference to Israeli law:

> "If the guy wants to go to [Beth Din] fine… but you can't try to force him. He went to courts, so we are not going to give him an *aliyah*. Then you are taking away his civil right to government court. So, the government are against that, and we don't fight with the government on such things. If the politicians want to and they change the law, fine, but we are working within arbitration law. We are going to follow arbitration laws even when we don't agree."[708]

In line with this position, Hillel Gefen of the Mishpetei Eretz Institute, an organisation that performs research into matters of Jewish law and works closely with Eretz Ḥemdah Gazit, has put forward a position paper in which he outlines the steps taken in the case of non-compliance with a Beth Din summons. In that document, the focus is exclusively on the process for issuing a *heter arka'ot* which poses no legal concerns, and not on sanctions, which do.[709] Knowing that even a *heter arka'ot* may be used by a plaintiff to shame the defendant, insofar as it evidences their lack of cooperation with the Beth Din summons and thus their non-fulfilment of the religious duty to litigate there, Eretz Ḥemdah Gazit is cautious to ensure that no inferences beyond the facts are made. As Rabbi Mann explained:

> "We have had times that we feel that a person is doing it in order to get the… other guy and embarrass him, hurt him, his standing in the community – things of that nature. Now we

[707] Interview with Rabbi Carmel.
[708] Interview with Rabbi Mann.
[709] Hillel Gefen (n 340).

> can't prevent that for the most part, we write the story: the Beth Din secretary called him and he said 'I don't want to come to you or any other Beth Din' – that quote will be written. We'll say we sent to him by mail, and email and WhatsApp, and then we called and as soon as he heard it was Beth Din he hung up. There will be a description as to why we think he's not coming. If someone takes that and wants to make 5000 copies of that plaster that throughout all the buildings in the neighbourhood, we can't stop them."

The cautious approach outlined by Rabbi Mann, reflects an understanding of the spirit of the law that prohibits the use of sanctions. Not only are sanctions not used, but efforts are also made to ensure that a *heter arka'ot* is not utilised by the plaintiff to bring shame to the defendant.

While Eretz Ḥemdah Gazit is cognisant of the law in Israel pertaining to *seruvim*, both Rabbi Yaakov Warhaftig, who acted as *Av Beth Din* in Har Nof, and Rabbi Mann, acknowledged that despite the illegality of issuing sanctions for non-compliance with a Beth Din summons, there are still Battei Din within Israel – particularly those which operate within very insular communities – that will issue such sanctions, despite the risk of legal consequences.[710] This is also evident in the cases that have come before the courts in Israel in the aftermath of *Katz* where sanctions have been issued for non-compliance with summons' of private Battei Din.[711]

In contrast to Eretz Ḥemdah Gazit, both the BDA and the cRc Beth Din will issue *seruvim* for non-compliance with their summons'. The rules and procedures of both courts, reference that:

> "If no proper response is forthcoming to an invitation (*hazmanah*) after proper notification and the passing of 30 calendar days, it is within the discretion of the *Av Beth Din* to authorize the Beth Din to issue a *shtar seruv* (a document noting that this person refuses to participate in the proceedings of the Beth Din, and permitting, according to Jewish law, the claimant to seek relief in secular court), and publicize that fact in any manner the Beth Din sees fit."[712]

In alignment with the verdict of the US courts, a *seruv* that goes beyond simply granting the plaintiff a *heter arka'ot* is issued and may be *publicised* with the intention of pressuring the defendant to attend arbitration at the Beth Din.

[710] Interview with Rabbi Mann; Interview with Rabbi Warhaftig.
[711] See the cases discussed in Shapira (n 654) 2-4.
[712] *BDA rules* (n 329) s 2(i). Almost identical language is found in the equivalent section of the *cRc rules* and procedures document.

Despite the permissiveness of the US courts in relation to *seruvim*, the BDA is still reticent to issue a *seruv* unless it has the full backing of its religious and lay leadership. As Rabbi Shlomo Weissmann, director of the BDA, explained:

> "when we issue a *seruv* for example the president signs off, because he wants to review the *hazmanah* (summons) history to see we've given proper warnings before stating they are not in compliance."[713]

Rabbi Mordechai Willig, *Av Beth Din* of the BDA added that:

> "when it gets a little bit testy, [the *menahel*] talks to me and Rabbi Reiss who's now a very capable *Av Beth Din* and our associate *menahel* – we talk about it and the four of us try to reach the proper balance. These are hard calls; they are not black and white. The most important thing is the result, what is going to be good – procedure yes, but result is also important."[714]

The wording of the *seruv* sent out by the BDA to the defendant is as follows:

> "The undersigned hereby makes known that <DEFENDANT NAME> has been summoned to appear before the Beth Din of America to respond to certain claims of <PLAINTIFF NAME> with respect to a claim for money owed, and <DEFENDANT NAME> has failed to submit to binding arbitration in front of the Beth Din of America or in front of any other beth din panel. Therefore, <DEFENDANT NAME> is "*mesarev l'din*," in refusing to appear before a Beth Din according to Jewish law, and Plaintiff Name may proceed in the secular courts or by any other legal means.
>
> In testimony thereof, we set our hand this <DATE>.
>
> <SIGNED>
>
> Rabbi Mordechai Willig
> *Av Beth Din*"[715]

It is noteworthy that the above text does not specify any sanctions but does refer to the defendant as a *mesarev l'din* (one who refuses to attend the Beth Din), a term that could stigmatise them in certain communities where a lack of complete *halakhic* observance would be considered shameful.

[713] Interview with Rabbi Weissmann.
[714] Interview with Rabbi Willig.
[715] Email from Rabbi Shlomo Weissman to Chaim Cowen, 9 May 2023.

Under certain circumstances, the BDA will not issue a *seruv* to the defendant but will instead grant the plaintiff a *heter arka'ot*. These are cases where there is a reason to question the motives of the plaintiff such as where a claim is made that has passed its statute of limitations and thus cannot be litigated in secular court – even though in such a case the *heter arka'ot* will be of little value insofar as the case cannot be tried in the courts. Other instances include where the case against the defendant does not appear solid, or where the defendant is prepared to attend another Beth Din, but the plaintiff insists on the BDA.[716]

Despite the legality of issuing *seruvim* in the USA, there are rabbinic voices that question their efficacy in the context of religious arbitration. One former *dayan* of the BDA explained the reality as he saw it with regards to *seruvim*, 'I don't think it does very much… there are people who get *seruvim* and they live with a *seruv*, if they want to go to court'.[717] The director of the BDA differentiated between the Modern Orthodox community who tend not to take as seriously a *seruv* for non-compliance with Beth Din commercial arbitration as does the ultra-Orthodox community.[718] Despite this, even within the Modern Orthodox community, he asserts that Rabbis will not simply ignore a *seruv*:

> "I think the rabbis will take it seriously. The rabbi of a large shul in the United States will feel like he is bound by it and have to deal with it and all and will call his *rabbeim* (mentors) to see if he has to throw the guy out of shul for not coming to Beth Din for a *dinei mameno[t]* case. It's a bit of an uncomfortable situation and it might result in the rabbi saying to the guy, 'do me a favour, and go to the Beth Din as I don't want to throw you out of shul.'"

As such, the impact of a *seruv* differs from one community to another, and when the community itself disregards a *seruv* its rabbinic leadership may still feel accountable to the BDA and provide it some measure of consideration.

6.2.5 Recommendations for Australian Battei Din

This study leads to a clear conclusion with regards to the issuing of a *seruv* in the Australian context. *Live Group* forms a precedent that sanctions will be construed as contempt of court and will expose the *dayanim* to criminal liability. However, the issuing of a *heter arka'ot* which includes no such sanctions, would be permitted.

[716] Interview with Rabbi Weissmann.
[717] Interview with Rabbi Warburg.
[718] The reverse is the case with regards to a *seruv* issued for *gett* recalcitrance, where according to the director of the BDA, the Modern Orthodox community take this quite seriously and the ultra-Orthodox community, less so; see Interview with Rabbi Weissmann.

Unlike in the USA where there is a greater tolerance for religious autonomy, and religious freedoms couple with the arbitration laws to form a wide protection for Battei Din against possible review by the courts,[719] the Australian courts who entertain a far more limited notion of religious freedoms, see the Beth Din in a similar vein to other secular forms of arbitration, where the voluntariness of the parties is paramount.[720] As is apparent from the interviews of *dayanim* in Israel and the USA, best practice Battei Din are cognisant of the law in their respective countries and take measures to ensure that their practices with regards to *seruvim* align with secular legal expectations.

Historically, when Battei Din were granted autonomy over the Jewish community they required the coercive power of the *seruv* to ensure that they had the necessary clout to maintain public order. Nowadays, countries that are legally monistic limit coercive power to the state. While a 'weak' legal pluralism has developed, which grants expression to other legal systems via arbitration,[721] the ability to enforce their awards remains with the state. In this context, an attempt to benefit from the state's power of enforcement of arbitral awards while still asserting traditional methods of religious enforcement to coerce compliance with the arbitration is likely to backfire, resulting in the loss of state enforcement as well as the loss of communal respect for the rabbinic arbitrators,[722] as the decision in *Live Group* demonstrated.[723]

6.3 Representation in Beth Din

The critical role of legal representation in the adversarial justice system stands in stark contrast to the resistance it seems to encounter at Jewish law. In this section we will explore Talmudic attitude towards representation in court, some aspects of which the Talmud is critical, while others its embraces. In addition, we will see that despite limited forms of representation being permitted in the Talmudic and Geonic periods, over the medieval and modern periods customary practice

[719] See Grossman (n 190).
[720] This is evident in the majority judgement of *Ulman v Live Group* (n 292) [161] who dismissed the arbitration agreement between the two companies that specifying that disputes 'shall be brought to the Chief Dayan of Sydney AUS. (sic) Rabbi Gutnick' as inferring that it would be arbitrated in accordance with Jewish law. This was challenged by the dissenting judge at [263] who advocated the US position that this was to be interpreted as granting the Sydney Beth Din (of whom Rabbi Gutnick had been the *Av Beth Din* for many years) jurisdiction. These competing views seem to reflect their respective appetite for allowing religious law to gain back-door entry into society via arbitration laws.
[721] See Part 3.2.
[722] One mitigating factor which resulted in the reduction of the *dayanim's* penalty for contempt of court on appeal was the 'humiliation the appellants suffered as a result of publicity'; see *Ulman v Live Group* (n 292) [200].
[723] While not directly related to this study, it is important to note that sanctions issued in a non-arbitral context, such as those placed upon a recalcitrant husband in the *agunah* context are not subject to the legal impediments outlined here and form an important internal mechanism for dealing with abuse within the religious community. See Rabea Benhalim, 'Oppression in American, Islamic, and Jewish Private Law' (2023) 94 *University of Colorado Law Review* 149, 205.

evolved to the point where a Rabbinic advocate, or *to'en rabani*, became a common feature of the Beth Din system.

The *halakhic* and historic overview will be followed by an assessment of contemporary best practice in the USA and Israeli Battei Din which formed a part of this study. Their relevance to the secular arbitral context will be assessed and recommendations will be proffered for Australian Battei Din navigating potential challenges in this regard.

6.3.1 Talmudic Resistance Towards Lawyers

The notion of an *orekh din* (lit. one who organizes a legal matter), a term that is generally accepted to refer to one who fulfils a role like that of a contemporary lawyer,[724] is portrayed negatively in Talmudic literature. Judah ben Tabbai, a scholar in the 1st Century BCE, advises judges 'do not play the part of an advocate.'[725] The Babylonian Talmud extends this beyond the context of judicial advocacy to anyone who plays the role of a lawyer, interpreting the verse 'Your lips have spoken lies'[726] to refer to legal advisors.[727] Additionally, an anecdote is brought in the Talmud in which Rabbi Yoḥanan regrets having given advice to heirs in terms of how to best structure the payments of medical bills for the widow of their deceased father so as to best protect their inheritance, exclaiming 'we have made ourselves like legal advisors'.[728]

The rationale behind the Babylonian Talmud's aversion to lawyers, can be explained on several fronts. One reason emerges from an understanding of the jurisprudential differences between Jewish and secular law, where in areas of *mamona* the former provides broader judicial discretion than the latter thus reducing the need for representation, as has been discussed previously.[729] Another explanation is based on the fact that certain presumptions of Jewish law stand true only when the litigants present their own case.[730] Further, *Rashi* explains that the presence of a proxy

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[724] See e.g. Maimonides, *Pirush HaMishnayot*, *Avot* 1:8 who explains 'they compose questions and answers: when the judge says this, answer him that; and when the litigant argues this, so should be your answer – as if they are organizing the case' (translation from sefaria.org).
[725] *Mishnah, Avot* 1:8.
[726] Isaiah 59:3.
[727] Babylonian Talmud, *Shabbat* 139a.
[728] Babylonian Talmud, *Ketubot* 52b (translation is from sefaria.org). This anecdote is brought with significant changes in Jerusalem Talmud, *Bava Batra* 9:4. For an analysis as to how these discrepancies reflect the differing attitudes of each Talmud to the notion of lawyers; see Sinclair, *Advocacy and Compassion in the Jewish Tradition* (n 507).
[729] See Part 2.2.8.
[730] This includes the dependency in many cases of a litigant making an oath (see Jerusalem Talmud, *Sanhedrin* 3:1 where the notion that the High Priest can send a proxy to court is challenged on the basis that the proxy cannot make an oath on his behalf), as well as the principle articulated in Babylonian Talmud, *Bava Metzia* 3a that 'a person does not exhibit insolence by lying in the presence of his creditor, who had done him a favour by lending money to him' (translation and elucidation from sefaria.org) which stands true only if the two litigants are present and advancing their own claims.

reduces the ability of the parties to compromise, being that a third party representative does not have the right to renege on the litigants legal rights.[731] Contemporary academics have also explained Jewish law resistance to including lawyers in the proceeding as stemming from essential differences between Jewish and common law, insofar as the former is inquisitorial in nature and the latter adversarial.[732] In the adversarial system, where the judge is an objective umpire, it is up to the lawyers to ensure justice for their clients with the judge ensuring that 'the rules of combat and fair play are adhered to' as well as 'declaring a victor.'[733] In contrast to this, *dayanim* in Jewish law are required to be far more active in the ascertainment of both the facts and law, taking on much of what would otherwise be facilitated by lawyers in the adversarial system.[734]

6.3.2 Forms of Permitted Advocacy in the Talmud

Notwithstanding its negative sentiment towards lawyers generally, the Talmud does not outlaw all forms of representation, recognising that under certain conditions, it is critical to the realisation of justice. One such example is that of a *harsha'ah* (granting of power of attorney; the one granted power of attorney is called a *murshah* pl. *murshim*) which is a mechanism that enables a creditor to have an agent represent them in court against their debtor. *Harsha'ah* provides confidence to creditors who might withhold from lending due to fear that a debtor will escape overseas making it impractical for the creditor to personally attend court and pursue their loan.[735] Notwithstanding its important practical function, it would often be taken advantage of, even in Talmudic times, by a plaintiff who wished to employ a representative who could better articulate their claims or intimidate the debtor. As such, the Talmud interprets the verse 'and did that which is not good among his people'[736] as referring to one who comes to court as a *murshah*.[737] This comment is interpreted by *Tosefot* to refer to instances where the creditor could have personally attended court but chose not to, due to the more persuasive traits of their chosen representative. However, where

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[731] Commentary of Rabbi Shlomo Yitzḥaki (*Rashi*) to Babylonian Talmud, *Shevuot* 31a s.v. *zeh haba'ah b'harsha'ah*. This comment is made in the context of *harsha'ah* which is not the same as a legal advisor as will be discussed below. It also assumes that the litigant is not present in the proceedings – were the litigant present this reason would be less relevant.

[732] See e.g. Frimer (n 172); Sinclair, *Advocacy and Compassion in the Jewish Tradition* (n 507); Michael J Broyde, *The Pursuit of Justice and Jewish law: Halakhic Perspectives on the Legal Profession* (Yashar books, 2nd ed, 2007) 7.

[733] Frimer, Ibid 297-298.

[734] That judges must personally cross-examine witness, see *Shulḥan Arukh, Ḥoshen Mishpat* 28:8-10; that they must probe the litigant see *Shulḥan Arukh, Ḥoshen Mishpat* 75:1; both cited in Frimer, ibid. The more active role of the *dayan* in comparison to common law judges was a theme that emerged from many of the interviews conducted as part of this study, see Interview with Rabbi Rapp; Interview with Rabbi Weissmann; Interview with Rabbi Rechnitz; Interview with Rabbi Carmel; Interview with Rabbi Warhaftig.

[735] Rabbeinu Yeḥiel ben Asher, *Tur, Ḥoshen Mishpat* 123:16.

[736] Ezekiel 18:18 (translation from sefaria.org).

[737] Babylonian Talmud, *Shavuot* 31a.

the mechanism is used legitimately, such as where the creditor is not physcially able to attend, the employment of *harsha'ah* is considered a good deed.[738]

While the mechanism of *harsha'ah* has been viewed by some as an antecedent for allowing lawyers in a Beth Din,[739] there are significant differences between the two concepts. The *halakhic* justification for *harsha'ah* is based on the creditor's ability to transfer their right to claim monies from the debtor to a third party who acts in their stead.[740] This justification would not extend to allowing a debtor to send a *murshah* insofar as they have no monetary claim to transfer and indeed the *Shulḥan Arukh* rules that a defendant has no ability to send a *murshah* in their stead.[741] Additionally, *harsha'ah* was designed for instances where the plaintiff was not able to attend court personally, due to extenuating circumstances. While, as evident from the comment of *Tosefot* that it was utilised (improperly) even when a plaintiff could attend, this practice attracted a similar criticism in the Talmud to that of employing an *orekh din*.

Another form of permitted advocacy, mentioned in both the Jerusalem and Babylonian Talmud exists under the rubric of 'speak up for the dumb.'[742] The Talmud informs us that Rav would use this verse as a basis for prompting creditors to utilise a specific legal argument against a debtor who asserted that their debt was cancelled in accordance with Biblical law at the start of the Sabbatical year.[743] The Jerusalem Talmud states in more general terms that 'when Rav Huna realized an argument in favour of a person who himself did not know it, he guided him, following "open your mouth for the dumb".'[744]

Acknowledging the challenge of defining where assisting the 'dumb' crosses into outright advocacy on their behalf, Maimonides states the law in his code as follows:

> "If a judge sees a vindicating argument for one of the litigants and realizes that the litigant is seeking to state it, but does not know how to articulate the matter, sees that one was

[738] Commentary of *Tosefot* to Babylonian Talmud*, Shavuot* 31a s.v. *ze hab'ah b'harsha'ah*. This position is accepted as the *halakhah* in *Shulḥan Arukh, Ḥoshen Mishpat* 123:14.
[739] The term *harsha'ah* is used interchangeable with *to'anim* in Israeli statute, see Part 5 of *Takanot HaDiyun* [Hebrew]. Rabbi Sha'ar Yashuv Cohen points out the mismatch between the two terms in Sha'ar Yashuv Cohen, '*Ma'amad Orkhei Din B'Halakhah*' (1981) 22 *Torah Sheba'al Peh* 64, 72 [Hebrew]. It is noteworthy that Rabbi David ben Naphtali Frankel in his commentary *Korban HaEdah* to the Jerusalem Talmud, *Sanhedrin* 2:1 explains the term *antellar* as synonymous with the term *murshah.* Based on the context there, an *antellar* refers to a lawyer acting for the High Priest in the capacity of either plaintiff or defendant, which – as will be explained – goes beyond the Talmudic definition of a *murshah*.
[740] See Aaron Kirschenbaum, 'Representation in Litigation in Jewish law (A Review-Essay)' (1975) *Dinei Yisrael* 25, 32-39 for a detailed discussion as to the *halakhic* basis for *harsha'ah*.
[741] *Shulḥan Arukh*, *Ḥoshen Mishpat* 124:1.
[742] Proverbs 31:8 (translation from sefaria.org).
[743] Babylonian Talmud, *Gittin* 37b.
[744] Jerusalem Talmud, *Sanhedrin* 3:8 (translation from sefaria.org).

> painfully trying to extricate himself with a true claim, but because of his anger and rage, he lost touch of the argument, or sees that one became confused because of his intellectual inadequacy, he may assist him somewhat to grant him an initial understanding of the matter, as indicated by Proverbs 31:8: 'Open your mouth for the dumb person.' *One must reconsider the matter amply, lest one become like a legal counsellor.*"[745] (emphasis added)

Legal advocacy is also permitted for certain individuals, where they are especially vulnerable or where attending court is seen as beneath their dignity. The Talmud mandates that a Beth Din appoint a trustee (*apotrupos)* for orphans to represent them in court regarding claims related to their deceased father's estate.[746] Additionally, the Jerusalem Talmud proposes that a High Priest sends a representative (*antellar*) in their stead, being that it would be unbefitting that they personally attend court.[747] Additionally, the Talmud permits advocacy when performed on behalf of one's relatives on the basis of the verse '[Do] not ignore your own kin'[748] although this exception does not extend to a person of stature.[749]

6.3.3 Post-Talmudic Evolution of Representation in Beth Din

The position of the Talmud in relation to representation is generally negative, except for where conflicting *halakhic* principles call for the carving out of certain exceptions. However, the practice of Jewish communities over the medieval and modern periods saw a gradual expansion in both the communal and rabbinic appetite for permitting representation. In the medieval period the Jerusalem Talmud's precedent of the High Priest sending a representative to court (*antellar*) was extended to encompass noblewomen and Torah scholars.[750] In addition, the precedent of the *antellar* was used by certain medieval Spanish scholars to provide a basis for the debtor being able to appoint a *murshah* despite the lack of a clear *halakhic* justification for how such an appointment can be made in the absence of a monetary claim that can be transferred.[751]

Over the course of the Modern Period, communal practice took on a life of its own, going beyond the *halakhic* boundaries outlined above in relation to representation.[752] Rabbi Yeḥiel Mikhel Epstein

[745] Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 21:11 (translation from sefaria.org).
[746] Babylonian Talmud, *Kiddushin* 42a.
[747] Jerusalem Talmud, *Sanhedrin* 3:8.
[748] Isaiah 51:7 (translation based on sefaria.org).
[749] Babylonian Talmud, *Ketubot* 52b.
[750] Naḥum Rakover, *HaShliḥut v'haHarsha'ah b'Mishpat HaIvri* (Mosad HaRav Kook, 1972) 314-318 [Hebrew]. These exceptions were codified in *Shulḥan Arukh*, *Ḥoshen Mishpat* 124:1.
[751] Rakover, ibid 326-331. Despite their viewpoint, *Shulḥan Arukh*, *Ḥoshen Mishpat* 124:1 maintained the classical view that prohibited the defendant's use of a *murshah*.
[752] Rakover, ibid 333-349.

writing in the 19th Century in his *Arukh HaShulḥan* lays out his assessment of the *halakhic* position which heavily limits the use of representation. Following this, he adds:

> "All [I have written above] is the law. However nowadays the custom in all Battei Din is that the defendant also appoints a *murshah* and certainly the plaintiff does, no matter whether the litigants are present in Beth Din or not. Nonetheless, if they are not in Beth Din and the Beth Din sees that it cannot properly ascertain the law by probing the *murshim*, they will send after the litigants who will have to attend the Beth Din."[753]

Some provide a *halakhic* basis for granting credibility to this custom, based on the idea that parties in a civil case can contract-out of aspects of Jewish law that belong to the category of *mamona*. As such, where representation is the norm, subject to a party's explicit protest, they will be deemed to be consenting to their inclusion.[754] Others base it on the notion that a paid lawyer is akin to a relative who is permitted to act as a lawyer insofar as they have an interest in the case, and are not considered 'a passer-by who gets embroiled in someone else's quarrel.'[755] A further argument made to favour modern-day practice of including representation is based on a broad application of the requirement to 'speak up for the dumb', insofar as the modern-day complexities of the legalities concerning commercial transactions render the non-legally trained litigant severely handicapped when attempting to present their own case.[756]

Concern regarding unethical practices of *to'anim* are evident in the period of their proliferation within the Beth Din system. Rabbi Ḥaim Benveniste, commented on the 17th Century practice in Venice for both litigants to bring a *to'en* bemoaning the reality that the greater the reputation a *to'en* earned for a willingness to act deceitfully, the more clients they would attract.[757] A similar reality in North Africa in the 18th Century resulted in a rabbinic edict banning the use of *murshim* due to their penchant to pervert the law and guide their clients to falsify their claims.[758] In 19th Century Constantinople a communal edict prohibited Torah scholars from acting as *to'anim* based on a

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[753] Rabbi Yeḥiel Mikhel Epstein, *Arukh HaShulḥan, Ḥoshen Mishpat* 124 (translation is my own).
[754] This justification is brought by the Rabbi Yehoshua Falk, *Me'irat Einayim, Ḥoshen Mishpat* 17:14; this is also brought to explain contemporary practice in Israeli Rabbinical Courts by both Sha'ar Yashuv Cohen (n 739) 74 and Yisrael Meir Lau, '*Yitzug Ba'alei Din Bifnei Bet HaDin'* (2000) 20 *Teḥumin* 21, 30 [Hebrew].
[755] Proverbs 26:17 (translation from sefaria.org); see Rabbi Ezra Batzri, *Dinei Mamonot* (Makhon HaKetav, 1974) vol 1, 440.
[756] See Broyde (n 732) 17-18 citing Rabbi Shimon Schwab.
[757] Rabbi Ḥaim Benveniste, Responsa *Ba'ei Ḥayai*, *Ḥoshen Mishpat* 2:75; referenced in Rakover, *HaShliḥut v'haHarsha'ah b'Mishpat HaIvri* (n 750) 337.
[758] Rabbi Avraham Ankava, *Kerem Ḥamor* 2:75; referenced in Rakover, *HaShliḥut v'haHarsha'ah b'Mishpat HaIvri* (n 750) 339. It is noteworthy that there were exceptions granted to this edict, such as where a litigant was elderly, sick, an orphan or a widow.

number of reasons, including ones that the Beth Din did not wish to disclose.[759] All in all, it is evident that Battei Din contending with the rise of the *to'en rabani* found them to be an obstacle in the pursuit of justice.[760]

The state of Israel formalised the role of a *to'en rabani* in its Rabbinical Courts in the *Takanot HaDiyun* which permit litigants to send a *murshah* unless the Beth Din requires them to represent themselves,[761] subject to the conditions that the *murshah* is licensed,[762] and that the litigants initially present their case.[763] The licensing of *to'anim rabbani'im* aims to ensure that they adhere to an ethical framework and provides a mechanism for their de-registration where necessary.[764] Also of note, despite the fact that initially women were excluded from acting as *to'anot rabaniyot* (female equivalent of *to'anim rabbani'im*) based on the statutory requirement that a *to'en* has studied for at least four years at a *yeshiva* (male seminary), this was altered in 1991 to provide an alternate requirement of having studied at an educational institution recognised by the *Beth Din HaRabani HaGadol* for at least three years and having earned a certificate of completion, which has resulted in the inclusion of women who now act in this capacity in Rabbinical courts.[765]

Despite the provision allowing for representation in Israeli Rabbinical Battei Din, it is still considered non-essential for a fair trial. This is evident from an appeal that made its way to the *Beth Din HaRabani HaGadol* in which the appellant sought to vacate a ruling of a district Beth Din on the basis that he was not allowed representation. The appeal was rejected on the basis that the lack of representation was not sufficiently significant to warrant the overturning of the decision insofar as the appellant could still represent himself. Dov Frimer contrasts this decision considering an American case in which a Beth Din operating as arbitration had their award vacated on the basis that the losing party was not permitted representation. This reflects the notion that whilst

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[759] Rabbi Yosef Alfandri, Responsa *Porat Yosef*, *Ḥoshen Mishpat* 30; referenced in Rakover, *HaShliḥut v'haHarsha'ah b'Mishpat HaIvri* (n 750) 340-2. One such reason was that by acting as *to'anim* some of the Torah scholars had become victims of communal gossip which had tarnished their reputations. Rabbi Alfandri comments that Torah scholars continued to act as *to'anim* despite the edict.

[760] Positive aspects of *to'anim* have also been noted. For example, Batzri (n 755) 441-442 recognises that there are both ethical and unethical *to'anim*, and Lau (n 754) 30 notes that the presence of *to'anim* can reduce fighting between the litigants.

[761] *Takanot HaDiyun* s 47(1) [Hebrew].

[762] Ibid s 50(1)(b).

[763] Ibid s 60(1).

[764] The licensing framework pertaining to *to'anim* in Israel can be found in the *Takanot HaTo'anim HaRabani'im* [Rabbinic Advocate Regulations] 5761-2001 [Hebrew].

[765] *Takanot HaTo'anim HaRabani'im* [Rabbinic Advocate Regulations] 5761-2001 s 2(a)(2)(b) [Hebrew]; see Eliezer Hadad, *'Hishveh Hakatuv Isha L'ish: Al Mamadan shel Nashim B'vatei Din Rabani'im'* [Scripture Equates a Woman to a Man: On the Status of Women in Rabbinical Courts] (Israel Democracy Institute, 2013) 83-87 <https://www.idi.org.il/media/3432/mm-100.pdf> [Hebrew].

representation has become an accepted feature in a Beth Din, it has not been elevated to the same status it is accorded in the adversarial system.[766]

6.3.4 Eretz Ḥemdah Gazit v Beth Din of America: To *To'en* or Not to *To'en*?

While the *Takanot HaDiyun* apply only to the State Rabbinical Courts and not to private Battei Din in Israel, *to'anim* are nonetheless an accepted feature of Eretz Ḥemdah Gazit's arbitrations. However, unlike the State Battei Din, Eretz Ḥemdah Gazit will allow any form of representation that the party chooses, regardless of whether they hold a license to practice.[767] In approximately half of the cases, parties will bring representation and the larger the amount of money in dispute, the greater the likelihood of litigants bringing representation.[768] In terms of the conduct of *to'anim*, Rabbi Daniel Mann who sits as an *Av Beth Din* in the Jerusalem branch of Eretz Ḥemdah Gazit remarked:

> "They are pretty professional. Did I like everything that every lawyer and every *to'en* did? No. But was there anything that I thought was 'off', out of bounds, that was so ridiculous that that's criminal? No."[769]

Given the presence of *to'anim*, Eretz Ḥemdah Gazit trains its *dayanim* with regards to ensuring that the litigants remain their focus, and that poor behaviour from *to'anim* is not tolerated. Their *menahel*, Rabbi Ido Rekhnitz explained:

> "What we teach our dayanim is that when you start a meeting, in the court, even the *Bet HaDin HaRabbani*, the *to'en rabani* or the lawyer will stand and say 'I will say what we want from the other side, what is our case *tviyah* (claims).' In this Beth Din we tell him, 'sit down please, we want to listen to the real party, not the lawyer.' This puts the lawyer or the *to'en rabani* on the side… when you listen to the parties themselves you have much more chance to know the truth. If the lawyer or *to'en rabani* is *tzoek* (screams) you send him out."[770]

To'anim do not feature in either the BDA nor the cRc Beth Din. The rules and procedures of both Battei Din affirm the right of the parties to be 'represented by an attorney who must be licensed to practice law in any jurisdiction in the United States'[771] and do not reference *to'anim*. The *menahel* of the BDA, Rabbi Shlomo Weissmann stated their policy as follows:

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[766] Frimer (n 172) 302-303.
[767] Interview with Rabbi Rechnitz.
[768] Interview with Rabbi Mann.
[769] Ibid.
[770] Interview with Rabbi Rechnitz.
[771] *BDA rules* (n 329) s 12; *cRc rules* (n 396) s 12.

> "Our rule is that we don't allow *to'anim* unless both sides agree, and any side that is represented by a *to'en* is also represented by a lawyer… That practically means we virtually never have *to'anim*. I can't remember the last case we had with a *to'en*."[772]

This resistance to *to'anim* is shared by the cRc Beth Din, whose *Av Beth Din*, Rabbi Yona Reiss, went on to explain the rationale for their position:

> "We don't generally allow for rabbinical advocates, and that's because it's not a requirement of the arbitration statute so long as the parties can be represented by licensed attorneys. There are problems of serving as *orkhei hadayanim*, of trying the skew the facts and presentation of a case to fit within the parameters of Jewish law, and it may sometimes take away from the honesty of the presentation – and most significantly, at least here in this country, rabbinical advocates are not subject to any professional rules or licensing requirements and therefore there is the possibility that they could tempted to do things that are not incredibly ethical in order to advance the cause of their party because they don't stand to lose their license or be subject to any disciplinary action like licensed attorneys in the event that they would, for example, switch sides in the middle if one side decides to buy them off, things that would be unheard of if one were serving as a licensed attorney. Since we don't have any kind of professional rules, people who might otherwise be decent people have a tremendous motivation, to race with each other to the gutter in employing tactics that might be utilised in being able to maintain an edge and keep up with the competition, so to speak."[773]

The rationale expressed by Rabbi Reiss was shared by other *dayanim* from the BDA,[774] although Rabbi Willig, *Av Beth Din* of the BDA mentioned an exception:

> "As a rule, no *to'anim* are allowed. In certain unique cases where both parties want it and it's an *agunah* case or something like that we may relent."

Despite their reticence to include *to'anim*, the *dayanim* of both the BDA and cRc Beth Din were embracing of secular legal representation. While, as Rabbi Reiss mentioned, it is something that is mandated under US arbitration law, the *dayanim* appreciated its important role in the pursuit of justice. One example of this was provided by Rabbi Daniel Rapp of the BDA who explained that:

[772] Interview with Rabbi Weissmann.
[773] Interview with Rabbi Reiss.
[774] Interview with Rabbi Willig; Interview with Rabbi Weissmann. Both Rabbis Willig and Weissman added the concern that *to'anim* are often paid by the hour and are thus incentivised to draw out the proceedings.

> "Oftentimes there are lawyers and in the event that *dina demalkhu[t]a dina* comes into play we will often say that we'd like you to brief that and each of them will write you up their understanding of the law and we will review that and decide based on that."[775]

Additionally, lawyers are helpful in assisting parties in setting out the facts, and since they generally do not know the relevant Jewish law, they are less likely than a *to'en* to attempt to skew the facts to align with what they think will achieve a positive verdict for their client.[776]

While the differing perspectives with regards to *to'anim* in the Israeli and US Battei Din that formed the subject of the study could be put down to the fact that licensing of *to'anim* in Israel provides a mechanism for their oversight, this seems to be at odds with the facts-on-the-ground insofar as Eretz Ḥemdah Gazit does not practically require that its *to'anim* are licensed. Despite this, the experience of Rabbi Daniel Mann who served as a *dayan* in both the BDA and Eretz Ḥemdah Gazit is that in Israel, 'we have much better experience with *to'anim*'.[777] One could argue that the mere existence of a registration process for *to'anim* lends dignity to the profession, which elevates even the conduct of those who act without a license. Additionally, the training of *dayanim* at Eretz Ḥemdah Gazit with regards to how to deal with inappropriate behaviour of a *to'en* empowers the *dayanim* to effectively take a stand in instances of impropriety. Moreover, as discussed in our analysis of the differences in approach between the USA and Israel Battei Din that were the subject of this study, Eretz Ḥemdah Gazit appears to see itself in the image of the courts, rather than arbitration.[778] As such the *Takanot HaDiyun* which grants permission to litigants to utilise *to'anim* in the context of the State Rabbinical courts would likely have influenced their decision to include *to'anim* in their arbitration, despite the challenges that their inclusion could entail.

6.3.5 Recommendations for Australian Battei Din

Based on the above, the Australian context would appear reflective of the situation in the USA where, unlike in Israel, there is no regulation of *to'anim*. As such, concerns that have been raised since the proliferation of *to'anim* in the modern period with regards to their underhanded practices and general hindrance to the pursuit of justice would mitigate against their inclusion in Australian Battei Din. However, unlike in the USA, it appears that Australian arbitration law places limits on the denial of a litigants' unlicensed representation.

[775] Interview with Rabbi Rapp.
[776] Interview with Rabbi Weissmann; Interview with Rabbi Rapp.
[777] Interview with Rabbi Mann.
[778] See Part 4.5.

In Australian arbitration law, 'parties may appear or act in person, or may be represented by another person of their choice'[779] and 'a person who is not an Australian lawyer does not commit an offence under or contravene the provisions of the *Legal Profession Uniform Law* (Victoria) or any Act merely by representing a party in arbitral proceedings in this State.'[780] In his commentary on this provision, Doug Jones notes that like the previous iteration of this law in the Superseded Uniform Acts the arbitrator has no discretion to refuse the party the right to bring representation,[781] although the litigants may choose to waive this right.[782]

The notion that parties may bring a 'person of their choice' and the fact that this extends to include a non-lawyer appears *prima facie* to limit the Beth Dins ability to outlaw *to'anim*.[783] This stands in contrast to New York and Chicago arbitration laws, under which the BDA and cRc Battei Din operate, which limits the right of a party to the selection of a licensed attorney.[784] Doug Jones notes that the litigants' ability to select 'a person of their choice' cannot be used as a delay tactic where that person has very limited availability.[785] It is arguable that given the reputation of *to'anim* to inhibit the pursuit of justice, as evidenced in by historical precedent and the position of contemporary *dayanim* in the USA, their selection by a party may be viewed as tactical rather than *bona fide* and thus not be protected under the Act. However, this argument is untested, and it is unclear as to whether it would be accepted by a court if the Beth Din were challenged by a litigant for whom they did not permit representation by a *to'en rabani*.

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[779] *Commercial Arbitration Act 2011* (Vic) s 24A(1).
[780] Ibid s 24A(2).
[781] Jones (n 182) [8.660].
[782] Ibid [8.750]. This is subject to the waiving of such rights not conflicting with 'such safeguards as are necessary in the public interest' in *Commercial Arbitration Act 2011* (Vic) s 1AC(2)(a). See Chapter 3.6.4 where the importance of representation, specifically in the religious arbitral context is discussed. It is also noteworthy that parties attending the Beth Din should be notified of their right to representation, and it should be referenced in the rules and procedures of the Beth Din that are made available to litigants, see *Thaler v Amzalak* (n 540) [207] where Schmidt J noted that one of the parties 'appeared at the Beth Din unrepresented, on his evidence also unaware that he had the right to be represented'.
[783] This inference however, may be mitigated by *Commercial Arbitration Act 2011* (Vic) ss 19(1) and 19(2) which allow for the parties to agree on the terms of procedure (see s 19(1)) and provides the arbitrators broad discretion where there is no such agreement (see s 19(2)). As such, where one party resists the inclusion of a *to'en* the arbitrators would appear to have the discretion to determine whether they are or are not permitted to represent the litigants. Additionally, if *to'anim* are representing the parties and they attempt to delay or prevent the expeditious conduct of the arbitration, the arbitrators are granted broad discretion under s 25 of the Act. I am grateful to my brother Israel Cowen for drawing my attention to the relevance of these aspects of the Act.
[784] *New York Civil Practice Law & Rules* § 7506 (2023): '[a] party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place.' Wording of similar effect is found in *Illinois Uniform Arbitration Act* 710 ILCS § 5-6 which is the equivalent Illinois law under which the cRc Beth Din operates.
[785] Jones (n 182) [8.690].

As such, Australian Battei Din have the option of applying the model of Eretz Ḥemdah Gazit which trains its *dayanim* to be assertive in sidelining *to'anim* to the extent possible and ensuring that the litigants are front-and-centre of the case. This will likely be hard to achieve, particularly where an experienced or aggressive *to'en* is representing a client before *dayanim* who have less experience or are not assertive. An alternate solution is for the *dayanim* to refuse to arbitrate a case in an instance where either party insists on bringing a *to'en*. While an arbitrator may not refuse a litigant the right to bring a representative of their choosing, there appears to be nothing that prevents an arbitrator from refusing to arbitrate where conditions are such that they lack confidence in their ability to achieve justice for the parties, such as where *to'anim* are acting on behalf of the parties.[786]

6.4 Female Testimony in Beth Din

One of the more sensitive areas in which Jewish law seems to conflict with modern sensibilities, is with regards to its position on the admission of female testimony in the context of Beth Din arbitration. The Biblically derived prohibition on accepting female testimony has been the subject of much consternation and has been interpreted by some to imply a perspective of women that deems them as unsavoury or lacking in credibility.[787] Such a view of women in general, is manifestly negated by a large range of scholars in the corpus of *halakhic* literature that deals with this subject. In practice, both in the Rabbinical Courts in Israel, as well as in the Battei Din that formed the subject of this research, female testimony is accepted without reservation. A range of studies have presented detailed surveys of the *halakhic* literature on the subject,[788] and as such, for the purposes of this research, only a brief outline will be provided as to a basis by which Battei Din are accepting of female testimony despite sources to the contrary within the *halakhic* tradition.

The non-acceptance of female testimony would provide a major cause of conflict for a Beth Din operating as an arbitral body in a Western legal context. Besides for cultural sensibilities relating to equality, fairness and justice that it would quite obviously offend, it is likely that excluding such testimony would result in the Beth Din falling foul of the *Commercial Arbitration Act 2011* (Vic)

[786] This approach is taken by Rabbi Daniel Rapp of the BDA, who refuses to arbitrate in instances where there are *to'anim* representing either side (seemingly this would occur under the limited circumstances where the BDA allows for *to'anim* as discussed above); Interview with Rabbi Rapp.
[787] See e.g. Rachel Adler, 'The Jew Who Wasn't There: Halacha and the Jewish Woman' (1972) 2(6) *Off Our Backs* 16-17 (reprinted from *Davka*); Ruth Halperin-Kaddari, 'Women, Religion and Multiculturalism in Israel' (2000) 5 *UCLA Journal of International Law & Foreign Affairs* 339; Deena Kopyto, 'Women's Testimony and Talmudic Reasoning' (2018) 2(2) *Kedma* 61.
[788] See e.g. Gershon Holzer, '*Edut Isha b'Mishpat Ha'Ivri'* [Female Testimony in Jewish Law] (1971) 67 *Sinai* 94 [Hebrew]; Hadad (n 765); Ilan Fuchs, 'Women's Testimony in Jewish law: A Historical Survey' (2012) 82-83 *Hebrew Union College Annual* 82-83, 119.

which aims to promote fairness[789] in the arbitral process, as well as the equal treatment of parties[790] both of which would be contravened in the event that evidence was discarded on the basis of discrimination between the sexes. Moreover, under the Act an arbitral award may be set aside where it contravenes public policy of the State,[791] which proscribes the unequal treatment of the sexes.[792]

6.4.1 The *Halakhic* Position on Female Testimony

The original sources for prohibiting female testimony in court are derived from Biblical verses in Deuteronomy 19:15-17. Applying homiletical devices to this text, the *midrash* (a compilation of rabbinic exegesis on Scripture) as well as both the Jerusalem and Babylonian Talmud arrive at the conclusion that only male testimony is acceptable according to Torah law.[793] No reasons are provided in any of these sources for why the law is as it is, leading some medieval authorities to posit that it belongs to the realm of scriptural decree (*gezerat hakatuv*) concerning which there is no compelling rationale.[794]

Despite the seemingly 'blanket' quality to the ban on female testimony, one already finds exceptions to this rule in the Talmud itself. Examples include scenarios such as where the testimony pertains to the freeing of a 'chained' woman (*agunah*),[795] the identification of a brother for the purpose of levirate marriage (*yibum*),[796] the status of a woman whom has been held in captivity,[797] and others.[798] Following in the footsteps of the Talmud, later scholars further expanded upon the list of

[789] *Commercial Arbitration Act 2011* (Vic) s 1AA.
[790] *Commercial Arbitration Act 2011* (Vic) s 18.
[791] *Commercial Arbitration Act 2011* (Vic) s 34(2)(b)(ii).
[792] *Sex Discrimination Act 1984* (Cth) s 5 which includes circumstances whereby 'the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different sex.' While *Sex Discrimination Act 1984* (Cth) s 37 provides exclusions for religious bodies, it is unlikely that this would extend to a Beth Din which is operating as arbitration and seeking the enforcement of its award under the *Commercial Arbitration Act* which does not distinguish between religious and secular arbitral bodies.
[793] *Midrash Sifrei* 190 to Deuteronomy 19:15; Babylonian Talmud, *Shavuot* 30a; Jerusalem Talmud, *Sanhedrin* 3:9; this is brought as the *halakhah* in *Shulḥan Arukh, Ḥoshen Mishpat* 35:14.
[794] See commentary of *Tosefot* to Babylonian Talmud, *Zevaḥim* 103a, s.v. *ain*; Responsa of *Rashba* attributed to *Ramban*, 74; referenced in Moshe Meiselman, *Jewish Woman in Jewish law* (Ktav Publishing House, 1978), 75-78 who explains that 'in a secular legal system, there is no room for arbitrariness; not so in a divine one… [t]he entire Jewish legal system is replete with *gezerot hakatuv,* decrees of the Torah.'
[795] *Mishnah, Yevamot* 16:7.
[796] Babylonian Talmud, *Yevamot* 39b.
[797] *Mishnah, Ketubot* 2:6.
[798] See Holzer (n 788) 99-102.

exceptions to include such circumstances where no males were present who could give testimony,[799] or where a female perspective is necessary.[800]

6.4.2 Credibility (*Ne'emanut*) v Formal testimony (*Edut*)

A compelling theory which distinguishes the various exceptions mentioned above from the base-line rule prohibiting female testimony, can be found in Maimonides' codification of Jewish law.[801] When discussing the discretion granted to judges, he writes:

> "A judge may adjudicate cases involving monetary law based on factors that he is inclined to regard as true and concerning which he feels strongly in his heart are correct even though he does not have proof of the matters. Needless to say, that if he personally knows that a matter is true, he may judge the case according to his knowledge… if he regards a woman or a servant as trustworthy, should he feel strongly that the matter about which they are speaking is correct, he may rely on their statement and judge accordingly…. These matters are solely given over to the heart of the judge to decide according to what he perceives as being a true judgment.
>
> Why then did the Torah require two witnesses? Because when two witnesses appear before a judge, he must judge according to their testimony whether or not he knows it to be true."[802]

In this text, Maimonides distinguishes between two types of witness accounts. In the first, the judge is required to critically evaluate the witness testimony and listen to his 'heart' in deciding whether to determine in accordance with the said testimony. The second scenario describes a circumstance where the judge has not formed a view of the case, and must follow the witnesses, somewhat blindly. In the first instance, a broader range of testimony is acceptable, including female testimony. In the second however, only the formal testimony of two witnesses who fit the technical, and not overtly rational,[803] requirements stipulated in the Talmud – which includes the prohibition on female testimony – is acceptable. Indeed, Maimonides goes on to write that so powerful is this latter type of testimony, that in an instance where the judge is unable to prove that the witnesses are acting

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[799] This view is brought alternatively in the names of Rabbeinu Gershom and Rabeinu Tam, see Rabbi Moses Isserles, in his commentary *Darkhei Moshe* to *Tur, Ḥoshen Mishpat* 35:11:3.
[800] Rabbi Moses Isserlin, Responsa *Trumot Hadeshen* 1:353.
[801] See e.g. Hadad (n 765) 54-57; Meiselman (n 794) 73-78; Rabbi Menachem M Schneerson, *Likkutei Sichot* (Kehot Publication Society, 10th ed, 2006) vol 3, 987.
[802] Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 24:1 (translation from sefaria.org).
[803] Other technical requirements include that the witnesses may not be related to one another (see Maimonides, *Mishneh Torah, Hilkhot Edut* 13:15), and if one member of the group of witnesses is found to be invalid, the rest of the group is disqualified (see Maimonides, *Mishneh Torah, Hilkhot Edut* 20:3).

deceitfully but is convinced that something is amiss, 'it is forbidden for him to deliver a ruling. Instead, he should withdraw from this judgment and allow it to be decided by someone whose heart is at peace with the matter.'[804] As opposed to the first type of testimony where the judge has discretion as to its acceptance, the second 'formal' type of testimony cannot be disregarded, instead the judge has the option of either ruling in accordance with it or recusing himself from the matter.

To put it in other words, the first form of testimony in which female testimony is acceptable, is where what is required is *credible* evidence (*ne'emanut*).[805] The second type of testimony requires, in addition to credibility, a number of technical criteria which elevates it to a unique status that does not exist within secular legal systems, one which coerces the judge to either rule in accordance with it or recuse himself from the case, under the rubric of formal testimony (*edut*)[806]. The latter form of *edut* is not utilised in contemporary commercial Battei Din,[807] although it is still utilised in certain ritual settings, such as in the context of sacralising marriage and divorce.

6.4.3 Application to Contemporary Battei Din

This analysis provides an explanation for the reality that contemporary Battei Din will not hesitate in accepting female testimony. Scholars who have conducted research into the topic of female testimony at Jewish law are unanimous in their assertion that 'rabbinical courts routinely accept women's testimony and practically accord it the same evidentiary weight that is accorded to men's testimony.'[808] Moreover, in the many interviews conducted with Battei Din in America and Israel, the *dayanim* were in consensus as to the equal esteem with which testimony of both sexes are treated. In the words of the *Av Beth Din* of the BDA:

> "all of our *eidu[t]* is not really *eidu[t]* – ask any *dayan* they'll tell you… we accept testimony, its more on the realm of *umdena* (discretion) and when women want to come, they can testify in that capacity."[809]

[804] Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 24:3 (translation from sefaria.org).
[805] The notion that a female witness is less credible than a male witness, which is the assumption of Adler (n 787) does not accord with the historical *halakhic* scholarship on the subject. To the contrary, the many exceptions to the rule prohibiting female testimony evidences their credibility in matters of significant *halakhic* consequence as does the practice to accept female testimony in all Battei Din that were the subject of this study; see Part 6.4.3. That female testimony is not barred due to a lack of credibility is stated explicitly in the commentary of *Tosefot* to Babylonian Talmud, *Zevaḥim* 103a, s.v. *ain*.
[806] The term *edut* is also used in reference to the first form of testimony (*ne'emanut*), however for the purposes of clarifying the difference between these two categories, the terms *ne'emanut* and *edut* are useful.
[807] Interview with Rabbi Mann.
[808] Halperin-Kaddari (n 787) 356; see also Gershon Holzer (n 788) 111-112; Hadad (n 765) 32; Fuchs (n 788) 157.
[809] Interview with Rabbi Willig.

An additional basis for permitting female testimony, mentioned by several *dayanim* in the interviews conducted was the notion that they conduct arbitration under the rubric of *pshara krova l'din* (compromise which is close to the law).[810] This principle extends leeway to the judge to exercise discretion in considering forms of evidence that don't align with the formal requirements of Jewish law.[811]

At face value, the prohibition on female testimony seems to present a significant barrier to the smooth integration of a Beth Din into contemporary society, both in terms of the latter's cultural and legal dimensions. As has been illustrated above, there is a long history of exceptions to this rule, which can be explained by the notion that female testimony was always accepted as credible evidence (*ne'emanut*), and only limited from being included in the category of 'formal testimony' (*edut*) for which there are a range of technical requirements, some of which are not overtly rational. As such, unlike ritual elements of Jewish life which require the formal standard of *edut*, Battei Din operating in commercial litigation are exclusively concerned with credibility (*ne'emanut*) and as such, should have no hesitation in admitting female testimony.

6.5 APPEALS

The notion of an internal appellate process within the context of arbitration that allows for review of the substantive law applied in the initial award is not required under Australian, USA or Israeli law.[812] Despite this, it is offered by both the BDA and Eretz Ḥemdah Gazit who believe that it provides their litigants greater confidence in their arbitral process.[813] In this section, the broad *halakhic* consensus for the notion of an appellate Beth Din, despite its lack of precedent in Talmudic times, will be briefly outlined. Following this, we will explore the prevalence of appeals processes in the Battei Din surveyed as a part of this study, and its relevance to the Australian Beth Din context.

[810] See Interview with Rabbi Rapp; Interview with Rabbi Weissmann; Interview with Rabbi Langer; Interview with Rabbi Warhaftig.
[811] An outline of the notion of *pshara* (compromise) and *pshara krova l'din* can be found in Elon et al, *Jewish law (Mishpat Ivri)* (n 166) 361-364.
[812] It is not referenced in the relevant arbitration statutes under which the Battei Din surveyed in this study operated. With regards to Australian law, it was specifically referenced as not being a requirement of arbitration in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, [20] (French CJ, Gummow, Crennan and Bell JJ) which stated that 'it is true to say that the provision of an award under the Arbitration Act lacks distinctive hallmarks of the exercise of judicial power, namely the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system'.
[813] Interview with Rabbi Willig.

6.5.1 Appeals in Jewish law

The notion of an appellate court does not feature in the Talmud. As discussed previously, this point of departure from other legal systems, which deem the appellate process as core to the administration of justice, can be explained with reference to their differing jurisprudential underpinnings.[814] Given the absence of formal review, Jewish law prescribes a range of safeguards which act to ensure that a Beth Din is held accountable.[815]

The absence of any such doctrine, proved the source of significant controversy when, in the years following the Balfour Declaration in 1917, the British Attorney-General over Mandatory Palestine, Norman Bentwich, made the granting of Jewish law authority over personal matters conditional on the establishment of an appellate Rabbinical court.[816] In response to this proposition, two camps emerged: the Rabbinate of Jaffa who maintained that such a court was prohibited by Jewish law and the Rabbinate of Jerusalem who argued that it was permitted.[817]

The debate turned on various readings of a passage of the Babylonian Talmud, *Sanhedrin 33a*, and the interpretation of several Jewish law principles, primarily the notion of *beit dina batar beit dina lo dayki* (a Beth Din does not examine another Beth Din).[818] The Chief Rabbinate ultimately decided that there was sufficient basis to allow for an appellate court within Jewish law, and the *Beit Din Gvohah L'Irurim* (Rabbinical Supreme Court of Appeals) was founded in 1921.[819]

Despite appellate courts not being referenced by either the earlier or later commentaries on the Talmud,[820] Professor Simḥa Assaf provides evidence that in many instances across the medieval and modern period such courts did function within the Jewish community.[821] He argues that the precedent established by their existence provides greater clarity as to the *halakhic* position with regards to appellate courts than does any theoretical analysis of Jewish law.[822] Likewise, the position of the State Rabbinical courts in Israel, that endorse appeal at Jewish law, has come to be adopted as *halakhically* acceptable by a broad consensus of the Orthodox Jewish world, evidenced by the fact

[814] See Part 2.2.8.
[815] See Arthur Jay Silverstein, 'The Right of Appeal in Talmudic Law' (1973) 1(6) *Case Western Reserve Journal of International Law* 33, 42-46.
[816] Aryeh Morgenstern, *HaRabbanit HaReishit l'Eretz Yisrael: Yisodah v'Irgunah* (The Hebrew University Magnes Press, 1972) 69-70 [Hebrew].
[817] Ibid; Zoraḥ Warhaftig, '*Takanot HaRabbanut HaReishit*' (1995) 15 *Teḥumin* 81, 83 [Hebrew].
[818] Babylonian Talmud, *Bava Batra* 138b (translation from sefaria.org); for an explanation of each *halakhic* viewpoint see J David Bleich, 'The Appeal Process in the Jewish Legal System' (1993) 28 *Tradition* 94.
[819] Assaf (n 510) 85; its name was subsequently changed to the *Bet HaDin HaGadol* [Great Rabbinical Court] in 1943; see Warhaftig (n 817) 84.
[820] Ḥaim David HaLevi, *'Bit Din L'Irurim'* (1995) 15 *Teḥumin* 187, 190 [Hebrew].
[821] Assaf (n 510) 74-85.
[822] Ibid 74.

that 'even the most radical of the ultra-Orthodox exercises their right [to appeal] before the *Beit Din HaGadol*'.[823]

While the arguments that provide a *halakhic* bases for permitting an appellate review of a Beth Din have clearly been accepted by the religiously observant community, there have been instances where a respondent has challenged the appellants right to have a decision reviewed by the Beit Din HaGadol. In responding to this claim, the Beit Din HaGadol has based its authority on power of the Chief Rabbinate to make communal edicts,[824] as well as the fact that appeal is enshrined in legislation,[825] which has the effect of creating a presumption that *dayanim* of district Battei Din accept that the finality of their decisions are conditional upon whether the disgruntled party chooses to seek its review by the Bet Din HaGadol.[826]

6.5.2 Appeals in Battei Din acting as Religious Arbitration

Unlike in Israel where the district Battei Din have jurisdiction under law with regards to matters of personal status, Battei Din operating in commercial matters both in Israel and abroad act in the capacity of arbitration and are thus not required under secular law to formulate an internal appellate process. The *UNCITRAL Model Law* which have been adopted with minor changes by the Australian CAAs provide a clause permitting a party to 'request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature' or to 'request the arbitral tribunal to give an interpretation of a specific point or part of the award' and set out relevant timeframes within which this must occur.[827] However, it does not provide for a party to have the matter appealed internally on other bases, such as errors of law.

Despite similar provisions in New York arbitration laws,[828] the BDA goes beyond its arbitral duty and offers parties the ability to apply to have the initial decision appealed, and provides that an award may be modified where 'the *Av Beth Din* determines that a provision of the Award is contrary to Jewish law'.[829] This tier of internal review is made possible due to the fact that the *Av Beth Din* of the BDA does not normally sit on cases in the first instance, and in instances when he sat on the initial panel, the appeal is brought before the *sgan Av Beth Din*.[830]

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[823] Rabbi Eliezer Waldenberg, Responsa *Tzitz Eliezer* 16:67 (translation is my own).
[824] The basis for the authority of the Chief Rabbinate to issue communal edicts is discussed in Warhaftig (n 817) 81-3.
[825] See *Takanot HaDiyun*.
[826] Referenced in Bleich (n 818) 106.
[827] *Commercial Arbitration Act 2011* (Vic) s 33; cf *UNCITRAL Model Law* (n 10) art 33.
[828] *New York Civil Practice Laws and Rules* § 7511 (2023).
[829] *BDA rules* (n 329) s31(a); see Part 4.2.6 for further discussion about the appeals process at the BDA.
[830] Interview with Rabbi Weissmann.

When asked as to the Jewish law basis for appeals that underpins its inclusion in the BDA process, the *Av Beth Din* explained:

> "[appeals are] not allowed as a rule, but since it's in our rules and procedures… there was a whole fight in Israel where the British government insisted on appeals and Rav Kook went along with it and they yelled at him. Rav Eliyashiv sat on the court of appeals for 20 years – he was considered the greatest *dayan* of his time. So, if you want to say it's no good you have to go against Rav Eliyashiv."[831]

Included in his rationale is the precedent of the Beit Din HaGadol in Israel, among which many well-respected *halakhic* authorities have been members, including Rabbi Yosef Shalom Eliyashiv. In addition, he references the fact that it is in 'our rules and procedures' which, akin to the *Takanot HaDiyun* create the presumption that decisions rendered by the initial panel are done with the knowledge that they are to be considered final only if the right to appeal is not exercised.

While both the BDA and Eretz Ḥemdah Gazit[832] offer an avenue of internal appeal with regards to errors of Jewish law, this was not found to be the case in smaller Battei Din that were the subject of this study. Both the cRc Beth Din and the Beth Din of Rabbi Yaakov Warhaftig in Har Nof, Israel do not offer an appellate branch due to their limited infrastructure.[833] In the words of the *Av Beth Din* of the cRc:

> "I generally sit on the cases … it doesn't make much sense for a mistake of Jewish law to be argued, as the higher authority at the Beth Din heard it the first time around. That type of ground for appeal that exists in, for example the Beth Din of America, which has a larger, more expansive roster of *dayanim*, as opposed to the Chicago Rabbinical Council where the *Av Beth Din* will likely have sat on the case in the first place, so the parties understand that they obviously can argue the points as strenuously as possible but whatever Jewish law resolution we are going to come to, that is going to be our conclusion unless we ourselves determine that we made a mistake."

While there is always the ability for a party to make the argument to the original panel that there has been *ta'ut bidvar mishnah* (an error in black letter law),[834] such a claim will result only in the initial *dayanim* revisiting their ruling, not an separate appellate *dayan* or panel. As such, the cRc Beth

[831] Interview with Rabbi Willig.
[832] See Part 4.4.6.
[833] Interview with Rabbi Warhaftig; Interview with Rabbi Reiss.
[834] For an overview of the bases by which a ruling may be remitted to the original panel according to Jewish law, see *'Ta'ut HaDayanim', Encyclopedia Talmudit* (Yad HaRav Herzog, 1991) vol 20, 496 [Hebrew].

Din rules and procedures, whilst based on those of the BDA and almost identical in language, excludes the provision allowing for appeal in the BDA when 'the *Av Beth Din* determines that a provision of the Award is contrary to Jewish law'. They do however offer limited means for modification of the awards in instances where these align with 'the major causes for appeal… provided under Illinois law'.[835] While it does not provide the same scope and oversight as does the BDA, it does provide disgruntled parties an avenue to have their concerns addressed internally by the original panel and thus potentially alleviating their need to seek redress in court.

6.5.3 Application to the Australian Context

It is evident from the above that the inclusion of an internal appeals mechanism in Beth Din arbitration is acceptable within the religiously observant community, and it is utilised by the BDA and Eretz Ḥemdah Gazit to build the community's trust in their decisions. Pragmatically however, the inclusion of an appellate arm within the Beth Din is contingent on the availability of an extensive roster of *dayanim* which presently does not exist within the Australian Jewish community. As such, echoing the practice of the cRc Beth Din, Battei Din in Australia should provide a mechanism for disgruntled parties to raise concerns regarding the modification of an award in instances where it would provide cause for an appeal to the courts. This provides the Beth Din the ability to correct any potential errors and save costs – both financial and reputational – that could result from a the matter being appealed to the courts.[836] However, the offering of an appeals system in which appeals based on an error of Jewish law could be reviewed by *dayanim* who were not on the original panel is contingent on the quantum of *dayanim* being such that the *Av Beth Din* or his delegate can sit out of the original proceeding and thus take on appeals as necessary.

A further avenue for creating an appellate structure in Australia could come in the form of collaboration between Battei Din in Melbourne and Sydney. Each Beth Din could choose to appoint the other as having appellate jurisdiction in instances where a party is dissatisfied with their award. By writing this into the rules and procedures, it would have *halakhic* validity, akin to the manner by which rulings of district Battei Din in Israel are rendered conditional to the appellate jurisdiction of the Beit Din HaGadol based on the *Takanot HaDiyun*. While the factors influencing a potential collaboration between these two Battei Din in Australia is beyond the scope of this study, there is a

[835] Interview with Rabbi Reiss.

[836] *Thaler v Amzalak* (n 540) [8], [240]-[241] discusses how the disgruntled party had approached the Beth Din seeking to have the decision revisited. It was only after receiving no response that he proceeded to take action in the courts. The existence of a professional appellate process may have provided an internal remedy which would have avoided the need to resort to the courts in that case.

case to made for their mutually benefiting from an appellate system that provides disgruntled litigants an avenue of redress without having to approach the courts.

6.6 CONCLUSION

In this chapter, the potential conflicts between Jewish and secular law pertaining to the use of a *seruv*, the right to representation, the admission of female testimony and the appellate process have been explored. It is evident that Australian law does not permit the utilisation of a *seruv* and that a Beth Din should not attempt to use coercive measures to procure the attendance of an unwilling litigant. With regards to the right to representation, while legal advocates are frowned upon in Jewish law, they have over the modern period become a common occurrence in Battei Din and are the norm in the Israeli Rabbinical courts. As such, Battei Din should have no issue accepting their presence in the arbitral setting, although the American experience warns against permitting representation by unregistered *to'anim*. Additionally, the admission of female testimony in the context of commercial arbitration at a Beth Din is a universal norm, despite the exclusion of such testimony in certain ritual matters. Last, the notion of including an appellate structure in the Beth Din, whilst not mandated under arbitration law, is common in best practice Battei Din despite the absence of such a mechanism in Talmudic times.

In terms of the procedural aspects outlined above which can, and have, formed conflict with aspects of Australian arbitration laws, avenues for accommodation have been advanced that incur no fundamental departure from the natural trajectory of Jewish law. Australian Battei Din can learn from the way in which Israeli Battei Din navigate the outlawing of a *seruv* and from the way in which American Battei Din navigate the challenge presented by unregistered *to'anim*. The way in which Jewish law has evolved in relation to the areas of conflict outlined in both this and the previous chapter highlights its adaptability towards the varied environments in which it has operated over the past two millennia.

The following chapter turns to examine the historical, social and cultural context of Australian Battei Din, with a focus on the Melbourne Beth Din, which is its longest standing Beth Din and the one that services its largest Jewish community. The Jewish law accommodations to Australian law explored in the current and preceding chapters, coupled with an understanding of community sentiment towards Australian Battei Din which emerges from the proceeding chapter, jointly illuminate the aspects of the proposed working model for Australian Battei Din which will be outlined in Part 8.

7 THE MELBOURNE BETH DIN: FROM MAYHEM TO MODERNITY

7.1 INTRODUCTION

The research thus far has focused on the theoretical and empirical components of what would constitute 'best practice' in a Beth Din, gleaning empirical data from well reputed Battei Din in Israel and the USA. This chapter aims to provides an understanding of the Australian setting in which these learnings are intended to be applied, focusing on the history and personalities of the Melbourne Beth Din, which is Australia's oldest continuously functioning Beth Din. The tracing of the Melbourne Beth Din's history forms a departure from the research in the preceding chapters which is more universal in its application, and is a critical step in formulating the elements of a working model that takes into consideration the idiosyncrasies of the Melbourne milieu.

The brief historical overview of the Melbourne Beth Din presented in this chapter is broken down into seven 'epochs' which represent significant periods of its development and evolution. As the oldest Beth Din in the Commonwealth outside of London, the Melbourne Beth Din has 150 years of history that could form the basis of an independent study. This overview grants important context with regards to the present community sentiment towards the Beth Din, including its centrality within the community, significant leaders who have shaped the organisation, as well as the way it has adapted to changes within the community and abroad.

Following the overview, aspects of the Melbourne Beth Din's history that have a bearing upon its suitability as an avenue for commercial arbitration will be explored. These include the Beth Din's navigation of local and international challenges, such as its relationships with competing Battei Din as well as the shifting of allegiance from the Chief Rabbinate of the UK to the Chief Rabbinate of Israel. Additionally, the limited forays into commercial arbitration at the Melbourne Beth Din over the course of its history will be discussed.

7.2 HISTORICAL OVERVIEW OF THE MELBOURNE BETH DIN

Over 150 years ago the Melbourne Beth Din came into being. At the time it was known as 'the local Beth Din' making clear its subordination to the Beth Din of the Chief Rabbi in London. In the subheadings below, significant epochs of the Beth Din's evolution are explored, providing an overview of its function, leadership and communal standing from its inception to the present day. The research combines primary and secondary sources together with interviews with

historiographers of the Melbourne Jewish community, Rabbi John Levi and Reverend Yossi Aron as well as that of legal academic and community leader, Professor Louis Waller, of blessed memory.[837]

7.2.1 Origins of 'the Local Beth Din'

The catalyst which brought the local Beth Din into existence was the conversion crisis which engulfed the fledgling Jewish community in Australia in the nineteenth and early-twentieth centuries. The Jewish and general community suffered from a severe gender imbalance due to the fact that it was primarily single men who had journeyed to the goldfields seeking their fortune. The small proportion of Jewish women resulted in many Jewish men entering partnerships with Christian women, some of whom wished to regularise their situation from a *halakhic* standpoint by converting to Judaism.[838] Jewish law mandates that a Beth Din oversees the conversion process, and as such, the Australian Jewish community of the time sought the establishment of a Beth Din in the colonies.

A letter sent in 1848 by the President of the Melbourne Hebrew Congregation, a synagogue that had been formalised in 1841, to Chief Rabbi Nathan Marcus Adler raised, among other questions,

> "whether, under favourable circumstances, you would authorise the making of female proselytes, there being one or two cases that have very frequently been brought under our notice, but which we have invariably refused to entertain, not thinking it a matter for laymen (most of whom are young and inexperienced in such affairs) to legislate upon?"[839]

While the response to this question is not known, the resistance of the Chief Rabbinate at the time towards permitting conversion is well documented. In 1833 the London Beth Din had stated that 'it is not permissible in this country to convert any person' in response to what they perceived to be ban on Jewish conversion by Oliver Cromwell in 1656 as a proviso for the Jews' return to England.[840] In addition, under Chief Rabbi Nathan Marcus Adler and later under his son Chief Rabbi Herman Adler, a strict policy of centralised religious authority was in place, which frowned upon attempts locally and abroad to assert rabbinic leadership.[841] This was exacerbated by the dearth of qualified

[837] This chapter echoes much of what has been previously published in Cowen (n 44).
[838] Joseph Aron and Judy Arndt, *The Enduring Remnant* (Melbourne University Press, 1992) 331-332.
[839] Lazarus Morris Goldman, *The Jews in Victoria in the Nineteenth Century* (Published by the author, 1954) 59.
[840] Malcolm John Turnbull, *Judaism in Melbourne 1870-1970: The Breakdown of Anglo-Orthodoxy and the Growth of Religious Pluralism* (PhD thesis, Deakin University, 1993) 243.
[841] Raymond Apple, 'A Chapter in Rabbinic History: Origins of the Sydney Beth Din' (1994) 12(2) *Australian Jewish Historical Society Journal* 346, 348.

rabbis in Australia, the flagship synagogues being led by reverends. As such, several attempts at forming a Beth Din under the aegis of the Chief Rabbinate were summarily declined.[842]

Aside from *geirut*, a validly constituted Beth Din is also a requirement in facilitating a *gett*. Overall this was not a pressing communal issue insofar as divorce was something of a rarity in the nineteenth and early-twentieth century. However, it was in the context of obtaining a *gett* for a Jewish woman who remained in England while her husband was sent off to Australia as a convict, that the first known Beth Din in Australia was convened. Rabbi Aaron Levy, a delegate of the London Beth Din was sent to Australia in 1830 to procure the *gett*, and he remained in New South Wales for six months during which time he assisted in organising the religious affairs of the Jewish community in Sydney and performed a conversion.[843]

Chief Rabbi Adler ultimately recognised the challenges faced by the fledgling Australian Jewish community and granted Reverend Herman Hoelzel[844] permission to oversee the performing of conversions in the 1850s.[845] However it was only upon the arrival of the scholarly Reverend Samuel Herman, who was inducted as minister of the Ballarat Congregation in 1864 that a formal Beth Din of limited jurisdiction came into being, with Herman as the *Av Beth Din* and East Melbourne Hebrew Congregation's minister and their *shoḥet*, Reverends Moses Rintel and Isaac Pulver as *dayanim*.[846] It was the first such entity authorised by the Chief Rabbi outside of London and the Beth Din was permitted 'only to act in cases of emergency' with all other cases to be brought to the Chief Rabbi for his 'special sanction'.[847] Herman was 70 years old and his English was limited, and thus while he was formally the *Av Beth Din*, it was Rintel who appeared to be its senior member given his proficiency with the language and his greater experience with the Australian community.[848]

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[842] Failed attempts to gain authorisation to form a Beth Din from the Chief Rabbi by Reverends Moses Rintel (minister of the Melbourne Hebrew Congregation and then to the East Melbourne Hebrew Congregation) and Isaac Pulver (East Melbourne Hebrew Congregation's *shoḥet*) in 1853 and again in 1863 are outlined in Aron and Arndt (n 838) 332-4.

[843] Jeremy Pfeffer, *From One End of the Earth to the Other: The London Bet Din, 1805-1855, and the Jewish Convicts Transported to Australia* (Sussex Academic Press, 2008) 287-298, 309-314.

[844] Hoelzel, a minister in Hobart and Sydney, had the title *morenu* ('our teacher') bestowed upon him by various European Rabbis. This was not necessarily rabbinic ordination, although it indicates Orthodoxy and learning. See further in Raymond Apple, 'Herman Hoelzel – Ambitions of a Presiding Rabbi' (2017) 23 (2) *Australian Jewish Historical Society Journal* 233.

[845] Turnbull (n 840) 241.

[846] Goldman (n 839) 172.

[847] Letter from Chief Rabbi Nathan Marcus Adler, 27 October 1863; quoted in part in Aron and Arndt (n 838) 334.

[848] Aron and Arndt (n 838) 41. This may explain why the *Jewish Herald* (Melbourne, 21 May 1880) mistakenly referred to Rintel as 'chairman at the time of his death'.

7.2.2 1864-1882: A Rocky Start

The first two decades of the local Beth Din of the Colonies[849] were turbulent, primarily due to the tensions between its members, reflecting a schism in the Melbourne Jewish community at the time. Rintel had served as the first minister of the Melbourne Hebrew Congregation from 1849 but as a result of a dispute with the Board of the Synagogue, he left in 1857 to form the Mickveh Yisrael Hebrew Congregation which was later to become known as the East Melbourne Hebrew Congregation.[850] Disputes emerged between Rintel and the new minister at Melbourne Hebrew Congregation, thirty-year-old Reverend Abraham Frederick Ornstein who had assumed the role in 1866.[851] Despite Rintel's departure from the oldest and principal Congregation of Melbourne,[852] he still saw himself as the senior Jewish Minister of Melbourne, and the dispute between the two rabbis engulfed the community.[853]

In late 1865, the Chief Rabbi attempted to grant the Beth Din communal acceptance by advocating for the establishment of a Joint Committee to recommend eligible converts to the Beth Din, comprising of lay members of both Congregations. The 'Joint Committee of Gerim and Guerros of the Melbourne and East Melbourne Hebrew Congregations' was duly established but was embroiled in dispute a few years later when the members of the Melbourne Hebrew Congregation resigned from the committee due to Rintel and Pulver's intransigence, both of whom were from East Melbourne Hebrew Congregation, to reducing the fees for conversion. The committee was reconstituted by the Chief Rabbi in 1869, and later in 1871 it became the 'Conjoint General Purposes Committee' denoting its ambit in dealing with all matters affecting the Jewish community, not only conversion. A short while later Rintel organised an ad-hoc Beth Din to perform a conversion without informing his colleagues at the local Beth Din. When this action was protested at the Conjoint Committee, the delegates of East Melbourne Hebrew Congregation resigned, rendering the committee defunct.[854]

The friction between Rintel and Ornstein played itself out in the Beth Din. Upon Pulver leaving Melbourne in 1871, Rintel proceeded to replace him on the Beth Din with the soon to become President of East Melbourne Hebrew Congregation, Wolf Davis, instead of Ornstein. Infuriated at

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[849] The term 'local Beth Din' was used in the earlier days in reference to the limited powers of the Melbourne Beth Din vis-à-vis the London Beth Din, however it eventually became known as the Melbourne Beth Din.
[850] *Jewish Herald* (Melbourne, 21 May 1880).
[851] Aron and Arndt (n 838) 39.
[852] Melbourne Hebrew Congregation was referred to as such in correspondence relating to this issue from the Chief Rabbi Nathan Marcus Adler; see Goldman (n 839) 191.
[853] Supporters of both Rintel and Ornstein aired their views in *The Argus;* see Goldman (n 839) 186. The *shoḥtim* of Melbourne Hebrew Congregation and East Melbourne Hebrew Congregation echoed their ministers' rivalry; see Turnbull (n 840) 42-43.
[854] Goldman (n 839) 191-195.

having been overlooked, Ornstein wrote to the Chief Rabbi triggering Wolf Davis' resignation and Ornstein's appointment to the Beth Din in 1872 on the Chief Rabbi's orders.[855] Their acrimonious relationship continued, with Rintel refusing to allow any converts, even when they had been sanctioned by the Chief Rabbi, which resulted in his removal from the Beth Din. Later in the decade, it appears that Rintel was restored to the Beth Din[856] and was active as a *dayan* until the time of his death.[857]

With Herman and Rintel's death in 1879 and 1880 respectively, minister of the Ballarat East Jewish Synagogue, Reverend Israel Goldreich, assumed the position of *Av Beth Din*.[858] His colleagues on the Beth Din were Reverend Elias Blaubaum, the first minister of St Kilda Hebrew Congregation who had been appointed as a *dayan* at the time that the Chief Rabbi had expelled Rintel from the Beth Din,[859] and Reverend Dattner Jacobson, the minister of Melbourne Hebrew Congregation from 1877 who was also appointed as a *dayan* at that time.[860] Jacobson's tenure at the Beth Din was mired in controversy, fuelled by his public statements, both in *The Argus* and at the pulpit, in favour of making converts.[861] In addition, Jacobson proceeded to admit converts for personal financial gain without consultation with the local Beth Din or the Chief Rabbi. Goldreich and Blaubaum informed the Chief Rabbi of this in 1882 and Jacobson was subsequently expelled from the Beth Din.[862]

7.2.3 1883-1936: Abrahams and Brodie

Shortly after Jacobson was reprimanded for his unauthorised activities, he shocked the community by announcing his resignation as minister of Melbourne Hebrew Congregation in a sermon, following which he ventured into the pews to sit with the congregants as a regular member.[863] While Jacobson

[855] Ibid 194.
[856] Evident from correspondence from the Melbourne Hebrew Congregation to the Chief Rabbi in 1878 stating '… the Board are in possession of the fact that the law prohibiting the ministers of East Melbourne Congregation taking part in making Guerros has been rescinded'; quoted in Aron and Arndt (n 838) 337.
[857] *Jewish Herald* (Melbourne, 21 May 1880).
[858] David Havin, *Even Shetiya: Orthodox Jewry in Carlton and Surrounding Suburbs* (Published by the author, 2007) 46.
[859] Goldman (n 839) 213.
[860] See letter from the Chief Rabbi Nathan Marcus Adler regarding Jacobson's appointment to the Beth Din of which 'Rev. Herman… must still remain the president' in Aron and Arndt (n 838) 48-49; ibid 307 refers to Jacobson as 'Chairman of the Beth Din' which is at odds with the instructions of the Chief Rabbi. It could be that after Herman's death there was a rotating chair, or, like Rintel, Jacobson simply 'appeared' to be Chair insofar as the Beth Din was in Melbourne and Goldreich had to travel from Ballarat which might have been incorrectly perceived as deferential to Jacobson.
[861] Goldman, ibid 307.
[862] Turnbull (n 840) 244-247; a letter from the Chief Rabbi confirming Jacobson's expulsion following his resignation from the Melbourne Hebrew Congregation was printed in the *Jewish Herald* (Melbourne, 29 December 1882).
[863] Goldman (n 839) 311; *Jewish Herald* (Melbourne, 13 September 1882).

evidently regretted having resigned,[864] the community was ready to move on and began the process of recruiting a new minister. In 1883, Rabbi Dr Joseph Abrahams was appointed minister of Melbourne Hebrew Congregation. He had the appropriate qualifications for his role as *Av Beth Din*[865] and served in this capacity for almost forty years, after which he remained on the Beth Din as a *dayan* until his passing.

In 1888, with the appointment of Reverend Jacob Lenzer as minister of East Melbourne Hebrew Congregation, a new era of cooperation between the major Synagogues was reflected by his admittance onto the Beth Din alongside Abrahams and Blaubaum who represented Melbourne and St Kilda Hebrew Congregations respectively.[866] However, this newfound calm was to be unsettled by the emergence of a new community of immigrants from Eastern Europe which was coalescing in Carlton, that didn't naturally align itself with the establishment Beth Din and its Anglo-Orthodox heritage and membership. While one can trace the split between the Anglo and Eastern European worldviews as underlying the tensions that triggered the breakaway divide between the Melbourne and East Melbourne Hebrew Congregations back in 1857,[867] its first act of autonomy came in the form of a butcher that opened in Fitzroy in 1891 which advertised itself as 'Kosher' without reference to the Beth Din or any of the establishment Synagogues.[868] This butcher was subsequently reigned in and its *kashrut* authorisation placed under the auspices of the Beth Din.[869] While this initial 'rebellion' was quashed, the sentiment it represented gathered momentum over time, evidenced in the proliferation of ad-hoc, and eventually more established, alternate Battei Din in Carlton in the decades that followed.[870]

Reverend Jacob Danglow joined the Beth Din during Abrahams' era. Danglow had assumed the position of minister of St Kilda Hebrew Congregation in 1905, and despite his lack of formal rabbinic ordination,[871] represented both St Kilda and the wider community with distinction for 52 years earning himself the appellation in his eulogy as 'the uncrowned monarch of Australian Jews.'[872]

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[864] *Jewish Herald* (Melbourne, 29 December 1882).
[865] He had received *yadin yadin* certification which qualified him as a *dayan*, a partial translation of which can be found in Aron and Arndt (n 838) 58.
[866] Ibid 185.
[867] Yankel Rosenbaum, 'Religiously Carlton: Jewish Religious Life in Carlton 1919-1939' (1994) 12 *Australian Jewish Historical Society Journa*l 519, 519.
[868] *Jewish Herald* (Melbourne, 23 October 1891); Turnbull (n 840) 555.
[869] *Jewish Herald* (Melbourne, 15 January 1892).
[870] These and other alternate Battei Din are discussed further in Part 7.3.1.
[871] He was given the honorary title of *morenu* in 1932 by Chief Rabbi Hertz who stipulated that as the title is honorary he was to act 'only after consultation with [his] colleagues on the Beth Din under the presidency of one who has full *semicha*'; referenced in John Levi, *Rabbi Jacob Danglow: the Uncrowned Monarch of Australian Jews* (Melbourne University Press, 1995) 198.
[872] Ibid 298.

Danglow replaced Blaubaum on the Beth Din, but due to his lack of practical experience was initially given the role of secretary of the Beth Din, and, as is noted in the minutes of his first sitting, 'took no part in the discussion'.[873] Notwithstanding the fact that Danglow became a full member of the Beth Din in 1911,[874] he maintained his role as record keeper. At the time of Danglow's passing in 1962 , the *Av Beth Din* at the time, Rabbi Dr Izaac Rappaport of the Melbourne Hebrew Congregation, extolled Danglow's 'impartial and meticulous' minute taking of the Beth Din's meetings for close to thirty years.[875]

In 1919 Abrahams resigned from the Melbourne Hebrew Congregation, but chose to remain on the Beth Din until his death in 1938. Although in late 1920 he communicated to Danglow his intention to retire immediately from the post of *Av Beth Din*, it appears that he nonetheless maintained this role until the arrival of his successor Rabbi Israel Brodie three years later.[876]

Brodie attracted negative communal attention in his first year as *Av Beth Din*, when the Melbourne Beth Din authorised no fewer than seven *geirim*[877] and was rumoured to have a backlog of 40 applicants. This was likely a result of the Beth Din's limited functionality in its previous years under the aging Abrahams and Lenzer and the young and inexperienced Danglow,[878] and its rejuvenation upon Brodie's arrival alongside the appointment of Rabbi Solomon Mestel as minister of the East Melbourne Hebrew Congregation in 1923 who also served on the Beth Din. The communal uproar at the spike in conversions led to the East Melbourne congregation disallowing the newly appointed Mestel to sit on any *geirut* cases. [879] Six years later, Mestel resigned from the Beth Din over a disagreement with Brodie over the permissibility of playing sport on Shabbat.[880]

Later in Brodie's tenure as *Av Beth Din*, a challenge which engulfed the community related to the fledgling Beth Israel reform movement which faltered under ill-suited leadership until the arrival of Rabbi Dr Herman Sanger in 1936. In 1931 the Beth Din proposed a statement that the Liberal Jewish Synagogue is a 'separate Jewish sect' and as such requires 'a special burial ground to be set apart for those who choose to belong to [it]'. This statement was not made public at the time due to disagreement among the lay leadership, [881] however it was eventually implemented by order of

[873] Ibid 35; quoting from the *Local Beth Din Minutes* (Melbourne, 20 and 27 November 1905).
[874] Jacob Danglow, *The History of the St Kilda Hebrew Congregation* (St Kilda Hebrew Congregation, 1921) 15.
[875] Levi (n 871) 299; quoting from *Melbourne Hebrew Congregation Newsletter* (Melbourne, September 1962).
[876] See Levi, ibid 122, 143.
[877] Ibid 143; quoting *Local Beth Din Minutes* (Melbourne, 19 December 1923, 31 March 1924 and 11 August 1924).
[878] The Beth Din had last seen (and rejected) applicants in 1908; Levi (n 871) 134.
[879] Turnbull (n 840) 366-367.
[880] Aron and Arndt (n 838) 85; Levi (n 871) 168.
[881] Levi, ibid 174.

Brodie himself, when he later visited Australia in his capacity as Chief Rabbi of the Commonwealth in 1952.[882] Further rifts between the Beth Din and the Liberal community followed Sanger's acceptance of a convert previously refused by the Beth Din. The *Australian Jewish Herald* decried this 'unwise' and 'unwarranted' act to which the Board of Management of Synagogue Beth Israel responded that they are 'in no way under the jurisdiction of the local Beth Din'.[883] Despite these public flare-ups, Temple Beth Israel, as it came to be known, would at times refer cases to the Melbourne Beth Din[884] and the Orthodox rabbinate came to recognise the futility of attempting to assert its authority over the Liberal institutions.[885]

7.2.4 1937: Communal Schism

From 1932, the Beth Din was comprised of Brodie, Abrahams, Danglow and the recently arrived Rabbi Joseph Lippman Gurewicz who had commenced his tenure as rabbi of the Carlton United Hebrew Congregation. Gurewicz was of Eastern European origin and was embraced warmly by the Carlton Jewish community on his visit in 1930 to collect funds. Two years later the various communities of Carlton combined resources to bring Gurewicz back to Melbourne following which they appointed him as their rabbi.[886] Notwithstanding the differences in approach and worldview between the 'establishment' Anglo-Orthodox rabbinate and the new Eastern European rabbi, Brodie and Danglow accorded Gurewicz great respect. Danglow spoke warmly at Gurewicz's induction[887] and Brodie would travel weekly to his home in Carlton to study Talmud with him.[888] This cordial relationship was reciprocated by Gurewicz who chose to act as a *dayan* on the Melbourne Beth Din rather than on the North Carlton Beth Din which had recently come into operation.[889]

The year 1937 heralded change for the Melbourne Jewish community, much of it centring around the goings-on of the Melbourne Beth Din. In November of 1936, Brodie shocked the community when he announced his resignation from the Melbourne Hebrew Congregation due to take effect in September of the following year so that he could travel to England in time to commence a doctor of letters at Oxford University.[890] Both Danglow and Gurewicz were intent on acting as interim *Av Beth*

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[882] John Levi, *My Dear Friends: The Life of Rabbi Dr Hermann Sanger* (Hybrid Publishers, 2009) 117. An example of Herman Sanger's response to this edict in his sermon 'What is a Jew?' delivered on Rosh Hashana [Jewish New Year] 1958, is referenced at 210.
[883] *Australian Jewish Herald*, (Melbourne, 3 and 10 December 1936).
[884] Interview with Rabbi John Levi, Historiographer of the Melbourne Jewish Community (Chaim Cowen, Melbourne, 5 September 2019) ('Interview with Rabbi Levi').
[885] Israel Porush, *The House of Israel* (The Hawthorn Press, 1977) 190.
[886] *Australian Jewish Herald* (Melbourne, 15 September 1932, 10 November 1932 and 24 November 1932).
[887] *Australian Jewish Herald* (Melbourne, 22 December 1932).
[888] Turnbull (n 840) 125.
[889] Ibid 600.
[890] *Australian Jewish Herald* (Melbourne, 26 November 1936).

Din until Brodie's replacement at the Melbourne Hebrew Congregation could be found. Upon Brodie's arrival, Danglow was viewed by many as the 'Spiritual Head in Australia'[891] and now with a further thirteen years of experience and an honorary Rabbinic title bestowed by the Chief Rabbi, Danglow, and the members of both St Kilda and Melbourne Hebrew Congregations,[892] felt it appropriate that he hold the interim chairmanship. Gurewicz however, given his rabbinic credentials and his undisputed erudition in matters of Jewish law was a natural fit for the role and was of the strong view that Danglow's honorary title insufficiently qualified him for the role of *Av Beth Din*.[893]

At the last Beth Din meeting before Brodie left to England, he informed his colleagues that after consulting with Chief Rabbi Hertz, he had decided that Danglow was to fill the role of interim *Av Beth Din*, a decision that was ratified in writing by the Chief Rabbi a short while later.[894] Within a few weeks the 'Beth Din of the United Congregations' was established with Gurewicz at its head, supported by East Melbourne Hebrew Congregation, the Wolf Davis Congregation (also known as Stone's Shul) and the Carlton United Hebrew Congregation.[895] The tensions between the two Battei Din were exacerbated by a controversy regarding the exporting of kosher meat by the Smorgon brothers to Palestine. The meat had been certified by the Melbourne Beth Din, and posters in Tel Aviv signed by Gurewicz denouncing Danglow's reliability in matters of *kashrut* created a schism between the two that would take many years to mend.[896] Over the ensuing nineteen years until Gurewicz's passing in 1956, his Beth Din came to be recognised by many rabbinic scholars in pre-war Poland, Russia, Lithuania as well as British-mandate Palestine and he formed an archive of hundreds of files of their correspondence.[897]

7.2.5 1938-1958: The Divided Years

Danglow's interim chairmanship concluded upon the arrival in 1938 of the scholarly Rabbi Dr Harry Freedman who replaced Brodie as both minister at Melbourne Hebrew Congregation and *Av Beth Din*. His tenure lasted until 1946 at which time he resigned over a difference with the Board of the Congregation. Interestingly, the next minister appointed in 1947, Rabbi Hugo Stransky, was not vested with the position of *Av Beth Din* being that Freedman, who had now become minister at

[891] Levi, *Rabbi Jacob Danglow* (n 871) 134.
[892] *Australian Jewish Herald* (Melbourne, 5 August 1937).
[893] Sam Lipski, 'Chalk and cheese - Rav Gurewicz et Amicorum' in Strum et al (eds) *Eshkolot: Essays in memory of Rabbi Ronald Lubofsky* (Hybrid Publishers, 2002) 32, 37.
[894] Havin (n 858) 48.
[895] *Australian Jewish Herald* (Melbourne, 5 August 1937).
[896] See Turnbull (n 840) 586-587; Levi, *Rabbi Jacob Danglow* (n 871) 209; Lipski (n 893) 36; Havin (n 858) 48. Evidence of the mending of the relationship between the two Battei Din in 1948 takes the form of a letter issued by the Melbourne Hebrew Congregation to Gurewicz welcoming him back after an overseas trip; see Aron and Arndt (n 838) 158.
[897] Lipski, ibid 34.

Elwood Talmud Torah Hebrew Congregation, maintained that position and refused to resign.[898] Although the Beth Din was eventually reorganised so that Freedman, Stransky and Danglow rotated its chairmanship, this shift from the practice that the Melbourne Hebrew Congregation minister automatically assuming chairmanship of the Melbourne Beth Din was perhaps an early sign of a weakening of the nexus between these two entities.

The formation of a Kashrut Commission in 1949 to address criticism from the press regarding perceived cruelty to animals in the process of ritual slaughter, resulted in a temporary unification of the Melbourne Beth Din with its Carlton counterpart. The commission contained representatives from both Battei Din as well as lay delegates from all of Melbourne's Jewish congregations. However, the Commission was disbanded after five years amid accusations from the lay leaders that the Beth Din representatives were being deliberately uncooperative.[899]

By and large, over the course of the Melbourne Beth Din's early history, *kashrut* certification was part of the domain of the Beth Din, often administered by one of its *dayanim*. However, the Beth Din's exclusive authority in this area which was challenged as early as 1891 by an independent Kosher butcher in Fitzroy, and continued to face such competition through the 1930s evidenced by a number of statements issued by Brodie in the *Australian Jewish Herald* decrying the existence of 'unauthorised' kosher products and establishments.[900] Professor Louis Waller recalls[901] that by the 1950s the majority of kosher butchers were not under the aegis of the Beth Din and historiographer, Yossi Aron remembers[902] that in the 1970s the Beth Din's *kashrut* imprimatur was not trusted by the strictly Orthodox.

In 1952 the Beth Din again underwent change with the incoming minister of the Melbourne Hebrew Congregation, Rabbi Dr Izaac Rappaport assuming the role of *Av Beth Din*. Rappaport's tenure was mired in controversy, a product of his uncompromising personality.[903] An attempt at uniting the two Battei Din failed, although with the passing of Gurewicz in 1956 and the waning of the Carlton Jewish community, the Melbourne Beth Din lost its primary competition. The relationship between the Orthodox and Liberal communities degenerated under Rappaport, as did internal relations among the Orthodox, with Danglow, the veteran secretary of the Beth Din, writing to the Chief Rabbi in

[898] Aron and Arndt (n 838) 117.
[899] Turnbull (n 840) 589; Levi, *Rabbi Jacob Danglow* (n 871) 268; Aron and Arndt, ibid 320.
[900] See for example *Australian Jewish Herald* (Melbourne, 14 April 1932 and 27 October 1932).
[901] Interview with Louis Waller, Professor of Law and member of the Melbourne Jewish Community (Chaim Cowen, Melbourne, 11 September 2019) ('Interview with Professor Waller').
[902] Interview with Reverend Yossi Aron, Historiographer of the Melbourne Jewish Community (Chaim Cowen, Melbourne, 8 September 2019) ('Interview with Reverend Aron').
[903] Turnbull (n 840) 135-6.

1958 regarding the disunity on the Beth Din which he claimed to be a product of Rappaport's attitude of 'injustice, intolerance and narrow prejudice'.[904]

7.2.6 1959-2002: Decline in Communal Confidence

In the 1950s, Rabbi Sholem Gutnick was admitted onto the Beth Din, after he had assumed the mantle of rabbinic leadership at Caulfield Hebrew Congregation in 1952. He was to remain on the Beth Din for nearly five decades.[905] With Danglow's passing and the resignation of his successor Rabbi Dr Simon Herman both occurring in 1962, St Kilda Hebrew Congregation's representation on the Melbourne Beth Din ceased. This marked a watershed moment in the Beth Din's composition whose majority was now comprised of Eastern European migrants, with the permanent appointment of the scholarly Rabbi Yehudah (Lewis) Kaplinski and the occasional involvement of Rabbis Shlomo Rudzki (South Caulfield Hebrew Congregation), Jacob Schreiber (Kew Hebrew Congregation) and Chaim Gutnick (Elwood Talmud Torah Hebrew Congregation).[906]

With the rise of Eastern European representation on the Beth Din, its relationship with Melbourne Hebrew Congregation which had always been a bastion of Anglo-Orthodoxy, appeared to be on the decline. This sentiment is evident in a request from the Melbourne Hebrew Congregation in 1970 that Rappaport personally contribute to the costs of their provision of chambers for the Beth Din, indicating that the Beth Din was no longer viewed as having an affiliation with their congregation, but had become Rappaport's private enterprise. The following year Rappaport refused to discuss the Beth Din's arrangements with Chief Rabbi Jakobovits, again evidencing its waning identity as an Anglo-Orthodox establishment responsible to the British Chief Rabbi.[907] While this 'independence' could either be attributed to a gradual shift in identity of the Beth Din or the style of its leadership at the time, it is most likely a combination of these factors; an inevitable shift in communal allegiance brought to a head by an intransigent *Av Beth Din*.

The opacity of the Beth Din's operations, coupled by its members lack of diplomacy, was a concern for the lay leadership of the Melbourne Jewish community in the late 1960s. Chief Rabbi Jakobovits was consulted, and he presented plans for a 'Proposed Scheme for the Reorganisation of Rabbinical and Supervisory Services in Melbourne' to the chairman of the Council of Orthodox Synagogues, Dr

[904] Turnbull (n 840) 467-470; Interview with Rabbi Levi.
[905] Although it appears from the *Australian Jewish News* (Melbourne, 28 March 1980) that he took a ten-year period of absence from the Beth Din.
[906] Turnbull (n 840) 661-3.
[907] Aron and Arndt (n 838) 144.

Saul Weiner, in 1970.[908] Attempts to implement changes were rebuffed by Rappaport,[909] and thus following Rappaport announcing his retirement in 1977 which was to take effect two years later, Weiner called a meeting of communal leaders to vote to put the Beth Din under the administrative and financial oversight of a governing board.[910] Notably, the congregations whose leaders sat as *dayanim* on the Beth Din either abstained from indicating their view or dissented to the proposed changes and the hoped-for restructure didn't manage to generate the momentum required for its actualisation.[911] In February 1980, Rabbi Sholem Gutnick assumed the mantle of *Av Beth Din* in what was decried by Chief Rabbi Jakobovits as a 'self-proclaimed claim to automatic succession'.[912] A few months later the Rabbinical Council of Victoria consulted with the Chief Rabbi in ratifying Gutnick's appointment for a two-year term after which there was to be a review. [913] The proposed review failed to materialise, and he remained in that role for the ensuing two decades.[914]

Under Gutnick's leadership the Beth Din shifted its physical address from the Melbourne Hebrew Congregation to the premises of Caulfield Hebrew Congregation, where he was the rabbi. *Dayanim* who had previously served on the Beth Din under Rappaport continued to serve under Gutnick, and ministers at Melbourne Hebrew Congregation were appointed as members of the Beth Din, including Rabbi Michael Newman in 1980[915] and Rabbi Michael Mandel in 1985.[916] In 1994 Gutnick retired from Caulfield Hebrew Congregation, but elected to remain on as the *Av Beth Din*, and his successor, Rabbi Yonason Abraham joined as a *dayan*.[917] Two years later, Gutnick appointed his son, Rabbi Yossi Gutnick, as secretary of the Beth Din and as a *dayan* on the court when required. Shortly thereafter complaints of unprofessional and improper conduct by Gutnick in his capacity as *Av Beth Din* led to an investigation conducted by lay professionals in the Jewish community at the behest of the Council of Orthodox Synagogues Victoria.[918] Amid mounting communal pressure to reign in what many viewed as a 'one-man operation' Gutnick resigned in 2002.[919] This moment marked a

[908] Letter from Chief Rabbi Jakobovits to Dr Saul Weiner, 24 December 1970.
[909] Letter from Dr Saul Weiner to Chief Rabbi Jakobovits, 16 March 1971; Letter from Chief Rabbi Jakobovits to Dr Saul Weiner, 7 April 1971.
[910] *Australian Jewish News* (Melbourne, 30 March 1979).
[911] Council of Orthodox Synagogues Victoria Circular, May 1979.
[912] Letter from the Chief Rabbi Jakobovits to Rabbi Sholem Gutnick, published in *Australian Jewish News* (Melbourne, 28 March 1880).
[913] Letter from Chief Rabbi Jakobovits to Rabbinical Council of Victoria Secretary, Rabbi Michael Newman, 28 May 1980.
[914] Yossi Aron, *Caulfield Hebrew Congregation: The First 75 Years* (Memoirs For You Publishing, 2019) 130.
[915] In accordance with the direction of the Chief Rabbi, referenced in Aron and Arndt (n 838) 150.
[916] Aron and Arndt (n 838) 166.
[917] *Australian Jewish News* (Melbourne, 19 August 1994).
[918] Interview with Professor Waller.
[919] *Australian Jewish News* (Melbourne, 11 October 2002); 'Melbourne Beth Din under reconstruction' *The Religion Report* (ABC Radio National, 30 October 2002)

watershed for the Beth Din, whose reputation had declined dramatically over the Rappaport and Gutnick years, presenting an opportunity for its restructure.

7.2.7 2003-Present: The Restructured Beth Din

Following the demise of the Beth Din in 2002, the Rabbinical Council and Council of Orthodox Synagogues joined forces to install an interim Beth Din while a committee worked on designing the new Beth Din structure. The interim *dayanim* included Rabbis Yaacov Barber (South Caulfield Hebrew Congregation), Feitel Levin (Brighton Hebrew Congregation) and Mordechai Gutnick (Elwood Talmud Torah Hebrew Congregation) in addition to Rabbi Shlomo Rudzki who had served under the two previous chairmen of the Beth Din.[920]

A board of governance was installed, a constitution drafted, and on 24 September 2004, Melbourne Beth Din Nominees Limited was registered as an Australian public company under the Australian Securities and Investment Commission.[921] According to its constitution, *dayanim* are to be nominated by the Rabbinical Council of Victoria and ratified by the Council of Orthodox Synagogues of Victoria.[922] The term of a *dayan* is limited to two years, after which further ratification is required to secure any further two year terms.[923]

Rabbi Mordechai Gutnick, nephew of Rabbi Sholem Gutnick, was appointed Senior Rabbi of the restructured Beth Din, and later became known as its *Av Beth Din*.[924] *Dayanim* serving on the Beth Din at present include Rabbis Avrohom Kievman, Yisroel Greenwald, Mordechai Berman and Menachem Sabbach.[925] The Beth Din rents its premises from the Blake Street Hebrew Congregation, but has no formal links to any particular synagogue.

7.3 Trends and Themes

The history of the Melbourne Beth Din, outlined above, provides an important basis for understanding its present-day culture and community perception. Three areas that will be explored in some detail below are:

<https://www.abc.net.au/radionational/programs/archived/religionreport/melbourne-beth-din-under-reconstruction/3524356#transcript>.

[920] *Australian Jewish News* (Melbourne, 18 October 2002).

[921] 'Melbourne Beth Din Nominees Limited', Australian Business Register, *ABN Lookup* <https://abr.business.gov.au/ABN/View/84110851413>.

[922] Constitution of Melbourne Beth Din Nominees, s 20.1.

[923] Constitution of Melbourne Beth Din Nominees, s 20.4.

[924] Interview with Reverend Aron.

[925] Melbourne Beth Din Website, *Meet the Team* <http://www.mbd.net.au/about/meet-the-team/>.

(a) the emergence of alternate Battei Din which threatened the centrality of the Melbourne Beth Din;
(b) the Beth Din's shift in allegiance from the Chief Rabbinate of Britain to the Chief Rabbinate of Israel; and
(c) the Melbourne Beth Din's limited involvement in commercial arbitration to date.

These themes provide greater understanding of some of the vicissitudes of the Melbourne Beth Din over its history and demonstrate its resilience in the face of local and international changes. While the Melbourne Beth Din's reputation has been tarnished by difficult and controversial personalities who have historically led the institution, it will be argued that the Melbourne Beth Din's ability to withstanding the challenges posed by alternate Battei Din, and to evolve along with the demographic changes of Melbourne's Orthodox community are qualities that make it the most appropriate venue for commercial arbitration. In addition, the restructure overseen by the community's lay leadership in the early 2000s, means that the Melbourne Beth Din has come to embrace modern governance and corporate structure which create the potential for transparency and accountability which are key to building the communal confidence required for a trusted commercial arbitration body.

7.3.1 The Challenge of Alternate Battei Din

The Melbourne Jewish community has seen numerous Battei Din set up without the formal sanction of the Chief Rabbinate of the British Empire. Most of these alternate Battei Din were set up on an ad-hoc basis to deal with particular cases. However, on several occasions alternate Battei Din maintained an ongoing presence for a period, and serviced a component of the community who preferred them to the establishment Beth Din.

Unsanctioned Battei Din existed prior to the establishment of the local Beth Din in 1864 however they were not 'alternate' insofar as there was no authorised Beth Din at the time, and required the Chief Rabbi's specific permission to oversee a *halakhic* conversion.[926] Following the establishment of the local Beth Din, the first accounts of the formation of ad-hoc Battei Din involved its disgruntled panellists. In one case Moses Rintel, a founding a member of the local Beth Din, co-opted fellow congregant Wolf Davis and Revered Isaac Friedman of the Sandhurst Synagogue to perform the conversion of a young boy. The matter was protested by his peers on the local Beth Din who took the matter to the Chief Rabbi who determined that another conversion ceremony be held for the

[926] Travelling Rabbi, Yaakov Saphir performed a conversion in 1862 and was criticised by the Chief Rabbi for doing so; see Aron and Arndt (n 838) 333-334.

boy at the authorised Beth Din.[927] A short while later, Revered Dattner Jacobson, also a member of the local Beth Din, was found to be independently 'proselytising for a profit' and was expelled from the Beth Din as a consequence.[928] In both cases, the Chief Rabbi was called in to address these illegitimate Battei Din and their actions were repudiated.

With the formation of the immigrant Eastern European Jewish community in Carlton, alternate Battei Din became a more persistent theme, and were significantly harder to reign in given the absence of an allegiance between the immigrant population of Carlton to the British Chief Rabbinate. In late 1891 Rabbi Avraham Eber Hirschowitz arrived in Melbourne after a short stint in Sydney and shortly thereafter established a Beth Din for the *Ḥevra Torah* community in Carlton, much to the displeasure of the local Beth Din.[929] While his tenure lasted only three years, the desire for independence from the Anglo-Orthodox mainstream that his Beth Din represented was replicated in generations to come. In 1928, Revered Leopold Goran, a minister of the Carlton community, accepted a convert who had been refused by both the Melbourne and Sydney Beth Din. His actions made headlines in the *Australian Jewish Herald*[930] and he was summoned to a conference with the establishment Beth Din, the outcome of which saw him pledging to bring any future converts to them.[931]

Four years later, a letter was sent from the Carlton based Machzikei Hadath Hebrew Congregation to the Melbourne Hebrew Congregation informing them of the newly established North Carlton Beth Din.[932] This Beth Din was to become the first long-standing alternative to the Melbourne Beth Din, operating with Revered Yoir Adler as *Av Beth Din*.[933] In 1937, after Danglow assumed the role as interim *Av Beth Din*, a disgruntled Gurewicz left the Melbourne Beth Din and reconvened the North Carlton Beth Din, rebranding it as the Beth Din of the United Congregations. This Beth Din attained international standing under his chairmanship and operated until his passing in 1956. It is noteworthy that the developments in Carlton were protested by the establishment Beth Din as well as in editorials written by Newman Rosenthal in the *Australian Jewish Herald*.[934] While the North Carlton Beth Din was described by Brodie and Danglow as 'insignificant',[935] Gurewicz's Beth Din of the United Congregation was seen as a greater threat to the establishment and thus received the

[927] Goldman (n 839) 194-195.
[928] Turnbull (n 840) 246.
[929] Havin (n 858) 24; Goldman (n 839) 369.
[930] *Australian Jewish Herald* (Melbourne, 19 April 1928); quoted in Turnbull (n 840) 574.
[931] Turnbull, ibid 574-575.
[932] Aron and Arndt (n 838) 191.
[933] Havin (n 858) 46-47.
[934] *Australian Jewish Herald* (Melbourne, 5 August 1937 and 2 September 1937).
[935] Havin (n 858) 47; referencing *Jewish Weekly News* (Melbourne, 3 December 1933).

strong disapproval of Chief Rabbi Hertz who urged its cooperation with the Melbourne Beth Din.[936] Notwithstanding the protests from the Anglo-Orthodox mainstream, the Carlton Battei Din remained resolute, and formed durable alternatives to the Melbourne Beth Din.

The precedent set by the Carlton Battei Din, appears to have weakened the monopoly of the establishment Beth Din. During Rappaport's tenure as chair of the Melbourne Beth Din, there was widespread dissatisfaction among the rabbinate and lay leadership regarding its operation. In 1978, a meeting with the communal rabbis was called by the Council of Orthodox Synagogues Victoria and the notion of installing a second Beth Din was advocated by a number of the rabbis present, including Rabbis Ronald Lubofsky (St Kilda Hebrew Congregation) and Ellis Sultanik (North Eastern Jewish Centre) in which context, Gurewicz's alternate Beth Din was brought as a case-study. In addition, reference was made at that meeting to the Adass Israel and Lubavitch communities of Melbourne, which did not strongly identify with the Melbourne Beth Din and appeared to have had their own alternative arrangements.[937]

In more recent times, Rabbi Shneur Reti-Waks of the Ark Centre was censured by the Melbourne Beth Din for arranging conversions via an overseas Beth Din. The Sydney and Melbourne Beth Din issued a joint statement that 'any conversion performed by individual rabbis or by private Battei Din are not and will not be accepted' and an agreement was struck with Reti-Waks whereby he pledged to cease accepting candidates for his conversion program.[938]

While the establishment Battei Din have historically frowned upon attempts by other Battei Din to perform *geirut*, this sentiment does not appear to be the case regarding commercial arbitration. Ad-hoc Battei Din that arbitrate financial disputes have received no public sanction from the establishment Battei Din, who evidently do not see this as a usurpation of their role. To the contrary, Rabbi Yehoram Ulman, who is co-*Av Beth Din* of the Sydney Beth Din, has acted as a *dayan* arbitrating commercial matters on ad-hoc Battei Din in several high-profile cases,[939] without any apparent criticism from the establishment Battei Din.

It would thus appear that the establishment Battei Din are more vigilant with regards to alternate Battei Din offering to oversee *geirut* since matters of personal status and identity impact upon the *halakhic* legitimacy of subsequent marriages and their offspring. On the other hand, commercial arbitration offered by ad-hoc Battei Din, meet a more relaxed response from the establishment

[936] Turnbull (n 840) 585.
[937] Council of Orthodox Synagogues, Minutes of Special Meeting with the Rabbis held at Caulfield Hebrew Congregation (Melbourne, 5 April 1978).
[938] *Australian Jewish News* (Melbourne, 24 February 2017 and 10 August 2017).
[939] Including the Beth Din cases that resulted in *Mond v Berger* (n 539) and *Thaler v Amzalak* (n 540).

Battei Din, as the litigants' choice of dispute resolution forum is paramount. Additionally, commercial disputes between parties, are perceived as having a negligible flow-on effect upon the wider community, and thus the presence of alternate Battei Din in commercial matters is of less concern to the establishment Beth Din. This mirrors the secular law courts exclusive jurisdiction over criminal matters and its acquiescence to alternate dispute resolution forums in the commercial arena.

Over the past few decades, it has become apparent that the actions of Battei Din dealing in the arbitration of civil matters does in fact have a bearing on the wider community. Misconduct by Battei Din in cases of financial arbitration has damaged the reputation of Battei Din generally and has discouraged Orthodox Jews from resolving their commercial disputes in line with their *halakhic* obligations.[940] In addition, *Ḥillul HaShem* (desecration of G-d's name), which is meant to be averted by taking one's disputes to a Beth Din and thus avoiding the airing of domestic disputes within wider society,[941] has instead been exacerbated by the negative public exposure triggered by the misconduct of these Battei Din.

Notwithstanding the challenges to the Melbourne Beth Din's centrality, it has managed to remain Melbourne's pre-eminent Beth Din, and a backbone of its Orthodox community. It's early founding, relative to the history of the Melbourne Jewish community, is a significant factor which that has prevented it from being perceived as a parochial institution relevant to only one segment within the Orthodox community. Moreover, the communal Orthodox rabbinic and lay leadership bodies, the Rabbinical Council of Victoria and the Council of Orthodox Synagogues of Victoria, which are themselves comprised of a cross-section of Melbourne's Orthodox communities, have ensured that the Melbourne Beth Din retained the acceptance of the Orthodox community with both organisations playing a role in its governance and appointments in accordance with the Melbourne Beth Din's Constitution.[942] Given the negative experience associated with ad-hoc Battei Din involving themselves in commercial arbitration, it would be advised that this element is added to the ambit of the establishment Beth Din rather than establishing a new Beth Din for this purpose. This would enable the community's leadership bodies to utilise the governance structure already in place at the Melbourne Beth Din to ensure the installation of best practice policies and procedures, as well as to harness its centrality within the fabric of Melbourne's Jewish community.

[940] These cases are referenced in some detail in Part 8.4.
[941] Maimonides, *Mishneh Torah, Hilkhot Sanhedrin* 26:7.
[942] See e.g. Constitution of Melbourne Beth Din Nominees s 5.1 '[t]he initial Member of the Company shall be the COSV'; s 15 which requires the appointment to the Board of one ex-officio member of the RCV and one ex-officio member of the COSV.

7.3.2 The Chief Rabbinate and the Melbourne Beth Din

A further trend which is evident in the history of the Melbourne Beth Din, is the evolution in its relationship with the Chief Rabbinate of the British Empire and later, the Commonwealth. In its initial period, the Chief Rabbinate was an overwhelming authority to whom the Beth Din owed its existence and thus its allegiance. The local Beth Din was formed in 1864 by Chief Rabbi Nathan Marcus Adler, after having previously refused petitions for its formation as early as 1849.[943] Discontent with the Beth Din was managed by the Chief Rabbi, on whose authority Rintel and Jacobson were expelled from its ranks.[944] As late as 1924 it is apparent the Chief Rabbi's approval was still being sought for every conversion performed by the Beth Din.[945]

From the 1930s, although the Chief Rabbinate's influence remained, its authority over the Beth Din began to wane. The strengthening of the Carlton community, which quickly became a 'vibrant, dynamic and functionally independent Jewish centre,'[946] and their lack of allegiance to the Chief Rabbinate, coupled by the strengthening of the Liberal Beth Israel community which did not see itself as being under the dominion of the Chief Rabbinate,[947] are likely contributing factors for its diminution in authority. Gurewicz reflected the sentiment of the Carlton community in ignoring Chief Rabbi Hertz's urging to desist from forming his own Beth Din in 1937,[948] and aligned himself with the Chief Rabbinate of Palestine among others, with whom he corresponded on matters of Jewish law, rather than with the British Chief Rabbinate.[949]

Notwithstanding its waning power evident under Hertz, Chief Rabbi Brodie seemed to reassert authority over Melbourne affairs. In 1957, the question of whether the Liberal community could share a cemetery with the Orthodox was referred to Brodie, who ruled that it be divided.[950] Again in 1958, Brodie intervened to prevent Danglow from issuing a *kashrut* license independent of the Beth Din.[951] However, these interventions in Melbourne affairs, may have been an expression of the respect Brodie commanded due to his stint as minister of the Melbourne Hebrew Congregation, rather than evidence of an increase in the authority of the British Chief Rabbinate generally.

Following Brodie, the Chief Rabbinate's influence appeared to wane further. While on the one hand, the Beth Din under Rappaport asserted its authority on the basis that it had been 'appointed as such

[943] Goldman (n 839) 115.
[944] Aron and Arndt (n 838) 337.
[945] Turnbull (n 840) 368.
[946] Rosenbaum (n 867) 522.
[947] *Australian Jewish Herald* (Melbourne, 10 December 1936).
[948] Turnbull (n 840) 585.
[949] Lipski (n 893) 38-39.
[950] Turnbull (n 840) 468; quoting the *Australian Jewish Herald*, 5 September 1958.
[951] Levi, *Rabbi Jacob Danglow* (n 871) 294.

by the late and revered Chief Rabbi Sir Israel Brodie,'[952] yet at the same time it rebuffed the Council of Orthodox Synagogues of Victoria's attempts to implement Chief Rabbi Jakobovits' proposed restructure of the Melbourne Beth Din.[953] Rappaport's refusal to comply with the Chief Rabbinate signified a watershed in the declining relationship between the Melbourne Beth Din and its founding head office.

In correspondence to Dr Saul Weiner, Chief Rabbi Jakobovits acknowledged the changing relationship with Australia, writing that he had 'no personal interest in maintaining the traditional formal link with [his] Office' but nonetheless felt that the Chief Rabbinate should maintain its role in approving and authorising the *Av Beth Din* of Melbourne as a 'safeguard against arbitrary nominations or machinations by local vested interests'.[954] In a similar vein, in his letter congratulating Rabbi Sholem Gutnick on securing support from the Rabbinical Council on his appointment as *Av Beth Din* in 1980, Jakobovits suggested that prospective members of the Beth Din under Gutnick 'submit their rabbinical credentials to me as well as to you' leading to 'consultation with each other [to] eliminate aspirants who are not properly qualified.'[955] Likewise, Jakobovits informed the Rabbinical Council that during Gutnick's tenure 'any rabbi who seeks arbitration on any aspect of the Beth Din, its headship, composition or procedure, may take his case before the Chief Rabbi and the London Beth Din whose decision will be final and binding on all concerned'.[956] Jakobovits' recognition that the traditional links were no longer binding, rendered his subsequent suggestions to the Beth Din toothless and it would appear that they were largely, if not completely, ignored.[957]

In the subsequent restructure of the Beth Din in 2004, the Constitution made no reference to the Chief Rabbinate of the United Kingdom nor to the London Beth Din, with all appointments and oversight being relegated to local councils. In January 2005 the Melbourne Beth Din did away with its traditional stamp that had included the words 'founded by the Chief Rabbi of the British Empire 5626', in acknowledgement of the fact that there was 'no longer any trace, formally or informally, of

[952] Letter from Melbourne Beth Din to Dr Saul Weiner, 20 February 1979.
[953] Letters from Chief Rabbi Jakobovits to Dr Saul Weiner, 24 December 1970, 7 April 1971 and 27 February 1979; Letter from Dr Saul Weiner to Chief Rabbi Jakobovits, 16 March 1971; Letter from Melbourne Beth Din to Dr Saul Weiner, 20 February 1979.
[954] Letter from Chief Rabbi Jakobovits to Dr Saul Weiner, 27 February 1979.
[955] Letter from Chief Rabbi Jakobovits to Rabbi Sholem Gutnick, 28 May 1980.
[956] Letter from Chief Rabbi Jakobovits to Rabbinical Council of Victoria Secretary, Rabbi Michael Newman, 28 May 1980.
[957] Reference to Gutnick making appointees to the Beth Din without consultation (neither local nor abroad) were reported in the *Australian Jewish News* (Melbourne, 11 October 2002) and in Mark Baker, 'The War of the Rabbis: How Kosher are our Orthodox Rabbinic Courts?' (1999) *Generation Magazine* 12.

any [o]f the old allegiance or authority of the [C]hief Rabbi.'[958] At present, the Melbourne Beth Din formally communicates with the Israeli Rabbinate, and features on their register of approved Battei Din. A mutual sentiment was expressed by former Chief Rabbi Lord Jonathan Sacks when asked in the early 2000s at a rabbinic conference in Melbourne regarding the relationship between the Australian and London rabbinate. He responded with the verse 'the law will go out from Zion, and the word of the Lord from Jerusalem'[959] indicating his agreement that the Australia's rabbinic alliance should be with Israel rather than with the United Kingdom.[960]

In his analysis of the Chief Rabbi's Australian jurisdiction, Rabbi Israel Porush argues that 'the dependence on the Chief Rabbi was broadly in inverse proportion to the qualifications of the local rabbinate.'[961] This correlates with the fact that the early Reverends who comprised the local Beth Din were subjected to the far more authoritarian management by the father and son Chief Rabbis, Nathan Marcus and Hermann Adler, while more recent history has witness greater qualification among *dayanim*[962] and a reciprocal 'softer touch' from the Chief Rabbinate. In addition, the decline in the Chief Rabbinate's influence mirrors the decreasing authority of the United Kingdom generally and the rise of Australian national independence, as reflected in the such milestones as the act of Federation in 1901, the first native-born Governor-General in 1931, the *Australia Act (Cth)* 1986 which formally removed constitutional ties between the two countries and the sentiment that inspired the Australian republic referendum of 1999. Much like the present-day relationship between Australia and the King of England, it can be argued that the Chief Rabbi remains a symbolic figurehead of Australian Jewry, whose practical authority is a thing of the past.

As such, presently the Melbourne Beth Din seeks its legitimacy from the Chief Rabbinate of Israel, which maintains a central register of internationally recognised Battei Din. However, the Israeli Chief Rabbinate, are concerned primarily for matters of personal status, such as *geirut* and *gittin* which require a global Orthodox consensus as to an individual's Jewish identity as well as the *halakhic* legitimacy of marriages and their offspring. Commercial matters are less of a concern for the Israeli Chief Rabbinate, insofar as the outcome of Beth Din rulings in this regard have little impact upon the Orthodox community generally.

[958] Email from Rabbi Mordechai Gutnick to Chaim Cowen, 7 February 2020.
[959] Isaiah 2:3.
[960] Interview with Reverend Aron.
[961] Porush (n 885) 258.
[962] At present, all the dayanim on the Melbourne Beth Din have *yadin yadin* qualification; see Melbourne Beth Din Website, *Meet the Team* <http://www.mbd.net.au/about/meet-the-team/>.

There are no formal international authorities that regulate the way in which commercial arbitration is to be performed by Battei Din in Australia. Rather, responsibility in this regard[963] would sit with the governing board of the Melbourne Beth Din which, in consultation with the Rabbinical Council of Victoria and the Council of Orthodox Synagogues Victoria, are charged with developing operation rules which oversee, inter alia, 'procedural matters that need to be attended to, prior to bringing a matter before the Melbourne Beth Din'.[964] Other influences over the manner in which commercial arbitration would be performed by Australian Battei Din are best practice international Battei Din that have built a reputation for providing fair outcomes via processes which are enforced by the legal systems of their host country.[965]

7.3.3 Commercial Arbitration at the Melbourne Beth Din

While the initial impetus for forming Battei Din in Australia was to provide an avenue for the performance of *halakhically* valid *geirut* and *gittin* in the colonies, there is evidence that it soon took on a broader array of functions, including, on occasion, the settling of financial disputes among co-religionists. Shortly after the Beth Din of the Great Synagogue, Sydney was reconvened by Rabbi Francis Lyon Cohen, it referred to the arbitration of a financial despite in its minute book.[966] However, with regards to the Melbourne Beth Din, commercial arbitration was not one of its known functions,[967] and in describing the main work of the Beth Din in 1912, Abrahams, the *Av Beth Din*, mentioned 'the settlement of questions affecting *Shechita*, Divorce, *Chalitza*, *Matsoth*, and so on'[968] failing to make any reference to financial disputes. That being said, evidence for its dealings in commercial matters did appear in a 1937 edition of the *Australian Jewish Herald* whereby the editor commented that a friend of his 'was interested in a civil dispute that would most certainly have been ventilated in the courts had not the Melbourne Beth Din succeeded in settling the point at issue.'[969] In addition, in *Generation Magazine*, editor Mark Baker cites the minute-books of the Melbourne Beth Din between 1905-1950 which record 'a great deal of mediation on business disputes'.[970] As such, whilst not the predominant work of the establishment Battei Din in Australia, it appears that commercial arbitration and mediation did take place under its auspices.

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[963] Constitution of Melbourne Beth Din Nominees, s 3.1.1.4 states that 'determin[ing] disputes' is an object of the company. However, at the time of writing this is not listed on the Melbourne Beth Din website among the services it provides; Melbourne Beth Din Website, *About the Beth Din* <http://www.mbd.net.au/>.
[964] Constitution of Melbourne Beth Din Nominees, s 3.5.1.
[965] See Part 4.
[966] Apple, *Origins of the Sydney Beth Din* (n 841) 353.
[967] Interview with Rabbi Levi; Interview with Reverend Aron.
[968] *Jewish Herald* (Melbourne, 19 January 1912).
[969] *Australian Jewish Herald* (Melbourne, 14 October 1937).
[970] Baker (n 957) 90. The term 'mediation' rather than 'arbitration' might reflect the lack of binding arbitration agreements between the parties and thus the lack of enforceability of decisions rendered by the Beth Din.

In contrast, the alternate Beth Din of the United Congregations formed in 1937 by Gurewicz was known to regularly deal in commercial arbitration as part of its array of services.[971] It is plausible that the relative dearth of commercial arbitration in the establishment Melbourne Beth Din as opposed to Gurewicz's Beth Din, reflected the different communities that they serviced. The Anglo-Orthodox community was far more acculturated than its Carlton counterparts, and as such would generally approach the Beth Din for matters the state courts could not provide, namely its ritual functions such as *gittin*, *geirut* and *kashrut*. The *halakhic* prohibition of taking one's litigation before a gentile court[972] was perhaps less well known in Anglo-Orthodox circles, evident from the scarcity with which such cases came before the establishment Beth Din in Melbourne.[973] In contrast, the Eastern European immigrant community in Carlton which was serviced by Gurewicz's Beth Din, would have been far more reluctant to utilise the secular courts for financial arbitration, both as a product of their experience with anti-Semitic governmental authorities in their countries of origin and due to their greater knowledge and observance of *halakhah* as compared to their Anglo-Orthodox counterparts.[974]

Following the Second World War, a significant influx of European refugees altered the dynamics of the Melbourne Jewish community and heralded the decline of Anglo-Orthodoxy. The Melbourne Beth Din underwent commensurate change and its Anglo-Orthodox predominance ceased with the passing of Danglow and the resignation of his successor, Herman, in 1962, following which the ministers of St Kilda Hebrew Congregation no longer acted as *dayanim*. In its place the ascendant *ḥabad* community gained representation on the Beth Din, and its adherents – Rabbis Sholem and Mordechai Gutnick – have been its chair for the past forty years.[975]

One might have expected that the shift in the establishment Beth Din from Anglo-Orthodox to Eastern European, which reflected the changing community in Melbourne, would have brought with it a surge in the number of financial disputes brought to it for arbitration. This however does not appear to have been the case, likely because of the lack of communal confidence in the Melbourne Beth Din under the leadership of Rabbis Rappaport and Sholem Gutnick. This aligns with the fact that the references to the Melbourne Beth Din involving itself in arbitration discussed above all pre-date

[971] Interview with Professor Waller; one such case is referenced in Lipski (n 893) 45.
[972] *Shulḥan Arukh, Ḥoshen Mishpat* 26:1.
[973] In addition, from the language of the editor's friend quoted in the *Australian Jewish Herald* (n 969) who stated that their civil dispute 'most certainly [could] have been ventilated in the courts' it appears that they might not have been aware of, or concerned for, any religious prohibitions of having their dispute litigated in court.
[974] Anglo-Orthodoxy is described by Turnbull (n 840) 647 as 'the centre point on the religious continuum' with the Carlton community and its offshoots as 'to its "right" – to varying degrees.'
[975] Turnbull (n 840) 661-663.

the 1950s when Rabbis Rappaport and Sholem Gutnick sat at its helm. In areas of conversion and divorce, where the Jewish community had little alternative, many would have begrudgingly utilised its services despite their frustrations towards its leadership. However, in relation to commercial arbitration, where secular alternatives abound, the reputation of the Melbourne Beth Din, particularly with relation to its lack of transparency, would have made it a very unattractive forum for members of the Jewish community. The paucity of any records of *halakhic* arbitration during this era strengthens the case for prioritising the building of communal confidence in the leadership and reputation of the Beth Din as a necessary pre-condition to instituting arbitration services. It is noteworthy that while the reconstituted Melbourne Beth Din's constitution provides for it to deal with commercial disputes, it does not advertise this as one of its services – perhaps out of recognition that there is little demand at present for this service as a result of it having not yet built sufficient community trust and confidence in its operations.

As such, as recent high-profile cases of commercial arbitration between Orthodox Jews have demonstrated, where parties are seeking to fulfil their religious duty to litigate before a Beth Din they are either doing so at the Sydney Beth Din[976] or are constituting ad-hoc *zabla* Battei Din[977] for these purposes. The lack of administrative oversight in both the Sydney Beth Din and the ad-hoc *zabla* Battei Din, are a concern for many members of the religious community who do not wish to fall foul of their *halakhic* duties, but have little confidence in the transparency and due process provided by these bodies.[978] Thus while the reconstituted Melbourne Beth Din provides in its governance structure the mechanism for instilling greater communal confidence in its processes, to date it has remained in the mould of its Anglo-Orthodox heritage, focussing on ritual, rather than commercial, matters.

7.4 CONCLUSION

Studying the origins and subsequent history of the Beth Din, founded by the Chief Rabbinate of the British Empire, provides one with a sense of its challenges and triumphs and the evolutionary path it has charted since its establishment. The Melbourne Beth Din was the first Beth Din established outside of London by the Chief Rabbinate and has gradually grown apart from its founders. Its foray into independence has seen its departure from its Anglo-Orthodox origins and an embracing of the Orthodoxy of its Eastern European immigrants who rose to prominence over the course of the 20th Century, and along with this its allegiance has shifted from the British to the Israeli Chief Rabbinate.

[976] *Live Group v Ulman* (n 268).
[977] Mond v Berger (n 539) and *Thaler v Amzalak* (n 540).
[978] *Australian Jewish News* (Melbourne, 10 January 2019).

In the course of its history, the Melbourne Beth Din has been challenged by alternate Battei Din, some more tenacious than others, testing its centrality in the community and often forcing it to recognise the changes taking place within the Jewish community. Its *dayanim* have confronted a fair share of opposition; be it from the Carlton Jewish community and its rabbinic leadership who did not identify with the Beth Din's Anglo-Orthodoxy, or from the Liberal community whose brand of Judaism did not put *halakhah* at its centre, or from the Council of Orthodox Synagogues of Victoria who attempted, and ultimately succeeded, in penetrating the Beth Din's opacity and bringing modern governance structures to bear.

The Beth Din as an avenue for arbitration has been a feature of the Sydney Beth Din and alternate Battei Din in Melbourne, and less present – although not entirely absent – from the practice of the Melbourne Beth Din. Considering the cases over the last two decades in which arbitration at the Sydney and ad-hoc *zabla* Battei Din have fallen short of the law in terms of their processes and procedures, there is a need for greater oversight to restore the community's confidence in the viability of Beth Din arbitration. The newly restructured Melbourne Beth Din has these mechanisms in place, however it does not at present offer arbitration as one of its services. The following chapter will present a working model for Australian commercial Battei Din, synthesising what has been learned from the theoretical research into Jewish and secular law, the empirical study into international best practice Battei Din, as well as the historical overview of the Melbourne Beth Din and its relevant themes.

8 A WORKING MODEL: SUMMARY AND EVALUATION

8.1 INTRODUCTION

The focus of this final chapter is to bring together the various strands of this study and distil a practical working model that can be applied to Battei Din in the Australian context that aspire towards an application of Jewish law arbitration that accommodates its secular milieu. The likelihood of this model being met by resistance or acceptance by prospective *dayanim* will be evaluated against the viewpoints espoused in interviews with five *dayanim* who currently practice in Melbourne and Sydney. Additionally, it will be demonstrated that the practices that resulted in the court's criticism of Battei Din mishandling commercial arbitration in three cases where Beth Din awards were challenged in court, are addressed via the elements of the working model.

The model that is proposed in this chapter contains elements that ensure both consensual and contingent accommodation is achieved, as outlined in Part 3.6.4. Specifically, aspects of the model pertaining to the use of a *seruv* that includes sanctions as well as legal representation speak to the importance of ensuring vulnerable litigants are consensual in their interactions with the Beth Din and mitigates against their feeling compelled to participate in proceedings due to communal sanctions or pressure. Contingent accommodation, which stipulates that there be 'minimal state-defined standards' for arbitration are provided by the CAAs of each state and need to be enshrined in the comprehensive rules and procedures of the Beth Din as well as via mandating the provision of reasoned judgements for their awards. Further safeguards which go beyond those required by the CAAs that are delineated in this chapter include the inclusion of an internal appeals mechanism and the emulation of the organisational structure and processes of best practice international Battei Din which strive to a gold-standard of operation, geared at building community confidence in their arbitral offerings.

Additionally, as discussed in Part 3.6.4, the Australian context does not provide the same degree of freedom of religion as is the case in the USA, despite each of their constitutions sharing almost identical wording in this regard. As discussed previously in relation to *Live Group v Ulman*, Australian courts appear to adopt a 'secular-absolutist model' which puts the individuals interests before that of their religious *nomoi* group, and in doing so show little concern for the limitation on religious expression that will result from this prioritisation. This provides a further safety net for vulnerable litigants of Australian Battei Din and provides added impetus for Battei Din to ensure that their procedures and operations address potential areas of friction with secular law.

8.2 THE AUSTRALIAN *DAYANIM* TAKING PART IN THIS STUDY

Five *dayanim* took part in this study, three of whom are members of the Melbourne Beth Din, one from the Sydney Beth Din and one from an alternative private Beth Din in Melbourne that deals exclusively in commercial arbitration.

The *dayanim* of the Melbourne Beth Din who agreed to be interviewed included its *Av Beth Din*, Rabbi Mordechai Gutnick. Rabbi Gutnick has *yadin yadin* qualification and conducted s*himush* (Beth Din apprenticeship) under Rabbi Zalman Shimon Dworkin in New York, as well as under Rabbi Yitzchak Hendel in Montreal, Canada. Whilst living in Sydney, he acted as a *dayan* alongside his step-grandfather Rabbi Asher Abramson in commercial cases that came before the Sydney Beth Din. Upon moving to Melbourne, he has continued taking on commercial arbitration privately as a *yaḥid mumḥeh* but not in his capacity as *dayan* on the Melbourne Beth Din.[979]

Two other *dayanim* of the Melbourne Beth Din, Rabbi Yisroel Greenwald and Rabbi Mordechai Berman likewise participated in this study. Rabbi Berman is qualified with *yadin yadin*, and is regularly engaged privately to aid in the resolution of commercial disputes in accordance with *halakhah*. He has conducted *shimush* in relation to commercial Beth Din cases and is the author of a book on the topic of interest repayments at Jewish law.[980] Rabbi Greenwald is also a *dayan* on the Melbourne Beth Din, qualified with *yadin yadin* ordination, but has not had experience as an arbitrator in commercial matters.[981]

In addition to the abovementioned *dayanim* of the Melbourne Beth Din, Rabbi Yehoram Ulman and Rabbi Shabsi Tayar also agreed to be interviewed as part of this study. Rabbi Ulman is a co-*Av Beth Din* of the Sydney Beth Din and is qualified with *yadin yadin* from Rabbi Zalman Nechemia Goldberg and has acted as a *dayan* in 'dozens and dozens' of commercial cases, as part of the Sydney Beth Din, on *zabla* Battei Din and as a *yaḥid mumḥeh*.[982] Rabbi Shabsi Tayar is the *dayan* and proprietor of Mehadr Beis Din Tribunals, a company based in Melbourne and registered in 2016 that provides *halakhic* 'counselling, mediation and arbitration'.[983] He is qualified with *yadin yadin* and acts as a

[979] Interview with Rabbi Mordechai Gutnick, *Av Beth Din* of the Melbourne Beth Din (Melbourne, 20 October 2022) ('Interview with Rabbi Gutnick').
[980] Interview with Rabbi Mordechai Berman, Dayan of the Melbourne Beth Din (Zoom, 31 August 2022) ('Interview with Rabbi Berman').
[981] Interview with Rabbi Yisroel Greenwald, Dayan of the Melbourne Beth Din (Zoom, 16 August 2022) ('Interview with Rabbi Greenwald').
[982] Interview with Rabbi Yehoram Ulman, co-*Av Beth Din* of the Sydney Beth Din (Zoom, 8 November 2022) ('Interview with Rabbi Ulman').
[983] 'Mehadr Beis Din Tribunal', Australian Business Register, *ABN Lookup* <https://abr.business.gov.au/ABN/View?abn=82420994426>; see also Mehadr Beis Din Website <https://www.mehadrbeisdintribunal.com/home>.

dayan on this Beth Din,[984] which over the year prior to the interview had run 'a handful' of formal cases, with others being referred to it that settled prior to arbitration.[985]

The *dayanim* who agreed to be part of the study, are primarily based in Melbourne, which of the Australian Battei Din has served as the focus of the study. Within Melbourne, the *dayanim* who form a part of the Melbourne Beth Din provide insight into the feasibility for the inclusion of commercial arbitration into its array of services and Rabbi Tayar provides an outsiders perspective to the establishment Beth Din and with experience in performing Jewish law arbitration. Rabbi Ulman provides an important voice as a co-*Av Beth Din* of the Sydney Beth Din and as a *dayan* who has had significant exposure to commercial arbitration in the past, a few case of which have been made known to the public by the successful challenges mounted against them in the courts.[986]

8.3 The Working Model and its Feasibility

In this section, a working model based on this study is proposed, which includes elements that are gleaned from the research in the preceding chapters. Following the overview of each element, the feasibility of its adoption is evaluated, considering the views expressed by the Australian *dayanim* interviewed.

As will be discussed, many of the elements that are proposed, challenge the normative manner by which Battei Din have historically operated. It is noteworthy that *dayanim* interviewed who had practical experience in contemporary *halakhic* arbitration appeared to be more embracing of the elements of the working model, appreciating their necessity in the modern secular context. On the other hand, those *dayanim* whose knowledge appeared to stem from academic study of Jewish law rather than its practical application in arbitration-based Beth Din models seemed to push back against some of the perceived limitations on its traditional practice. Additionally, resistance to certain elements of the working model seemed to stem for an incomplete understanding of secular law, such as the assumption that not providing reasons might reduce the courts' ability to overturn an award. Alternatively, their reticence may have stemmed from their personal viewpoint on debated areas of Jewish law, such in the relation to *dina demalkhuta dina* and *zabla,* where it was recommended that the Beth Din aligns with certain interpretations of these concepts instead of

[984] He is the only *dayan* formally involved in Mehadr Beis Din Tribunals, and other arbitrators are included in instances where parties opt for the matter to be arbitrated by a panel of three; see Interview with Rabbi Shabsi Tayar, Dayan and Proprietor of the Mehadr Beis Din Tribunal (Zoom, 6-7 September 2022) ('Interview with Rabbi Tayar').
[985] Ibid 3-4.
[986] Rabbi Ulman was a *dayan* in the cases of *Thaler v Amzalak* (n 540) (as *borer* for Mr Amzalak in a *zabla* Beth Din), *Mond v Berger* (n 539) (as a *borer* for Mr Mond in a *zabla* Beth Din) and in *Live Group v Ulman* (n 268) (as a *dayan* on the Sydney Beth Din).

others. These concerns could be allayed by further professional development in terms of secular law requirements of arbitration, as well as by the Av Beth Din dictating the position that the *dayanim* of the Beth Din will adopt in relation to debated areas of Jewish law, to ensure alignment with the secular arbitral framework. The theoretical research outlined in the chapters on Jewish law accommodation, coupled with the secular courts' criticism of Australian Beth Din decisions, discussed in Part 8.4, make a strong case for *dayanim* coming to terms with the necessity of certain trade-offs in achieving enforceability of their awards.

8.3.1 Implement comprehensive rules and procedures

A significant feature of all the best practice Battei Din surveyed was in the publication and adherence to comprehensive rules and procedures. The BDA's rules and procedures would form an excellent starting point for such a document, which can be adapted to the Australian arbitral context with permission. However, as discussed previously,[987] the mere crafting of a rules and procedures document is insufficient, if it is not accompanied by the professional education and governance that creates a culture which promotes fastidious adherence to these protocols, and thus ensures compliance with Australian arbitration laws.

All of the Australian *dayanim* that were interviewed, recognised the importance of implementing formal rules and procedures to the success of a Beth Din providing commercial arbitration. It was acknowledged that the procedural baseline of *halakhah* permits a more informal process than one would normally find in secular courts and as such, with regards to matters that are not explicitly addressed in *Shulḥan Arukh*, there is a likelihood of a fluctuating standard from one Beth Din and another.[988] The lack of uniformity in procedure, and as such the possibility that standards would be less than those expected under arbitration law, is especially a concern in the context of *zabla* Battei Din where *dayanim* may be inexperienced and are unlikely to invest the effort in establishing proper procedural rules given that they are operating on an ad-hoc basis.[989]

Moreover, the Australian *dayanim* interviewed were unanimous in their assessment that the breaches that occurred in the cases of *Mond v Berger* and *Thaler v Amzalak* were not only in contravention of secular law but also of *halakhic* requirements. Some attributed the failings to the inexperience or ignorance of the *dayanim* in the proper application of Jewish law.[990] Others referred to the fact that the *dayanim's* ignorance of secular law in those cases resulted in a *halakhic* failing,

[987] See Part 4.4.2 where this was stated in the context of Eretz Ḥemdah Gazit.
[988] Interview with Rabbi Berman.
[989] Interview with Rabbi Greenwald; see further below in Part 8.3.5.
[990] Interview with Rabbi Gutnick; Interview with Rabbi Greenwald.

insofar as *halakhah* requires that the *dayanim* conduct the case in such a manner that would result in the decision being confirmed on appeal and thus gain enforceability.[991]

Presently, there are no published rules and procedures on the website of the Sydney Beth Din,[992] and commercial arbitration is not a service offered by the Melbourne Beth Din. The Mehadr Beis Din Tribunal which is privately run, has published its rules and procedures online.[993] It would appear that this recommendation is one that will encounter little resistance by the *dayanim* and is an important step in ensuring awards conform to both secular and *halakhic* standards, and are enforceable under arbitration law.

8.3.2 Prioritise building communal confidence in the Beth Din

Emerging from the research into the history and evolution of the Melbourne Beth Din, it is evident that the opacity of its leadership in the latter half of the 20th century dealt significant damage to its reputation. In effect, it was reduced from being considered a backbone of the Jewish community, to an ostensibly private organisation operating at the whim of its *Av Beth Din*. Steps were taken in the early 2000s to implement community oversight, via the installation of a board of governance, the drafting of a constitution and the creating a transparent process for appointing *dayanim*. However, winning back communal confidence is an ongoing process, especially in the modern era in which there is greater scepticism of leaders and authorities.[994] Unfortunately, the cases of commercial arbitration by Battei Din in Australia in the past decades that were successfully challenged in court,[995] has done further damage to the communal perception of Battei Din generally, and their capacity to perform commercial arbitration specifically. As such, any attempts to form a Beth Din that offers commercial arbitration will require the active prioritisation of building communal confidence, for it to succeed.

Parenthetically, it is important to note, that building community confidence in the commercial arbitration arm of a Beth Din is always necessary, even where there has been no history of malpractice. Rabbi Yosef Carmel, co-founder of Eretz Ḥemdah Gazit articulated this point when he opined:

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[991] Interview with Rabbi Ulman; Interview with Rabbi Berman.
[992] Sydney Beth Din website <https://www.bethdin.org.au/>.
[993] Mehadr Beis Din website, *Rules and procedures* <https://www.mehadrbeisdintribunal.com/din-torah/the-rules>.
[994] See discussion in Part 5.4.2.
[995] While there may have been many successful cases of commercial arbitration that have taken place, as asserted by some of the *dayanim* interviewed, the community's perception is coloured by the ones that have garnered media attention, i.e. those successfully challenged in the courts; see Interview with Rabbi Gutnick and Interview with Rabbi Ulman where they reference the successful cases they arbitrated.

> "Not only the Beth Din but also the courts, need to be appreciated by the people. I say not only regarding Battei Din, it's also regarding the legal system, because they are supposed to represent the people and the justice for the people. *Kal v'ḥomer, ben beno shel kal v'ḥomer* (how very much more so), a system like us and other Battei Din which have no ability according to the law to enforce people to come, the basis for their work is the appreciation of the people, and the more you will be *makpid* on *sidrei hadin* (particular about procedural matters), on transparency, on quality et cetera, people will have the privilege to enjoy the way of Torah."[996]

The Australian *dayanim* interviewed noted the lack of communal desire for the Beth Din to facilitate commercial arbitration, and some referenced the poor publicity that Australian Battei Din have attracted with regards to arbitration. One *dayan* expressed the view that 'it's not part of the psyche here' to arbitrate at a Beth Din.[997] Another concurred stating that 'I think it's a psychological thing… maybe because its more informal, perhaps they see in *shul* (synagogue), they see the *dayanim* and they seem them at *simḥas* (functions), they're less aloof'.[998] Some of those interviewed referenced the case-law which had tarnished communal confidence, be it the concern that a Beth Din will issue a *seruv* and thus jeopardise the enforceability of the award[999] or the range of 'mistakes made' by *dayanim* in a number of high-profile cases.[1000]

Several of the *dayanim* referenced the notion that while many religiously observant Jews do not view the Beth Din as a viable alternative to arbitrate their commercial disputes, there are even non-religious Jews who might make use of their services. Rabbi Gutnick told an anecdote of two secular Jews who asked him to render a decision over a multi-million-dollar commercial dispute, on the basis that it was cheaper and more efficient to go to a rabbi than to court.[1001] Likewise, Rabbi Tayar noted that:

> "I've invited even secular individuals and adjudicated such cases as well. You'll be surprised to hear about many less overtly religious Jews agree to *halakhic* arbitration and many overtly religious individuals and religious institutions ignore their *halakhic* duties."[1002]

This notion speaks to the potentially wide appeal that a commercial Beth Din could have within the Australian Jewish community. Paradoxically, the religious community are likely the most impacted by

[996] Interview with Rabbi Carmel.
[997] Interview with Rabbi Gutnick.
[998] Interview with Rabbi Berman.
[999] Interview with Rabbi Gutnick.
[1000] Interview with Rabbi Berman.
[1001] Interview with Rabbi Gutnick.
[1002] Interview with Rabbi Tayar.

the negative press associated with the Beth Din due to their greater awareness of its operations. As such, much of the work required in restoring communal confidence needs to take place within the religious community itself. As a flow on effect of developing a stronger reputation, there is the possibility that some secular Jews may also choose to utilise the Beth Din to arbitrate their disputes for pragmatic and cultural reasons.

The awareness of the *dayanim* as to the lack of communal confidence in the ability of a Beth Din to facilitate commercial arbitration, and the role that the negative press has played in this, is itself an important step in the journey of building communal confidence. An openness to the need for greater transparency and the implementation of the working model that flows from this study is predicated on an awareness of the need for change in this regard. The lack of communal confidence is sadly justified based on half a century of opaque leadership and a further two decades of case-law that has evidenced misconduct by *dayanim*. However, the acknowledgement of these issues by the Australian *dayanim* involved in this study forms an important foundation upon which an improved reputation of Australian Battei Din can be built.

8.3.3 Emulate organisational structure and processes of best practice international Battei Din

The research conducted into the operations of the BDA, the cRc Beth Din and Eretz Ḥemdah Gazit, provides important examples of how Battei Din have achieved a reputation of best practice in the international community. Each of these institutions maintain an organisational structure that supports the *dayanim* in providing a professional service to litigants. They each have a director (who may also act as a *dayan*) who is active in leading the Beth Din in terms of compliance with secular law, public relations, as well as overseeing the professional development of the *dayanim*. This individual is key to the success of the Beth Din insofar as a they bring administrative prowess which is often outside of the skill set of the *dayanim* and *Av Beth Din*, and have the time to oversee the smooth running of the Beth Din, which is not typical of a part-time *dayan* who might be tethered by other communal responsibilities. Additionally, the study highlighted the importance of secretarial support in ensuring that the Beth Din runs in an organised fashion, and who acts as an intermediary between the litigants and the *dayanim* to prevent *ex parte* communication. Additionally, the presence of female members on the administrative staff, assists in enabling the Beth Din, which is naturally dominated by males employees, to provide a more inclusive environment for its female litigants and clients.

Beyond their organisational structure, the best practice Battei Din surveyed evidenced awareness of the need to provide a legal and other relevant professional advice to the *dayanim*, and in the case of the BDA, to include them on the panel so as to ensure that the arbitrators are across factually

complex scenarios that are brought before them. The inclusion of such professionals is strongly recommended for the Australian context, both in terms of the practical function they serve as well as from the perspective of building communal confidence, insofar as the inclusion of relevant experts evidences the Beth Din's genuine desire to understand the complexity of a given case and thus ensure that an appropriate *halakhic* decision is rendered.

Additionally, the practices of these Battei Din, in terms of how they deal with potential conflicts of interest or apprehensions of bias are instructive for Battei Din in the Australian context where the case-law evidences that this has been an issue in the past and is likely to remain one, given the relatively small size of its Orthodox communities and the limited number of qualified *dayanim*.

The example of Eretz Ḥemdah Gazit, which prioritises transparency to a greater extent than the US Battei Din surveyed, provides instructive guidance with regards to methods for increasing communal confidence which is a priority in the Australian context. Aspects of these practices include the publication of written judgements on their website that are tagged and easily searchable.[1003] Furthermore, the inclusion on their website of ethical guidelines for their *dayanim* as well as *halakhic* policies which provide certainty for litigants in instances where clarity of the Beth Din's approach to certain controversial areas of *halakhah* is necessary to enable clients to better order their affairs. These measures were adopted by Eretz Ḥemdah Gazit in recognition of the fact that they are charged with winning over the public's trust, and providing a service that would attract potential clients, which is equally relevant to the Australian context.

In evaluating the feasibility of these elements of the working model, the interviews play a limited role. The organisational structure of the Beth Din rests on financial considerations, which has not been the subject of this study, as well as the ability and willingness of the lay leadership of the Melbourne Beth Din to recruit appropriate personnel. With regard to the inclusion of non-rabbinic experts either as advisors for the *dayanim* or as part of the panel, viewpoints varied among the interviewees. Interestingly, those with the greatest experience in commercial arbitration were the most open to the inclusion of such experts, even on the panel itself.[1004] However, a view was also put forth that the presence of non-rabbinic experts may be construed as being disrespectful to the *dayanim* and would need to be done sensitively so that it doesn't appear that the *dayanim* are

[1003] As discussed in Part 4.5 the USA Battei Din prioritise confidentiality over transparency and publish few (if any) judgements. Given the poor reputation that Australian Battei Din have earned, it is recommended that they follow the lead of Eretz Ḥemdah Gazit in this regard, prioritising transparency to win back communal confidence.

[1004] See Interview with Rabbi Ulman who asserted that the Sydney Beth Din has started to implement the practice of having a lawyer present in complex civil law cases; Interview with Rabbi Berman; Interview with Rabbi Tayar.

amateurs and that the expert is their supervisor.[1005] While this sentiment should be taken into consideration in the sensitive implementation of this working model, in achieving the goal of establishing a functional and professional Beth Din, it needs to be weighed against the priority of advancing community perception of the Beth Din as a viable forum for commercial arbitration.

In evaluating the likelihood of the acceptance of recommendations regarding the installation of processes for dealing with conflicts of interest as well as the methods to promote transparency of the Beth Din, it is instructive that the interviewees evidenced awareness of the lack of communal confidence in relation to the Beth Din, especially in the realm of commercial arbitration, as discussed in the previous section. Additionally, the *dayanim* concurred on the *halakhic* imperative of achieving enforceability of the awards. The latter factor should provide the impetus for the *dayanim* to adopt the recommendations geared at ensuring awards are not struck down based on actual or apprehended bias. The former factor should provide a strong case for the adoption of the Eretz Ḥemdah Gazit practices to promote transparency. The implementation of this working model will require the ongoing efforts of a director who is driven to ensure the Beth Din's accountability which is dependent on the ability of the Beth Din to create an organisational structure that provides mechanisms that ensure transparency is maintained.

8.3.4 Train *dayanim* in relevant aspects of secular law

Parts 2 and 3 of this study explored the common law context within which Jewish law operates in Australia. Jurisprudential differences between the two systems were highlighted, as were its ramifications in terms of their understandings of the role of a judge. Additionally, an overview was provided of the arbitral context within which religious law operates in western society, which drew attention to the rise of legal pluralism in the latter half of the 20th century, noting that multiculturalism generally, and at law specifically, has not been without its challenges. Drawing on Ayelet Shachar's research, methods of accommodation were discussed and the recommendation that a combination of consensual and contingent accommodation would ensure that appropriate safeguards are in place to prevent a collision of secular and religious sensibilities.

In promoting an awareness of the secular context within which the Beth Din operates, it is recommended that *dayanim* are afforded training in the basics of secular law jurisprudence, with a focus on understanding the judicial ethos expected of judges at secular law.[1006] Additionally,

[1005] Interview with Rabbi Greenwald.

[1006] This is not for the purposes of emulating such an ethos, aspects of which are foreign to the way in which a judge in Jewish law is expected to conduct themselves (see Part 2.2.7) but rather to gain an understanding of certain minimum standards, some of which would outlaw certain interpretations of the role of a judge in *zabla* (see Part 5.2.1).

dayanim should have a sophisticated understanding of the *Commercial Arbitration Act (Vic)* 2011 and relevant case law which establishes the minimum standards required of professional arbitrators and which, if adhered to, enhances the likelihood of awards being confirmed if challenged in the courts.[1007] Moreover, as the theoretical research has demonstrated, in many cases the proper application of Jewish law depends on an understanding of secular law as it pertains to the doctrines of *dina demalkhuta dina, minhag hasoḥerim* and *minhag hamedinah*.[1008]

The interviews conducted with Australian *dayanim* evidence a strong desire for training in arbitration law. Two Victorian *dayanim* reflected positively on a previous session presented by an arbitration organisation in which judges and barristers presented to rabbis on 'various information that [they] should know if [they are] going into arbitration, what the secular courts would assume that [they] should know.'[1009] Additionally, all five *dayanim* interviewed spoke of the critical importance of professional development being provided with regards to arbitration law.[1010] A driving factor behind this would appear to be the benefit it provides in enabling the enforcement of Beth Din awards which is imperative from both a *halakhic* and pragmatic perspective.[1011]

The unanimous desire expressed for such training bodes well in terms of the adoption of this element of the working model. While this element goes beyond their training in arbitration law, and also calls for the development of an understanding of the secular jurisprudential context, with a focus on the judicial ethos expected of secular judges, this may be able to be amalgamated with a course that focuses on arbitration laws, particularly if it is presented by secular judges who are familiar with these expectations.

A further aspect of the legal-rabbinic relationship required for successful religious arbitration was articulated by the *menahel* of the BDA, Rabbi Shlomo Weissmann, in his interview:

> "One thing… that makes us very successful is the overlap of legal and *halakhic* expertise. I think if anyone wanted to replicate what we do here, that's where you start. It's really hard for rabbis who just have the rabbinic training to run a Beth Din that has a stellar reputation and is really good about rules and procedures. Although we have seen some start [up]. For example, Beis Hava'ad in Lakewood doesn't really have that legal expertise built in, although

[1007] The topic of the use of *seruvim* which is relevant to ensuring consensual accommodation, will be discussed in the working model describe below in Part 8.3.8
[1008] See Part 5.3.
[1009] Interview with Rabbi Gutnick; this presentation was also referred to positively in the Interview with Rabbi Greenwald.
[1010] Interview with Rabbi Gutnick; Interview with Rabbi Ulman; Interview with Rabbi Greenwald; Interview with Rabbi Berman; and Interview with Rabbi Tayar.
[1011] Interview with Rabbi Ulman; Interview with Rabbi Berman.

they consult with lawyers, and they have, I think, built a good reputation for themselves for having procedural regularities – so it's not impossible. But the lawyer stuff really helps. It really helps. And you need the *halakhic* authority – so having that cooperative relationship between the lay and the rabbinic is important."[1012]

The setup of the Melbourne Beth Din is one which readily facilitates the symbiotic relationship between religious and lay leadership, including legal professionals.[1013] Were its ambit to extend to commercial arbitration, a legal professional should minimally be sought out to join its board of directors, and ideally, be employed among its personnel as is the case in all of the best practice Battei Din surveyed, each of which contained at least one individual who was qualified both as a *dayan* and as a lawyer.

8.3.5 Refrain from using the *zabla* method for selecting *dayanim*

The study of *zabla* in Part 5.2 revealed that it is a problematic method for selecting arbitrators and has drawn criticism by respected *halakhic* authorities in the modern era. In addition, *zabla* has come under direct reproach in the Australian context, by the judges in both *Mond v Berger* and *Thaler v Amzalak*. In both cases, submissions were made to the effect that Jewish law permits judges a degree of partiality, assertions that rely on sources that have been strongly criticised within the *halakhic* system and do not comply with Australian arbitration law. While it is conceded that *zabla* can be performed in a manner that conforms with the highest *halakhic* and secular law standards, this relies on the personal integrity of the arbitrators and is difficult to oversee. As such, given the poor communal confidence with regards to Battei Din in Australia and the significant degree of risk associated with *zabla* Battei Din, it is recommended that Battei Din are established with fixed *dayanim* and the *zabla* process is not used. It is noted that in certain hard cases, the *Av Beth Din* or director may deem that *zabla* is warranted conditional on the Beth Din having the ability to oversee it and ensure the implementation of its rules and procedures.[1014]

Based on the interviews conducted with Australian *dayanim*, this recommendation will likely be met with some resistance. All the interviewees recognised the inherent problems associated with *zabla,* including the risk of bias,[1015] the propensity of *borerim* to confuse their role with that of a *to'en*,[1016] and the inexperience and informality that often defines *zabla* arbitration.[1017] However, none of the interviewees had concluded that *zabla* should not be utilised as a result of these challenge, some

[1012] Interview with Rabbi Weissmann.
[1013] See Part 7.2.7.
[1014] Akin to the circumstances in which the BDA will allow for *zabla*, see Part 5.2.2.
[1015] Interview with Rabbi Gutnick; Interview with Rabbi Tayar.
[1016] Interview with Rabbi Ulman; Interview with Rabbi Berman.
[1017] Interview with Rabbi Greenwald.

condoning its use where that is the desire of the parties,[1018] or where there is no fixed Beth Din.[1019] The normative use of ad-hoc Battei Din in Australia is evidenced both in the case law and the interviews, and it is likely that a cultural shift in this regard will occur only if a Beth Din of fixed *dayanim* is established and is willing to firmly resist requests for *zabla*. Given the relatively small size of the Australian Jewish community and the likelihood that parties will have pre-existing relationships with the limited array of *dayanim*, *zabla* may be the only option in certain scenarios. In these cases, the Beth Din will need to assess whether it can have sufficient oversight over the process to avoid the dangers of a potential breach of natural justice and its subsequent impact upon the litigants as well as the reputation of the Beth Din.

8.3.6 Adopt a uniform approach to *dina demalkhuta dina*

The role of the doctrine of *dina demalkhuta dina* in the Beth Din context was explored in Part 5.3 of this study, from which several recommendations emerge. To accurately apply *dina demalkhuta dina*, a sophisticated knowledge of secular law is required of the *dayanim*, which is likely not to be available to one who has not undergone legal training. It was noted that best practice Battei Din embrace a relatively broad application of the doctrine, especially when factoring in the related principles of *minhag hamedinah* and *minhag hasoḥerim. Dina demalkhuta dina* converts secular laws whose non-application would put the Beth Din in breach of public policy into binding Jewish law and lends force to legislation and case law that underlies the dealings between litigants who engage in commercial activity in a secular state. As such, the inclusion of a legal expert, either in the arbitral panel itself, or to provide guidance to the *dayanim* regarding the relevant aspects of the arbitration to which *dina demalkhuta dina* applies is critical, both in terms of ensuring the correct application of *halakhah* as well as avoiding having the award vacated on public policy grounds.

Additionally, given the range of approaches to *dina demalkhuta dina*, it is recommended that Australian Battei Din determine a consistent position on the doctrine and publish their approach so that prospective litigants can order their affairs correctly and enlighten them to the fact that *halakhah* considers secular law in certain instances.

The views expressed by the Australian *dayanim* with regards to this recommendation, differed based on the level of experience of the *dayan* in commercial arbitration. The two who appeared to have had the most experience in these matters embraced the notion of including a legal expert for the purpose of the application of *dina demalkhuta dina*.[1020] Rabbi Berman brought an example of an

[1018] Interview with Rabbi Ulman; Interview with Rabbi Tayar.
[1019] Interview with Rabbi Gutnick; Interview with Rabbi Greenwald.
[1020] Interview with Rabbi Ulman; Interview with Rabbi Berman.

instance where he was observing a Beth Din in Bnei Brak in Israel and recalls the level of proficiency the *dayanim* evidenced in zoning laws, and how a similar level of expertise would need to be procured in the Australian context:

> "the [Bnei Brak] dayanim… said 'Oh, this Act was not very good and they replaced it with this Act and that's much better' and [were] talking about different council rules. And they had maps, and they knew everything, they were like councilors. They knew all the different areas and were very up to date with everything… in Australia… if one's not aware and you need to know what the law is then you'll need to… bring in some sort of legal expert to clarify what the law is where that's needed."[1021]

Others did not see a need for the inclusion of a legal expert beyond the initial training required for ensuring conformity with arbitration law.[1022] Additionally, one interviewee asserted that while he would permit a party to bring an expert,[1023] and will sometimes include a lawyer on the panel,[1024] expertise with regards to secular law is not required for the purposes of a *halakhic* decision insofar as 'we're only concerned with common knowledge of the average person to form an implied agreement.'[1025] This response leaves open the question as to whether a lawyer still needs to be sought to assess whether there are relevant public policy considerations or how the doctrines of *minhag hamedinah, minhag hasoḥerim* or *dina demalkhuta dina* are applied in instances where there are legal presumptions that are not known to the litigants but might nevertheless be attributed to them at secular law.

The range of views on this matter among the *dayanim* interviewed, demonstrates inconsistency with regards to the breadth of the application of *dina demalkhuta dina* and its corollary in terms of the requisite knowledge of secular substantive law required to be able to provide an accurate *halakhic* ruling. This provides a further impetus to ensure that a unified and clear approach to *dina demalkhuta dina* is adopted by a Beth Din, and that legal experts are included in the process to aid the *dayanim* in ascertaining relevant laws. Additionally, the range of views on the matter, adds further impetus to the recommendation that the approach of the Beth Din is advertised to the public so that prospective litigants can order their affairs accordingly as well as to ensure the consistency of its application by the *dayanim*.

[1021] Interview with Rabbi Berman.
[1022] Interview with Rabbi Greenwald.
[1023] Interview with Rabbi Tayar.
[1024] Ibid.
[1025] Ibid.

8.3.7 Provide and publicise reasoned judgements

Part 5.4 of this study has explored the statutory and common law basis for the requirements of arbitrators to provide reasoned judgments for their awards that are commensurate with the complexity of the case. Additionally, in line with the approach of Eretz Ḥemdah Gazit, it is recommended that decisions are made publicly available to promote a culture of transparency in the Beth Din to counteract the opacity that has tarnished its reputation in the latter half of the 20th century and the negative publicity that Battei Din performing commercial arbitration have received over the recent decades.

The *dayanim* interviewed noted the lack of a requirement for providing a reasoned judgment at Jewish law unless requested by the parties.[1026] Some also mentioned that there have been instances where parties that have come to them for arbitration have waived their right to reasons, and one utilises a pro-forma arbitration agreement for cases where he acts as a *yaḥid mumḥeh* that includes a standard clause waiving the right to a reasoned judgment.[1027] Additionally, two of the *dayanim* expressed a view that providing a judgment without reasons might make it harder to appeal and thus provide greater certainty of the award being confirmed if challenged.[1028]

These findings demonstrate that the provision of a reasoned judgment is not a consistent practice among *dayanim* in Australia who deal in commercial arbitration. While it is correct that parties may waive their right to a reasoned judgment, in the interests of building a reputation of transparency, it is strongly advised that such waiver is not sought from the parties. Concerns that a reasoned judgment may provide grounds for appeal, would seem counter-intuitive insofar as the lack of reasons would likely raise questions of arbitrariness, as was in fact the case in *Thaler v Amzalak* where the among the reasons for the award being vacated was that beyond the facts of the case and the final decision, adequate reasons had not been provided.[1029]

8.3.8 Refrain from issuing a *seruv* that includes sanctions

As discussed in Part 6.2, in the context of commercial arbitration the issuing or threat of issuing a *seruv* with sanctions to a non-complying party exposes the *dayanim* to criminal charges for contempt of court as well as providing grounds for vacating the award due to the arbitration agreement being procured under duress. As such it is recommended that sanctions not be used by

[1026] Interview with Rabbi Gutnick; Interview with Rabbi Ulman; Interview with Rabbi Berman; Interview with Rabbi Tayar.
[1027] Interview with Rabbi Berman.
[1028] Interview with Rabbi Berman; Interview with Rabbi Tayar.
[1029] Although in that case the right to reasons was not waived by the parties. Ben-Yaakov (n 626) argues in a similar fashion against the viewpoint advanced by some Israeli Battei Din that reasons provide greater cause for judicial vacating of the award.

Australian Battei Din and that a *heter arka'ot* is instead granted to a plaintiff in cases where the defendant does not wish to arbitrate at the Beth Din.

All the *dayanim* interviewed demonstrated an awareness of the illegality under Australian law of threating a party with a *seruv*. Additionally, many of them expressed the view that irrespective of its illegality, a *seruv* has little efficacy in the modern era insofar as they are unenforceable being that there is no central authority whose decision is accepted as binding upon the whole Jewish community.[1030] Rabbi Ulman also agreed to this proposition, stating that in the wake of *Live Group* that 'my opinion now, at this point, is that a *seruv* should only be used for people who are *mesarev hagett* (refuse to give a *gett*).'[1031] Based on the interviews conducted, it is thus apparent that this recommendation would encounter little resistance.

8.3.9 Encourage legal representation and discourage representation by *to'anim*

The findings in Part 6.3 of this study with regards to the place of representation in Beth Din arbitration is that whilst arbitration laws in Australia provide parties with a right to either legal *or lay* representation, the inclusion of *to'anim* is strongly discouraged. While in the USA, the exclusion of *to'anim* is more straightforward insofar as there is no right to lay representation in the arbitral context, in the Australian context it is advised that the Beth Din seeks legal advice with regards to how *to'anim* may be excluded without falling foul of the law, or simply recuse themselves from cases where the parties insist on the presence of *to'anim*. Since there may be cases where the Beth Din will see no alternative but to include *to'anim*, it is imperative that *dayanim* receive training with regard to how to respond to *to'anim* who wish to disrupt proceedings or use underhanded methods to promote their clients' cause. Additionally, it is recommended that the Beth Din ensures that parties are aware of their right to representation as this provides important benefits, both in ensuring that the facts are presented clearly as well as facilitating that vulnerable parties are acting voluntarily and being supported throughout the arbitral process.[1032]

In evaluating this recommendation, no *dayan* raised any concerns with permitting representation in Beth Din arbitration, and indeed the Mehadr Beis Din Tribunal specifically refers to the right of the parties to legal or lay representation in their rules and procedures.[1033] With regards to *to'anim* the

[1030] Interview with Rabbi Gutnick; Interview with Rabbi Greenwald; Interview with Rabbi Berman; and Interview with Rabbi Tayar.
[1031] Interview with Rabbi Ulman.
[1032] See Part 3.6.4 regarding the role that representation could play in ascertaining that vulnerable parties are attending Beth Din voluntarily and thus mitigate against awards being vacated on the grounds of the arbitration agreement having been signed under duress.
[1033] Mehadr Beis Din Tribunal, Commercial Dispute Resolution Rules s 6.2 <https://www.mehadrbeisdintribunal.com/din-torah/the-rules>; although it is noted at s 6.1 that the *halakhic* preference is for the parties to attend unrepresented.

dayanim demonstrated a strong awareness of their potential to disrupt the proceedings and the flimsy *halakhic* basis upon which the service that they provide rests.[1034] Notwithstanding this, all the Australian *dayanim* who have dealt in commercial cases believed that on the whole *to'anim* are the norm in Beth Din litigation and some believed that they had no ability to exclude them if the parties agree to their presence.

In dealing with cases where the Beth Din sees no other option but to include a *to'en*, one of the *dayanim* recounted how he dealt with a difficult *to'en* in cases where he provided arbitral services as a *yaḥid mumḥeh:*

> "There is one particular *to'en*… his method was intimidation until finally I had a few cases where I refused to accept him as a *to'en*. I said, 'if you want to have a *to'en* take somebody else, don't take him.'"[1035]

The approach evidenced here of negotiating with the parties to ensure that only reputable *to'anim,* whom the Beth Din is confident that they will not obstruct the path to justice, is one method by which unreputable *to'anim* can be excluded from a Beth Din. Another experienced *dayan* explained that despite his distaste for *to'anim* he permits them as 'ultimately a good *dayan* would not allow a *to'en* to cloud his judgement.'[1036] The notion that a 'good *dayan*' is better equipped to deal with an unruly *to'en* adds weight to the recommendation that *dayanim* are provided training from those who have mastered the challenges associated with difficult *to'anim*.[1037]

8.3.10 Accept female testimony in commercial disputes

As discussed in Part 6.4 female testimony is routinely accepted by Battei Din in the context of commercial arbitration. Despite the limitations that *halakhah* places on utilising female testimony in ritual matters which require formal *edut*, in commercial matters where *ne'emanut* is key, *halakhah* does not make any distinction based on gender as to the evidentiary weight attributed to testimony. Additionally, the non-acceptance of legitimate evidence brought by either side will likely result in the award being overturned if challenged in court. As such, it is recommended that female testimony is accepted by the Beth Din in the context of commercial arbitration.

[1034] Interview with Rabbi Gutnick; Interview with Rabbi Ulman; Interview with Rabbi Greenwald; Interview with Rabbi Berman; Interview with Rabbi Tayar.
[1035] Interview with Rabbi Gutnick.
[1036] Interview with Rabbi Ulman.
[1037] Such *dayanim* are more likely to be found at best practice Battei Din in Israel such as Eretz Ḥemdah Gazit who have greater experience dealing with *to'anim* compared with best practice US Battei Din who generally do not permit *to'anim*; see Part 6.3.4.

The question of female testimony was not specifically addressed in the interviews with the Australian *dayanim*. However, based on the interviews conducted with *dayanim* in Israel and America as well as the academic literature referenced in this study, its acceptance is not controversial *halakhically*. Moreover, the position of the Australian *dayanim* that the enforcement of the award is of paramount concern *halakhically* as discussed previously, lends weight to the evaluation that this recommendation will not be resisted by Australian Battei Din.

8.3.11 Provide an internal appeals mechanism in relation to Beth Din awards

Despite it not being a requirement under arbitration law, Part 6.5 demonstrated that all of the best practice Battei Din that were included in this study provide an appeals mechanism with the minimal standard allowing all forms of appeals that would otherwise give cause to challenge the award in court, and the maximal standard also allowing for appeals on matters of Jewish law. While the notion of an appeal to a second court has no precedent in Talmudic law, its adoption in the State Rabbinical courts of Israel and the US Battei Din surveyed demonstrates its importance in the contemporary milieu where transparency and accountability is critical to building communal confidence. The implementation of an appellate system in the Australian Beth Din context is strongly advised, given the lack of communal confidence in the Beth Din generally, and its ability to provide commercial arbitration specifically.

The shortage of *dayanim* in Australia poses a challenge to the implementation of an appellate system which relies on the availability of *dayanim* who did not sit on the initial panel, and as such it is recommended that where there is no senior *dayan* available to revisit the case on appeal, that the Sydney and Melbourne Battei Din provide an appellate service for one another.

The interviews with Australian *dayanim* demonstrated varying levels of awareness of the legitimacy of an appellate system in *halakhah*. Many referred to the position that emerges from the classical *halakhic* texts that denies parties the right to appeal, except for where they can point to a *ta'ut b'dvar mishnah* (error in black letter law),[1038] and even then, it was unclear if the parties must revert to the initial panel or whether they could seek a new decision from another Beth Din.[1039] However, the *Av Beth Din*'s of Melbourne and Sydney demonstrated an awareness of the appellate system that operates in Israel and were supportive of the inclusion of such a system in the Australian context.[1040] In fact, it was opined that had there been an appellate mechanism in the Beth Din dispute that led to *Thaler v Amzalak* the conflict might have been resolved to the satisfaction of the

[1038] Interview with Rabbi Gutnick; Interview with Rabbi Greenwald; Interview with Rabbi Berman; Interview with Rabbi Tayar.
[1039] Interview with Rabbi Berman.
[1040] Interview with Rabbi Gutnick; Interview with Rabbi Ulman.

parties without it having to have been adjudicated in the courts, thus avoiding the significant costs as well reputational damage to Battei Din that resulted from the case.[1041] As such, despite a lack of awareness among some *dayanim* of the *halakhic* basis for appeals, it is something that is supported by the leadership of the Sydney and Melbourne Battei Din and is thus likely to garner support. As mentioned earlier,[1042] the feasibility of the Sydney and Melbourne Battei Din acting in appellate capacity for one another, is beyond the scope of this study.

8.3.12 Ensure that *dayanim* selected for the Beth Din have the appropriate character and skillset

The character of the *dayanim* is crucial to the success of the Beth Din, and as such many of those interviewed spoke to the qualities that should be sought in the *dayanim* who are appointed to serve in the Beth Din.

Rabbi Rapp, a *dayan* on the BDA, described the emotional undercurrents to which a *dayan* must be attuned:

> "You need to have the knowledge and you need to have the sensitivity. Because there are divorce cases and then there are cases that are divorce cases even though no one is getting a divorce. If you have a partnership that is breaking up after 30-40 years, psychologically, I do a lot of mediation and a lot of times a younger *dayan* will say to me, we know where this is going let's just settle it. The answer is 'no, they are going to have to talk still, they have to be heard, they have to say what they want to say, they need to say it with that person listening to them – once they have got that off their chest now they are ready to…' there is great value in a Beth Din just to, you know, 'I feel like I have been heard I'm going to talk and you're going to listen and you can't interrupt me and that's helpful for me to say something and for you so you now at least understand my mindset as to why I'm upset'. And in terms of not just getting the dollars and cents right but somehow mending what could be a wonderful friendship that is being torn to shreds – in my mind that's sometimes as important. It's not always about the money."[1043]

He added the importance of ensuring that women feel accommodated and comfortable in the Beth Din, not only in the commercial arbitration setting, but also with regards to the other services provided by the Beth Din, such as facilitating religious divorce and conversion to Judaism:

> "There has always been a woman on staff in the Beth Din and her job is that whenever there's a *gett* she sits next to the woman who is getting divorced with a box of tissues. And

[1041] Interview with Rabbi Ulman.
[1042] Part 6.5.3.
[1043] Interview with Rabbi Rapp.

> that's important – you have to remember that in a *gett* it's you and your husband, for the woman, and you're the only woman there. All the *dayanim* are men, the *eidim* (witnesses) are men, the *sofer* (scribe) is a man, he likely has a long white beard and a long black coat – obviously you're in a psychologically fragile position to start with. I've always said in our *geiru[t]* work, that I've always wanted to have, when a woman is *megayer* (converting) and she comes out of the *mikveh* (ritual bath), she has a need to hug somebody, and sorry we can't do that, I would always say 'have a hugger' someone to come with her and bring her there and say how excited they are and give her a hug afterwards."[1044]

In line with this, Rabbi Yaakov Warhaftig, *Av Beth Din* of Neve Nof in Israel advised that the priority in selecting a *dayan* should be that 'first thing is *sekhel yashar* (common sense), after [that is] to know the *halakhah*.'[1045]

Rabbi Ronnie Warburg, a former *dayan* on the BDA, highlighted the importance of the *dayanim's* integrity as well as their awareness of secular law:

> "The first thing and that's probably the most important thing and how you do it you really need to focus on, is that they have to be honest. It's not necessarily the case, we'll leave it at that. That's number one… Number two [is that] they should have a legal background."

These comments, shared by a range of interviewees, reflect an unfortunate failure which emerges from the historical study of the Melbourne Beth Din. The Melbourne Beth Din has suffered great reputational damage, from which it has not yet fully recovered, due to a half century of divisive and opaque leadership.[1046] The character and personality of the *dayanim* is integral to the success of the Beth Din, and while *halakhic* knowledge is a given, it alone is insufficient, especially in the realm of commercial arbitration where litigants have alternate secular venues from which to choose. For a Beth Din to succeed in the sphere of commercial arbitration, *dayanim* must possess the traits of integrity and high emotional intelligence in no less measure than their *halakhic* acumen.

This challenge is exacerbated in the current climate in Australia where there are very few qualified *dayanim*. Two of the Australian *dayanim* interviewed, raised the fact that Australia suffers from a paucity of *dayanim* with the relevant *halakhic* expertise.[1047] Related to this challenge, one of the *dayanim* recounted that when there had previously been an initiative to introduce commercial arbitration as part of the Melbourne Beth Din's services, concern was raised by the existing

[1044] Ibid.
[1045] Interview with Rabbi Warhaftig.
[1046] See Part 7.2.6.
[1047] Interview with Rabbi Gutnick; Interview with Rabbi Berman.

rabbinate as to 'who's going to be on this Beth Din' resulting in a push 'to bring somebody from overseas.'[1048] The implication appears to be that there was little confidence that the *dayanim* available at the time would have been able to successfully implement the initiative to the standard expected by the community.

Solutions to this challenge presented by certain *dayanim* interviewed included either embarking on a training program whereby an internationally respected *dayan* is commissioned to train prospective candidates in Australia,[1049] or by including overseas *dayanim* in the actual arbitration service offered in Australia utilising video web conferencing technology.[1050] A further solution might be to enlist panellists who are not qualified as *dayanim* but have relevant expertise, to serve alongside a qualified *dayan*. This method is utilised by the Beth Din of America, whose rules and procedures require as a minimal standard that 'one panel member must be a rabbi' as long as the others on the panel are religiously observant.[1051]

This element is particularly challenging in the Australian context. The poor reputation of Australian Battei Din having made the career choice of a *dayan* unappealing to prospective candidates who might have the qualities of character that would align with this working model. As such, finding a suitable cohort of *dayanim* for a commercial Beth in Australia will be difficult. It may be necessary to initially employ panellists of appropriate character who lack the qualification of being a *dayan*, as the BDA allows for, or seek out idealistic individuals who have retired from their primary career and are keen to participate in such an initiative. If the initiative succeeds in creating a viable commercial Beth Din that gains the confidence of the community, it may breed the further success of inspiring appropriate individuals to consider qualifying as a *dayan*.

8.4 Australian Case Law and the Working Model

The interviews with the Australian *dayanim* form a means against which to measure potential resistance or openness to the proposed working model. Another form of evaluation of the elements of the model is to assess them in the context of the decisions of Battei Din in Australia that were criticised by the courts due to irregularities in the arbitration process. This section will include a summary of the cases of *Mond v Berger,*[1052] *Thaler v Amzalak*[1053] and *Live Group v Ulman,*[1054]

[1048] Interview with Rabbi Gutnick.
[1049] Interview with Rabbi Gutnick.
[1050] Interview with Rabbi Berman.
[1051] See Part 4.2.7; this is in contrast to Eretz Ḥemdah Gazit who require all of its panellists to be qualified *dayanim*, see Part 4.4.7.
[1052] *Mond v Berger* (n 539).
[1053] *Thaler v Amzalak* (n 540).
[1054] *Live Group v Ulman* (n 268).

including a digest of how each case fell short of the standard expected under Australian law. The effectiveness of the recommendations will then be assessed considering whether they comprehensively address the concerns raised in the judgements.

8.4.1 *Mond v Berger*

The case of *Mond v Berger* dealt with a petition to vacate an award issued by a *zabla* Beth Din. The Beth Din had arbitrated between Mond and the Caulfield Hebrew Congregation ('CHC'). Mond was a congregant of a small prayer group called Or Chadash that occupied a small synagogue within the building complex that hosted the larger CHC. After a member at Or Chadash had been denied the right to nominate for a role on the executive of the CHC at their forthcoming AGM, Mond sought to inspect the register of members and was informed that no such register existed. He subsequently sought an injunction to hold off the AGM until the terms of eligibility for nomination to the executive of CHC could be clarified. This was followed by a further application by Mond for an injunction to prevent CHC from terminating his membership and prayer rights. Both injunctions were granted up until 'the question of eligibility for membership of the defendant has been determined by Rabbinical Arbitration or otherwise.'[1055]

Subsequently a *zabla* Beth Din, whereby Mond selected as his *borer* Rabbi Ulman, the CHC selected Rabbi Berger, and the two *dayanim* jointly chose Rabbi Katz as the *sholish,* was convened and an arbitration agreement was signed by the parties. The hearing was open to the public and lasted for a little over a week after which an award was written and handed to the parties. Subsequently, Mond petitioned for the award to be vacated based on irregularities in the Beth Din hearing. In *Mond v Berger*, Dodds-Streeton J found a range of distinct bases to establish 'misconduct' under *Commercial Arbitration Act 1984* (Vic) s42,[1056] resulting in her vacating the Beth Din's award.

In her judgement, Dodds-Streeton J noted a range of procedural errors made by the Beth Din. One of the key issues to be resolved was the determination of a register of members, a decision that Beth Din delegated to a stranger to the proceedings.[1057] In addition, the Beth Din made a determination in their award relating to Or Chadash, a non-incorporated entity that was not referred to in the list of issues in dispute between the parties, and thus outside of their arbitral reference.[1058] The defendants attempted to justify their inclusion of matters beyond their arbitral reference arguing that Jewish law permits judges to make findings regarding strangers to the litigation.[1059] However,

[1055] *Mond v Berger* (n 539) [24] (quoting O'Dwyer MJ).
[1056] This was subsequently superseded by the *Commercial Arbitration Act 2011* (Vic); see above Part 3.2.
[1057] *Mond v Berger* (n 539) [353].
[1058] Ibid [41], [359].
[1059] Ibid [117].

Dodds-Streeton J did not accept this argument in light of the fact that 'Victorian law governs the arbitration agreement and the construction of the terms of its reference.'[1060]

Additionally, the Beth Din signed what they titled a 'Partial Award.'[1061] Such an award, which according to the submissions of the *dayanim* was not final and only interlocutory in nature,[1062] was not a valid form of an award under the *Commercial Arbitration Act 1984* (Vic).[1063] As such, despite its tile as a 'Partial Award', her Honour found it to effectively be a final award, and only 'partial' in the sense that it left certain matters unresolved. Hence, it was found to be a suitable award under the Act which could be challenged under the usual bases.[1064]

Furthermore, the first principle of natural justice which mandates that arbitrators are disinterested and unbiased, was found to have been breached in several instances.[1065] Rabbi Berger, the *dayan* selected as *borer* by CHC, upon learning that the plaintiff had received hate mail after approaching the Magistrates court to prevent the CHC AGM from proceeding, responded that 'Mr Mond has got only himself to blame.'[1066] In her judgement, Dodds-Streeton J found that these comments '[gave] rise to a reasonable apprehension of bias….indicat[ing] a closed mind on an important question to be decided in the case'.[1067]

Another such instance in which a *dayan* displayed partiality, occurred during a meeting between the arbitrators, the plaintiffs, and the plaintiffs' legal representatives. In the meeting, comments were alleged to have been made by Rabbi Berger to the effect that the plaintiff would be expelled as a member if he did not accept a settlement proposal on offer. Additionally, Rabbi Katz, the *sholish,* was alleged to have stated in reference to the case against CHC that '[y]ou can't fight City Hall.'[1068] While the precise phraseology and sequence of event at the meeting were debated by the parties,[1069] her Honour found the credibility of the plaintiff's testimony to be far stronger than that of the defendant arbitrators and on the basis of their account, determined that Rabbi Berger's threat 'would cause a fair minded person knowing the relevant circumstances of the case to apprehend

[1060] Ibid [276].
[1061] Ibid [72].
[1062] Ibid [279].
[1063] Ibid [322].
[1064] Ibid [335].
[1065] Natural justice includes 'two rules or principles… the first is that an adjudicator must be disinterested and unbiased… [t]he second principle is that the parties must be given adequate notice and opportunity to be heard'; ibid [98] quoting Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385, [396].
[1066] Ibid [172].
[1067] Ibid [177]; viz. whether Mond had a right according to *halakhah* to approach the courts in this instance.
[1068] *Mond v Berger* (n 539) [181].
[1069] Ibid [226].

that [he] had prejudged or might prejudge the case; and that he might not bring an impartial and unprejudiced mind to the resolution of questions involved in it.'[1070] Her Honour drew the same conclusion with regards to Rabbi Katz's comments.[1071]

A further aspect relating to misconduct centred on the unauthorised departure of one of the key witnesses, Rabbi Abraham, during the hearing. The arbitrators were not found to have in any way colluded with the witness and appeared not to have had any foreknowledge of the witness's sudden departure[1072] and as such misconduct was not established on its basis alone. However, in the award where the *dayanim* referred to the incident, they stated that 'the Dayanim, by a majority, ruled, having [sic] into account all circumstances, that it would be unjust to delay his departure.'[1073] The evidence presented in court demonstrated that no such ruling had taken place, nor had any application by Rabbi Abraham been proffered before the *dayanim*. As such, the false impression conveyed in the award of such a ruling having been made led to the 'reasonable suspicion of a lack of impartiality' particularly when taking into context the other instances of apprehended bias which were established by the court.[1074]

8.4.2 *Thaler v Amzalak*

Thaler v Amzalak concerned a dispute that had come before a *zabla* Beth Din in which Thaler had purchased more than $300,000 worth of shares from Amzalak, via his representative. When Thaler's representative attempted to file the share transfer, it became clear that the shares were no longer in Amzalak's possession. Thaler summoned Amzalak to Beth Din to recover the monies paid for the shares. The Beth Din issued an award in favour of Thaler, granting him full recovery of the purchase money. Amzalak refused to comply with the award and Thaler subsequently applied to the court to have the award enforced. Amzalak filed a cross-summons requesting that the award be vacated based on a host of procedural shortcomings as well as misconduct by the *dayanim*.

In reviewing the Beth Din's award in *Thaler v Amzalak*, Schmidt J described the *dayanim*'s approach to the arbitration as 'most unfortunate.'[1075] Her Honour identified a host of procedural errors, enumerated below, upon which she based her decision not to enforce the arbitral award that had been issued against the defendant.

[1070] Ibid [230].
[1071] Ibid [232].
[1072] Ibid [152].
[1073] Ibid [72], [130].
[1074] Ibid [165].
[1075] *Thaler v Amzalak* (n 540) [253].

Schmidt J critiqued the Beth Din's failure to adhere to the tenets of natural justice. The *dayanim* appeared to favour one party over another in the language they chose to use for their private deliberations. The *dayanim* spoke in Yiddish, a language that was understood only by the plaintiff who at times commented on, or responded to, their private conversations.[1076] In a similar vein, the *dayanim* appeared to favour the plaintiff over the defendant in their acceptance of evidence. They chose not to take evidence from two witnesses that the defendant provided and accepted evidence from the plaintiff without adequately ascertaining its veracity.[1077] When the defendant raised the apprehension of bias with regards to the *borer* selected by the plaintiff,[1078] he did not receive a satisfactory response from the *dayanim*.[1079]

In addition, the Beth Din failed to provide a pre-hearing conference, resulting in the defendant not being abreast of the plaintiff's claim, nor the evidence it rested upon.[1080] The defendant was thus unable to prepare properly for the hearing and which could have influenced his failure to recall the exact nature of certain transactions raised in the hearing.[1081] In line with this, the Beth Din failed to adequately delineate the points in issue between the parties, which left the defendant vulnerable when the plaintiff objected that his submissions were 'irrelevant' insofar as the *dayanim* had nothing against which they could ascertain the validity of the objection.[1082]

Further, the *dayanim* fell short of the administrative requirements expected in arbitration. Although it was claimed that the audio of the proceedings was recorded by the *dayanim*, neither the recordings, nor notes made by the Rabbis were retained and thus could not be submitted to the Court.[1083] In addition, the defendant was effectively given only two days' notice of the arbitration hearing, which was determined by the Court to be inadequate.[1084] In terms of their decision, the *dayanim* produced a few succinct paragraphs which made no reference to the reasons for rejecting the defendants case and thus fell short of the standard established at common law. In addition, that the *dayanim* failed to inform the defendant of his right to legal representation,[1085] and it was noted

[1076] Ibid [220]-[227].
[1077] Ibid [230]-[234].
[1078] Ibid [106].
[1079] Ibid [208]; in fact, two of the *dayanim* were found to have a bias against the defendant, see [166-169]
[1080] Ibid [138].
[1081] Ibid [236].
[1082] Ibid [188].
[1083] Ibid [170].
[1084] Ibid [177]; Schmidt J found the lack of notice a breach of natural justice which would imply that this procedural flaw could also be classified as *functional*.
[1085] Ibid [207].

that an attempt by the defendant to have the award reviewed by the initial panel received no response from the *dayanim*.[1086]

Moreover, the arbitration agreement was both faulty and not properly complied with in the proceedings. The parties had not being provided a copy of the agreement,[1087] the agreement referenced the *Commercial Arbitration Act 2010 (NSW)* which had not yet come into force,[1088] and the *dayanim* did not comply with the provision in the agreement that the *dayanim* be appointed by a Registrar.[1089] In addition, the 'Rules and Procedure of the Beth Din for Commercial/Civil Disputes' referenced in the agreement were not applied in the proceedings.[1090] Moreover, the agreement was incomplete insofar as it referenced an annexure that had the '[d]isputes and differences… between the… parties… set out' when in fact no such annexure existed.[1091]

8.4.3 *Live Group v Ulman*

Live Group v Ulman dealt with a case that had come before the Sydney Beth Din. The plaintiff had entered into a contract with Sales Port Pty Ltd which included a conflict resolution clause stating that in 'a case of dispute that can not be resolved by the parties… the matter shall be brought to the Chief Dayan of Sydney AUS.'[1092] Following a breakdown in the relationship between the parties, Kuzecki who was the proprietor of Sales Port Pty Ltd made contact with the Sydney Beth Din ('SBD'), first meeting with one of their *dayanim* in his home, and later corresponding via email, requesting that they summon Barukh, the proprietor of Live Group Pty Ltd, together with his sister and mother, to a hearing at the SBD.

A Beth Din summons was issued as requested by Kuzecki to which Barukh responded that he had 'no intention of appearing' asserting that 'the Beth Din is not the appropriate forum in which [Kuzecki's] grievances should be aired.'[1093] In the ensuing correspondence, the SBD stood its ground, informing Barukh that 'in accordance with Jewish law [one is] not permitted to refuse such a summons.'[1094] Further refusal by Barukh resulted in the SBD threating him with religious sanctions in the event of his non-compliance by a specified date. Barukh issued proceedings in the Supreme Court of NSW

[1086] Ibid [240]-[241]; while this did not constitute a basis for the non-enforcement of the award, it is a means by which the Beth Din could have corrected aspects of its award and avoided its being vacated; see discussion in Part 6.5.
[1087] Ibid [180].
[1088] Ibid [182].
[1089] Ibid [183].
[1090] Ibid [184]; this referred to a document 'prepared for the Melbourne Beth Din by senior counsel' although it has not been used to date by the Melbourne Beth Din, insofar as it does not perform commercial arbitration.
[1091] Ibid [186].
[1092] *Live Group v Ulman* (n 268) [8].
[1093] Ibid [49].
[1094] Ibid [50].

against the SBD claiming reasonable apprehension of bias and that the *dayanim* were in contempt of court by employing religious sanctions to force his attendance at the Beth Din. The court found in favour of Barukh, and its decision was affirmed on appeal.[1095]

In *Live Group,* Sackar J found the defendants guilty of contempt of court for threatening religious sanctions against Barukh if he did not comply with their Beth Din summons. Sackar J also noted breaches of natural justice, although he found this not to be justiciable in the circumstances since no arbitration agreement had been signed.[1096]

The core matter that was raised in *Live Group* pertained to the document sent by the Beth Din following the plaintiff's refusal to obey the Beth Din summons which included the threat of religious sanctions for non-compliance. The letter, addressed to the legal representatives of the plaintiff, stated that:

> "Unless by 5pm January 26 2017 the Beth Din hears from you on behalf of your client that he has recanted and that he acquiesces to the Beth Din process in accordance with Jewish law, (which is indeed compatible with secular law), and the following halachic sanctions will apply and the Synagogue/s where he prays will be informed accordingly.
>
> 1. He will not be counted to a minyan
>
> 2. He will not be able to receive an aliyah to the Torah
>
> 3. He will not be offered any honour in the Synagogue"[1097]

This threat was reiterated in a later email in which the Beth Din also asserted their willingness to cooperate with the plaintiff in taking the matter before the Supreme Court of NSW.[1098]

In his judgement, Sackar J referenced *Attorney General v Times Newspapers Ltd*[1099] where Lord Diplock delineated three broad independent categories of contempt of court. The first provided that 'all citizens should have unhindered access to the constitutionally established courts' the second that they should be able to count on 'a tribunal which is free from bias,' and the third that there should be 'no usurpation by any other person of the function of that court to decide it according to law.'[1100] While the case law recognised that legitimate pressure may be applied to dissuade a litigant from attending court, for example 'the disinterested persuasion to settle by a member of the

[1095] *Ulman v Live Group* (n 292).
[1096] *Live Group v Ulman* (n 268) [119].
[1097] *Live Group v Ulman* (n 268) [53].
[1098] Ibid [66].
[1099] *Attorney General v Times Newspapers Ltd* [1974] AC 273.
[1100] Ibid [307-309].

litigant's family,'[1101] this is to be distinguished from 'a threat to a party pending proceedings [which] has long been considered possible conduct giving rise to contempt'.[1102]

As such, Sackar J found that the Beth Din to be in contempt of court, their threats having constituted conduct which placed improper pressure on Barukh to not exercise his right to access the secular court.[1103] His Honour determined that the mere assertion of the position at Jewish law that a Jewish person is prohibited to have their disputes heard before a secular court without the express permission of a Beth Din, would be 'an accurate description of the relevant content of Halachic law, and in this sense cannot be considered improper pressure carrying the tendency of [sic] likely to interfere with the course of justice.' [1104] As such, the following correspondence sent to the plaintiff on 22 December 2016 was determined to be an acceptable response to a litigant who refused to acquiesce to a Beth Din summons:

> "All members of the Jewish faith are obliged to have their disputes heard in accordance with Jewish law at a Beth Din. They are not permitted to seek adjudication at a civil court without the express permission of a Beth Din when the other side has refused to abide by a Beth Din summons. In accordance with Jewish law they are not permitted to refuse such a summons."[1105]

Further, whist not justiciable, Sackar J noted for 'purely academic' purposes that an apprehension of bias resulted from the conduct of the *dayanim* in the case.[1106] The suspicion of partiality emerged from the multiple emails and phone calls made between the applicant and the Beth Din, many of which seemed 'entirely unnecessary.'[1107] In addition, the plaintiff claimed that the Beth Din had provided the applicant with advice regarding how he should best make his claim.[1108] Sackar J also found that the tone of the correspondence between Beth Din and the applicant to be overly informal including sign-offs such as "All the best!" or its Hebrew equivalent "Kol tuv!"[1109] His Honour also drew attention to a meeting which had taken place between the applicant and a *dayan* of the

[1101] Mason P in *Harkianakis v Skalkos* (1997) 42 NSWLR 22, [30]; quoted in *Live Group v Ulman* (n 268) [93].
[1102] *Live Group v Ulman* (n 268) [103]; the defendants argument that the threat of sanction related to the plaintiff's non-attendance at Beth Din and did not relate to any proceedings afoot in the courts was dismissed as 'sophistry' by Sackar J insofar as via their acquiesce to the Beth Din summons, they were effectively having to renege on having their case determined by secular courts, see [251]-[252].
[1103] Ibid [265].
[1104] Ibid [262].
[1105] Ibid [50].
[1106] Ibid [233]; while this element of the judgement is plainly *obiter dicta* it is nonetheless useful in terms of the guidance it provides future Battei Din in moulding their practice to avoid inappropriate procedural conduct.
[1107] Ibid [116].
[1108] Ibid.
[1109] Ibid [227].

Sydney Beth Din, in which the prospect of commencing proceedings at the Beth Din was discussed. While the *dayan* was not criticised for having attended the meeting insofar as he was not aware of its purpose, as soon as he was informed of the party's intention, he 'ought to have excused himself from the meeting' to avoid a suggestion of apprehended bias.[1110]

The defendants argued that much of the communication related to 'procedural, administrative or practical matters'[1111] and the regularity of the correspondence was largely a product of 'an anxious, somewhat impatient litigant' whose unsolicited emails were either ignored or responded to in a 'generally minimal and universally focussed way.'[1112] In addition, they contended that the Beth Din had its own mechanism to deal with apprehended bias, insofar 'practice now universal amongst permanent Beth Dins' allowed for 'defendants [to] choose other Dayanim than those originally constituted to hear their case.'[1113] However, given the absence of procedural guidelines at the Sydney Beth Din, it was unclear how the Beth Din intended on informing the defendant of his right to choose alternate *dayanim*.

Sackar J found these circumstances to give rise to reasonable apprehension of bias:

> "a fair-minded, observant Jewish person, informed or with knowledge of the material facts of the case, including the content of Halacha and the prescribed conduct of the Dayan in the conduct of a Din Torah… might reasonably apprehend [that] the Beth Din might not bring an impartial mind to the resolution of the… commercial dispute."[1114]

8.4.4 Evaluating the working model considering the Australian case law

While the case law discussed above is non-exhaustive in terms of the range of errors that a Beth Din could make in relation to Australian arbitration law, it does provide a limited way of testing the efficacy of the elements of the working model,[1115] especially with regards to thematic errors that featured across all the cases. Two such themes which can be identified are a general lack of procedural guidelines that govern the Beth Din process, as well as breaches of natural justice,

[1110] Ibid [211].
[1111] Ibid [121].
[1112] Ibid [123].
[1113] Ibid [168].
[1114] Ibid [211].
[1115] It is noted that these cases formed a prompt for the writing of this thesis and as such, the errors evident in these cases did influence the research. As such, their use as a point of evaluation is – to a degree – circular. Notwithstanding this, they do provide an illustration of how the working model could apply to factual circumstances. Additionally, their inclusion in the thesis provides important context for understanding community sentiment towards religious arbitration and serve as a cautionary tale for *dayanim*.

specifically the rule against bias. The evaluation of the working model based on these cases is outlined below, with its elements referenced in bolded script.

The importance that **a comprehensive set of rules** be developed and implemented by Australian Battei Din is illustrated by the cases. In Appendix 10.4, the procedural flaws that were noted across the three judgements are compared with the comprehensive set of rules and procedures that are used by the BDA and adopted with minor changes by the cRc Beth Din. The chart in Appendix 10.4 demonstrates how many of the procedural flaws outlined in the cases can be mapped to a specific section of the BDA rules that provides a process or rule that governs the Beth Din's approach to the issue. The existence of such rules assists the Beth Din by providing a form of checklist against the many pitfalls that they may face throughout the arbitral process. As discussed previously,[1116] rules do not in and of themselves elevate the professional standard of a Beth Din but are rather the product of a culture that values professionalism and transparency, and thus must be coupled with **appropriate training for the dayanim** to ensure that the rules are understood, both in terms of their practical application as well as the broader professional culture which they reflect.

Moreover, the need for an **organisational structure** that caters to the administrative requirements of a Beth Din is evident from the caselaw. This is particularly relevant in the case of *Thaler v Amzalak* which was riddled with administrative errors; from a lack of record keeping to inadequate notice being provided regarding the hearing, to the lack of responses to requests made by the parties. The fact that improper (including *ex parte*) communication took place between the applicant and the Beth Din in *Live Group*, which differed from the others insofar as it was not a *zabla* Beth Din but rather an established Beth Din that employs secretarial support, demonstrates that it not enough merely to have administrative support but that such staff require training to understand the laws which govern arbitration. This illustrates the need for such training to be organisation-wide and not limited only to the *dayanim* who are acting as arbitrators.

A theme that emerges from these cases are the breaches of natural justice that occurred due to the partiality, or apprehended partiality, of the *dayanim* in all three cases. With regards to both *Mond v Berger* and *Thaler v Amzalak* the importance of the recommendation that Battei Din **refrain from using the *zabla* method of selecting dayanim** is abundantly clear. In both cases, the testimony provided by the *borerim* themselves was that some level of partiality was permitted according to Jewish law and, regardless of whether this is an accurate representation of the *halakhah*,[1117] it clearly demonstrates that in practice there are *borerim* who will act with partiality towards the party

[1116] See Part 4.4.2.
[1117] See Part 5.2.1.

that selected them, in contravention of the doctrine of natural justice. However, it is important to note that apprehended bias was found not only among *borerim* but also with regards to the *sholish* in *Mond v Berger* and *Thaler v Amzalak*. Likewise, partiality was evident in the correspondence between the SBD and the applicant in *Live Group v Ulman* and imputed from the fact that a *dayan* did not excuse himself from a meeting with the applicant upon discovering that its purpose was to discuss the prospective case. This indicates that bias is an issue not only in *zabla* cases, but requires vigilance in all settings. The elements that address this issue include the need for **training of dayanim** especially with regards to the differences between Jewish and secular law in terms of their respective understandings of the role of a judge,[1118] with a focus on the judicial ethos required of a secular judge.

In *Thaler v Amzalak*, additional to the various procedural flaws and breaches of natural justice, the arbitration agreement was determined not to be binding due to omissions and non-compliance with its terms. Such errors would be addressed by the recommendation that the **process of international best practice Battei Din are emulated**. All the best practice Battei Din that were included in this study worked closely with legal professionals who, as part of their role, would provide oversight of the arbitration agreement and ensure its accuracy and compliance. *Thaler v Amzalak* is an unfortunate example of how, among other irregularities, the lack of such expertise in the Beth Din resulted in the court vacating its award.

Thaler v Amzalak also demonstrated the importance that a Beth Din **encourages legal representation** and that **an internal appeals mechanism is provided**. In that case, the Beth Din was criticised for not having made the parties aware of their right to representation. Additionally, the fact that the disgruntled party attempted to have the award revisited by the panel but received no response from the *dayanim* was noted in the judgement. Both elements provide the parties with confidence in the Beth Din's procedural fairness. The encouragement of legal representation that can assist in the presentation of the litigants case as well as the provision of an appeals mechanism for internal review of their decision, would assist a Beth Din in delivering a fair award that stands up to scrutiny. In line with this, *Thaler v Amzalak* demonstrates the need to **provide reasoned judgements** to the parties, given that the lack of reasoning in the award was one of the causes for it being found not to be enforceable.[1119]

Last, while the position at Australian law was not known prior to *Live Group* it is now evident that a Beth Din should **refrain from issuing a *seruv* that includes religious sanctions**. From that case it

[1118] See Part 2.2.7.
[1119] See Part 5.4.4.

emerged that the Australian position on the matter differs from the USA and better aligns with Israeli law.[1120] It also clarified that a *heter arka'ot* which simply states the *halakhic* position, without an explicit threat of sanctions, despite its potential to place pressure on community members who do not want it known that they refuse to attend a Beth Din, is legal.[1121] This recommendation is also in line with the view expressed by a range of *dayanim* both in Israel and the USA who opined that the use of coercion to gain attendance in the Beth Din context, is likely to be counter-productive.[1122]

The evaluation of the working model against the cases, illustrates its application to real-world scenarios and evidences how Battei Din would have benefited significantly from adherence to such a framework. The elements include **prioritisation of building communal confidence in the Beth Din** which must underpin the culture of the Beth Din. The mere mechanical application of the working model without it being underpinned by a culture of transparency, is likely to result in further instances of non-compliance with Jewish and secular law that were not overtly addressed in this study. As such, this working model forms a starting point, based on the data collected in this project, with which a Beth Din seeking best practice should not only comply, but also seek to further enhance and develop.

8.5 Further Challenges

A further challenge noted by some of the *dayanim* is with regards to the financial resources required to establish and maintain a Beth Din that would offer commercial arbitration.[1123] In line with this, it was noted that one of the obstacles encountered in a previous attempt to establish such a Beth Din in Melbourne was the difficulty in finding an insurer willing to take on the risk associated with its operations.[1124] This was the case prior to the decision in *Live Group v Ulman* following which there would likely be even higher insurance premiums . This is coupled with the costs generally associated with running such a Beth Din, as evidenced in the US and Israel Battei Din surveyed.[1125] A solution to this challenge is beyond the scope of this study, and requires investigation into avenues of potential funding.

[1120] See discussion in Part 6.2.2.
[1121] See Part 6.2.5.
[1122] See Part 6.2.4.
[1123] Interview with Rabbi Greenwald.
[1124] Interview with Rabbi Gutnick.
[1125] Financial challenges faced by the Battei Din surveyed are discussed in Parts 4.2.9 (BDA), 4.3.9 (cRc Beth Din), 4.4.9 (Eretz Ḥemdah Gazit).

8.6 CONCLUSION

This aim of this thesis is to provide the Australian Jewish community with a working model that can act as a guide for the implementation of Battei Din that provide commercial arbitration in a manner that considers the secular legal context as well as international models for best practice in this domain. This chapter has served as more than just a summary of its elements but goes the extra step of evaluating the likelihood of their adoption by taking into consideration the present attitudes and viewpoints of practicing *dayanim* in Australia who agreed to be interviewed. The process of evaluation has demonstrated that certain elements are more easily implemented compared to others, but none of the hurdles appear insurmountable. In fact, in the interviews, it was the *dayanim* who lead the Melbourne and Sydney Battei Din as well as those who have had the most experience in the commercial arbitration context, who evidenced viewpoints that best aligned with the working model.

This study provides those concerned for the fullness of *halakhic* observance, which includes the litigation of commercial disputes before a Beth Din, with a framework for realising this goal. It presents a path for the establishment of such Battei Din which does not compromise on the *bona fide* application of *halakhah*, nor the requirements of secular law.

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9.2.2 Israeli Case Law

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9.2.3 UK Case Law

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9.2.4 USA Case Law

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9.3 LEGISLATION

9.3.1 Australian Legislation

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9.3.2 Israeli Legislation

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9.3.3 USA Legislation

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9.6.1 Newspapers

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10 APPENDIX

10.1 APPENDIX A – USA INTERVIEW TRANSCRIPTS

10.1.1 Interview with Rabbi Rapp

Interview with Dayan Daniel Rapp on 23 November 2022 at Yeshiva University, conducted by Chaim Cowen

C: Okay so just recording, together with Rabbi Daniel Rapp from Yeshiva university. Do you want to, if you can just restate what your position is and you affiliation with the Beth Din of America?

D: So, I teach at Yeshiva University and my affiliation with the Beth Din of America is that I have been a Dayan with the Beth Din of America at least since 1998. So, I've been around for a while

C: What's the degree of your engagement? How often are you involved with the Beth Din, in what capacity?

D: Specifically with *dinei momenos*?

C: yes. I'm specifically interested in *dinei momenos*.

D: so, with *dinei momenos* I'd say that on average I have a case once a week. It can be every day of the week of the week or a whole week without any cases. That's the way it works. Scheduling is always very tricky, there's always cancellation possibilities etc

C: and those cases are generally run for how long?

D: a minimum would be 1-2 hours. I've had cases that have run probably over 100 hours. There's a broad range.

C: are you one of the more regular dayanim scheduled on?

D: I think so, Rabbi Weissmann would know better but I think I'm probably the most scheduled. It's the impression I get – unless there's someone who's really really busy

C: what training have you had that sets you up for success as a dayanim in DM?

D: I have yadin yadin smicha from YU and I also have a law degree

C: Yes, how do both of those bits of training feed into your day-to-day dayanus experience?

D: obviously you have to know the halacha, that's kind of the yadin yadin is obvious. Also, if there's one thing I always beat the drum on is that if you don't understand the question you aren't going to get the answer right, so my experience in the legal world. My involvement, tangentially in the business world had given me a deeper understanding of the cases which allows me to understand the case better. Once you understand it better, you'll do a better job at coming to a proper resolution.

C: do you feel that if a Dayan doesn't have that legal background – are they able to judge accurately?

D: it depends on the case. We deal with such a wide… in monetary cases, it can be a divorce, the division of the estate, it can be an inheritance case, it can be a division of a partnership, it can be a contract case, it can be a patent law case. It's such a broad definition of what we're talking about it

so therefore yes, there are areas that if you are dealing with a complex business agreement, you're dealing with a complex real estate deal – therefore if you don't understand the real estate business, you don't understand the tax laws you don't understanding why someone would be doing this and what they are trying to accomplish your probably not going to get the crux of what the question was. On the other hand, if it's only a matter of division of marital assets, you don't really need a business background for that.

C: Where I'm coming from in Australia, there's a great paucity of dayanim generally and to find one with a law degree narrows the field to zero. What are methods you would advise for a dayanim who doesn't have that legal background to ensure they are still…

D: it's interesting, I don't know if Rabbi Weissmann mentioned this, but the rule of the Beth Din of America is that every panel has to have at least one Rabbi and one lawyer. Now if you have three members of a panel, they don't have to be the same person. If you're talking about a Dayan yachid, one judge, the Beth Din insists the one judge is a Rabbi lawyer, which we have a small handful – I can handle that, Rabbi Weissmann can handle that, Rabbi Reiss can do it, that's the shortlist – there are a few more, not many more, but in other cases once you are dealing with three you have a lot more flexibility: you can have one guy who's the Rabbi and another guy who's the lawyer and they can work together. I sit a lot with Rabbi Willig and a lot of the times I will spend the time explaining to him, "okay let me to explain to you what they are trying to accomplish here, you know they bought a building and its syndicated and based on leverage and therefore a key part of this is refinancing and therefore even though they are making money on *this*, the most important thing is *that* – that's why people are so concerned about this" and that would better understand this. Even if you don't have great experience here so much from the outside, there have been clients, depending on the case, when we bring in people who wouldn't normally be judges because of their expertise. If we have a case that involves child custody well always bring in a psychiatrist as that's not an area I have expertise in and that's a big deal, you don't want to get that wrong. There have been times we have dealt with patent law cases, patent law is a different kind of law to every other type of law, so you bring in, either one of the judges is a patent lawyer – even though that person mightn't be a Rabbi, or you bring that person in as an outside expert. To sit in on the case and to explain to the dayanim that this is what we need to know.

C: Are you a practising lawyer?

D: I was, I'm a recovering attorney

C: I imagine you would have your areas of specialisation, so there would be cases that would come outside of your area of specialisation. Do you feel your legal background gives you something even in those areas that you don't have specialisation in?

D: So, any lawyer, law is not like medicine so much, meaning that a person who needs a heart transplant you don't give them a gynaecologist. But in the event you need a lawyer, and this person is a litigator, and they understand how the law books work and how case law works they can figure out how to write will. It might take them longer than the person who does it on a regular basis, but they can figure it out. So, you still have advantage of a lawyer who has an appreciation, when they come forwards and say this is the law of the land because I have this decision, you can say 'that's traffic court' we don't really care about that, that's not the supreme court.

C: Are you consulting secular legal books as part of your *din torah*?

D: you could. What happens more often, again you might have discussed this with Rabbi Weissmann, but a major issue we have is in terms of representation at *dinei torah*. We don't allow *toanim* at Beth Din. We are definitely in the minority in that policy, but I strongly support that policy – in cases that I have sat on where both parties have wanted to bring in *toanim* I have said that you can do whatever you want but I'm not sitting on a case like that. But we do allow lawyers. For several reasons – one of them is that legally we have to. Under US law you have a constitutional right of representation that cannot be waived. Oftentimes there are lawyers and in the event that *dina d'malchusa dina* comes into play we will often say that we'd like you to brief that and each of them will write you up their understanding of the law and we will review that and decide based on that. The Beth Din has interns whom also when we have a question, we can turn to them and say 'do me a favour research this topic and get back to me about what the state of the law is'.

C: what is your issue with *toanim*? What is it that concerns you with *toanim* in a bd?

D: a lot of things concern me. One thing is that it's against halacha – *al tehi k'orchei hadayanim* – besides that the difference between lawyers and *toanim* is that in the event that a lawyer is caught lying in a case they get disbarred, when a *toan* gets caught lying in a case they get more clients as they see they are willing to go the extra mile for you. There is nothing stopping them from lying cheating stealing, there is no oversight whatsoever. Also, there's a major difference between what lawyers do and what a Beth Din is. I've spoken to secular lawyers and explained to them the ideal of Beth Din practice and when it comes to the law, at least in the US, the lawyers' job is two-fold they have to prove the facts and they have to prove the law. In a Beth Din they only have to prove the facts, we aren't interested in what you have to say about the law, that's our job. Therefore, a *toan*, really offers nothing, in terms of halacha, I'm not interested in what you have to say. In terms of the facts 'you weren't there so why are you telling me what happened?'

C: would you argue that from a constitutional perspective if someone is saying this is my representation and they happen to be a *toan*, if you say no to them…

D: under US law you can absolutely say no to them

C: are you depriving them of representation?

D: no, let's say I walk into secular court, and I have a *toan* with me. Will they let the guy in the law?

C: so, you're saying it has to be qualified representation?

D: there are rules in the Unites States…

C: I'd like to do a deep dive into something you mentioned. You mentioned the difference between Jewish and secular law in terms of how inquisitorial the dayanim are and one could argue more broadly that Jewish law is inquisitorial while secular law is adversarial. How do you notice the differences, coming from a legal background, or the potential conflicts between the systems itself. Are there fundamental differences in approach that are crucial to be understood for a secular society to really know what a Beth Din does or how Jewish law works?

D: not really, it's interesting, so I happened to be a Rabbi in Colorado. A bit of US geography, Colorado isn't around the corner from here

C: I flew over it on my way from SFO I think

D: Its beautiful I hope you enjoyed the flight. So I was in Colorado one time and they asked me to speak to secular firm, give what's called CLE – continuing legal education – so I got up and I gave my

song and dance and a guy came over to me and said 'it's the best CLE I have ever been to' and I said it's a nice thing to say but your clearly lying through your teeth coz what the heck do you, some guy sitting in Colorado, care about a Beth Din? It's very nice of you, very out of town of you, to say that but I don't actually believe a word you are saying. He said 'no, I have a client and I have to present next week in Sharia Court. I know nothing about Muslim law, but this presentation – that you're presenting the facts and not presenting the law – just clarified what I'm supposed to be doing there.' So that is the difference.

C: does that mean the cross examination comes from the dayanim?

D: that's correct; however it works, we like to know what happened. You give the fact we'll decide the halacha in that case and therefore we need… the truth of the matter is that in 80% of the cases there is no halacha to be decided, we just need to get to the bottom of the facts

Time marker 12:41

C: so, you are acting as a jury in a sense

D: correct, we are fact finders

C: so, will you be very active, asking a lot of questions to each side?

D: correct we will be asking questions and trying to figure out what exactly happened here

C: apart from the general difference between Jewish and secular law, are there differences in particular areas of law that can create a conflict?

D: the major issue that causes conflict is *ribbis*. There is an unbelievable amount of contracts that directly or indirectly involve interest payments and we will not grant them as a matter of policy

C: even if they contracted under secular law? As that's an area where *dina d'malchusa dina* wont override?

D: correct it's an *issur d'oraisa* and therefore, sorry. We had a case years and years and years ago where there were two guys charging interest to each other back forth without any *heter iska* – no reason whatsoever it was totally not allowed – at one point one guy owed the other an awful lot of money and the guy who owed the money all of a sudden found G-d. He said 'I'm sorry how can I pay?' he had a great awakening. On the one hand he's right he can't pay, and on the other there's a certain lack of equity here, shall we say. I remember the decision of the Beth Din at the time was, that yes 100% you don't have to pay but now that you've fund G-d you don't want to be *oiver* an *issur* of having taken *ribbis* that you weren't supposed to, so we undid every single payment from day one. Yes, you cannot collect but you will return anything you took – we'll bring this back down to net zero.

C: I'm also interested in procedural law. Would you say the secular standard of procedural law is higher or lower than the Torah standard? In terms of natural justice, bias, hearing one party – making sure on is heard in front of the other…

D: we as a Beth Din are very careful with this. No ex-party communications. There's a disclosure at the beginning of every case we go through a round or two of Jewish geography to say, I think your neighbour at one time sat next to me at a wedding and everything has to be disclosed and the party has the option of waiving it or not. We've had cases out there where we have sat down and one of the parties said, 'sorry, 'I'm not comfortable with that relationship' and we'll cancel and get another dayanim and come back next week.

C: is that a *chumra* or is it *ikkar hadin*?

D: it depends on which one. There are times when it's a *chumra*, but there are times… in one case I walked in, I was 5 minutes late to a case and by the time I walked in, there was yelling and screaming. So, the story was that one party was insistent that they wanted a certain person to be a witness and they were not going to sign the *shtar brurin* until there was agreement on that. And the dayanim were saying 'well we can't decide anything without the *shtar brurin*, sign it and we'll decide it for you, we can't decide it beforehand, we have no power beforehand.' They were stuck here, and I walked in, and I said, 'everyone is going to have to leave, and I said we have a problem here, one of the parties has taken me out to dinner'. Back 10 years ago I was in Israel, he took me out… Sukkos night he took me out to dinner. They said if we do this they are never coming back here. I said okay, if I can just say this is my relationship and if the other party accepts me despite that then okay, we'll go on, as is. But is all gotta be in the record, it's gotta be clear. And if they say they're not comfortable then I've got to walk.

C: Are the procedures recorded?

D: yes, it's a funny story how that happened. Michael Broyde had a case in Atlanta and he made a decision and one side won and one side lost and the losing side went and appealed, and the losing side shows up in court on the appeal with a translator and said 'I don't speak English and I don't know what happened, how they decided against me' – the whole thing was a total lie. They guy spoke a perfect English throughout the case. To avoid that happening again they started recording.

C: the *shtar brurin* that you mentioned – is that the same as the arbitration agreement or are they two documents?

D: they are the same document

C: does that mean you use the secular pro forma and that serves as a *shtar brurin*? Is there an official *tofes hashtar* for the *shtar brurin*?

D: no, they just have to be legally bound. For example, we also do a *kinyan* before the case begins but the truth is we don't really have to as we have the *shtar brurin*, so they have contracted to follow the Beth Din – there's not much more that has to be done

C: Zablo, which is obviously permitted within halacha, that involves a known bias as each party is picking a Dayan they like?

D: I have never sat on a zablo, I refuse to do zablo

C: is it because of that issue?

D: Yes

C: why does halacha itself tolerate…? Does halacha itself view the third Dayan, the sholish as the judge?

D: that's a machlokes rishonim I believe. Some of them say I'm supposed to pick somebody and your supposed to pick somebody both of which are unbiased, and they'll just pick a third one. I think this idea that somehow the first two became lawyers – I don't know where that came from and that's why I have not sat on a zablo. There have been cases where the Beth Din has encouraged me to take zablo cases for example where there's a woman's gett floating out there somewhere and the only way we have a chance is to do it is through this, the Beth Din policy has been to hold your nose and do it

C: what about seder hadin? I'm familiar with the work of Prof Eliav Shochetman 'seder hadin harabbani' that he has put together… my understanding is that seder hadin is not in any location in shulachan aruch, its sort of scattered around. Would you say that a lot of seder hadin is informal or its decided based on what the Beth Din wants or is there a particular halachic seder hadin that covers off on all the areas of procedure?

D: I can't think of anything that doesn't fall under halacha – I can't think of anything that we just do it because we do it…

C: say for example the amount of time, of notice that you have given to a party before calling a hearing, is there a halachic view on how much time you give?

Time marker 20:13

D: the idea of three hazmonas that's a halachic idea

C: and the time between hazmonas?

D: I think that's also discussed, I mean we have our rules and regulations, I'm sure you've seen them

C: yes, I've seen them, but I'm interested to know the background of those rules and regulations are they coming from a halachic source or are they coming from a secular arbitration code that's adapted – do you know what their origin is?

D: its mostly ours… its interesting I gave a shiur earlier this year on affidavits. I'm teaching gittin and it happened to come up *a shvua biktzas(?)* so I spoke about affidavits and then I pulled out… at the end I said this is what the Beth Din does and showed this is the policy and you can see how it developed from the *rishonim*. Afterwards I gave a shiur on women testifying, and we thought let's pull out the rules and regulations and there was nothing there. So, I went to Rabbi Weissmann and said, 'did I miss it?' and he said 'no actually don't have anything in the rules and procedures about women's testimony'. Should we? Maybe. I don't know

C: *tachlis*, you tell me, women's testimony how do you deal with it?

D: we take it

C: the *svora* behind it is… what's the basis?

D: the basis is, *bizman hazeh*, I don't have *smicha*, this is not a Beth Din. We have lost the *smicha* thousands of years ago. At this point we are trying to do *pshara krova l'din*, we are trying to get to the bottom of the facts. I will accept audio tapes, I will accept video tapes, I will accept things you found on the internet, I will accept a slew of things – I am just looking to get the facts as best I can. A woman's testimony is no worse than any of that. Rabbi Bentzion Chai Uziel has a teshuva where he makes that argument.

C: I see you have mishpat ivri sefarim over there (pointing to it on his bookcase)

D: I got them out of sheimos, most of my stuff... expensive set

C: I know I've got that at home. My question is, do you use mishpat ivri?

D: no, I used to use it years ago

C: it's obviously designed for…

D: definitely worth having in the library

C: my understanding is that in Israel Batei Din would rely on a sefer like that.

D: I'm not opposed to that. Menachem Alon is a great guy and Nachum Rakover is a good guy, but there's just better places to find things nowadays you know.

C: linking back to the complexity of commercial litigation today, do you find that you are trying to find precedents in *choshen mishpat* for cases where there's leverage involved or refinancing. Are you looking in choshen mishpat or are you not trying to squeeze a round peg into a square hole?

D: absolutely, yep

C: are you consulting with contemporary teshuvos on this area or are you writing your own novel teshuvos?

D: depends if there's something contemporary out there, I'm very happy to see it but…

C: otherwise, you're using your *hachro'a*?

D: correct, some way or another you've got to figure out. But not a lot changes in straight business. Contracts are contracts.

C: I'm also interested, if a litigant is not happy with a psak, is that something you deal with, or it goes…

D: well, Rabbi Willig deals with it. I'm the guy they're not happy with (laughing). I rarely find out about it, interestingly. There are rare occasions where it's sent back down to me to reconsider something… we have an appeals process which is… yeah

C: that appeals process itself sounds quite novel halachically – *beis din achar beis din lo daiki*

D: yes, there's a Sforno in parshas mishpotim that talks about it. Rabbi Bleich wrote an article on this. He's not around today but he's an entertaining guy to talk to for sure. Eretz Yisroel has the *kav* of the *beis din l'irurim*.

C: so, there are *svoros* that enable you to do that…

D: there is the Sforno, when you talk about the *sarei alafim* and *sarei me'os*, the Sforno says that's actually an appeals system which is a big *chidush*… he's a *rishon*.

C: also, the idea of giving reasoned judgements, which I understand the Beth Din of America does do, that's standard?

D: correct

C: that's also something historically not done?

D: well, it's like *teshuvos*

C: yeah, but is there an idea that reasons could open the door to dissatisfaction?

D: absolutely there's at least one Dayan I know about who's typical psak was, they are having a fight and he owes them $7432.91 have a nice day, that's the end of it. Try to appeal that.

C: what's the reason you do give reasons if it's a novel thing

D: one of the reasons we do it is so that people shouldn't think we are flipping coins. It's a *chillul hashem* as the loser will always say you didn't understand my case that's why you… as there no way logically you could have come to that. So that's why we write decisions.

C: who does that get published to?

D: the parties get it, that's it. The Beth Din at one point was publishing decisions, anonymised, and there were a few, the Beth Din comes out – I don't write for them that much as I don't have time and they push me and say you've written so many decisions, publish them all you want – they are yours! You paid for them; you have to enjoy them.

C: what is the decision writing process – is it delegated to one particular Dayan to write?

D: yes, the reality was the dayanim sit down and they make a decision, they decide how they are going to go, and someone has to draft it. I always try to get someone else to draft it, but being that I'm a Rabbi-lawyer I end up getting the bulk of Dayan yachids and in Dayan yachids there's no one else to dump it on, you're stuck writing it yourself, so therefore I say, 'I'm stuck with writing all of those, someone else come on step up here'. It's interesting in a case that we did just this week, I very much wanted a short psak, basically I wanted to ignore issues – I don't want to get involved in certain ones, I wanted to note that we considered it and then it will be in everyone's best interest, but the another Dayan said no, it's a fascinating topic and he's interested in researching. So, he said to me if you want to write it, write however you want, but if you want me to write it, you're gonna get a magnum opus out of this one.

C: do you have any involvement in other Batei din or is it exclusively Beth Din of America?

D: as far as *dinei momenos* goes its Beth Din of America

C: what would you say separates the Beth Din of America from other Batei Din around the world and America itself?

D: the reasons I think so highly of it is that every so often I get people who request directly and not through the Beth Din, and I strongly discourage that – I just had a case this week. And there's a few reasons, one is that the Beth Din is a very well set up Beth Din with secretarial staff et cetera. if I was doing the case myself, just the scheduling leads to ex parte communications – are we meeting next Tuesday, are you available at 3 o'clock etc – inevitably I'm talking to one party and not the other party and its very difficult to keep that down to this, the fact that I have a secretary who is working in the Beth Din and keeping a calendar and saying this is the day we are meeting, this person is running late. That itself makes things much, much better. Documents are not given to me directly, they go straight to the secretary who confirms that the other party has a copy already and then passes it all on. That's A. The other is the secular knowledge. The secular knowledge makes a big difference in certain cases. All too often I'll see a case and will be thinking 'the guy just doesn't get it' – after 9/11 when we were working on the agunah cases, whether or not to accept DNA evidence, was a major issue that had to be decided from the get-go and we all understood that whatever the decision is, it had to not just be made by our Beth Din but we had to get buy in from other Batei Din because if I turn around and say this woman can marry someone else and some else disagrees with me and then she gets married and I say 'mazal tov' and they say 'your kids are mamzerim' we haven't done the woman a favour. So, we had to have meetings we had to have an understanding. We got together, a whole lot of Batei Din got together to discuss this issue and of course we got Israeli Batei Din on board also and it was just clear that some of them just didn't understand it – just

plain didn't have the background and based on that the questions they were asking, if you had any scientific background you would realise they were just ridiculous. That's a big issue here.

C: you are saying those two things separate out the Beth Din of America: A. the professionalism of the secretarial staff and support staff and (B) the mutual knowledge in Jewish and General. Are there other Batei Din, if I'm looking to Best Practice, are there are other Beth Din you recommend that I visit outside of the Beth Din of America to see how they operate?

Time marker 31:22

D: Rabbi Weissmann deals with other Beth Din more than I do and whenever I get called by from an outside Beth Din, I'll always be sending them to go through the Beth Din of America. Another difference that I find, I don't know if this is the best thing or not, but this isn't where I make my money, I remember I spoke publicly about the Beth Din and I was asked how I get paid – I said "weekly, very weakly" (laughter). Therefore, I want this case to end, I want this to be settled

C: you are saying it doesn't depend on the workload, its fixed…

D: it depends on the workload, but I don't have all day for this. I have a shul, I'm teaching a load here et cetera, that's what's feeding the children. So therefore, unlike the lawyers who are getting paid by the hours and if they have nothing else in their docket, they'd like to see this go as long as possible – that definitely remains true for *toanim* and may remain true for dayanim where this is their parnossa, but I would be very happy to see everyone settle their cases and go home

C: which raises an interesting issue. I understand that at secular law you can't be a mediator and an arbitrator because as a mediator you are privy to information that wouldn't be shared with an arbitrator. My understanding and I could be wrong, is that in a typical Beth Din setup they can flip between mediation and arbitration…

D: correct

C: does that create a conflict or some sort of issue?

D: the story is as follows. Whenever that happens, oftentimes, very often I would say, there comes a point in a case where we'll say you should be settling this, and we'll often say you've got options here; you can step out and negotiate among yourselves, you can negotiate here in front of us, you can use us as a Beth Din to do shuttle diplomacy or you can use *one* of the three of us to do it if that's what you want…. We always say that under the law, under the halacha, anything you say to settle the case will not be held against you therefore we will discount that. However, warning, we are human, so as much as will act that way, we *will* hear it – so you've got to make a decision if that's something that concerns you.

Time marker 34:08

C: does that worry you as a potential point of appeal to a secular court, if they say I showed my cards to these arbitrators…

D: no, again, if you waive that, if we said listen, you're about to show your cards here and they say 'I want to show my cards'… as far as I know there's never been a Beth Din case overturned based on that

C: has there been any case overturned that you are aware of from the Beth Din of America?

D: there was one or two… I'm being sued currently in my position as Dayan

C: oh, I didn't know…

D: yes, yes… Rabbi Weissmann's also being sued on this case. Rabbi Willig got away from this one somehow or another

C: sued in your personal capacity or as the Beth Din of America?

D: I assume they probably went after me individually also, I'm not that concerned or involved in it. In that case there was some issue which didn't get the case overturned but had it sent back to us. Rabbi Weissmann is more involved

C: by sued you mean its being sent back to you to revisit or sued as in personal…

D: they want me to pay money because I caused damage, when I decided against them

C: so that's currently in motion?

D: in the federal court in New Jersey or something, I'm not totally sure, I'll take some weeks off (unclear). Rabbi Weissmann's more involved in this.

C: the judgements itself – the court's not vacating the judgements you've made?

D: there might have been one, in that case there might have been some reason, but again Rabbi Weissmann knows better. Once I make a decision, I'm pretty much out of the picture

C: fair enough. From your sense, are there areas in the Beth Din of America that you feel could be improved, or if we are starting off something, we should be aware of potential hurdles or challenges?

D: finances, finances it seems is always a challenge for the Beth Din of America. Rabbi Weissmann always complains that I'm not giving him enough time and the answer is that the people who are paying me money are… they would rather have more full time dayanim etc, but I always complain that Rabbi Weissmann is always too darn honest, he has to stop that already, its crazy (laughter)

C: any advice you would offer to a Beth Din that is beginning as to how it should best set itself or what training the dayanim should be given et cetera?

Time marker 37:00

D: again, it's a mix, you need to have the knowledge and you need to have the sensitivity. Because there are divorce cases and then there are cases that are divorce cases even though no one is getting a divorce. If you have a partnership that is breaking up after 30-40 years, psychologically, I do a lot of mediation and a lot of times a younger Dayan will say to me, we know where this is going let's just settle it. The answer is 'no, they are going to have to talk still, they have to be heard, they have to say what they want to say, they need to say it with that person listening to them – once they have got that off their chest now they are ready to…' there is great value in a Beth Din just to, you know, 'I feel like I have been heard I'm going to talk and you're going to listen and you can't interrupt me and that's helpful for me to say something and for you so you now at least understand my mindset as to why I'm upset'. And in terms of not just getting the dollars and cents right but somehow mending what could be a wonderful friendship that is being torn to shreds – in my mind that's sometimes as important. Its not always about the money.

C: Looking at the Melbourne Beth Din as it stands, that's one of our big challenges, often the dayanim, they are *davka*, not the type of person who's a people's person

D: right, I think in Israel this is a big problem they are always saying

C: you, for example, you are a communal Rabbi, so you know people. Not every Dayan is a communal Rabbi and a lot of them are 'bookish' – and that's what got them to where they are – and they often fall down on that human level. What you are saying is that the human aspect is equally important as the knowledge in halacha

D: absolutely, for example there has always been a woman on staff in the Beth Din and her job is that whenever there's a *gett* she sits next to the woman who is getting divorced with a box of tissues. And that's important – you have to remember that in a *gett* its you and your husband, for the woman, and you're the only woman there. All the dayanim are men, the eidim are men, the sofer is a man, he likely has a long white beard and a long black coat – obviously you're in a psychologically fragile position to start with. I've always said in our geirus work, that I've always wanted to have, when a woman is *megayer* and she comes out of the *mikveh*, she has a need to hug somebody, and sorry we can't do that, I would always say 'have a hugger' someone to come with her and bring her there and say how excited they are and give her a hug afterwards

C: this may be pushing the envelope a bit too much, but is there any room in halacha for a female dayanim?

D: a machlokes, tosafos in Niddah says yes.

C: is there anywhere in the orthodox world that that would be accepted

D: no there is not… it all comes down to Devorah

C: *eidus isha* is not a controversial thing, no one makes an issue with it, a Dayan would become an issue?

D: correct, various reasons why

C: I guess that means that even if there was a panel of three and a woman on it additionally, that would possibly cause issues

D: correct, we have woman lawyers that appear, and we accept witnesses that are women, but in terms of dayanus no, that's not accepted

C: okay, I think those are some of the key areas that I wanted to ask. Let me see if there's anything missing… we've covered quite a bit – thank you very much – unless there's anything you think I should know, or you want to add

D: I think you'll get a lot of the same, Rabbi Reiss is a chavrusa of mine, Rabbi Weissmann and I are very close, Rabbi Willig is all of our rebbi

C: they say you get three dimensions, when you get two slightly overlapping versions it gives you a bit of depth…

D: we are different personalities and have different views. Its funny at one point we started having monthly meetings. The way it started is that during covid the same case kept on coming up over and over again – you closed down your school and I'm not paying tuition. My kid didn't go, or zoom was a waste of my kid's time so I'm not paying tuition or I'm paying half tuition… whatever it is. So, parents didn't want to pay the schools, but schools pay the teachers obviously. And one school had five cases like this. There really isn't a lot of room for class action in halacha so we dealt with it as five different cases and Rabbi Reiss took a case, I took a case. In my case the party wanted to submit

Rabbi Reiss's psak saying that the school had won according to Rabbi Reiss and therefore they wonted… I said it's an odd one I don't know if I can accept… I said I'll accept it, but I don't feel bound to Rabbi Reiss. He's a nice guy and all and I admire him and I'm happy to hear what he has to say but you know this isn't a matter of he's the Supreme Court and I'm the Appellate division and I have to follow him – I don't. it ended up that it became clear to me that my decision and his decision on the same case were going to be different. And the question was how does that look for the Beth Din – if you're given the same facts in front of the same Beth Din and one judge says one way and another says another way, so I said if the Beth Din wants to have a policy here then I'm happy to follow the Beth Din policy. So, Rabbi Reiss sent in his decision, and I sent in my decision, we sent them to Rabbi Willig, and everyone read it over and we had a zoom meeting to duke it out to see what it is. And whatever we worked out, we worked out.

C: and that was before you'd rendered a decision to the parties?

D: he had rendered his but mine was drafted but not given yet because if people think I'm wrong I'll back down. At the end of this meeting, Rabbi Willig said, 'that was so much fun, we should do this!' We started getting together once a month and everyone giving 'here's the issue I'm dealing with, this is coming down, we've got the following mamzeirus questions, yesterday we had a chalitzah' – you missed it by a day…

C: take that zoom case with the school, I'm interested in the dayanic thinking. Where do you go with such a case, what sefer are you opening?

D: the first thing you have to do is say what's the issue here? Is there a contract here that they are bound to? If there's a contract then you look at the contract and you see how does that fill out (unclear). Then if not, you say this is an act of G-d, on the one hand this is an act of G-d, but if its an act of G-d okay, I pay for tuition and you don't deliver I don't have to pay that's one thing, but if I say that the school has to pay the teacher then it's not really tenable to say the parents don't have to pay the school but the school has to pay the teacher. What we are dealing with is *pshara krova l'din*, with equity. Rabbi Shechter wrote a decision not in any particular case, regarding Pesach programs, obviously all the Pesach programs got cancelled, but they got cancelled really late. The question is that the caterers have already bought the food, its not just a matter like okay this year is lost, they actually were on the hook, but they really delivered nothing. So, Rabbi Schechter thought that because of equity you can't just bankrupt these people so therefore it has to be dealt with in that way.

C: so, will you every have a full psak that won't quote a source, that's entirely svora?

D: theoretically you could… you don't *want* that to happen because you don't want people to think you flipped a coin. People who are slow to come to a Beth Din, among the thing that they say is that they always just split the baby. That's what were gonna do, that guy owes me a million dollars and I'm gonna ask for a million dollars and they'll say he owes you five hundred thousand. No, he owes me a million dollars. Pshara doesn't mean 50-50 it means we have a right to consider equitable…

C: do *dinim* such as *modeh b'miktzas*, *shavua*, do those things feature, *dalet shomerim*?

D: yes, we'll say we don't do *shavu'os*, the minhag in the *nosei keilim* of the *Shulchan Aruch* is you charge them a third – because he can't take a *shevua*

C: is that common practice among dayanim not to take *shavu'os*?

D: one hundred percent. I don't know of any Beth Din that does *shavu'os*. In the event there should be a *shevua*, there's an adjustment for that. There are times when you look at the case and you figure, okay equitably what should this look like. Based on that, lets explain why that works. In a case we just had, a school fired a teacher after 34 years. They said we don't give any severance pay, sorry. The teacher was fired mid-March and the teacher couldn't get a job the next year. So, part of the discussion here was, that wasn't nice of the school, that's not right, but we don't really demand that people pay severance. This case, common decency would have said… so therefore we came up with that the *psak* would have been that there wouldn't be severance in this case however given that the firing was done that late in the year it caused the teacher to be unemployed for a year and they had to pay the teacher another years salary because of that. Is that really severance? The teacher deserves a year. I'll figure out how to write a psak that that's what the teacher is getting.

C: Do you also ever incorporate *chayav b'dinei shamayim* aspects?

D: by *gramah* that always comes up

C: will you therefore say that we can't make you pay but you should… as in *b'dinei adam* your *patur* but your *chayav b'dinei shamayim*?

D: sometimes well say that but sometimes we'll say *pshara krova l'din*, even though your *patur b'dinei adam* we hereby obligate you

C: and you'll make an amount you feel is right

D: right

C: you'll never put it on the litigant or on the parties, to say you are exempt at common law, but equity demands something above that which is up to you

D: no, no

C: so, you'll given them more clear cut

D: yes, we'll say equitable considerations indicate that there should be compensation in this case, and we set the fair amount at…

C: do you have any relationships with arbitrators who are secular arbitrators?

D: I don't, but Rabbi Reiss and Rabbi Weissmann, I believe are both members of the American Arbitration Association. Rabbi Reiss for sure was, probably still is… not a lot, no. My mediation has expanded into some non-Beth Din areas as well.

C: Ever non frum or non-Jewish parties would be involved?

D: believe it or not, I have even had non-Jewish plaintiff's, oddly enough

C: why?

D: the reason that people go to Beth Din, again in the London Beth Din they've had cases where both parties were not Jewish

C: looking for a *din torah*? Fascinating

D: correct, it's a fascinating thing that's happening. The idea behind it is as follows, let's say you are a widget manufacturer and I supply you with your materials and I have been supplying on time what you've needed for a reasonable price, and you've been paying on time, and we are very happy. And

something happens, I send you a batch that you say the quality wasn't good, I say the quality was fine but what you asked for was the wrong thing. We want to get past this in a way that the relationship lives on. I don't want to lose you as a client, you don't want to lose me as a supplier. When you go to court and you bring in the lawyers, the animosity just builds up as it gets dragged out. We are looking for something that's quick and honest. I think you've done me wrong so let's bring in somebody from the outside, lets deal with this and move on with our lives. Its quicker, it's cheaper and it's a lower profile.

C: it's even cheaper than secular alternatives to arbitration?

D: it's much cheaper because its much quicker

C: its quicker than secular arbitration?

D: much

C: whys it quicker than secular arbitration?

D: what?

C: why is it quicker than secular arbitration? Meaning not at court

D: oh arbitration, that depends

C: why would a non-Jew pick a Beth Din over…

D: if the Beth Din is known as honest and fair, why not? What's the difference? I remember a very funny case. There was this guy, he was in India. In India they don't have chain stores, just ma and pop stores. This guy was in the evening-wear business and had developed this distribution and wanted to grow it, he decided that high-end lingerie was a natural fit for what he had already. He hired some frum Jews in New York to design a product for him and had it manufactured in Indonesia based on their specs and shipped to Mumbai. What happened was they put it together using glue rather than sowing it, which is a cheaper way of doing it. When it got to Mumbai it was stuck in customs for six months in a non-air-conditioned warehouse, the glue turned yellow and started falling apart. There's no way you can sell high-end lingerie that has yellow glue that's falling apart so they sued them, they said your quality was no good. They said 'we met your specs, we did not make it so that it should last for 120-degree humid conditions in a warehouse for six months. Had you told us that we would have sowed it and charged you more. You never told us that.' Therefore, he said listen, 'you have to understand I'm looking for high end'. The guy clearly had no idea what a Beth Din was he said I've spent so much money for these advertisements look what I have here, standing in Beth Din picking up pictures of scantily clad women (laughing)… we'll take your word on this one…

C: he was suing the New Yorkers… as they had specified glue in their specs to Indonesia?

D: right

C: so, he had picked the forum because?

D: because he didn't want to lose them

C: so, he asked them where do you want to go?

D: he basically said I'll come to New York and come to your arbitration

C: that's incredible

D: fascinating

C: okay I'll pause this.

Time marker – 54:07 (end)

10.1.2 Interview with Rabbi Weissmannn

Interview with Rabbi Shlomo Weissmann, Menahel of Beth Din of America, New York on 23 November 2022 with Chaim Cowen

C: Okay, where here on the 24th of November, actually the 23rd, it's the 24th in Melbourne. I'm with Rabbi Shlomo Weissmann from the Beth Din of America. First of all, thank you very much for your time – I appreciate that.

S: Are these recordings for your own notes?

C: I'm going to transcribe it.

S: So, we are not making a podcast?

C: Correct, these are for my own notes, and I will transcribe it

S: So, I won't have to correct myself.

C: That's correct. So, I have a variety of questions and we'll sort of see where it goes. I don't have to deal with all these questions… my first question is if you can give me a sense of the story of the Beth Din of America, you know how it has sort of gotten to where it is so I can get a sense of the context, specifically focusing on the *momenos* aspect.

S: So, a briefest review of the Beth Din of America is that I believe it was started in 1960 by the Rabbinical Council of America when they saw a need for an English speaking Rabbinical court that would cater to the Jewish community in the United States in 1960. There were *Batei din* doing *gittin,* but they were mostly old European Yiddish-speaking rabbis that were overseeing it. So, the Rabbinical Council of America which was the more Modern Orthodox arm of the community started the Beth Din of America I think mostly to do *gittin* and to deal with get kind of Jewish Status relate issues. I would say for the first three to four decades of its existences that's what they did they may have done a smattering of cases here and there but the files we have here going back to 1960 involve mostly *gittin* and other personal status *shailos* that came up. The *Av Beth Din* was Rabbi Steinberg – he would run the operation here and it was small barebones operation, nothing too robust. In the mid-1990s I think the community saw the need for a more professionalised operation where it wasn't just rabbis doing *gittin* but for there to be lawyers involved for there to be rules and procedures that would spell out the way proceedings would be governed and basically to upgrade and professionalise the organisation and introduced *dinei momenos* on a more regular basis. So that effort was, I think, really initiated by a man called Shelley Rudolf who was a leader of the Orthodox Jewish community. He had been president of the OU at the time or previous to that, he was a lawyer and someone who cared about these things. This roughly coincided with the time that Rabbi Mordechai Willig was developing the prenup so my understanding is that everything kind of came together because the prenup needed a Beth Din that would in a professional way oversee the cases under the prenup to avoid *agunah* issues and at the same time there was an awareness that there was a need for a more professional structure around *dinei momenos*, so around 1995-1996-1997 the prenup was launched, the Beth Din of America was kind of spun off from the Rabbinical Council of

America and became its own independent organisation and got its own board of directors consisting of a mixture of rabbinic and lay leaders and hired a directed for the first time – it was Michael Broyde, he was a professor – you've probably heard of him – at Emory, and he acted in that capacity and took a leave of absence from his teaching and did that for about a year. After that year he weas succeeded by Rabbi Yona Reiss who basically who basically held that position until 2008 when he became the dean of REITS in the Yeshiva.

C: Just remind me, they were the head of the board?

S: No, they were the professionals in the office.

C: What was their formal role?

S: Director

C: Where I come from Director means board member

S: Yes, here too, basically managing director

C: basically CEO?

S: basically CEO

C: Not the AV BD… the Av BD was Rabbi Willig?

S: The Av BD back then was Rabbi Gedaliah Dov Schwartz. Starting probably a few years earlier, Rabbi Steinberg had passed away, 1994 maybe – I can check – Rabbi Steinberg was *Av Beth Din* until 1991 or maybe a few years before. Rabbi Gedaliah Dov Schwartz was *Av Beth Din* from 1991 and then this structure formed around him, and he remained the *Av Beth Din* until 2020 when he passed away.

C: So, Rabbis Reiss and Broyde – were they dayanim or more sort of…

S: they were my role, they were the CEO of the organisation and were also dayanim by training and would sit on cases – which is true of myself as well – first Rabbi Broyde and then it transitioned to Rabbi Reiss. They were CEO of the organisation and they hired staff… there was some infrastructure before them. Rabbi Carmy Schwartz was the director before them and I don't know exactly when he left or if he overlapped, I'm not sure. Basically, when they decided to professionalise it and get lawyers involved and form a board of directors, that's when Rabbi Broyde took over because he's a lawyer.

C: Rabbi Reiss is also…

S: He's a lawyer as well

C: Aha – I have a few questions here, but first of all, I'm interested to know why it's called the Beth Din of America, as opposed to the Beth Din of New York, does it see itself as broader than just this state?

S: It sees itself as broader because of its affiliation with the Rabbinical Council of America it was formed as a Beth Din to serve North America. Practically speaking the majority of, certainly *gittin* it serves are for people in this area, the tri-state area, *dinei momenos* also I would say there's a higher percentage of New York cases than elsewhere but we proport to serve the North American Jewish community

C: And would you say this BD gets the most traffic out of any BD?

S: Out of any BD of Centrist Orthodoxy, I can't speak for *chasidishe* Batei Din, I don't know if they get more traffic than we do. Maybe or maybe not – it's not clear as they don't know the numbers. We certainly do more *gittin* than any single Beth Din in the United States.

C: And *dinei momenos*, you're saying more than any centrist Batei Din?

<time marker – P1 7:00>

S: For sure, if you look at the CRC in Chicago or the RCC in California or the Beth Din of Florida in Boca Raton in South Florida they aren't doing a lot of *dinei momenos* as they just don't have the infrastructure, I'm guessing similar to Melbourne, they do *gittin* as they need to do *gittin*, they do *geirus* because they need to do *geirus*. *Dinei momenos* is really a specialised creature that needs expertise, it needs a lawyerly orientation, unless you were more *charedi* in your orientation and say we don't need lawyers at all we are all rabbis, but that's not the way we think of it. There are Batei Din in the New York area, Brooklyn and Monsey, who do *dinei momenos* a lot without a lawyerly orientation, we can talk more about that…

<small pause for an interruption>

C: Okay we were talking about the amount of traffic it gets here as opposed to other places.

S: So I would say in terms of *dinei momenos* for sure we are the busiest, I don't know how to exactly define it, in terms of the central community Batei din, as you get more into the *charedi* world there are other Batei din that operate – Machon Lehora'a in Monsey and a few in Brooklyn, I don't know that they are busier in terms of *dinei momenos* and there's a whole industry of *zablo* and I don't know how the numbers compare to us.

C: And is there some sort of record keeping in terms of what different BD are getting in terms of cases or is it all anecdotal?

<time marker – P1 8:30>

S: It's all anecdotal and there's no place where its published.

C: And do you have any formal relationships with other Batei Din?

S: We have an informal relationship with, necessarily when the *hazmona* process proceeds we have to communicate with other Batei Din as someone might opt for a different Beth Din so there may be some communication along those lines.

C: And do you also professionally develop together?

S: There should be. We've tried to start to have meetings for example for *mesadrei gittin* we have now organised an annual, or maybe not an annual now since covid, an annual *mesadrei gett* conference where we all sit around a table a discuss practices and stuff like that, we want to do that for *dinei momenos,* but it doesn't really exist yet

C: Sure. And you mentioned that you have spun off from the Rabbinical Council of America, does that mean there's no longer a formal link there?

S: There isn't a formal link but there is an informal link. We're close, we rent space from them, their office is right next door to ours, they technically appoint members to our board, when there's board

turnover their supposed to have a role in appointing members to the board so there's a relationship there.

C: Is it unique here in America to have a board, or is it common among other reputable Batei Din?

S: I don't know, meaning I guess to the extent that a BD is a non-profit organisation it has a board, I don't know how other BD in the NY area operate, the more *charedi* Batei Din probably don't have a structure like that.

C: And are those directors of the board, are they very active? Are they involved in minutia?

S: They are not involved at all in cases, they don't know names of cases. The board itself is not very active. It meets once a year on average, maybe twice a year. But the executive board, the top five of the board, I'm in constant contact with them. They meet several times a year with me, and we talk about issues that cone up. Among those are two or three lawyers who I will sometimes bounce arbitration law or procedural questions off them – really because they are smart ppl who can give good advice, They are more involved, when we issue a seruv for example the president signs off, because he wants to review the hazmanah history to see we've given proper warnings before stating they are not in compliance, so that's the kind of thing. That seruv review process is the only formal instance where they will see names of people involved in cases – that and sometimes when I consult with them when there is an arbitration law issue or a procedural issue or a policy issue I might forward an email and they'll see names and stuff like that, but it's not like they have any regular oversight over how we are handling cases, there is really independence on that. In the sense that the Av BD has ultimate authority over the substantive handling of case. Practically speaking in the rabbinic side and lay side they work very very well together – we are all oriented in the same directions. There aren't really issues that come up and we are helping out each other and we welcome their input, and they welcome our input

<time marker – P1 12:00>

C: and who appoints the board? You mentioned the Rabbinical Council of America have input, are there other bodies who have input?

S: no, it's kind of self-perpetuating, there are 18 lay leaders, lay board members and 12 rabbinic board members. The 12 rabbinic board members are nominated by the Rabbinical Council of America and voted on by the board. And the 18 lay board members are appointed by the board itself.

C: okay

S: practically speaking, when a board name comes up, I'll pick up the phone and call Rabbi Willig and make sure he's comfortable. It's a very… part of my job is to be the bridge and make sure no one ever fights and we all kind of vet each other – and the ideas out and everyone's on the same page

C: I'm interested in your role – which to me sounds quite unique. I don't know if other Batei din have a person who's like you. I'm familiar with Batei din that have a registrar, but your role seems to be more than that. Is that right?

S: I think so

C: can you elaborate a little bit on your role

S: I think what makes it unique and very functional is the fact that I have the dual pedigree, background, of being a lawyer and being a rabbi

C: with yadin yadin?

S: yes, I have yadin yadin. When I was first hired I didn't have yadin yadin, but I learned it over the first few years I was here. Because I wear both hats I can kind of see it from both perspectives and am able to work in a way that kind of brings both perspectives into play. And I think it is unique. I can't even think of a job like this in any realm really. That kind of carries this level of rabbinic functionality as well as operational functionality – legal functionality, I don't know if there is another…

C: is it a role that predates you or did it form with your entry to the BD?

S: it was developed with the initial… Rabbi Broyde and Rabbi Reiss. They were in that model as well; lawyers and dayanim.

C: so how does the reporting lines work? Meaning where do you sit in relation to the Av BD?

S: I would say that under the bylaws of the organisation = I can share the bylaws with you – the by-laws say the Av BD has ultimate authority over halachic matters and substantive case matters. He is the chief – there is a culture where he is very inviting of advice from the lay side, from lawyers. And that is part and parcel of the fact that I am reporting to him, and I am a lawyer also. So, there are a lot of people wearing different hats.

C: so, you report to the Av BD?

S: I report to the Av BD, and I report to the president, I guess. I don't really know who is more my boss.

C: So, if there is an issue relating directly to the Av BD does that go to the board or does it go to you to deal with.

S: like what? Some kind of scandal you mean?

C: or the Av BD is not responding to emails… some concern that that someone might have – that the Av BD isn't doing his job properly. Is that something you have to handle and have a conversation with the *Av Beth Din* or would that go straight to the president of the board to talk to the *Av Beth Din* about?

S: it doesn't really happen. I am just thinking in a worst case scenario where the *Av Beth Din* wasn't doing his job or something like that or not responding to emails I could probably have a meeting with the sgan *Av Beth Din* and the board and we'll all try to trouble shoot and figure out what's going on?

C: and who would be charged with having a conversation with the *Av Beth Din*? Or would the three of you figure it out mutually?

S: yes, we'd figure out who is the best person to have the conversation

C: in terms of the other members of the Beth Din. I see you have a secretary, is that right?

S: a secretary, you mean Cindy Frenkel, yes? She's the Director of Operations – that's her official title. She functions really as the scheduling and billing and day to day stuff like that

C: and what sort of other roles are there in the Beth Din?

S: so, there's rabbi Silberman, you saw in there, he is the *mesadar gittin.*

C: he was sitting on the left facing the couple?

S; that's right, he was opposite you – he's the *mesader gittin*, and he's title is the Associate Director, or the *Sgan Menahel*. He is the *mesader gittin* – he runs the *gittin* – and he also he wears a few hats, he also runs the *hazmona* process for *dinei torah* and he is involved also in personal status issues when we are dealing with *mamzerus shailos* and more complicated *yahadut shailos* – he is one of the three people who sit in on those meetings. And what else does he do? He also wears a hat in the sense – this is a little complicated now – we are going to talk about crossing lines of organisations – the geirus that's done, there's a national network of Batei Din for geirus. That national network is overseen by the Rabbinical Council of America and Beth Din of America jointly and he's the administer of that network – the GPS. Because he's the administer of that network he also kind of gets involved in like a said, *yahadut shailos* and *geirus shailos* and its not clear if he's doing that for the Rabbinical Council of America or the Beth Din. He is working wearing two hats.

C: this is an aside, not related to my research, but is this national network – is it to be an approved ger, you need to be approved by the national body?

S: historically, the United States, like everywhere, was the wild west in terms of geirus. Anyone could make a *ger* and then they'd put it on their own rabbinic letterhead and a generation later people would question it and make phone calls to see if its reputable. In the mid-2000s, like 2007 or so, and this was part of conversations with the chief rabbinate – Rabbi Amar at the time…

C: this is the chief rabbinate of israel?

S: yes, of israel, because the chief rabbinate of Israel was like there is no centralised authority here and we were like of course there is no centralised authority, this is America there is no centralised authority for anything here. So, it was decided that it was important to standardise geirus. To make standard rules and standards, rules and procedures for it and to certify local Batei din. So, there are about a dozen regional Batei din that operate under this GPS system – geirus protocols and standards – and its jointly run by the Rabbinical Council of America and the Beth Din of America

C: so that's recognised by Israel?

S: that's recognised by Israel.

C: does that incorporate chareidim?

S: no, it doesn't.

C: its more centrist?

S: its more centrist I would say

C: and charedim have their own relationship with israel?

S: yes, we didn't completely obliterate private geirus in the United States, but we did say that we won't certify separately private BD, if it's under the GPS its automatically approved in israel and if you go to a Beth Din and it's not under the GPS system then…

C: caveat emptor

S: yes, it might be good, or someone might question it in 20 years.

C: so, the other members of the Beth Din, the *sgan menahel* is the same as *sgan Av Beth Din* or is that different?

S: no… on the administrative side there's me, the *menahel* – the director- then there's the *sgan menahel* who's the *mesadar gittin* who's running the *din torah hazmona* process and dealing with the other stuff that comes up. Also helping me staff cases, basically helping me run the din torah side of things and that is basically it in terms… then there is the part time person who comes and does secretarial stuff for a few hours, additional to Cindy, because that's mostly churning out *hazmonas*.

C: is that because the case load is too much for one person?

S: yes, she is busy scheduling… scheduling is a real pain in the neck, so she is dealing with scheduling *gittin* and *dinei torah*. Scheduling *dinei torah* is a whole art. You have parties, you have lawyers, and you have dayanim and you have to get them all on the same page. So, she does a lot of that initial intake of gittin, scheduling of *dinei torah*, scheduling of *gittin* and other assorted intake and handling of inquiries.

C: and the person who comes in part time is purely *hazmonas*?

S; yes purely *hazmonas*, she works with the *sgan menahel* in sending out *hazmonas* for *dinei torah* and with me in sending out *hazmonas* for *gittin*.

C: what's a *hazmona* for *gittin*? Does that mean one party has approached and one hasn't?

S: often that will lead to tough cases, recalcitrance, someone who's not cooperating

C: again, not related to my research, but do you have a process relating to dealing with recalcitrance?

S: yes, the process is that we send out a *hazmona* and a second and third *hazmona*. If there's no meaningful response we will issue a *seruv* against them and we tell them that if they are not prepared to give a get now or are not prepared to give a get all together or to delay it, you are entitled to a hearing – what we call a get timing hearing, in front of a panel of dayanim who will vet that issue.

C: is that unique?

S: I think it's kind of unique. The attitude of many other Batei Din is that if you are still fighting in court and haven't resolved your issues then it's premature to do a get unless both of you want to do a get that way. So, they are not going to bother people when only one side wants to do a gett. Our view that is that every case is complex and unique and if one party is saying the marriage is over, I want my gett, it's appropriate for a Beth Din to be on top of that situation and issue a ruling whether the gett should happen. Because otherwise the gett is used for negotiation, leveraging improperly or potentially used for extortion.

C: so, in that ruling/hearing do they apply halachic principles, or do they apply common sense or meditation techniques?

S: ultimately it's a halachic determination, but it very seldom comes down to whether there is a *chiyuv* to give the get as the number of cases where there's a *chiyuv* to give a get are low and there's no real *nafka minah* whether there's a *chiyuv* to give a get or we just recommend that get be given. We could issues *harchokos drabeninu tam* and call for communal sanctions when someone isn't giving a gett when the marriage is functionally over and we, as a matter of common sense, think that the gett should be given without reaching a halachic conclusion of a *chiyuv* gett. So, there's a lot more commons sense going on at those hearings than halachic analysis I would say

C: so, bring that back into the *momenos* conversation, so you issue *seruvim* both for *momenos* people who decline a *hazmona* as you do in *gittin*. Is it the same *seruv*?

S: pretty much, it looks a little different, there's a slightly different *nusach* but it calls for the same thing, it doesn't explicit state it on it, but it basically says you are deemed a mesarev and therefore the community should put pressure, right

C: and *harchokos d'rabenu tam* are mentioned within the seruv?

S: no, there are two *seruvim* issued for *gittin*, one is a *seruv* where the person just blows us off on the *hazmona* – doesn't show up at all or doesn't respond, or doesn't respond in a meaningful way – meaning they say I don't want to give my gett till later until we've resolved all these issues but I'm not willing to submit to the Beth Din or to any other Beth Din, leave me alone, we'll issue a *seruv* against them, which is for not showing up to Beth Din essentially. That's different to if we have a hearing and we determine that he should give a gett and he doesn't, then we'll threaten and issue *harchokos d'rabenu tam* which are just more explicit. Practically speaking there is not really a difference between the two of them.

C: on the ground do those *harchokos* actually take place, meaning does the community listen?

S: it depends on which community, if you are talking about a more centrist community in the United States, they take it very seriously. If you have a *seruv* issues against you and you live in Teaneck New Jersey, you are a persona non grata, all the shuls will not allow you in the people will look down at you – it's a real thing. If you live in a more insular *charedi* community you can move from this *shtibel* to that *shtibel* and will they take it seriously, who knows. Some might…

C: in that *seruv* do you copy in the rabbanim?

S: we copy in the wife, and she can do with it what she wants. There's an organisation called ORA – the organisation for the resolution of agunot – where they on the basis of the *seruvim* issued they will put pressure, they will reach out to the husband and figure out what tactics should be used, is it social media, is it rallying in front of his house, is it speaking to all the rabbis in the community and they'll kind of work with our *seruvin*. It's a good relationship, we issue the *seruvin* and then we stop, and they take up from there and take it on.

<time marker – P1 26:20>

C: so, dealing with *dinei momenos*, do you issue the same *seruv*? Does it have the same impact when someone doesn't want to turn up to a *din torah*?

S: it's funny in a more Modern Orthodox community people get all incensed for a *seruv* for a gett, meaning that is what gets people excited, they'll rally against the guy its absolutely unacceptable to withhold the get from your wife – which I agree with, its unacceptable. When it comes to a *seruv* for not coming to Beth Din that's not as serious, it doesn't kind of get people as animated as a *seruv* for not giving a gett. When you got a *chasidish* community a *seruv* for not giving a get is bad, but for not going to Beth Din is a big deal.

C: but effectively, it's the same *harchokos* you are asking people to do but they won't necessarily listen as much when it comes to *dinei torah seruvs* is that right?

S: right, I think the rabbis will take it seriously. The rabbi of a large shul in the United States will feel like he is bound by it and have to deal with it and all and will call his rabbeim to see if he has to throw the guy out of shul for not coming to Beth Din for a *dinei momenos* case. It's a bit of an

uncomfortable situation and it might result in the rabbi saying to the guy "do me a favour, and go to the Beth Din as I don't want to throw you out of shul"

<time marker – P1 27:43>

C: and where do you draw the line between giving a *heter arka'os* as opposed to a *seruv*?

S: a *heter arka'os* we'll issue in any situation where someone is not cooperating with the process

<a short break and then interview resumed>

C: so, we were talking about the difference between the *heter arka'os* and *seruv*, when you give one and when you give the other.

S; there are cases when a *seruv* is just not appropriate – there are lots of different cases – for example when the statute of limitations has passed we won't issue a *seruv*, just a *heter arka'os* which is not worth very much

C: can I just clarify… does the statute of limitations apply in halacha?

S: no, where there is a secular statute of limitations, so usually it's not a hard and fast rule, that's the kind of case that we might not issue a seruv as its not 100% clear that the reason the person came to Beth Din is because they want to be in Beth Din but because he has no other forum where he can pursue his claim. Where the claim is not a solid claim in some way, we won't issue a *seruv*. If it's completely off base, we won't even send out a *hazmona*, but there are cases where we will send out a *hazmona*, such as a statute of limitation case but we won't issue a *seruv* as it just doesn't rise to the level. Another case where we won't issue a *seruv* but will issue a *heter arka'os* is if a defendant responds by naming a Beth Din that he is prepared to go to but then he won't participate in a *zablo*, so our view is that – the halacha is that – if there is no meeting of the minds on a Beth Din then you have to do a *zablo*, or say the guy digs his heels in and says I'm willing to go to Machon Lehora'ah but won't do a *zablo*, we'll issue a *heter arka'os*, as the should have to go to that Beth Din, but on the other hand it's based on a *nesivos* that says the *nitvah* gets to choose the Beth Din, at the end of the day *holchin achar hanitbah* means that he gets to choose his Beth Din so we won't issue a *seruv* because we follow that *nesivos lekulah*. So those are the kinds of cases in which we won't issue a *seruv*.

C: I'm also curious, people who go to a secular court without getting a *heter arka'os* – is that at all frowned upon?

S: is it frowned upon? I mean its halachically not allowed, but if the other side doesn't call them out on it and they are both happily at the secular courts is there anything the community does? No. Because people act improperly all the time.

C: but it is considered improper? For example, in Melbourne because there is no dinei momenos it's not even seen as improper – but you are saying that here there is a sense culturally…

S: certainly, in more *charedi* communities yes, but in more modern communities I don't know that it is necessarily, that's an educational problem. Part of our job is to educate the community that that is not where you should be litigating your cases. It's a little different if there's no Beth Din operating then there's no bar even, its *makom she'ain Beit Din*

C: there's always the opportunity of *zablo*, but *zablo* has such a poor name in Melbourne and in Australia that serious people don't consider it

S: right, for that reason

C: do you see yourselves as a Beth Din kavua?

S: no

C: so, there's no automatic jurisdiction?

S; that's right

C: is that based on Moshe Feinstein?

S; Rabbi Moshe Feinstein was really observing the cultural reality that there are many Batei Din operating and no real BD kavua

C: would you be able to give a number to how many momenos cases come to you in a given year?

S: we have, in any particular year, we have about 170 files opened, but not every file results in an actual *din torah* because some of them result in *seruvim*, some result in *heter arka'os*, some settle, some end up in a different Batei Din, some end up in court for whatever reason. So, we probable hear about one third of them a year, probably hear about 50 cases a year where we are in full blown hearings or mediations.

C: I'm also interested in the process. I believe on your website there is a downloadable rules and procedures of the Beth Din, so what is the process from a person approaching a Beth Din … if you can take me through the process from the get-go from when a person approaches the Beth Din saying they have claim they'd like to make against a certain individual, what are the steps the Beth Din of America will take to get to the case?

S: So, we'll start with the person will typically file, and fill in the form online, this will create a case on our end. We will then review the claim letter and if it's a bona fide claim, if it makes sense on its face, we'll send out a *hazmona* to the defendant, the *hazmona* has a deadline of about 2 weeks on it. If there's no response, we'll send out a second letter and then a third letter.

C: each letter has another two weeks?

S: yes, I think it stands at 10 days or something like that. And then we'll issue a *hasroas seruv*, a warning of imminent issuance of a *seruv* which has another 10 days or so of response time after which we could issue a *seruv*. Now during that *hazmona* process there might be any number of responses from the defendant. The defendant might respond that the case has no basis, if they send us a signed release for example for a loan, then we'll turn back to the plaintiff as say what's your claim on this bases – we'll do some vetting on a very preliminary level if it's clear that there is no basis for the case. That's one way a defendant may respond. A defendant might respond saying they want to go to a different Beth Din in which case we will offer that up to the plaintiff, if they both agree they go to that Beth Din if they don't agree then we'll send a letter out on the *zablo* side of things asking them to name a borer… and what else might they respond? If they respond that they are prepared to come to the Beth Din of America, we'll send them an arbitration agreement and have them sign the arbitration agreement. Once they sign the arbitration agreement then we will schedule a hearing. And based on the type of case it is and the availability and scheduling issues we'll empanel a panel of three dayanim typically – cases are typically heard by three dayanim where the amount in controversy is over $20,000, and where it's a smaller claim we'll have one Dayan hear the case – but both are waivable, by mutual agreement they can override it either way, and then we'll schedule a hearing.

C: is that done here in this office?

S: the starting assumption is that it's done here in this office, sometimes for logistical reasons based on where the parties and the dayanim are we'll use our satellite space in YU – we have a courtroom there, you'll see it, and sometimes it's done on zoom by mutual agreement of the parties. Depending on how heavily lawyered it is and how big a case it is, how sophisticated the parties are, there might be a preliminary conference where we talk about information sharing and discovery, but in a more run of the mill case we'll just schedule the first hearing, they'll show up and we'll get right into the substance of it.

C: Are they already in the arbitration agreement writing up what the boundaries of what they are claiming is?

S: the arbitration agreement will have a description of what is the scope of the arbitration but that is very broad

C: so, it's only at the hearing itself that you get a real sense?

S: you get a real sense, sometimes when there are lawyers involved and it's a very sophisticated case, we'll have them submit pre-hearing briefs, stuff like that. There's not really a hard and fast rule for that.

C: those lawyers who would be involved would they have some understanding of the halacha, or would they be non-Jewish lawyers or secular lawyers?

S: any of the above

C: and will they come in here not knowing how this thing runs?

S: sometimes. We tell lawyers that they should feel comfortable coming here if they have any experience at all in litigation or secular arbitration or anything as frankly it's not that much different. I mean the job of a lawyer is, the way we address the question of how can a lawyer represent the parties properly if they don't know Jewish law is that there are really two answers to that, that the job of the lawyers is to present the facts and it's the job of the dayanim to figure out the law – that's one thing. The second thing is there are so many times when the actual case will turn on issues of secular law more so than issues of halacha because *minhag hasocherim* plays such a dominant role in cases and because a lot of times there are contracts…

<end of P1 recording>

C: so, we were discussing the process from go to wo, how the lawyers would get involved and that there is often *minhag socherim* involved so the lawyers are proactive in *minhag socherim* as well.

S: that's right, even if not, the lawyers are charged with describing the facts and the dayanim are going to figure out the halacha and the law

C: do you allow *toanim*?

S: our rule is that we don't allow *toanim* unless both sides agree, and any side that is represented by a toan is also represented by a lawyer

C: so, you mandate that?

S: we mandate those two requirements. That practically means we virtually never have *toanim*. I can't remember the last case we had with a toan.

C: what's the reason for that?

S: it's basically because *toanim* are an unregulated profession, there is nothing that keeps them honest and unfortunately they have built a reputation of themselves instead of streamlining the process and making it more, being useful in the process, they tend to cause problems, they tend to stall cases, they tend to come up with all sorts of procedural things that result in delays and confusion and this is their reputation and unfortunately it's been borne out in those situations where *toanim* have appeared here or where I have seen toanim in practice they are not helpful to a streamlined process.

C: So, I guess, continuing along in the process, you have got the party to front up to the first hearing, what happens next after that?

S: after the first hearing it depends on how the case proceeds. In a simple case, the dayanim will ask each side to present their claims and present their evidence to their story and any witnesses they have or anything they want to do to build their case and interject with question and go back and forth to get to the bottom line. Where it's a more complex case where there are lawyers involved we'll have opening statements, this is all discussed at the outset, we'll have opening statements and then get into the substance of the case or we'll let the plaintiff just present and the case will proceed, A case might go on for one session, it might go on for three sessions. In a large case, in the minority of cases it can go on for 7 or 10 or 12 sessions, that's not the norm I would say.

C: A session is how long?

S: a session is scheduled for about 4-5 hours.

C: is there a fee structure that's given up front or accessible on the website?

S: yes, it's on the website, we charge $390 per hour per side, $390 for a panel of 3 dayanim

C: and I guess that just depends on how long the case is scheduled for. Are there additional costs for the write up of the judgements? Do you *bichlal* write up judgements?

S: we found that it's just easier and more transparent if we bill parties for the hearing time and not bill them for the write up of the decision, that's generally speaking how we do it

C: and is every decision written?

S: every decision is written, yes

C: how long would a judgement be, probably different sizes…

S: yes, it depends on the case – it can go 12 pages, it can go 3 pages it's hard to know. We have some anonymised and published decisions on our website. A few years ago, we worked hard to get some decisions up, but it was a lot of unrewarded legwork as we needed permission from both parties to publish it even after we changed names and most people said no, so we only have a handful of decisions up there. It's probably one of the most frustrating parts of what we do. We have a library of really good psakim that cover a whole gamut of cases and have good legal reasoning and we can't share them with the world

C: that's a shame… it's interesting that in the secular world there's no issue with that. Why is it that people are more concerned here than they would be in the courts?

S: well in the secular world there is an issue with arbitration, arbitration is all confidential, you don't read American arbitration association decisions, if you go on their website you can't read their decisions, and one of the promises of arbitration, one of the benefits of arbitration is that its confidential, it's one of the reasons that people prefer it.

C: so, hearings would never be open to the public? Apart from where its mutually agreed upon by the parties is that right?

S: that's right

C: and those decisions are written in English?

S: that's right

C: I assume they are written at a high level so someone who is not well versed in halacha probably wouldn't understand them?

S: no, we try, kind of a rule of thumb when writing the decisions is that any person reading this or a judge reading the decision at the enforcement stage, at the confirmation stage, should make perfect sense to that judge that this is the right decision, so it includes a detailed description of the facts, and then the halacha and sometimes the law where that is relevant and all the considerations that went into the psak spelled out in English so that an uninitiated reader should be able to read it.

C: so, have the BD decisions been reviewed by the courts and if so at what frequency would you say cases are?

S: I don't know the exact frequency, they are sometimes reviewed as sometimes a party will go to confirm an award and there will be a motion to vacate an award and the courts will actually scrutinise or have the opportunity to scrutinise our decisions. They are routinely confirmed. First of all because the arbitration law is pretty broad, and it allows confirmation you can allege some malfeasance or something like that so generally speaking they are confirmed. I don't know the numbers, I don't know what percentage of cases actually have to go through that process. I think usually, the vast majority of cases, once we issue the decision, people comply with it as they know they won't be able to get it vacated and it's a waste of time.

C: am I right that no case has ever been vacated

S: it's pretty much true, there was a case years ago that was vacated but the appeals court re-instated it.

C: was that Lang v Levy or was that a different case?

S: no, it was Brisman

C: I know Lang v Levy was a case where they confirmed the appeal

S: that was a great case, there was another case where the court didn't like one procedural thing we did and sent it back to us to redo.

C: did that then shift your processes based on that?

S: no, it was a unique thing about that case

C: so, what does a party do if they are not satisfied with the Beth Din's psak? Obviously, there's the secular court route, but is there an internal…

S: there's an internal appeals process under s31 of our rules and procedures you can appeal to the *Av Beth Din*

C: who doesn't normally sit?

S: I would say that's true, he doesn't normally sit. If he sat in that case, it would go to the *sgan Av Beth Din* who would somehow route it a different way. That's true he doesn't sit on the vast vast majority of cases. He sits typically on the gett timing cases as they are unique cases, but on the commercial cases it's rare that he sits and then he would review the case, sometimes he'll delegate that review to the sgan *Av Beth Din* so it's not always Rabbi Willig reviewing it.

C: and how he'll review it is that he'll read the judgement…

S: he'll read the decision and he'll read the submissions of the parties for the appeal, the appeal is done all in writing, it's all in written submissions, there are times when he'll just confirm the award, there are times when he might remand it back to the panel to reconsider some other thing, it's rare that he'll wholesale reject it and change it. Although in the Lang v Levy case is one where he modified it without remanding it.

<time marker – P2 9:00>

C: So, when dayanim are being selected for a case, how are they selected? I understand you have a large pool

S: we have a roster of a dozen regular dayanim and we select them based on evening out the experience and expertise. There's usually almost always one lawyer on the panel

C: a lawyer who's also a yadin yadin

S: sometimes, it depends, sometimes not, sometimes yes. Usually, there's overlap there. And then we'll staff it based on, we have a few dayanim that I would say are a real core of regulars, three or four that every case would have one of them and the other two seats are filled with our second tier dayanim who are not our core core dayanim who are people who have yadin yadin and lawyers who lead the pack in terms of…

C: I am interested in probing that a little bit, someone who has the legal side, is that seen as a corruption or dilution of the choshen mishpat when they are sitting there? Does that get frowned upon by the other dayanim or is there an appropriate balance as to what role secular law plays – how broad minhag socherim is versus how choshen mishpat comes in?

S: there's a consensus among our dayanim. Probably if you brought in an outside Dayan maybe you'd get a little pushback or a little friction, but among our core dayanim, our dozen or fifteen dayanim who are regular people, they sit with each other all the time, they all subscribe to the same world view, whether they are lawyers or not, that *minhag hasocherim* should generally be adhered to and looked at and is very relevant, but there are times when halacha also trumps. Among our regular dayanim there may be a little push back in conversation but never drawn out battles as to what the right answer is. There is usually a pretty quickly once they start deliberating, they all come to a consensus.

C: so, you don't find dissenting judges at times?

S: you don't find dissenting judges, that's right

C: when you are looking at modern cases dealing with the reality of our world, companies and the corporate veil and share transactions – do you recognise the corporate veil, I know there are discussions about whether halacha recognises the corporate veil or not…

S: yeah, that something that all dayanim assume is the case, you are not going to find personal liability when business was done via a corporation. Maybe you'll have an ambiguous case where maybe you should pierce the corporate veil…

C: but that would be the case from the secular perspective as well like fraud or whatever it is

S: you're not going to find a decision here that deviates significantly or maybe even at all from the secular court treatment of the corporate veil

C: how would you say is the difference between a complex commercial case coming here versus coming to a secular arbitration body in terms of the actual bottom line ruling would there be much difference?

S: I think that in a lot of cases there probably wouldn't be much difference other than that this process is a lot more streamlined than court

C: streamlined from other arbitration you are saying?

S: streamlined from court, from other arbitration maybe, I don't know. Arbitration by nature is more streamlined than court. But in a run of the mill case where there are corporations involved and there is big money and big business dealing, I think the majority of those cases you won't get much of a different decision as you'd get in court. I think that's fair to say.

C: and do you have a, I know there is pshara, pshara krova l'din, there's din – do you sit firmly in one of those buckets?

S; we're pshara krova l'din, meaning we'll follow the law – meaning the halacha or the law as the case may be – but where it might lead to an inequitable outcome or in order to just for example, female testimony, this is a hot button issue and it's not 100% clear which way you go, *pshara krova l'din* gives you the tools to take the testimony for what it is

C: and it's not treated any differently to any other testimony – and same thing if its Jewish and non-Jewish testimony it's all dealt with in the same bucket

S: that's right

< a short break was taken>

<time marker P2 - 13:52>

C: we were talking about how the Beth Din sits in the *pshara krova l'din*, and there's a consensus as to where secular law is *koveya* and where *choshen mishpat* is brought in – that's intuitively worked out by the dayanim. I'm interested also in discovery. Do you have an authority to get parties to provide all the various documents?

S: usually its voluntary, the parties cooperate. The arbitration statutes in NY and NJ and all these states they allow for you to go to court to enforce discovery even in a case that's being arbitrated. It's not something that happens often. Usually when they are here both parties cooperate. I haven't seen many situations where they've needed to go to court. We have over the years signed subpoenas and stuff like that that people have then filed in courts for third parties.

C: is it the same thing for injunctions and such like where something needs to be done urgently?

S: when something needs to be done urgently, people will understand that they can go to court. Written in our arbitration agreement is a sentence or two that says… to get an interim injunction… we had a case recently when someone, we were hearing the case and everything was proceeding and then all of a sudden one of the parties ran to court to file for receivership for the company saying that they discovered that they were behind in all their bills and they were secreting money or whatever it is, and the other party immediately started yelling and screaming in front of the Beth Din that that was completely outrageous, how could they run to court? And we took an attitude of well we are not in a position to issue emergency injunctive relief, we can't through the company into receivership overnight as the court can, and the way the arbitration agreement works it's that is says that if a person improperly goes to court to seek injunctive relief or receivership then we could ultimately find that the other side has been damaged, that that side has to pay damages or attorney's fees or whatever so there is something at stake, but the mere act of going to court in the middle of an arbitration didn't strike the dayanim as completely outrageous because they understood that we have our powers and the court have their powers and there may be times when you need that relief.

<time marker – P2 16:25>

C: when it comes to the selection of the dayanim, how do you ensure that there aren't relationships or perceptions of bias?

S: when we staff the case, we reach out to the dayanim, and we share with them the names of the parties and they are supposed to flag any relationships. If it's a distant relationship we might disclose it to the parties and say do you have any objection to the dayanim sitting, if its distant enough people will say no objection. But if someone objects, we'll move onto the next Dayan. Also, at the beginning of each hearing first thing we do when everyone is in the room, we go around the room and everyone introduces themselves and also discloses any potential conflicts of interest even if it's very distant and we make sure to vet all that before we even start.

C: What sort of documentation is sent to the parties. I know there are some things on the website, do they get a package of 'here are the procedures'? What does a litigating party receive from the BD so they know the expectations upon them and what they can expect from the BD etcetera?

S: they have access to the rules and procedures online, we send at the beginning of a hearing when we confirm the time, a PDF that's attached – I haven't looked at it in a while – that says if you're bringing physical copies of stuff you should have five copies; one for the other side, one for the dayanim one for yourself – you know basic logistical stuff like that.

C: For example, the fact that they need to bring originals – are they informed of what sorts of things can be tendered as evidence?

S: no, we don't get into the rules necessarily, we kind of… do it on the fly.

C: so, towards the end of the process, once the hearing has concluded what's the next steps?

S: once the hearing has concluded its up to the dayanim to write up a psak.

C: what's the timeframe?

S: in our rules and procedures we say we'll strive to issue a psak within 3 months and we are pretty good about that, there are times when it goes past that. It's one of the things that is a challenge for

us sometimes as the dayanim have other jobs and other priorities, but we're pretty good at keeping them to that and issuing a decision fairly quickly.

C: and once the decision is issued the Beth Din is now finished?

S: yes, unless it's an interim decision – there are times when we issue interim decisions – but otherwise we are basically finished.

C: will a litigant ever query a decision?

S: through s31… sometimes someone will say we made a typo, we wrote the name wrong, so we'll quickly fix it, but we don't make typos that often we try not to. What else happens? Sometimes a party will come back to us and say that the other party is not complying, and we'll say the place to seek compliance is court, but as a courtesy we might make a phone call

C: so, you won't issue a seruv for non-compliance?

S: we won't issue a seruv for non-compliance as you can go to court

C: fair enough. You mentioned one of the challenges is the timeframe of writing the piskei din. Are there any other challenges that you see in the BD or areas that you see are challenges that are pending or upcoming?

S: the biggest challenge here is resources, we are underfunded. It's a shoestring operation here as you see there are three people working here for a case load that is pretty big and we would do a better job I think – I think we do a very very good job handling the cases we handle – I think we'd do a better job maybe on some periphery issues wed do a better job and wed be able to do more communal education and spreading the word if we had a more robust staff.

C: where does your funding come from presently?

S: presently it comes from fees for services, donations from board members and a few other people and we get a sub venture from the OU

C: what's a sub venture?

S: a contribution

C: and that comes from membership fees?

S: the OU is loaded, they have their own resources from kashrus and fundraising

C: is there an issue with donors?

S; there is very much an issue, any other organisation in our position would fundraise, but we can't do it, we do it within our very small group of board members and friends and families – no even – we have a few people we go to, but any broad fundraising efforts would be viewed as problematic as they create conflicts of interest, so we can't throw a dinner, we can't call people on the phone and ask for contributions. The biggest challenge is that any other organisation in the world whether it's a hospital or a *chessed* organisation, you help someone out and then you call them up and you say look we helped you out and we could help more people of you help us. But here we can't do that with litigants or people who have gotten gittin.

C: do you have ideas of how to solve it? Is it raising fees?

S: raising fees is tough as you quickly hit the supply/demand problem and there is just not enough volume, you would have to raise the fees significantly to hire more people, so the fees is not the answer, I think. The answer is either tap into a few more people and bring them into our inner circle of people who can be supportive of is without creating myriad conflict of interest, we already have board members so we could bring a few more people into our board or the OU could be doing more

C: that way they are one step removed from the Beth Din

S: yes, I mean just structurally speaking, the way Batei din should be funded is through *kashrus*, that's the way it works in other cities, that's the way it works in Europe I think and I'm guessing where you are also. *Kashrus* is a real dependable revenue source, and those funds should be used for communal infrastructure like a Beth Din.

C: that makes sense. The challenges are mainly financial. Do you seen any challenges from a legal perspective or from where society is and where law might be moving.

S: we always worry, I guess, on the periphery about developments on the legal side about religious arbitration. I don't see any that are imminent, meaning the legal scholars among us, there is a member of our board who is really into religious arbitration and he can point to you trends in the supreme court jurisprudence that we should be worried about but it's not like, I don't think we run into the kind of stuff that you see in Australia. I don't see that as imminent as there's a strong pro-religion lobby and grass roots here in the United States, but you never know, if the Democrats win a few more presidential elections, it could be problematic, but I don't see that as an immediate problem:

C: fair enough

S: another challenge is community education. There are a lot more cases we could be hearing that are in the courts just because people are not sensitive to the need to litigate in Beth Din rather than in court.

C: how would that education take place?

S: continuing legal education, seminars…

C: for lawyers specifically?

S: geared to lawyers but open to the public; the more you talk about it, the more you spend your dayanim out on the speaking circuit the greater awareness and you can demonstrate that we are well spoken and have a secular-legal bend to what we do, you don't have to worry when you come to us that we are not going to know what a corporation is and the kind of things we are talking about, due process and about respecting secular institution and law and norms, is the kind of thing that when you talk to *balei batim* about that… it has, over the years we have done some of this and it has resulted in increased case-load.

C: what do you do in terms of professional development for dayanim?

S: probably not enough – there too, if we had more resources, we'd devote a little more energy to that.

<time marker – P2 25:17>

C: are there currently any requirements beyond yadin yadin, do they need to attend any arbitration seminars, I imagine there's education on how to be an arbitrator, do they have to attend that or does someone on the Beth Din attend that on their behalf?

S: No, there's not really a formalised program, anyone can be an arbitrator under the law

C: so, you don't have to get training in terms of how it works?

S: correct

C: so, you can go in and navigate it yourself?

S: that's right. We will pair up more junior dayanim with more senior dayanim, so they learn the ropes. Again, that's another areas that if we had more resources, if I were building it from scratch with triple the budget we have I would say, "oh yeh, we are going to hire a professional development person and trainer days, we would have seminars, we would have regular meetings of dayanim" – the problem is that I'm doing it myself and barely keeping up.

C: I hear that. In terms of reputation, how do you measure how well you are doing or how you are perceived in the community? Do you have a sense of that and how do you measure it?

S: Our sense is that we have an excellent reputation. Anecdotally, when people call and we speak to them the sense you get is that people who are sceptical about Batei Din and the role of *toanim* appreciate that we don't allow *toanim* and they view the Beth Din of America as heads and shoulders above other Batei Din in terms of integrity and in terms of process. There's no other Beth Din that has our level of professionalism in terms of the staffing, in terms of the staffing of the dayanim, in terms of the rules and procedures, I think people understand that the people who are in this space and know about this kind of thing, litigators understand that the Beth Din of America is different to other Batei Din in that respect.

C: is there a way in which that is measurable or that's sort of anecdotal?

S: Its anecdotal, we have talked about it, but we need to implement it – again it's another thing with resources, I just haven't been able to get to it yet – about sending out questionnaires to attorneys and litigants post *din torah*

C: do you regularly seek feedback at all?

S: it's something we should, it's something I have pushed the rabbinic side on probably six months ago that we really need to do that and they said "do it" and I haven't done it yet

C: do people voluntarily give you feedback anyway? Do you get people emailing you after a *din torah* saying it worked well or I didn't like, I felt ignored or whatever it might be?

S: sometimes but often not because these are lawyers that might have repeat business, they want to be careful about… every once in a while, I get a great email from someone saying it was such a professional experience, it was nothing like I expected – so that happens

C: okay great

S: but I think we'd benefit a lot from a more rigorous regular approach to soliciting feedback

C: in the Melbourne Beth Din its something we have implemented – on the website there's just a feedback link that goes directly to the board, so that way people don't feel their case is being compromised or if they're a ger you know

S: do people use it?

C: people use it. We also have to educate so that people know about it and also to know that it's safe to give feedback there as people are afraid the dayanim will get it. Particularly if the gripe is against a Dayan. We've found that just knowing its there makes people feel better about the Beth Din. We also get a lot of compliments, so that when people come to us and say the Beth Din has a bad reputation, we can say that 85% of what we get back are compliments.

S: that's useful, that's something we should think about

C: you are welcome to look at our website, just type in Melbourne Beth Din and you'll see what we have there. Obviously, it's not as developed as here but it's got some worthwhile things. You've mentioned that the Beth Din of America is a cut above the other Batei Din, what other Batei Din would you say are in its league? Or do you have respect for as a peer BD? I'm thinking in America but also around the world, are there other Batei Din that you look at and say they are doing a good job?

S: I think so, I'd say Eretz Chemda has a similarly good reputation. Some of the regional BD here in the United States I think are well regarded and we have good relationships with them, whether they be in South Florida, Rabbi Josh Flug, mostly doing gittin, the RCC in California we get along with and have a good relationship with them.

C: And Chicago is that in the same league?

S: Chicago, very much so as there is some overlap of personnel. Yona Reiss is the *Av Beth Din* and the *Sgan Av Beth Din* here.

C: He's the *sgan*… does that mean he is flying back and forth?

S: he happens to come into New York once a month, mostly to give shiurim in Yeshiva University where he is also a Rosh Yeshiva, He's not doing a lot, I can't remember the last time he was in the office – he's on zoom calls.

C: what about London or Johannesburg, do you have any connection with them or an understanding of how they operate?

S: I don't have a very deep understanding of how they operate, sometimes we will interface with them on a *birrur yahadut* question or something that will come up, so we kind of every once in a while, correspond. But there is not a lot of, if they are handling a case, they are handling a case and if we are we are, and there's not a lot of…

C: if I'm looking at top Batei Din and I look at Beth Din of America, Chicago and Eretz Chemda, would you say that's a good range in terms of getting best practice?

S: I think so, I'd be curious the London Beth Din has been around forever, and they also have a lawyer at the helm, Mr Frier…

C: Its interesting, I find their website very paltry, there's not really much documentation there

S: id be curious know are they hearing cases? do they deal with commercial cases?

C: I've reached out to their registrar and haven't had much luck

S: With Fry, Mr Fry?

C: I haven't reached out in a while, but I may travel there, so I might go to visit it

S: there's a woman in London, who would have insight because she worked there, Joanne Greenway, she is no longer there, she's an agunah activist person and for a few years worked in the London Beth Din as their liaison for agunas. She may have insight, she is a lawyer also I think… she was at the London Beth Din … (typing her name into a search engine) I bet you she would have ideas, or insights.

C: ok great, so I guess one last thing which is more overriding – I'm interested in what documentation you are comfortable to share, in terms of what you send to the litigants, the rules and procedures, any documents or cases, anything you feel would be instructive for me to read and look at to understand better how you operate, to know the processes you use etcetera

S: I think its all on our website really

C: is there anything beyond that you think I should look at, obviously within the realm of what you're comfortable to share?

S: there's not really, and the blog we started a few years ago, *Jewishprudence*, has nice articles… and its one the website. Look through the website see what's there and you'll really get a sense of what we are doing.

C: Great. Any advice for beginning the journey of setting up a commercial Beth Din in Melbourne? Any advice worth sharing?

S: one thing we touched upon that makes us very successful is the overlap of legal and halachic expertise. I think if anyone wanted to replicate what we do here, that's where you start. Its really hard for rabbis who just have the rabbinic training to run a BD that has a stellar reputation and is really good about rules and procedures. Although we have seen some upstart, for example Beis Hava'ad in Lakewood doesn't really have that legal expertise built in, although they consult with lawyers, and they have, I think, built a good reputation for themselves for having procedural regularities – so its not impossible. But the lawyers stuff really helps. It really helps. And you need the halachic authority – so having that cooperative relationship between the lay and the rabbinic is important.

C: thank you very much!

10.1.3 Interview with Rabbi Willig

Interview with Rabbi Mordechai Willig on 25 November 2022 in Riverdale, NY, conducted by Chaim Cowen

C: I'm with Rabbi Mordechai Willig, for the purposes of the recording, in New York, Riverdale. Rabbi Willig first of all thank you for your time.

M: You are very welcome

C: So, my first question to you is, are you able to tell me just a little bit about your role in the Beth Din of America as well as the journey that has taken you there, the training the experience?

M: Okay, I'll start from the very beginning. I was born in NY, my training from the age of 17 was in Yeshiva University. I studied primarily with Rav Soloveitchik zt"l who was a giant, no need for my endorsement. I developed a relationship to this day, a very strong one, with Rabbi Herschel Schechter shlit"a who was considered the primary student of Rav Soloveitchik. I was also close with

Rav Lichtenstein zt"l who was my rebbi in the Kollel and son in law of Rav Soloveitchik so it's all coming from the same source. With Hashem's help, I became a rebbi at YU. As you said, I'm in Riverdale, I'm a Rav in a shul at Riverdale. I was living a relatively peaceful life, nothing to do with the Beth Din. More or less when I graduated from college way back in the late 60's, I learned b'chavrusa with Rav Schechter shlit"a, every day we used to learn. It got to a point when he was too overwhelmed, he'd get interrupted every second so our chavrusa sort of ended. At that point in time, Rabbi Lamm zt"l started a *Kollel Hora'ah Yadin Yadin* under the leadership of Rabbi Nisson Alpert zt"l. I joined that group, I didn't have any intentions to do much, just another group to join as my chavrusa with Rav Shechter had come to an end as he was just too busy. They had reminded me that back 40 years ago, in 1982, I was the guest speaker representing this Yadin Yadin program – that was the only time I spoke in front of my Rebbi Rav Soloveitchik, I was not happy about that, can you imagine speaking in front of him, and giving some kind of shiur. I didn't do much about this. A couple of things happened, one, Rabbi Alpert sadly passed away fairly young and the year afterwards Rabbi Lamm asked me to be an assistant to Rabbi Bleich shlit"a – one of the giants of our time – if you've read anything…

C: Rabbi Dovid Bleich?

M: the man is unbelievable, there's nobody like him in this world. What he writes, there's no one who writes like him in this whole world, nobody. He was chosen to be the head of the school and I was chosen to be his assistant and it has been that way since 1987. It's a long time. I still lived a pretty peaceful life because I wasn't directly involved so much in Beth Din although at that point in time, during that time – in the mid 80's already – I was asked to serve… interesting how it started, we used to call it 'pizza Beth Din' as there was a close person to me in Bergen county, all these din torah's about *hasogas gvul*, pizza shops opening in that burgeoning area so together with two other rabbanim, Rabbi Yosef Blau shlit"a and Rabbi Aharon Levine zt"l we had an informal Beth Din, that's where I wet my feet and it spread out from pizza to other kind of cases. It was all ad-hoc, it was not a formal Beth Din, we had no secretaries, no infrastructure which in certain cases that came back to haunt us, but that's not for now…

C: was it zablo? Or was it ad hoc in the sense that…

M: it was ad-hoc. I'll give an example that's relevant to this discussion. There was once a case, I remember like it was yesterday. It was one of those *hasogas gvul* cases. Rabbi Aharon Levine who was not only a big *tzadik* and *talmud chacham* but also a PhD. He had written many books and in one of the books he had written his position that fundamentally there's almost no *hasogas gvul* in America. So, there was a case like that and one of the parties calls me up and says he's happy to come to us, but he won't sit with Rabbi Aharon Levin because he knows… I refused because you cannot tell me who you can and cannot sit with. As a result, it went to a Monsey Beth Din who paskened *hasogas gvul* and it was overturned in court – restraint of trade, the whole nine yards, it was very, very bad.

C: it was overturned in court based on…

M: restraint of trade. In American law you cannot do this thing. One of the reasons Rabbi Levine wrote that because America is a different kind of country, whatever. Just giving you the details, you'll see the next step. Then, it became a very serious problem which began around that time which is the agunah problem, as I'm sure it's a problem in every part of the world. I was getting pulled into some of the cases which involved trying to take care of an agunah. Before that I had some commercial cases where I was pulled into a zablo as a matter of fact, as someone in my shul

was involved. I didn't want to do it and I had no choice. The other dayanim were very honest, I wouldn't have sat otherwise but their world view was not my worldview. I always say, there were two clean shaven members of Young Israel's, but the fellow went to a chasidishe Rav in Boro Park for a Din Torah – I'm not blaming him, we didn't have much of an infrastructure then ourselves. I would say it was in the 90's – can't remember what year it was exactly – early to mid-90's. I thought that I was right based upon the fact that if parties agree to something you have to judge what's in their mind when they agree – some kind of a title insurance case. My position was that since this fellow who was suing the guy I knew did his business with goyim and non-frum Jews in a certain way and he happened to come across a frum jew and the contract was the exactly the same contract and it was written up by lawyers and not by Rabbis that they expected to be judged based upon American law, not *beToras dina d'malchusa dina* which may not apply between two frum Jews but as *minhag hamedinah*. That was my position, they rejected my position, but even though I was outvoted 2-1 they understood that I was probably right, so they gave the guy less than half of what he probably wanted. I saw from there that even honest people, these were honest people with no ex-parte, this was really legitimate, that there is room to have a Beth Din which has a somewhat different world view.

Then I had a couple of very messy divorce cases, one of them was successfully resolved because the two dayanim were fine. And the other was very unsuccessful because one of the dayanim did not do the right thing – I won't go into the details now – but it led to a terrible terrible conclusion with the violating of the Ten Commandments and many other terrible things.

C: this was a property settlement?

M: this was an end of marriage case. I remember the month, June of 1997. Two cases, one we resolved very successfully…

C: and this was related to momenos?

M: related to momenos, related to kids, related to everything. When I had two honest people when we sat it was fine. When in one of them the other fellow was very reputable but didn't conduct themselves appropriately in my opinion, I don't want to go into the personal details of that individual and it was a terrible, terrible ending. Just at that time, you see how *Hakadosh Baruch Hu* runs the world, the Beth Din of America, which had existed since the 50's under the leadership first of Rabbi Steinberg zt"l the Broder Rav (?) and then Rabbi Gedaliah Dov Schwartz succeeded him in the very early 90's was being re-organised to take a more active role, particularly in monetary matters. Until then it was primarily – almost exclusively – for gittin. They did a good job of course, but they weren't sending out many hazmonas maybe the community wasn't really ready for it at that time, I'm not really blaming anybody, but it wasn't dealing in those kinds of situations. It was being re-organised. There was a Mr Rudolf z'l who was primarily behind it and there was a group called the Orthodox Caucus and they took a young talmid of mine from many years ago, Rabbi Michael Broyde, who was a professor at Emory. He took a leave of absence and did a very good job of organising the Beth Din, he hired two wonderful administrative individuals, two wives of doctors well known to us who did a wonderful job in running the office for many many years until they both recently retired – really exemplary. He wrote up rules and procedures, did a very wonderful job and then he went back to his professorship which he still has in Emory and in his place came another talmid of mine who is still there in a somewhat different way, it was Rabbi Yona Reiss. Rabbi Yona Reiss is an attorney with a degree from Yale and he was a student of mine almost 40 years ago in the yeshiva. He is outstanding, outstanding, outstanding. He ran the Beth Din for 10 years and then he was picked to become the dean in our Yeshiva, so he left that role. And then he left that role to take

over the situation in Chicago where he was the assistant to Rabbi Schwartz, and Rabbi Schwartz passed away and he is now the *Av Beth Din* in Chicago. Meanwhile Rav Schwartz was also our *Av Beth Din*, and I was asked back then, in 1997, to become his assistant. Rabbi Broyde asked me, and I felt, given my credentials – I had studied for Yadin Yadin, and I had some Beth Din experience and Rabbi Schwartz was a senior Rabbi of great reputation – it was a *makom she'ain anashim*, so I agreed. We had this exemplary Beth Din with rules and procedures, I even have a copy to give you – you can probably get it online.

C: yes – you are saying that was originally written by Rabbi Broyde?

M: yes, Rabbi Broyde wrote it in 1997. It's basically the same even to this day, he wrote very good rules and procedures. Things are tweaked here and there. Oh, I should say one more thing, this is part of my resume which led me into this, I was involved in the prenuptial agreement which of course is part of this kind of Beth Din and this was also done with the encouragement of the same little group called the Orthodox Caucus, it lived for about 10 years but in those 10 years it helped me in the prenup and it helped reorganise the Beth Din, then it sort of disappeared. I guess *Hakadosh Baruch Hu* put it into the world to accomplish two good things.

<Time marker 12.08>

M: Because of that I became a little bit more involved in the world of dayanim. I got to know some of the main players in the holy land. The prenup that it was helpful with, was signed by three of the most great dayanim at the time – Rabbi Zalman Nechemia Goldberg zt"l who got me involved originally and Rav Zimbalist who just passed away was another Gadol and Rav Ovadia Yosef also signed – so I got to know a little bit some of these people and I became involved in the world of dayanus. There was a Rabbi Gartner from Yerushalayim who helped me a lot, so I became a little bit involved so when this thing happened in 1997 – that was signed in 1992 by these Rabbanim and a few others in America – five years later I was a natural candidate to step into that role.

C: was that the point that it began doing *dinei momenos*?

M: that's the point that it began doing *many* dinei momenos

C: so, it had previously done some

M: some, but it was very little. Our first celebrated case was a messy end of marriage, and the lady had a very tough lawyer, someone I know personally pretty well, related to someone from my shul. It went back and forth and back and forth, they finally agreed to a system, I think it was a good system and they signed a document, an arbitration.

<pause for short break at time marker 13:35>

RMG: Anyways, so that celebrated case, the tough lawyer agreed to the conditions that we said the *gett* will be given first. My two cases I had that previous year before the Beth Din was reorganised, in one the judges realised that you'd better give the *gett* upfront and that was successful. In the other one, the third judge would not accede to that, and we were unable to out-vote him as the Rabbi of the guy was beholden to the third Rabbi and that's why it was terrible – because the *gett* wasn't given upfront and it was a disaster, disaster. Anyway so the *gett* was given upfront but our *chiddush* was, which other Batei Din do not do until this day I don't think, is because there was child custody involved we put the psychologist on the Beth Din itself, so there was myself and Rabbi Broyde who has a law degree and Dr Pelcovitz who is a premier psychologist then and certainly now, was the

third Dayan. We paskened the *shailos*, people wrote up in the papers, people complained about it, doesn't matter.

C: was it relevant whether he had *yadin yadin* or not? Or to be on a Beth Din you don't need to…

M: he didn't have yoreh yoreh either, he has neither. We felt that what other Beth Dins are doing, three Rabbis hear it, and they talk to the psychologist who doesn't see him and doesn't see her, doesn't see anybody – it's a game of telephone, it's a kli sheini, he doesn't see it. Much better he should see the actual case, see the husband, see the wife, see the case. There's nothing wrong with having him on the Beth Din, you may consider it revolutionary and I'm sure others would criticise us; it doesn't matter that they criticise us, we do what's right. Conceptually, same idea – we have these tough monetary cases, on the Beth Din we'll put someone who is a forensic accountant or a businessman. You don't have to have smicha to sit on our Beth Din.

C: I assume *shomer torah u'mitzvos*?

M: always *shomer torah u'mitzvos*, always

<short break for a phone call>

M: there's always a Rav on it, always at least one. Often there's an attorney as that's relevant. And when it comes to other specialties we'll have forensic accountants, and sometimes psychologists of there are children involved. So even though in American law any court can overturn any custody decision because the State considers itself… it hasn't happened to us to my knowledge in all these years.

C: have they reviewed your cases?

M: I don't know if they have ever been appealed. I don't know. I know monetary cases that have been appealed and tenure cases have been appealed, but this I don't remember, because our psychologist is more credentialed than theirs. To my knowledge it hasn't happened. It can happen but hasn't to my knowledge. Anyway, so as a result of that, the Beth Din started to expand its activity gradually, gradually, gradually. When Rabbi Reiss left to Chicago, Rabbi Shlomo Weissmann, another talmid of mine who is a Columbia Law graduate took over. He had *smicha*, since then he got a *yadin yadin smicha* and is very, very capable and another talmid of mine, Michoel Zilberman took over as the assistant Menahel he is very, very good. He is a fantastic *mesader gittin*. He knows how to do a *chalitza*, we just had one a few days ago here in shul. He is involved in *geirus*, he is really a crackerjack as is Rabbi Weissmann in his role. We always have a female administrative assistant in the Beth Din because when a woman comes in, she shouldn't be the only woman there. We try to be friendly as far as that is concerned. And the Beth Din has expanded dramatically. We have more dayanim, we try whenever possible to settle cases. We have one of our other crackerjack talmid of mine, his name is Rabbi Rapp, he is a genius in trying to settle cases, he is also a genius in deciding cases, he is very good – also a Columbia Law grad. He is sitting and teaching in our Yeshiva. We have a young young fellow named Itamar Rosensweig, a superstar, he is editor of something called Jewishprudence, which puts out things, and he is spectacular, also giving a shiur by us. So, we have good personnel. And many other dayanim who sit on cases, Rabbi Auman who was in the first cohort of *yadin yadin* when Rabbi Lamm began it way back in the late 70's – he is the Rav of Young Israel of Flatbush, he comes and sits on cases. And many other individuals, Rabbanim and attorneys, again, accountants and businesspeople, and the Menahel chooses who is on the Beth Din and it works. It's expanded in terms of how we are hearing monetary cases dramatically. We do send out hazmonas and we do send out seruvim when appropriate. You know we are criticised often. I will tell you one

criticism. There was a case where the parties agreed to have their case, any disputes heard by our Beth Din, but applying Ohio law – I think it was Ohio. A case came to the Beth Din and one of the judges felt 'I don't do that, cant do it' whereas we felt that you can do it and you should do it, maybe you should do it even if they didn't write it in because if that's the meeting of the minds as I spoke about earlier. But certainly, if they did write it in, we don't think that's a violation of arka'os or things of this nature. I wrote something about it too a bit later. One of the judges was so outraged by our position that he refused to sign, and he actually left the Beth Din, which was sad.

<time marker 19:48>

C: sign, meaning he refused to judge?

M: he wouldn't sign, which means only two out of three signed. Which is not supposed to happen, but he felt, if I think they're wrong and I'm right then I have to sign anyway. But if I think they are *oiver* and *issur gamur* of *arka'os* I can't sign, he was a man of principle. I admire him for it – I think his principle is wrong, but a man of principle. We often will take into account secular law, not as *dina d'malchusa* but as meeting of the minds.

C: and how do you know what the secular law is?

M: that's what happened, when I had this case that I told you about earlier so the two charedi dayanim were never had a secular education said, wait a minute, if you are right, we should go to law school, why should we go to yeshiva? So, I said no, you have to go to yeshiva, and you have to know what the law is anyway because the law is relevant. They didn't accept my argument, that's one of the reasons I got involved in this Beth Din – they did accept my argument. Simple as all that.

C: does that mean you had to have a lawyer sitting as a Dayan?

M: No if there's no lawyer you can get someone to ask a lawyer but its better to have a lawyer, same as a psychologist better to have one on the panel then to ask them later on because he isn't so attuned to what is going on in the courtroom. That's been our policy ever since then and *Baruch Hashem* the Beth Din has a good reputation, we have made mistakes, for sure. Anyone who thinks he's perfect is crazy. Of course, we have made mistakes. But thank G-d to best of my knowledge we've never been accused of dishonesty or ex parte communication or things of this nature, corruption, no on has every accused us of it – that it didn't happen I'm pretty sure, but we weren't even accused to my knowledge. I once had a case, an interesting case – with the prenup that I was involved in formulating, way way back then it $100 a day for support. There was a case in Maryland where a fellow was asked to come to give his wife a gett. On day one he said fine I'll give it to you today. It took I think three months until the Beth Din session came about, you know how it is, we encourage lawyers where its appropriate, he had a lawyer and she had a lawyer and three dayanim and two parties – that's a lot of people, seven people. Until they got together it took three months. Fine. He said in Beth Din I'll give a gett right away, she said no, let's have the other stuff, the financials and the stuff, taken care of in civil court. What's he going to do? She wouldn't take the gett. Three years later it finally ends up in the secular court and he hasn't given her a gett.

C: Three years?

M: Three years. It ends up, he gives her the gett. He gets a love note in the mail "I need three years of back- support, $100,000". He says "Ribonoi Shel Olam, I wanted to give the gett the first day". So, it came to Beth Din. The Beth Din was divided, one person said, 'are you kidding, he wanted to give the gett the first day?' two of them said 'how do we know that, it didn't come to Beth Din until three months later, so he has to give her $10,000 for the three months'. They both appealed. We have an

appeals system in our rules and procedures, and I was the appellate judge and I said after a lot of consultation…

C: as a yachid?

M: appeal is always a yachid – either the *Av Beth Din* or a designee. So, Rabbi Schwartz designated me as I was a so called prenup expert, so after consulting and deliberating I ruled that she gets zero, she gets zero. She was incensed. She threw away $10,000. She went to the court in Maryland to overturn me. They couldn't say corruption, so they said irrational. An irrational decision can also be overturned. The judge in Maryland looks at the cases and says no this is not irrational, it's a correct decision.

C: so, you had written a judgement?

M: yes, it makes perfect sense what this judge wrote. That's one case where we survived. Another interesting case, it was actually a tenure case – it involved a Rebbi in a school. The Rebbi was a real right-winger, completely right-wing, but he had found favour in the eyes of the left-wing principal, or head of school as he was called, and he gave him tenure. That principal left and the next principal didn't have the personal connection, so they fired him. He came to Beth Din "I have tenure, you can't fire me." So, a case in Beth Din, myself and two other Rabbis, two Rabbis who happened at the time to live in Teaneck and we heard the case – he said how can you fire me, I have tenure. The school's lawyer was a labour lawyer, we knew he wasn't telling the truth, he said 'tenure is only for that year' or something ridiculous. We know what tenure means; you can't fire him unless there is cause. So, we asked, maybe there is cause – we had another case where someone lost his tenure because of inappropriate activities. What's the cause? They said he didn't say Hallel on Yom Ha'atzmaut – he's a right winger. The guy yells back 'how do you know?' it was a riot of a case. So, we did, this almost never happened, usually they want severance, we actually reinstated him, over the objections of the principal and everyone else, because he has tenure. The rule in New York State is that if you don't bring it into the court within 12 months its stale and you can't force the other side to comply.

C: statute of limitations.

M: whatever it is. They got some two-bit lawyer to put it into the court. But they came with their fancy lawyer who sweet talked the judge into saying that our decision is wrong for whatever reason and therefore its null and void. The entire Beth Din system in New York State was shaking. Anyone can go into a court, sweet talk the judge – the judge was I believe a Jewish anti-Semite, I was led to believe, so we were really in trouble. But it's an appeal. We had two of my talmidim who were working for a nice fancy law firm, once has since moved on and is now a professor of law to take on the case pro bono. They did a job. The appellate division ruled in our favour against that lower judge five to nothing, gave him a real *putch*.

C: do you know the name of the case?

M: I do know the name of the case… we can talk about the name of the case later. We are grateful to those two young lawyers; both have gone on to do great things in their professional lives and in their communal lives both are involved in our Beth Din in two different ways. Outstanding, outstanding. It was a great boon to the Beth Din system. Five smart judges said that no, it was a very appropriate decision, it was done correctly, with all the rules and regulations. So, there are ups and downs to the system. One prenup, there was one judge who said it was not good. First, they said it was unconstitutional – but that was ruled again in our favour – a judge in Connecticut. But there was

a judge in New Jersey who said the prenup is no good because he's forced to sign it. Why is he forced to sign it? Because his wife won't marry him unless he signs it? What? I'll buy a house for a million dollars – I won't pay you because you're forcing me to pay a million dollars. Absurd, there are absurd judges in our world too. Anyway, our Beth Din is operating *Baruch HaShem* nicely, I told you about our personnel and of course there are rough edges, there are rough edges but your interested primarily in the financial aspects. There are rough edges most significantly in end of marriage issues and of course in personal status; yuchsin and Cohanim but you are dealing with that already you don't need our advice for that. In financial matters, often in end of marriage its not only about a *gett*, its about financial matters and gets very testy sometimes and our Beth Din has been criticised by various people for different things, but we try to do what's right, we try to be honest and correct. Are we perfect? Absolutely not.

C: how important is the knowledge of secular law and how relevant is that to being able to give a proper judgement as a Dayan?

M: it depends on the case of course. *Shor shenagach es hapara* you don't need to know secular law, there's no meeting of the minds, nothing. It is relevant to some extent, did the *shor* have the right to be there according to *minhag hamakom*, but it is important I believe in most of these financial cases that the Beth Din should include within it among the three panellists someone who has a law degree, I think it's critical – as otherwise you have to go, three Rabbis have to ask a lawyer, but that lawyer didn't hear the case, you are reporting, we call that a game of telephone, it's all *kli sheini* something is lost in transmission so I think it's always better to have a lawyer run the case. In almost every case, I can't say every single one, but nearly every case there's a [lawyer]… remember many of our lawyers have *smicha*, some have *yadin yadin*, I gave you a couple of names already who have *yadin yadin*, they are outstanding. Though some have regular *smicha* and some have no *smicha*, if they are the most qualified in this particular case, we'll put them on the panel.

C: there's the procedural law, *seder hadin*, and there's the substantive law. Is halacha prescriptive or clear in terms of what *seder hadin* should be?

M: no, of course not. There should be certain guidelines, but in specifics how to do this, how to do that, there is a *seder hadin* – there's are beautiful sefarim '*seder hadin*' you should get them

C: Rabbi Schochetman

M: Rabbi Shochetman has a beautiful, beautiful, terrific. His is specifically for Eretz Yisroel, we don't have the same clout, they are automatically part if the judicial system of the state of Israel. We are not. To enforce our judgement, you have to go to a totally separate system called secular law. We try to make sure that our *shtar brurin* is enforceable and our judgments are enforceable because if its not enforceable its not worth that much. It was Rabbi Henkin who said that if a person refuses to sign a *shtar brurin* for arbitration they are a *mesarev l'din* – 'I'll come but without a document' – its worthless because then he can just listen and not do what he's supposed to do, so you have to make sure that that's true. We don't let *toanim* in, that's another big thing. *Toanim* make everybody crazy, they are only interested in screaming and yelling and there is no way to disbar them. We have lawyers and lawyers can be difficult but if they are unethical, they can be disbarred. *Toanim*, the more unethical he is the higher price he commands.

C: going back to the procedural aspect, you mentioned earlier before we started recording about zablo being inherently problematic…

M: zablo is not inherently problematic, when it's done properly, according to the Rosh and Shulchan Aruch, it's the best thing. I emphasise *when done properly*. But *when done properly* means no ex parte communication. The Aruch Hashulchan already says the custom was to do ex parte communication by a zablo, but he says a funny thing – look Reuven talks to his borer and Shimon talks to his borer so it's a fair game and the third judge will decide. That's crazy, you're making him into a *Dayan Yechidi*.

C: essentially two *toanim* and a *Dayan Yechidi*?

M: two *toanim* are worse than the two *borerim* and often they switch roles, today I'm a *toan*, tomorrow I'm a *borer*. And then there's the question of who gets paid, how do they get paid. It seems to me – I wrote this – that if the Dayan who was the *borer* for Party A is speaking to his party ex parte and being paid by the hour, my opinion is that's *shochad* and it *passuls* him from all his *din torahs* for good. Unless you know for a fact, he doesn't take any extra money on the side – which is impossible to know. And that's how all zablos work, not all, almost all zablos work that way.

C: Is it that people are misunderstanding the halacha or is it that the halacha itself has a low bar in certain cases?

M: halacha itself is that no judge is allowed to talk to his client – or whatever you want to call him – ex parte. That's a din in Shulchan Aruch. The Aruch Hashulachan says that because zablo became compromised, sadly, since Shimon knows that Reuven is talking to his Dayan against the law, so he can also talk against the law, so it became kind of a *minhag*. But it's a poor, terrible minhag and any party can say I refuse to engage in that kind of *din torah*, I insist on a zablo the way its supposed to mean, with no ex parte. But it can't be enforced.

C: but even without the ex parte issue you have the issue that there is a pre-existing relationship between a particular borer and one side.

M: that's not supposed to be that way either, it's not always that way.

<time marker 34: 16>

C: on what basis are they being *borer*, isn't it that this is their community Rabbi or someone they feel connected to?

M: there's nothing wrong with being *borer* a Dayan, but ideally there should be no previous relationship either, you're 100% correct. It's a toxic mix of *borerim* and *toanim*. A toxic mix. To give an example when I was a kid we used to watch tag team wrestling – it was all fixed the ref, it was all fixed, they would play against each other and would laugh all the way to the bank – the longer it would go on they get paid by the hour – it would command huge prices sometimes. The more corrupt the higher price it commands, and it makes a mockery of the whole system. They scream and they yell, it's a joke, its terrible. As a rule, no *toanim* are allowed. In certain unique cases where both parties want it and its an *agunah* case or something like that we may relent, but as a rule… we have been asked that it's true that if we summon someone to a *din torah* and they say they want to go to a different Beth Din they have a right to do that. So sometimes we, although it's too rare, we take one judge from our Beth Din and one judge from that Beth Din and pick a third judge from a different Beth Din and everyone is honest with no ex parte et cetera that can be a legitimate zablo, with our rules, with our rules, no ex parte and everything is recorded… that can work,. But if its not with our rules, sadly I don't know if any other Beth Din that insists of ex parte in zablo. I don't know of any, maybe I'm missing something.

C: I'm also interested in where you have representation… will you allow one side to have a lawyer and the other side not…

M: the other side has a right to bring a lawyer

C: and if they choose not to, that's their prerogative?

M: that's their issue

C: are there any areas you feel are inherently in conflict between halacha and secular law?

M: well, we can't deal with criminal

C: there are a few examples, for example *eidus isha*

M: listen to me, all of our *eidus* is not really eidus – ask any Dayan they'll tell you. Its not the same kind of formal eidus they had of *veamdu shnei anashim lifnei Hashem* with the *amdu*… we accept testimony, its more on the realm of *umdena* and when women want to come, they can testify in that capacity

C: and perhaps this is controversial in our sort of context, but would there be an issue with a woman acting as a Dayan based on that?

M: a woman is excluded from dayanus. It's a *din mefurash* in the Gemara

C: but even though you are having people without *smicha*…

M: it's got nothing to do that, if you are a male above 13 you can be a Dayan if you're a female you can't

C: and is what we have today in a Beth Din considered being a Dayan?

M: absolutely

C: but their *eidus* is not considered *eidus*?

M: technically speaking if it's a male over 13 you can consider it as *eidus*, but I'm just telling you that *eidus* has refracted to become *umdena* and on that basis a woman can come in and it won't be official *eidus*, it will be *umdena*.

C: [with regards to] areas that are more complex, like the corporate veil…

M: we deal with those things

C: will you wholesale buy the secular understanding of a company?

M: we don't buy anything wholesale. We buy the torah wholesale and the torah looks at these things as it looks at them. There is a vast literature about the corporate veil when it does apply and when it doesn't apply and the dayanim will pasken based on their understanding.

C: you also mentioned the right to appeal which also classically was not there

M: that's not allowed as a rule, but since it's in our rules and procedures… there was a whole fight in Israel where the British government insisted on appeals and Rav Kook went along with it and they yelled at him. Rav Eliyashiv sat on the court of appeals for 20 years – he was considered the greatest Dayan of his time. So, if you want to say its no good you have to go against Rav Eliyashiv.

C: is having appeals a concession or is it an improvement?

M: we think it's an improvement as it gives people greater sense of confidence. They have a second chance, but only within the Beth Din system. That's another thing, people sometimes go to secular court, see they are losing and then they come to Beth Din, they became *baal teshuvas*. We throw them out based on the *Ramah* – the *Ramah* says you can't get two bites of the apple. In our Beth Din you get a second bite – but only by the *Av Beth Din* or his designee, but that's only within the system. But if you are losing in court and then you want to come to be a *baal teshuva*, that's not a *baal teshuva* if you ask me.

C: I'm also interested in, as an *Av Beth Din*, how that roles manifests in terms of the other dayanim. If there are concerns with other dayanim, does it come to you?

M: most of this is done by the menahel, he is very capable. He calls me very often; we talk on the phone very frequently. I try to stay above the fray, but I have had to make many difficult decisions. I mean, I had this title just recently, but Rabbi Schwartz had a stroke, so I was functioning in that capacity before, and even when he was healthy, he was living in Chicago and I'm in New York and most of our… are in New York so I was to some extent functioning when he was healthy. He would come in from time to time, we would have these conferences with members of the Beth Din. Rabbi Schwartz was a gentleman and a scholar and he always deferred to people 50 years younger than him – he was a giant in that regard.

C: when it comes to writing reasons for piskei din…

M: you have to

C: you have to from a secular perspective or from *ve'asisa hayashar vehatov*?

M: we think it's the right thing to do. It's true before we had an organised Beth Din, and it was ad hoc we would never give reasons. Any reason is just going to… we had no infrastructure. You give a reason you get destroyed. But once we had infrastructure there are always reasons given, sometimes more, sometimes less. We had a case, many cases are just hum-drum, we've heard these many times before just different nuances. We had a *bar metzra* case, which is almost unheard of, and even more we ruled in favour of the *bar metzra*. It was in the Brooklyn community – Reuven sold a house to Shimon, and we said no it has to go to Levi – it was a… we wrote a reasoned explanation why it is. All our decisions are written in English by the way, our concessions are in English, we write in English. Its very nice to talk in Yiddish or Hebrew but that doesn't usually work.

C: are there any bright lines you can draw between where we will look at secular law versus where we won't. You mentioned in *hasogas gvul* we look at secular law but, in the *bar metzra* we won't look at secular law. Is there a line to be drawn somewhere?

M: the answer is as follows, in the case of *bar metzra* it involved all frum Jews – interesting it was a Sephardic case and they wanted us to pasken based on Sephardic halacha, choice of law which we did – and there's no reason to introduce secular law into the mix, on what basis?

C: so, does that go to the meeting of the minds? Are you saying that the meeting of the minds would have been that this should be…

M: the meeting of the minds, the best proof is that they came to Beth Din, they didn't go to secular law, at secular law the *bar metzra* would have lost for sure. They were *ehrliche yidden* and they wanted to come to Beth Din – all of them, all three. So, we ruled in that capacity. But where the meeting of the minds based on lawyers and contracts, here there were no contracts and lawyers it was just verbal, they were frum jews who wanted to be bound by the halacha. But whenever you are

dealing with contracts and lawyers you are almost always the assumption is that if there is a dispute, why are you calling in a lawyer, call in a Rabbi – the Rabbi should write it up for you – the default implication is that they wanted to be judged by the rules of the… the same rules of all the other cases of non-observant or non frum or non-Jewish would apply here too unless there is an implication to the contrary. So, every case is different – you never say always or never.

C: how would you describe the Beth Din of America in comparison to other Batei Din in America or the world?

M: there are two Batei Din in Lakewood that we're very high on – ones called Beis HaVaad and one's called Beis She'arim - we are very high on those Batei Din. They are to the best of their abilities doing things *kdas u'kedin*. I think they allow *toanim* which of course is harmful, but within that system, to the best of my… *keser shem tov oleh al gabaihem*, they have a *shem tov*.

C: how is that measured, anecdotally?

M: *shem tov* is measured by reputation based upon anecdotes, connections to those Batei Din, which we have some connections. People come all the time, if you want to go to a "charedi beis din" go to those two Batei Din in Lakewood, that's where we send people

C: and in Eretz Yisroel are there any Batei din, outside of the government that you would…

M: sadly, the government can no longer deal with monetary cases, they are prohibited by law, crazy, crazy, the Israeli government is crazy. That's the secular supreme court, they said you know, a judge cannot hear a monetary case – boom – except for end of marriage if they both decide to go there. If one runs to the secular then the second one does, which is also terrible. All these changes were made by recent Israeli government decisions which is terrible, so you can't even tell people to go there. One of my sons said that if you want to get an honest din torah in Eretz Yisroel you have to go to the Americans.

C: the American rabbanim?

M: you have Rav Asher Weiss who is American, you have Rabbi Fleishman shlit"a in Yerushalayim who is American even Rav Mendel Shafran is also really an American b'makor. In Eretz Chemda you have a few Americans, Rabbi Mann, Rabbi Jacobowitz, go to the Americans.

C: what is it about the Americans?

M: I don't know what it is, my son made this observation

C: is it a cultural thing?

M: maybe. I don't know what it is. But I'm sure there are other good Batei din, but you know. Reputation is that there are some, i don't want to say the negative.

C: I know the Beth Din of America has a board of governance, is that something that you think is crucial for transparency?

M: I don't think so, we have no problem having a board the board raises some money and sometimes gives us certain advice. The person we deal with typically is the president of the Beth Din who gives us advice on legal matters based on his legal expertise and his involvement. We have had a series of outstanding individuals, purely on a voluntary basis doing this. On the board are all kinds of people and our board has significant female presence because they want to show that we are not

male chauvinists and one or two people who are a little more liberal then the dayanim would probably like but we try to get along with everybody.

C: the Beth Din of America seems to have a unique structure in that there is a menahel and an *Av Beth Din*. What's the difference between the two roles, what's the line drawn between them?

M: I don't think its unique – if you go to even the classical Beth Din it's that way. The menahel is day to day, hes the intake and appoints the judges and all the regular work. The decisions that have to be made that will come to the *Av Beth Din* to make those decisions.

C: Other questions are things like, I'm looking, *ribbis* is something that has come up where there is a possible conflict with secular law?

M: of course. I'll tell you a story that proceeded the Beth Din of America reorganisation back in the 90's we had a case like that. Two frum Jews, it was *mamash ribbis*, real *ribbis* and there was a fight between them about a few dollars. Reuven is asking Shimon for money, and we thought that Reuven owed Shimon money as he had collected so much *ribbis*. So, we came to some sort of compromise… these things happen. Business is business mentality, they don't case about *ribbis*, its crazy.

C: would you apply the halacha of the *dalet shomrim*, I'm interested, in a regular situation the go-to place would be *choshen mishpat* to look at how to deal with a situation?

<time marker 48:50>

M: we are always bound by chosen mishpat, always, every single case. However, choshen mishpat itself has cases where the *minhag hamedinah* is what's supposed to be followed and its not considered a violation of "*arka'os*" if you apply secular law. I mentioned before Jewishprudence, I wrote something about that in the last edition, you can probably get that online about where secular law should be applied – read it and you'll see.

C: this is a question in *chakira*, is the issue of *arka'os* a chillul hashem because of the *gavra* or the *cheftza* – is it because you are going to non-Jewish people and they are giving it a *din*, or is that you are going to non-Jewish law and that is giving you a *din*

M: an excellent question, so that judge who quit, he assumed that both of them are considered… but my careful reading of the original source which was the *Rashba* came to an opposite conclusion, to go to a non-Jewish court is not allowed, the only exception is if you cant go to a Jewish court which is either that one party refuses to come or in a rare case about *Shmita* which is *Tur Siman 67* but otherwise you have the case go to a Beth Din, obviously if it's a criminal case the Beth Din can't take care of it and you have to go to secular law, you have to go to the police we aren't discussing those sort of cases. But my read, which I printed in that article, is that no, the *Rashba* never said that, to the contrary he seemed to say that with the exception of certain types of inheritance cases where inheritance is not considered straight money, not monetary, the principle of *kol tnai shebabamomom kayam*- that any condition works does not apply to the inheritance of blood relatives, only to husband and wife where it does apply. There the *Rashba* says you should follow secular law or an agreement to follow it is terrible, but except for one case of inheritance parents to children et cetera, on the contrary in the case of inheritance of husband to wife the same *Rashba* the same responsum says no, you should follow in effect the secular law because that's the custom in that part of the world – I read it the opposite way of how others were reading it – you can look at Jewishprudence and see what I said.

C: I'll look that up. Maybe one more question and then we'll wrap it up. You mentioned that the Beth Din of America will give a seruv, do you think, there's an option of giving a seruv and a heter arka'os

M: we do both

C: do you think a seruv has a place today or can it be counter productive

M: it has a place, and it can be counterproductive – both are true

C: so where do you draw the line?

M: you have to use your judgement; when do you give a seruv, when you give a heter arka'os when do you give both when do you give neither. These are all judgements which are initially made by our menahel and when it gets a little bit testy, he talks to me and Rabbi Reiss who's now a very capable *Av Beth Din* and our associate Menahel – we talk about it and the four of us try to reach the proper balance. These are hard calls; they are not black and white. The most important thing is the result, what is going to be good – procedure yes, but result is also important.

<break for a call>

C: to conclude, do you have any advice to a new commercial Beth Din if ones being setup in Melbourne?

M: don't start a new commercial Beth Din, what you should do is you have already running a Beth Din do you not?

C: yes, we have one with geirus and gittin

M: slow, is that Beth Din you have in Melbourne, is that pan-Melbourne, all chugim recognise your legitimacy?

C: yes, the sort of charedi community recognises it but they have their own

M: they have their own Beth Din?

C: its not a formal one

M: do they have a Beth Din for momenos too?

C: not an official one

M: your best bet is not to start something new, *oseh chadashos ba'al milchomos,* start a whole war with a new Beth Din. What should happen is as happened in our Beth Din, gradually, gradually either you or someone else should become a more active menahel and put out the word that if there are monetary claims they belong in Beth Din and not in secular court. Sadly even Orthodox Jews go to secular court, I'm not telling you something you don't know, get someone to speak about it – from the "Modern" community and the "Charedi" – best if they speak together, Rabbis who are recognised from both parts of the community, should speak together how its really terrible that everyone is going to secular court and we are establishing now that the existing Batei Din, the formal Beth Din and the informal Beth Din are going to get together to establish a Beth Din for momenos. Extend the purview to monetary cases, I'm sure you've had some monetary cases in the past.

C: very few but historically there have been some

M: but the point is that if you don't come there is a seruv, if there's no threat of a seruv its not going to work. People will just say I'm not going to come. The best kind of seruv is one that the joint communities agree to sign on. I don't know what the relationship between the Rabbis, the "Chief Rabbis" of the respective communities is, if it's a good relationship it can work, if its not a good relationship it can't work – I don't know, I've never been in Melbourne.

C: there's a Rabbinical council which spans all the different Rabbanim across most of the community, but again, not the charedi community but at the same time the charedi community is involved in certain initiatives together with the rest of the community like the *eruv* and there are a few things they bind together about. The challenge in Melbourne is that we had a case unfortunately where a seruv was given by the Sydney Beth Din

M: Sydney Beth Din, thousands of miles away?

C: No, Sydney Beth Din is 800km form Melbourne, a one-hour flight.

M: one hour flight could be 500 miles

C: they gave a seruv which was appealed to the secular court which was overturned

M: you can't overturn a seruv

C: they didn't overturn the seruv, they accused the dayanim of contempt of court by obstructing this person's access to secular court via giving a seruv

M: really?

C: it was a very unique case, it was then appealed by the dayanim and on appeal it was affirmed, although there was one dissenting judge who gave, I think, a more American style judgement saying hey this is religious area we shouldn't be touching it

M: isn't there a separation between church and state?

C: so, it's not as separate, Professor Chaim Saiman

M: he's one of our dayanim

C: he's been in touch with me and a number of people in Australia – he's looking at differences between America and Australia in terms of how their arbitration works. And it seems that in America they are far more hands-off. In Australia that separation is not as solid.

M: on what basis did the judge say… so according to this judge, the majority of judges on appeal, there can be no seruvin.

C: correct, so a seruv in Melbourne would be a big issue as the community is currently…

M: no, so, it won't work, it's against the law you can't have a seruv

C: which means it will have to be a heter arka'os

M: okay, so a heter arka'os, no choice

C: thank you very much, I'll stop the recording now

M: but there has to be cooperation between the rabbanim otherwise its not going to go

10.1.4 Interview with Mrs Goldberg

Interview with Mrs R Goldberg (de-identified) administrative assistant at Chicago Rabbinical Council Beth Din, 29 November 2022 with Chaim Cowen

C: I'm here with [redacted] at the Chicago Beth Din, so just two things – one is that I wont mention your name in any of the references from this and also to send you the transcript once its written up, which will hopefully be at some point in early 2023. If you can tell me briefly about your role and what you do in the Beth Din?

R: I'm assistant to the Beth Din and to Rav Yona Reiss, the *Av Beth Din*, what I do is everything administratively beyond what the Menahel does. So the Menahel is in charge of really making…

C: that's Rabbi Mostofsky?

R: no, that's Rabbi Abramson who you have not had the opportunity to meet because he is in Israel

C: he is the Menahel over everything?

R: over the entire Beth Din.

C: so, the Beth Din, not the organisation, Rabbi Mostofsky is over the entire organisation

R: right, then we have Rabbi Abramson. We also have a kashrus division which is separate too. Rabbi Abramson is the Menahel, so I am the assistant to anything that needs to be done administratively. So that means that if there is a *din torah*, I have to schedule it, I have to make sure they have all the information, whether it is protocol, even if it is *hazmanot*, summons, I write the summons, I send the *shtar*, I do all those type of things, I write the *pturim* for the *gittin*, if necessary I go in with the woman with *gittin*, as it is a mainly male-oriented process. I initiate everything, all emails go through me, I initiate everything, I work with the candidates, whether its *geirus*, *gittin*, *dinei torah*, *te'udot* or wills – anything, they goes through me. First of all I do all the scheduling, I print up any documents that are summaries of, I format, they do the *piskei din*, but I get it at the end and I format it and make sure everyone signs it and I email it out. I am the face to people who come in and for people who are emailing me, or anyone who calls. If there is something that I can do that the Menahel doesn't have to do, I tell them the whole process of what they can expect at a *gett*, what they need to do, how they need to register, how they need to do to apply – all that I do. So I am talking to all these people and making sure that everything is followed through until the very end.

C: How were all these processes built, what was the process behind the processes, meaning were they all here when you came?

R: Yes

C: historically they have been adopted as to what one does?

R: they evolved a great deal, but its pretty standard today that a Beth Din *mechubad*, a respected Beth Din would do all these things – the *gittin*, the *geirus*, all these different things. There are very straightforward protocols, through the RCA originally I believe, we are of course an independent Beth Din but we are related. There are very specific protocols and we go according to that and we ourselves make our own specific protocols regarding confidentiality and everything of the sort.

C: do you share processes with the BDA? Would it be a similar…

R: only when we have questions, but we never share any information. There is absolutely no sharing, we are separate and independent Batei Din. But we more or less go according to the same protocols,

and of course there is the personality of each one separately, we are independent. If necessary, we will ask them. They started a database system, so they asked us if we want it. Now we aren't connected in any way but we are similar – they implemented it and we are working in implementing it. We talk to them, they are all interrelated because we all work together, whether it is in this office of the greater RCA membership, so everyone, a lot a lot of people are involved over different states because the RCA does mostly the East Coast, we do mostly the Mid-West and the RCC does the [West Coast]

C: the RCC is the…

R: California

C: So, they are another sister organisation in a sense?

R: that's right. And we have other Batei Din, like the Dallas Beth Din that has recently been… we work with them, they are our adjunct, we work with them in order so that their Beth Din works. So if there is *geirus*, Rabbi Reiss will go to Dallas to do the *geirus* for joint candidates because they can't do it on their own. So we are involved, we'll do joint meetings with them, their Beth Din is growing and they're able to do *geirus* actually pretty recently in the past few years only, in Dallas, so they don't have to come here in order to do it, Rabbi Reiss will go there and Rabbi Abrahamson at times and sometimes Rabbi Kraft maybe. And they'll go there and they'll do it if they have a line-up of Texas candidates they'll go to Texas instead of having them come here so its less money for the candidates, they split their tickets instead of everyone coming to us. So, they do things like that.

C: Its an amazing partnership. I notice on the website that there is quite a lot of materials, the procedures etc, do you send the procedures document to the litigant or are they supposed to check the website, how do you make sure they know what to expect?

R: I have templates that I have been doing over time. So if anyone asks me for a *gett*, first of all I will tell them that I will answer any questions they want over the phone. But I will send them an email with the link to the application, specifically the link to the application, and I will also send them information about it and should you have any questions please do not hesitate to call me. So, I am not going to go through every single line with them, but I will send it to them and answer any questions they have

C: And the same thing with *dinei torah*?

R: *dinei torah* same thing, with anything that we do

C: so, what proportion of the traffic that comes through is *dinei torah* as opposed to *gett* or *geirus*.

R: *geirus* I would say is number one from the perspective of numbers. *Gittin* is a close number two at this point, but that can change any year, any time, there is no set anything and then *dinei torah* are less but they take up more time – from a different perspective I have a lot of work, much more work.

C: Apart from the scheduling, during the actual hearings itself are there things you need to be doing or does that run more by itself?

R: no, of course there is stuff to do. We make sure that all the dayanim just before the hearing have all the information necessary. They don't get it far, way ahead of time, its something they need to be unbiased about so they only get it before the hearing itself to review and I make sure all that stuff, all those documents, each one has copies because most of the time, even though I do send it to them also in their invite a lot of times, the outlook invite, I send them the information attached, but

they do need it in front of them, it's something that's more practical for them. So, they get copies of everything. I try to make sure that there is some payment that they have to pay. A big part of that – it's not expensive here in the CRC where other places are much more expensive – its also a matter of responsibility. The candidates or the litigants or whoever it is, they have to have something in it, so they have to be willing to put themselves out for it. And there will be times when they'll tell them that's its just not worth it, Rabbi Abrahamson can get on the phone and talk to the other side and say 'okay its done, we came to a compromise without that' – sometimes a call from the Menahel is enough, where sometimes just to get them in here for a hearing and then they say 'okay we're compromising'. And there are lawyers a lot of times involved so everyone has to be in the loop of course, and everything is total transparency so everyone gets everything no matter what it is – and that is something we tell them too, whatever you are sending is going to the other side and you have to agree to do that. At times they'll send stuff that they didn't cc the other side and we'll say we can't accept this unless you cc the other side. So it doesn't go directly ever to the dayanim, it goes to me and Rabbi Abrahamson that's it

C: and then you will communicate to the dayanim what they need to know?

R: that's right

C: that's obviously one way of achieving fairness. Are there other measures you take to ensure fairness that its worth for us to know in Melbourne?

<time marker 9:12>

R: for sure. There's always a chance that one of the dayanim says he has a conflict of interest because it's a community issue, these are mainly community issues, sometimes we get from out of town people coming in purposely in for *dinei torah* and things like that because they decide that's where they prefer to be, the two parties. And sometimes there's zablo where there is one of the dayanim or two of the dayanim, all these different situations. What was the…

C: my questions was what other things do you do to ensure fairness?

R: sometimes there is a conflict of interest so the dayanim need to know who the parties are, and they have a right to recuse themselves. They also, if they feel like they don't have a conflict but maybe the side do and they are still willing to be a dayan on that case, we'll have to ask the litigants if they all agree to having that dayan on that panel – so there is that too. What else is there? The regular stuff too, communicating with them, summaries if there are mediations, there are summaries that go out after each time, then there is the psak that needs to be formatted and sent out and also the shtar, the shtarot need to be signed beforehand, we do not do anything without a signed shtar as there is no teeth in it without. And payments too, we make sure they do the payments, I do that more or less.

C: is the fee structure clear, is it on the website?

R: yes

C: I'm also interested in your own personal training, what is your story that has landed you here?

R: I actually came from Baltimore, I was with Star K, I worked there for a number of years, I think 7 years or something. I worked for a Rabbi Heber and when I was coming to Chicago I really was not, I am not the type of person who has the networking who knows things, I don't know anyone – and its good for where I sit because it goes in one ear and out the other – but he strongly recommended to them that they take me but they thought for kashrus and they didn't have a position at the time, and

they were like we have to find you a position, we have to find you a position, we have to find you a position. And at one point the person who helped the executive office and Rabbi Abramson and the Beth Din, did both of those at the time, again these positions evolved, she all-of-a-sudden had to leave – her husband got a job in Florida and now she works for us in Texas, she moved afterwards to Texas herself, she remained with us for different things, mainly triaging our phones which has become, these kind of things grow and grow in this atmosphere as you know – in this environment they just grow and grow. So, at that point they called me and said we have a position, did you take anything yet? did you take anything yet? 'No' so I came in and I got it on the spot.

C: Can you tell me, what are the kind of skills that are most important for someone in your role, as secretary of the Beth Din… is secretary of the Beth Din the correct title?

R: I call myself the assistant to the Beth Din

C: so what are most important skills to make sure that role succeeds?

R: the ability to communicate very clearly to different types of people. The ability to listen to people and know when to talk and when not to talk, to be empathetic. I also am Israeli and I know Hebrew so I am able to write in Hebrew and read in Hebrew, I do the *pturim*, I am always willing to do that to. I can talk to Israelis, I can talk to Israel, I can talk to the Chief Rabbis office, I can call them – whatever it is, I can communicate in that way too. And a lot of office skills, that I have been working for very many years.

C: As you mentioned, it's a very male environment here. Do you feel that you play a very important role as someone who can help women have access to the Beth Din?

<time marker 13:56>

R: definitely and my history of my own, is that I have – it's so funny because my journey to get to here was a very interesting journey and I have been through a lot myself. I have been through multiple marriages myself and divorces. My daughter in law is a *giyoret* from the Dominican Republic. I have gone through all these different things that really relates so, so I am empathetic to a great extent. I have seen different situations in marriage and divorce personally and its just helps so much to be able to be empathetic to these people and the journeys they are going through – and that's a very big part of it – so, for sure. And they are just the same, the Rabbis, like '<Name removed>, we want them to feel comfortable, you should always be available to come in with us wherever it is if you see something', they trust me to see, to gauge… and if something didn't happen exactly… we'll discuss it. They are very nice, it happens to be that we have a beautiful group of people

C: yes, I have noticed that.

R: they are very, very bright, I don't even measure anywhere close to what they are

C: its very hard to replicate what you have got here

R: they are such great people too, on top of their knowledge. So its really a pleasure. The communication between everyone is very straightforward and everyone really wants to do their best. So if there's a *gett* to be done and they feel its urgent – we did one on Sunday, you know we all came in on Sunday to do this *gett* because it needed to be done then, that's when we had the time. And everyone is on board, and everyone will answer, even people out of the office, like our *eidim*, or our stand-in dayanim, things like that. So, everyone is on board and that's just a special, special thing I believe we have here. The people are so committed and genuine, they are good people, they know

how to communicate, they are sensitive. And Rabbi Abrahamson, you haven't met, he knows how to set people straight yet he knows how to be very sensitive, and that is what a Menahel needs to be. Sometimes he needs to tell them straight out, he is the big buffer you know.

C: maybe this will be our last question, as I have to catch that flight, what would you say are the challenges for the Beth Din? What are the areas you feel you could be improving on or are part of the gig, they are part of the challenges?

R: a lot of it is part of the challenges, but I feel more people, staff, to work through stuff.

C: are you saying everyone here is at capacity?

R: the Beth Din does not make money, its not a big money maker here at all, but the work is so detailed and in order to do it even better and not to have things fall through the cracks, I think we just need to have more people and that's an ongoing thing. I have to file stuff, I don't get to file, that's the last thing I do – I have got piles – who does that when you have a gett to schedule and 20 people are emailing you every five minutes? And things need to you know, fall into place, because if things aren't in order, you don't have the structure, things fall through the cracks.

C: one hundred percent.

10.1.5 Interview with Rabbi Kraft

Interview with Rabbi Aaron Kraft, at Chicago Rabbinical Council Beth Din, 29 November 2022 with Chaim Cowen

C: For the sake of the recording, I am repeating that I am with Rabbi Kraft, what is your first name?

A: Aaron

C: Rabbi Aaron Kraft from the Chicago Beth Din. So first of all Rabbi Kraft thank you for making the time, I'm sure you have many other things to do. My question: can you give me a sense of your involvement with the Beth Din, what do you do , how do you fit into this organisation?

A: Sure, I have been here for about two years now, so I am fairly new to the CRC and my role is a part-time role as a *dayan kavua* – not all Batei Din have a full staff of people for whom the significant part of their day is set aside for the Beth Din, but the CRC does have that. The truth is that I'm here almost for the whole day every day because I learn here in the mornings and I function at a more official capacity in the afternoons.

C: Your chavrusa is Rabbi Langer, he mentioned that?

A: that's correct, exactly. Rabbi Langer and I learn. We started at the same time, so we have been learning together and occasionally we overlap on different cases, or on different issues, but officially if something is scheduled in the morning then he is the official dayan who is on call and if something is in the afternoon I am the official one on call, so every once in a while we overlap but usually our interactions are mostly informal, in terms of we learn together. I have been involved in the gamut of what the Beth Din handles. I know that Rabbi Reiss often will have some additional, he'll often serve as a single dayan, he'll often be involved in the back-end considerations for gittin and things like that, but in terms of what the Beth Din as a panel is sitting on – in terms of *geirus*, *gittin* and *dinei torah* – I have been involved in all of them. The CRC as a whole, at least since I've been here, has been weighted more heavily towards the *geirus*, we do a lot of *geirus* work, so I have had a lot of involvement in the different aspects of the *geirus* process.

C: is that mainly testing *geirim*?

A: yeah, interviewing *geirim*..

C: testing and then doing the final…?

A: correct, the interviewing. I generally do not go to the *mikveh* – we have other dayanim in the neighbourhood who are dayanim specifically *l'giyur*, who when they do *mikveh* they get some of the other communal rabbis. I have gone on occasion, but if it's not necessary then I don't always go. So, I've done a lot of *geirus*, I sit on *dinei torah*, I've done a handful of *gittin*, so that's kind of where I am at right now.

C: first of all dayan *kavua*, to clarify, what does that mean? Does that mean you are a full-time, because you are part-time correct.. can you just explain?

A: my understanding in terms of how many Batei Din work, I'm pretty sure this is how the Beth Din of America works for example, is that they have a whole roster of a number of dayanim who live in the New York area and any time there is a case that comes up they will go through whatever process they go through to pick three dayanim to sit on that case – so they may have twelve people on staff and they might have a whole slew of cases and each person may only sit on one case over the course of time. Here there is a smaller roster – there's only the four dayanim that are sitting…

C: that's Rabbi Raccah, Rabbi Langer, yourself, and the *Av Beth Din*, Rabbi Reiss

A: so, the idea of the dayan *kavua* is that we always have a sitting panel that's available. Rabbi Reiss is full, full-time, Rabbi Raccah, generally does his best to make sure that he can be here whenever it is necessary (and he is usually involved in all beth din happenings). Rabbi Langer and I are each part-time so we just divide it morning and afternoon and that just depends on scheduling – on getting people together.

C: I am also interested in your background and training – what have you done to set you up to be a dayan?

A: I never really anticipated, or had a secret desire to be a dayan on a Beth Din before. So my background is after high school I learning in Eretz Yisroel for a year and then I went to YU, I was in YU as an undergraduate and then for smicha and then I did a post-smicha, I was part of the Kollel Elyon there, so I was there for almost 12 years. And that was mostly learning, other than what I was in *smicha* learning, the halacha requirements of *Orach Chayim* and *Yoreh De'ah*, so most of the time I was there I was learning Gemara. After I finished the Kollel Elyon, I was setup with a position here in Chicago – YU has a satellite Kollel, a community Kollel that they have here in Chicago – so they were expanding and they needed another person to give shiur to the Kollel guys. So I was brought on, my official title was the Rosh Chaburah, so I was learning YU's Kollel here in Chicago for eight years while I was giving shiurim to the guys there. At that time that's when Rabbi Reiss also moved to Chicago from NY and so…

C: so, you are originally from New York?

A: I am originally from Baltimore, but I was in New York many, many years before coming here. So, when I was in YU, Rabbi Reiss was the Menahel of the Yeshiva and we actually moved here at the same time, so we had a good relationship with each other. While I was in the Kollel I didn't have much to do formally with the Beth Din but on occasion they would need somebody, if one of the other dayanim, the CRC has always had dayanim *kavua*, but every once in a while if someone had a *negiyus* or whatever it might be, so I had over time, Rabbi Abramson had called me in to fill in here

or there. So I had started dabbling in Beth Din work so when the structure changed, when one of the dayanim moved, when Rabbi Schwartz z"l got ill, they needed to get to the next *shlav* of this Beth Din so I was brought on in that capacity. So my formal training is that I did a lot of learning.

[redacted]

C: have you had any training in professional conduct, arbitration or secular law – is that something you have felt is needed?

<time marker 10:05>

A: I definitely have an interest in at some point maybe doing something more formal, right now I figure that if I'm working on something formal, I might as well work on the *yadin yadin* formally before working on the extras. But I haven't had any formal training in arbitration or law. When I first went to smicha, I was deciding between law school and smicha if that counts for anything, but other than that, not much.

C: You have a natural penchant for that area?

A: I've always read a lot. My father happens to be a lawyer, so I grew up hearing about different legal and court proceedings – this was all very anecdotal, but I have always had an interest in contracts, business operations and things like that. I'm not by any stretch of the imagination an expert, or anyone who's understanding in it is flawless but I guess it's something I have an interests in, so it's not foreign to me. A lot of it is having Rabbi Reiss as a resource who is an expert in all of those areas – so that's been very helpful, I have learned a lot. There are times when I have called – I have friends who are lawyers – and I've called and said 'hey I'm working on this type of case and I want to make sure I'm understanding legal ramifications properly here – this is how I'm understanding it, is that true, is there anything I should be looking at differently.' Obviously not sharing any details of the case itself, but in terms of the area of law, I have done that before and found that to be helpful.

C: what about in terms of complex business operations. In terms of understanding what exactly the 'constructive trusts' or who knows what?

A: it happens to be that over the years I have also taken a side interest in different business investments and things like that. Again, I don't have a very strong formal background, or training in it, but in terms of basic familiarity so that if something comes here that is involving complex business structures, I have enough of a basic understanding so that I think I have the tools to be able to say 'okay let me make sure I get everything going on here' going online, researching or whatever. So that happens to be, I've always had an interest in that.

C: I'm also interested in… can you take me through the organisational chart here. I don't know if you have it written up anywhere, how does the admin side of the Beth Din work alongside the rabbinic side of the Beth Din?

A: it's a good question. I am not sure.

C: I saw there's Mrs Bachrach and <name removed>, what are their roles?

A: I think officially, Mrs <name removed> is the administrator for the Beth Din, or I guess the office administrator for the Beth Din and Rabbi Reiss' assistant. Mrs Bachrach is officially Rabbi Mostofsky's assistant. But practically both of them function specifically for the Beth Din as opposed to the kashrus – the kashrus has its own office administration.

C: Are they [kashrus] separately located?

A: they are downstairs. So Mrs Bachrach and Mrs <name removed> both end up being the assistants for the dayanim and for the operations of the Beth Din. Mrs <name removed> is really doing the scheduling for the Beth Din and the follow up etc and MRs Bachrach is available if we need anything. She also does work with, when we put out publications she does a lot of the editing work and some of the marketing and publicity for what is going on at the Beth Din or if we are doing communal events. Each have their own formal role, but together they are the ones that keep the Beth Din running.

C: do you ever allow people to come and view a proceeding?

A: it depends on what and it depends on who, but there have been people who have come in for different things. Usually if its anyone it's sometimes a rabbinic student or someone who is from the local Kollel *avreichim*, someone who is interested in that.

C: How long typically will a proceeding go for, or is that how long is a piece of string?

A: it depends on how many people are involved, the complexity of the case, etc. A lot of the smaller ones that we have are usually can be blocked out in either half a day or a day. Some of the more complicated ones might take place over several days. Usually even those, it's not necessarily consecutive days. I once sat on a case that was very large and there were a number of entities involved, a number of witnesses and large figures in terms of the monetary dispute and that took place over the course of several months. We would have a couple of days and there would be a break and so on. It really all depends on the nature of the case and the schedules of the parties and beth din.

C: what would you say are challenges for the Beth Din? Is there anything you feel you don't do well, or you feel it's an existential threat to the Beth Din or something like that?

A: It's hard to say…I haven't been here that long. I don't know, it seems like I'm coming on to a very well-oiled machine.

C: that's what it seems like, it's amazing, because we are beginning the journey but it's nice to see that there is a point to where it can come to. You mentioned the community trust – is there a way you can measure how the community feels about this Beth Din? Where do you get your sense of that?

A: I personally get the sense, I'm an outsider to Chicago. Chicago is a real insular, it's a big community, but it's a long-time very much people from Chicago stay in Chicago and marry people from Chicago and if they marry someone not from Chicago, you move to Chicago – that's the culture of the town. So the notion that there is an entity that is…

C: we're in Chicago right, this side of the road? (laughter)

<time marker 21:19>

A: Very good, we are in Chicago. So the idea that this is our Beth Din, the truth is the fact that the CRC is so well renowned as a kashrus organisation also, those two things go hand in hand, so that the reputation of the CRC is really stellar. And coupled with the Chicago mentality that they are so proud of this community and that this has been a hallmark of the community for so long, you get the impression that the Beth Din… in New York people have their Yeshivas and their shuls, I never got the sense that there is rallying around 'this is our Beth Din' I never had that type of impression when

I lived in New York. But here you get that impression, that's the way the community feels. Rav Schwartz a'h when he was here, he was the *Av Beth Din* of the entire community, that was recognised. Granted you always have the challenge of different… the polarisation of how much to the left and how much to the right and how all those hashkafic and political divides get in the way, but it happens to be that the CRC, we get a very wide variety of the Jewish spectrum coming to us, either its *gittin* or *geirus* or *dinei torah*. You see, when someone walks in here who doesn't have a yarmulka on and someone who walks in here who's coming from the Telz yeshiva, both of those things could happen. That shows, I think, a sort of perspective that the CRC is viewed as a real communal Beth Din. Not to say that there aren't other… there is a *choshen mishpat* Kollel and they have an arbitration body I believe, I don't know if its formal or informal, there are other dayanim in the community who are associated with the Aguda, they don't have a standing Beth Din but they also will do different things. It's not that everybody will come to us, but, *b'gadol*, you do see that a lot, so in my mind that's one way that I assess.

C: that's fair enough

C: does it have a status of a Beth Din kavua?

A: it does not, at least in our opinion. The status of a Beth Din kavua is a touchy one, in terms of the strict halacha of it, we are not convinced that there exists a Beth Din kavua *b'zman hazeh* anywhere. Even here, despite everything I just said, I don't think it reaches the threshold that this is the final arbitration body for all dinei torah and all aspects of Beth Din for the entire spectrum of the Chicago Jewish community, I don't think it gets to that point.

C: do you and Rabbi Langer, go by the title dayan? As in, if you were giving out a business card, is that part of your title or do you need to have a *yadin yadin*?

A: when the CRC puts out something, the way they do the titling they have the name of the Rabbi and the position underneath. So we'd be publicised as "Rabbi Aaron Kraft, Dayan Kavua, CRC" and Rabbi Yona Reiss, *Av Beth Din*, CRC, and Rabbi Yisroel Langer, Dayan Kavua – so they do that.

C: fair enough. You're not from here, is Rabbi Reiss from here?

A: he's from NY

C: which dayanim are local?

A: Rabbi Langer is not originally from here but he has been living here for over 20 years as opposed to Rabbi Reiss and I who just moved here less than 10 years ago. Rabbi Langer has been living here for at least 20-25 years, and his family, he is married to a Chicago family, so he has roots here so to speak. Rabbi Raccah is not originally from Chicago, but he's been probably been living in Chicago for, I don't know 30-40 years, he's been living in Chicago a very long time. Of the four of us, none of us are actually from here.

<time marker 27:13>

C: on a different topic that I'm interested, how important… there's the halachic knowledge and the people skills, what would you say is the weighted importance of each of those when it comes to running a Beth Din?

A: I'm assuming what you mean is in terms of practicality. It is obviously important that you need both of them 100% in their entirety but in terms of the average interaction, or how much is a dayan actually relying on one versus the other…

C: and how much is the Beth Din's reputation built on one versus the other, meaning are people looking at the Beth Din and going 'wow that's a really knowledgeable Beth Din' or 'wow that's a really friendly Beth Din'?

A: I think they are really looking at both, because one of the things, when you talk about communal buy-in and trust, one things that important is that people feel that the Beth Din is as pleasant as possible – most of the things going on here are not necessarily present.

C: I understand that

A: but in terms of the sensitivity and the professionalism, I think that's huge – the professionalism, and the way that the dayanim are interacting and the office staff is interacting, I think its huge. It happens to be that if you say percentage of what we are doing, more of what we are doing is interpersonal, how are we interacting and what are we portraying and how are we helping people. You cant cut corners on the foundation of the Torah and the knowledge as everything has to be done *al pi halacha* but a lot of the times what is happening here is more common sense and interpersonal than complex halacha. A lot of times the halacha is somewhat straightforward, its bringing it to fruition that's more difficult. So I think that the CRC does a veery good job of that, Rabbi Reiss is very professional and what's that things should run very professionally. He always quotes from Rabbi Schwartz, how Rabbi Schwartz said 80% of being a dayan is having the interpersonal skills and that type of sensitivity to people and the other 20% is applying the halacha.

C: there you go, that answers the question. I certainly see it in the non-dinei momenos side that the community gets up-in-arms about a dayan who isn't making eye-contact

A: everything is another impediment, if you already have a situation where you are trying to get people to utilise the Beth Din, if the interpersonal skills aren't there, if the sensitivity is not there, if there is a feeling that the dayanim aren't understanding the interpersonal side of things – those are all things that will discourage people from participating.

C: I'm also interested, you spoke about Chicago being tight-knit. How does that play out in terms of bias or perception of bias. You only have four dayanim to choose from, how do you navigate where there is a party that belongs to the community of one particular rabbi or whatever it might be

A: it's a very good question and it happens to be, you asked how many of the dayanim are from here per se, and the answer is technically none of them – that's a good thing.

C: I get that

A: because the way the Chicago community is structured is that if you're from here, you're not just from here, you are related to half the community. Its that type of place. It can be touchy. Rabbi Reiss b'davka does not have an affiliation with any shul – that way he is really not connected to any part of the community in that way more than others and that's something Rabbi Schwartz was *makpid* on in terms of the *Av Beth Din* and advised, to my understanding, Rabbi Reiss to be *makpid* on as well. The other three of us all have shuls also.

C: so you are the rabbi of a shul?

A: yes, so in theory it can create some situations where it wouldn't be appropriate for any one of us to sit on any given case, and we have had that. What we generally do is that we divide between, what is an objective bias that we have to recuse ourselves and what types of relationships we feel we can be impartial but we have to disclose to the parties that here is the reality – this person, I don't know, their brother davens in my shul or this person used to come and learn at the Kollel every

Sunday morning when I was in the Kollel for 8 years and over the years we've had a connection. So sometimes there are ancillary connections that we'll let the parties be aware of and sometimes we'll have to recuse ourselves. The fact that we are not actually from here probably makes it a little bit less complicated than it otherwise would be. Thank G-d I haven't had anyone from the shul come yet, but if I did I would have to recuse myself, but that's also a good thing – its only four, but at least it's not just three.

C: sitting as a yachid, is that an issue? In a case where there would be potential bias, would there be less confidence in the decision if there is only one judge?

A: meaning, if there was only [one], would that help?

C: no, I'm saying that in the event that there is a perception of bias, the one dayan who is not perceived to be biased, they could sit alone?

A: correct, in theory, yes.

C: what about recording – do you record or transcribe cases?

A: we have brought in other Rabbanim if need be, meaning the same way that I, before I was formally part of the Beth Din, I had been brought in a couple of time – I didn't even know why they needed me – there are options to do that.

C: do you record all proceedings?

A: yes

C: and that not typed up, are the recording referenced or are they just recorded in case there is a dispute later?

A: as far as I know they are recorded for the purpose of being able to go back, I guess in theory to have if needed if there is some sort of dispute or issue. Practically they don't get used that often. Every once in a while, I said sometimes these cases, you can have a day where you have a case and then a break and then a follow-up hearing, so sometimes the dayanim will go back and listen to the recording if it has been a very long time and they want to make sure they have the details – but its more for reference.

C: do you have a relationship with other arbitration bodies? Are you part of any organisations?

A: I don't know, I know we are formally accredited as an arbitration body so everything we do is binding as an arbitration

C: I'm curious, that accreditation, is there a government or some sort of private organisation? Do you have to meet any standards to be part of that?

A: that's a great question – I've wondered what the history is of how it became this way, but it's been that way since before Rabbi Reiss' time and I haven't yet had the chance to figure out what that entails, so I'm not sure.

C: Something I've asked others, so I'm not sure if there is more to shed light, but I'm interested in feedback, if a litigant is not happy what is the avenue for them – if they are not happy with a decision or are not happy with how they are treated here, is there a place they can go to or a person in the organisation here who will field those complaints?

A: informally, I have found that when people are upset about certain aspects of an experiential component of the Beth Din. You kind of mentioned two things, if someone's not happy with the outcome and then there is the experience. When it comes t the experiential side of things I don't know that there is a formal person – in theory Rabbi Mostofsky would be that person as the executive director, in practice I think what happens is that people who have connections to some of us as dayanim for whatever reasons, someone in the shul or in the neighbourhood whatever it might be. If they have some sort of grievance, they will let us know.

C: what do you do with that information, do you bring it to Rabbi Reiss?

A: I judge what to do with it, you know how it is, you are in communal work…

C: yes

A: you have to figure out when do you just make the person feel good and heard because that's what they really need and you say 'okay, thank you very much'. If I think it's something that is a serious concern, I will go to Rabbi Reiss to discuss if there is something we should be doing differently or something we could do better. At a certain point Chicago is also a place where things run as they have been running for a very long time – that's kind of like…

C: establishment

A: yes, the status quo is very big here, it's kind of hard to…

C: I hear. Okay, I think we'll call it a day.

A: great.

10.1.6 Interview with Rabbi Langer

Interview with Rabbi Yisroel Langer, at Chicago Rabbinical Council Beth Din, 29 November 2022 with Chaim Cowen

C: [I'm] recording over here with Rabbi Yisroel Langer, who is a Dayan at the Chicago Rabbinical Council Beth Din. Rabbi Langer, first of all of you could tell me a little about what your role is on the Beth Din?

Y: I answer calls, I sit in my office a lot of the day, and I answer calls that come in – people have questions. A good portion of the morning I spend learning with a colleague Rabbi Kraft, we learn together the… (interruption). I spend a lot of the morning, we do *choshen mishpat*, learning together these topics. Then whenever there is a *din torah*, we will deal with the *din torah*. Here, at the Chicago Rabbinical Council, there are three things that we do, primarily *dinei torah* – monetary dinei torah, geirus and gittin. Its been working out that most of the geirus and gittin take place in the afternoon. I'm here in the morning until 1.30, so I don't really get to partake – here and there – but most of the geirus and gittin I'm not part of. But *dinei torah*, people having arguments dealing with monetary disputes, we are here in the morning for that.

C: I know that there is a list of procedures and rules – how does that play out in reality. Is that something you are regularly consulting or is it part of your nature or are you flexible in how you apply those procedures based on particular cases, how does it play out?

Y: You mean in terms of halachic principles?

C: the procedures and rules that there Beth Din has put out, it's a many-page document on how the *dinei torah* runs – do you find the cases generally do run according to that document, it's quite smooth?

Y: oh, yeah

C: do you feel that people who come here are generally satisfied with what the Beth Din rules?

Y: Yes I think so, people feel that they were heard. A very important thing that Rabbi Reiss always makes sure to do at the end of a din torah – he repeats over what the litigants said so that everyone should feel that you heard my position, speaking it out, he can say 'did I miss anything?' so you know that your position was heard, your arguments were heard, and now the Beth Din will deal with it according to what halacha requires.

C: I'm interested in how much the success of the Beth Din is based on the rules, versus the personalities who are implementing them? What contributes more to the feeling of satisfaction in the litigants?

Y: I would think that mostly the litigants don't know the actual rules, who reads the constitution? it's a long constitution, most people I don't think read it, I think it's the people behind the Beth Din – people have confidence in Rabbi Reiss and Rabbi Raccah.

C: the judgements that are written up, are they written up by the dayanim together, there is one judgement written?

Y: so its written up, there is one Dayan who is picked to write it up and everybody… sends it to the other dayanim and everyone has their input and it goes back and forth. Its interesting, Rabbi Reiss and Rabbi Raccah take it very seriously the way it is written up, to edit it and the grammar, as if its something that's going to be published all over the world – and who's reading it already? It's the two litigants and maybe a lawyer if there is a lawyer involved. But its done with a very *medakdek*, a very precise, nothing should be overlooked.

C: Is there any way of getting them published beyond, or is this something the litigants are not comfortable

Y: we keep it internally?

C: and is it written in English or Hebrew?

Y: its written in English

(4.30)

C: and you quote the different sources you are relying on?

Y: we have sources, *ta'amim v'nimukim*

C: would you ever have a dissenting dayan who will either write an alternate judgment or refuse to sign or is there a consensus?

Y: ideally it should be done where all three dayanim are.. especially as the model we are working with is *pshara k'rova l'din* (interruption) when it comes to a real din torah its 2 out of the 3. When it comes to a *pshara* ideally we'd like to have all three dayanim on the same team. We try to work it out that way, usually it does, we speak it through. Sometimes we can have a small difference and the dayanim can compromise between themselves to come to a conclusion. But its very rare that

one dayan is adamant 'no' and the other two are adamant 'yes'. I've never been part of anything like that.

C: I know there are certain things that aren't historically classic for Batei din. Giving a reason is itself not classic, having appeals, accepting eidus isha – is there a particular perspective on those things as to how you navigate them? Are they complicated halachically to navigate or not so much?

Y: because we are dealing with pshara krova l'din its not a strict din torah so we do allow for evidence that is not, like women or *eid echad*, so we don't accept it like two *eidim*, its not like *al pi shtayim eidim yakum davar* and that's it, its fact. Its something that can be looked into, something that can give us…

C: are the dayanim active in asking questions and seeking out…? I know that in a secular court room the judges are very passive, the lawyers do all the cross-examining. In a Beth Din are the judges the ones who are…?

Y: the dayanim try to get a clear picture.

C: I am curious, the dayanim mentioned that they advise the parties to bring a lawyer with them. I know that you have Rabbi Reiss, but if you didn't have Rabbi Reiss, would it be challenging for the dayanim to know that the lawyer is saying this is the situation legally and they are representing a particular side? Does that situation every occur that you have to wonder, that you aren't necessarily the experts in secular law and you have an expert in the room and they are on one side? How do you navigate that challenge?

Y: Like you said, it is helpful having Rabbi Reiss in the room, that really helps that, but it doesn't usually, I mean there is secular law but we are working here with dinei torah and sometimes secular law… comes to contracts it is relevant, you have to take the lawyers word for it and then check up on it afterwards.

C: One of the things I am also interested in, is where you draw the line when you are using choshen mishpat and when you use secular law. I understand that there is some degree of *omed hada'as*, you are looking at what they intended at the time? Is that right?

Y: when it comes to a contract, if its understood by the parties that they are looking for, their contract was written up in accordance to secular law which is the case, that's how you are writing up the contract, the dayanim will deal with the halachic viewpoint but based on the rules of the secular laws that were setup.

C: what's your professional relationship with the *Av Beth Din*? How does it play out day to day – do you have to report to him on certain things? How does it look in terms of your relationship with the *Av Beth Din*?

Y: officially we are meant to go back every couple of weeks with various *shailos* that were presented to me and discuss with him how we resolve those issues. We did that at the beginning, I don't know that… I go to him so often that I think we just developed a certain trust in each other. When I'm learning choshen mishpat with my colleague Rabbi Kraft, often we'll go to Rabbi Reiss to… how does this play out? We've seen it in the books but how is this going to evolve when it comes to a real din torah, how will we deal with this?

C: do you find that choshen mishpat… obviously its not written in the context of corporations, share purchases, options and all sorts of economic mechanisms, whats the method that you apply choshen mishpat to those very contemporary structures that exist in the business world?

Y: Its really using a lot of these things in the business world, you are using logic, but your logic is being dictated by the halachic parameters or how to deal with it. You have to think on your own, but *hamotzi mechavero alav ha'raye* – that's going to be the rule that's going to win out over here. So they sort of merge. Choshen mishpat in general is complicated, its not like *hilchos Shabbos* where if you want to know the laws of *she'hiya v'chazara* you go to [siman] 253, you want to know the halachos of *bishul* goes to [siman] 318. Choshen Mishpat is all one big cholent, its not 'look over here for this *sheila*' there's so many different moving parts, its hard. Speaking to people who have an expertise in it is very helpful, 'what am I missing over here?' 'did I miss something?'

C: the fact that your judgements… I imagine if your judgments were published and other Batei Din were publishing their judgements there would be a lot of 'let me see how other people have navigated this' – the fact that its not published it means that everyone is dealing with their case as though it's the first time its been dealt with, is that right?

Y: you do have teshuvos seforim that deal with similar kinds of cases sometimes, more modern cases you don't have access to…

C: do you look at Israeli courts?

Y: I haven't

C: I'm sure there's lot of *chiddushei torah* coming out of a Beth Din that would be very valuable to the torah community

Y: at the same time you have to protect their confidentiality

C: do you feel that having a good knowledge of secular law – I think we've discussed this – is a positive thing?

Y: I think it's a positive thing, I cant say I have that like Rabbi Reiss, but its tremendously valuable to have

C: is there any way in which secular compromises the proper application of halacha do you find, or are you able to work both together?

Y: I've never had a situation that they didn't work

C: how many years have you been on the Beth Din now?

Y: I'd say three or four

C: thank you very much

10.1.7 Conversation with RLM, RDR, RYR

Contemporaneous notes from Conversation with Rabbi Levi Mostofsky, Executive Director of the cRc, Rabbi Daniel Racca, Senior Dayan at the cRc Beth Din, Rabbi Yonah Reiss, *Av Beth Din* of the cRc Beth Din and Chaim Cowen, at Chicago Rabbinical Council Beth Din, 29 November 2022

Rabbi Yona Reiss: in Monsey the court interfered with a *seruv* - bankruptcy debtor refused to enter a case, as the court violated the automatic stay. CRC would never give a *seruv* in such a case. Cited in *Kanfei Yona* can get one. No board but a executive committee and board of the CRC. They do get a wide range of the community including charedi, but there are others who have their own *choshen mishpat*. *Zabla* has become a bad word, even though in *Gemara* it's a good word - as it makes issues with *ex parte* comms, bias, bribe. Where there is a waiver then its okay to shift from mediation to

arbitration. Use a "med-arb" agreement. Sometimes its waived verbally and sometimes in writing. Have based their procedures on BDA with many tweaks. Other respected BD is *Meyshorim* in Lakewood. Bais Havaad Halacha Centre (baishavaad.org) as well, under Rabbi Miller. Rabbi Daniel Mann and Rabbi Jacobovits from Eretz Ḥemdah are well known to Rabbi Reiss. Rabbi Meir Orlean - writes *halakhic* literature in this area and is well respected. Machon L'Horaah in Monsey and Colel L'Rabonim (Rabbi Landesman). there are also well respected. There is a conference on *gittin* with many Batei Din, and looking to now organise this for the *Momenot* Batei Din - this can inform consumers as to who is the subscribers to these protocols. People just come to BD, don't say not to a *hazmanah*. *Seruv's* are issued perhaps once in 3 years. Rabbi Reiss does a lot of promoting the use of the BD - speaks to the legal community and due to his legal reputation it helps. Decisions not shared with the community, only litigants. Costs are very low and its covered by kashrus. BDA need to be much more savvy to stay afloat. Avi Helfand - professor of law and expert in enforceability of BD arbitration (on board of BDA)

Challenges?

Rabbi Reiss: bringing in secular community to *gittin*, many are not coming in for a *gett*

Rabbi Racca: small community - people know people. People are less careful to come to a reputable BD in *momenot* as don't need israel recognition. Cases are from hundreds of dollars to multi-millions. 30-40 million dollars. Allow women to bring support people, female secretary sits in from time to time. In Flatbush they gave *dayanim* a salary funded by the community (but wasn't successful - YR). Advised to have lawyers present - as a lawyer understands evidence and arguments and organises the case, lawyers are also dispassionate. There was a push in Chicago for rabbis to talk about this on *Parshat Mishpatim* to raise awareness. Also an association of Jewish lawyers where they promote this.

Rabbi Mostofsky: Use CLE's to promote this. Story of attorney whose bluff was busted by Rabbi Reiss. Rabbi Mostofsky's job is to make the place look friendly

An attorney called up and quoted a particular piece of legislation that the CRC BD were purportedly in breach of. RLM put him on hold and transferred to Rabbi Reiss to whom he delivered the same tirade. RYR calmly said "are your referring to…" and proceeded to quote the section to the attorney verbatim. The attorney was clearly deflated and turned much more respectful saying humbly "well… it could be argued that…" (basically, Rav Reiss' credentials play a big role in gaining the respect of the community, especially the legal community.)

Rabbi Mostofsky oversees all the CRC operations (*Kashrut* and BD) and he sees his role as ensuring that the BD is a place that is friendly and open, and not intimidating for secular jews - eg removing pictures of *gedolim* (some whose faces had sour expressions) from the walls, opening up the room more by ensuring it was well lit, good windows etc etc.

10.1.8 Interview with Rabbi Reiss

Interview with Rabbi Yona Reiss, at Chicago Rabbinical Council Beth Din, 29 November 2022 with Chaim Cowen

C: I'm recording here with Rabbi Yona Reiss, the *Av Beth Din* of the Chicago Rabbinical Council Beth Din. First of all, thank you for being willing to share. My first question is, is there a way to give a shorthand version, or as long as you want really, the story of the Chicago Beth Din for momenos. How did it start, how did it get to where it is now, what is its story?

Y: I've only been in this Beth Din for 9 and half years, so it started well before me. I think in the 1960s it was established as a Beth Din, a rabbinical court, for the Chicago community and its environs. The Beth Din was mostly focused for many years on supervising gittin, Jewish divorces and facilitating geirus, conversion to Judaism and clarifying Jewish status for those who needed a certificate of Jewish status to be married by the Chief Rabbinate of Israel or by other rabbinical authorities who required such a certification. But over the years one of the other functions of a Rabbinical Court that has been assumed by the Chicago Rabbinical Council is adjudicating monetary disputes between members of the community. This includes commercial disputes between people relating to business transactions, communal disputes, such as with respect to the termination of the rabbi of a synagogue or the principal of a religious school or other types of communal disputes, and it includes matrimonial disputes when a couple gets divorced, and they submit to the rabbinical court not only the supervision of the actual bill of divorce, the *gett*, but also other disputes, including monetary disputes, child care disputes and visitation and custody dispute. I think the caseload probably intensified, became increased, during the time that Rabb Gedaliah Dov Schwartz, my predecessor, was the *Av Beth Din*, and I think it has continued to be a very active part of our practice. We have regular sitting dayanim which is not something that every Beth Din enjoys, where not only I am a full-time employee of the Beth Din but we also employ other part-time dayanim, who are certified Jewish law judges, and who sit on a regular basis on our various cases. So we have four individuals who are either full-time or part-time dayanim, myself and three other judges ,plus we have a Beth Din administrator who is also qualified to sit on cases, so we have a rotation really for the most part of five individuals who hear all of the different cases that are submitted to us for adjudication.

C: thank you. Has it been documented, the history of the Beth Din anywhere or is it more sort of known to the people who know?

Y: I don't think there is any official, formal documentation of the activities of the Beth Din of the Chicago Rabbinical Council, although we do put out an annual report, a publication called *Chadashot* in which we update the community of our activities of the previous year. But I don't think anyone has done any full-blown history of the Beth Din.

C: in terms of, you mentioned the case load has gotten heavier under Rabbi Schwartz, do you have a sense of how many cases in momenos (monetary cases) you would deal with in a given year, obviously it fluctuates from year to year I assume, but…

Y: I can't say for sure, it's a lesser volume than the Beth Din of America which encompasses a much larger community, I would say that the volume of monetary cases is probably more in the realm of 30-40 cases that are opened each year in the different domains that I mentioned.

C: do people come from beyond Chicago to this Beth Din or is it servicing the local community exclusively?

Y: It's mostly individuals who are from what I call the Chicagoland community, but we also get cases I get from the outside. We recently had an East Coast case and sometimes we'll have cases from Saint Louis or other communities, Kansas, where they don't have an institutionalised Beth Din because the community is simply not large enough to support a local Beth Din. So, we serve as kind of a regional Beth Din for the entire mid-west area, and sometimes that will lead to cases being brough to us from other places in the mid-west. We had a case in St. Louis that I can remember, and other jurisdictions as well. I will sometimes also be drafted to sit on cases in different places, like in Cleveland and in Florida, so really there's a very broad swath in terms of the region that we cover.

C: What measures do you put in place to gain communal confidence?

C: it's a really good question. I feel we have a responsibility to gain communal confidence. The Gemara says the idea of *tzedek tzedek tirdof* - which is an important motto that we have emblazed on the wall of our Beth Din courtroom - stands for the proposition not only that you should pursue justice, but justice is written twice and the Gemara says that this is because it's not sufficient to have any old rabbinical court, you rather you need to have a *bais din yoffe*, you need to have a good and competent rabbinical court that, I believe, inspires confidence in the population. So one thing that we do, which is similar to what the Beth Din of America has done, is that we publish rules and procedures so that parties know what to expect in terms of how to present their cases, how the proceedings get scheduled, what their options are – to come here or to come to an alternative Beth Din if they are summoned to come here – and what is the process through which we issue our own rulings. All this gives a road map that I think provides a higher level of confidence in our Beth Din from the standpoint of both the parties and their representatives, if they are represented by attorneys. We also try to be very careful and this is something where I can be helpful, because I'm a licensed attorney, to follow all the procedural requirements of local arbitration law. The Torah says that you have an obligation in every community to appoint shoftim v'shotrim, meaning judges and an enforcement mechanism for the Beth Din judgements, so we need to make sure that our proceedings comply with the arbitration law procedural requirements so that our decisions can be enforced by the courts. We don't have the ability on our own to enforce our judgements, for example we can't marshal a person's bank accounts or garnish their wages or foreclose on their assets, so that's something where we need the assistance of the secular court system to enforce our rulings. So, we are very meticulous to follow all the procedural requirements. There could potentially be a tension if their procedural requirement would run counter to Jewish law, but we don't find that's the case. Their procedural requirements are very similar to many of our procedural requirements including that the judges are not supposed to hear the claims of one party in the absence of the other party, parties need to be allowed to provide all of the witnesses and evidence that they want to bring in order to support their claim and you have to give adequate notice and time of the hearing, and that you have to conduct the hearing in a way that is not corrupt. All these requirements are certainly consistent with Jewish law. The one requirement where there may be a little bit of a discussion as to whether it is really required by Jewish law, is the requirement to allow the parties to be represented by licensed attorney. In Jewish law we have the principle of *al taaseh atzmecha k'orchei hadayanim* - we don't always encourage lawyers so much, because we want to hear from the parties directly, but we do have a principle even in Jewish law that the Rambam talks about, *psach picha l'ilem*, that you are supposed to open up the mouths of the mute, that those who are not otherwise able to express themselves 100% clearly, should be assisted in terms of organising and formulating their presentations before the Beth Din, so we find that attorneys are very helpful in that regard. We are not bringing them in to argue points of Jewish law in front of the Beth Din, because that's our job, but they mostly serve the purpose to help organise the presentation of the claims so that they can be as clear and as organised as possible.

C: do you have a policy regarding *toanim*?

Y: we don't generally allow for rabbinical advocates, and that's because it's not a requirement of the arbitration statute so long as the parties can be represented by licensed attorneys. There are problems of serving as *orchei hadayanim*, of trying the skew the facts and presentation of a case to fit within the parameters of Jewish law, and it may sometimes take away from the honesty of the presentation – and most significantly, at least here in this country, rabbinical advocates are not subject to any professional rules or licensing requirements and therefore there is the possibility that

they could tempted to do things that are not incredibly ethical in order to advance the cause of their party because they don't stand to lose their license or be subject to any disciplinary action like licensed attorneys in the event that they would for example switch sides in the middle if one side decides to buy them off, things that would be unheard of if one were serving as a licensed attorney. Since we don't have any kind of professional rules, people who might otherwise be decent people have a tremendous motivation, to race with each other to the gutter in employing tactics that might be utilised in being able to maintain an edge and keep up with the competition, so to speak. Therefore, we don't consider it right now to be the best type of arrangement for there to be rabbinical advocates who will present the cases in front of the Beth Din.

C: I'm not sure exactly of the size of the community here, but do you have an issue of bias, where people know each other and it's very hard to find a Dayan who isn't somewhat connected to the litigants?

Y: it's a close-knit community but that doesn't mean there's an automatic disqualification. There is a distinction in Jewish law between disclosure and disqualification. If the members of the Beth Din have any knowledge of the litigants or even of those who may be close to the litigants, we always disclose it and if somebody is uncomfortable with the fact that we know somebody or we know their brother-in-law or whatever the case may be, then the Dayan in question will recuse himself. But, generally speaking, we find the parties aren't uncomfortable as long as there is no built-in disqualification, like of somebody being a good friend of the Dayan, or the Dayan having a monetary interest in the outcome of the case. So long as those features are not present, where there is no disqualification, we simply disclose any associations and as long as the judges feel they can be objective and the parties trust the dayanim to be objective, and the disclosures have been rendered appropriately and responsibly, we can go on and hear the case.

<time marker 13:40>

C: you have mentioned your own legal training, how important is it for a Dayan to have legal training, or for the Beth Din to have someone involved in it, who has legal training?

Y: it's not a sine qua non for any particular Dayan to have legal training. Nobody will say that Rav Moshe Feinstein, or if you picked the world's biggest talmid chacham today, would be disqualified because they didn't go to law school. But I think that it's certainly helpful in terms of being able to identify certain parameters of Jewish law that intersect with the secular law, like for example if the parties have made a condition that their transactions will follow secular law which will often be a binding condition according to halacha because we have a principle that *kol tenai shebamamon kayam*, any monetary condition is considered to be binding, then the dayanim will need to know the secular law. Similarly, if the Beth Din makes a determination that the transaction in question is subject to *minhag hasocherim*, to the custom of the marketplace, it's important to know what are the customs of the marketplace and often they will coalesce with secular law. Also, sometimes a particular law falls within the category of dina d'malchusa dina, the law of the land, if it was enacted for the purpose of *takonas hamedinah*, a broad sweeping economic regulation that requires compliance from everybody in order for the regulation to be effective, like the order of collection of bankruptcy creditors in a bankruptcy case, or the implementation of rent control laws to mention a couple of examples, and then it's important for the Beth Din to be well informed of what would fall within that category and what the rules and regulations of that specific law would be so that it could be applied properly. In addition, I think that in terms of whether somebody should be in the Beth Din who has a familiarity with secular law, it is a big strength of the Beth Din of America and of the Beth Din of the Chicago Rabbinical Council that we do have individuals with legal expertise who either

serve as dayanim or who have served as administrators or who serve as assistants or interns in the Beth Din. Sometimes it is useful to have such individuals who serve as board members who can advise with respect to legal issues and legal content, I think that this is a very important component for the success of a Beth Din, the ability to serve the community effectively and to properly apply all of the secular law considerations that go into a modern-day Jewish law adjudication process.

C: do you ever find that there are conflicts between Jewish and secular law, I think you mentioned earlier that there is a potential procedural conflict that doesn't really manifest. Is there ever a substantive area of conflict that requires sensitivity how it is navigated or a procedural area?

Y: there are obvious areas of conflict, like for example prohibited interest, when you can have two parties that enter into a transaction where a lender loans a significant sum of money to a borrower for interest and the parties did not enter into a *heter iska* that would cast the transaction as a joint venture rather than a prohibited interest transaction, where the Beth Din would not be able to enforce the obligation to pay the interest whereas in secular law, the interest obligation – as long as it's not criminal usury or the like – would be an enforceable obligation. There are plenty of other examples as well, such as the laws of yerusha – inheritance, where Jewish law is not identical to the intestate disposition of estates according to secular law, since under Jewish law only sons inherit and not daughters, and the oldest son receives a double portion. There are ways according to Jewish law to work around the default inheritance law with documents of indebtedness, called a *shtar chatzi zachar* (or *kulo zachar*) that can be drawn up to ensure daughters inherit as much as sons but if those documents had not been drawn up or if there are questions as to whether they had been drawn up effectively from the standpoint of Jewish law, obviously Jewish law is going to have a different approach to those kinds of cases as secular law is going to have. There are many, many realms of dispute resolution where the cases in question are going to have a different outcome according to Jewish law than secular law. Even in employment situations, sometimes there are disputes regarding severance pay, where there's at least a moral obligation that many authorities find in Jewish law to pay some severance if someone leaves the employ of an organisation after a certain number of years whilst according to secular law severance is a contractual right, so if it hasn't been contracted for then it's not payable. There is a host of different distinctions between secular law and Jewish law that often come up with respect to virtually every dispute – whether matrimonial, communal or commercial.

C: have any of your cases been reviewed by the courts?

Y: sure

C: and what have been the outcomes of those cases?

Y: we have a good track record. Look, I have worked at both the Beth Din of America, and I work at the Chicago Rabbinical Council and wherever we have a case where somebody needed to enter our decision into judgement, it's been entered into judgement. If somebody contested a decision, there was one case with the Beth Din of America where a lower court judge threw out a decision of the Beth Din and claimed it was completely irrational and then the appellate court said it was very rational and then reinstated the decision of the Beth Din of America. So, there's pretty much a 100% success rate in terms of decisions being upheld. There was one case where we learned a lesson over here, where there was a landlord-tenant dispute and one of the parties, I think the tenant, signed the arbitration agreement and was bound by the decision of the Beth Din but there was an oversight insofar as the wife of the tenant was also a party to the lease and didn't sign and therefore she was

able to file a separate claim in the civil court because she claimed she wasn't bound by the decision since she wasn't party to the decision. So, I think the Beth Din learned a valuable lesson.

C: that was a Beth Din of Chicago case?

Y: yes, so the Beth Din learned a valuable lesson of the importance of seeing to it that all the necessary parties sign on the dotted line

C: I understand that you are also the sgan *Av Beth Din* of the Beth Din of America. Is there a formal link between these two Batei Din, apart from the fact that you sit on both? Do the two Batei Din have a formal relationship or link in some way, or is that historical?

Y: there is no formal link, but historically there certainly is an informal, unofficial relationship. For example in the past period of time, before I became the *Av Beth Din* of the Chicago Rabbinical Council, the Chicago Rabbinical Council and the Beth Din of America shared the same *Av Beth Din*, Rav Gedaliah Dov Schwartz, served as the *Av Beth Din* for both and that leads to a certain type of close relationship. There is a sharing of information, resources, ideas, conversations, things of that sort. Even though they are still two distinct and separate entities, and they both operate according to their own internal laws, we still benefit from each other's forms and insights and the like. Nowadays I serve as the *Av Beth Din* of the Chicago Rabbinical Council and *sgan Av Beth Din* of the Beth Din of America so that continues this type of symbiotic relationship.

C: I'm also interested in the organisational chart, in terms of how the Beth Din works, there is the *Av Beth Din* and the dayanim and then on the administrative side you have a menahel or executive director which is a non-rabbinic role?

Y: the menahel of the Beth Din itself is a rabbinic role. There is also menahel who is the executive director of the entire organisation but that's separate…

C: that includes kashrus?

Y: that includes everything and technically the Beth Din is under the aegis of the executive director and executive board because we are one of the entities, but we are an entity that is very much given our own independence, which is necessary for a judicial body, so we have our own menahel as well. An interesting thing about my role as the *Av Beth Din* is that I'm not only the *Av Beth Din* for the Beth Din but for the entire Chicago Rabbinical Council so when there are kashrus decisions or issues that need to be handled and resolved, I'm also brought in for those purposes as well. In that sense the Chicago Rabbinical Council is kind of an amalgam of three different organisations on the East Coast – we're kind of like the Beth Din of America, the Orthodox Union, which is a major kashrus organisation, and the Rabbinical Council of America, which is the rabbinic membership organisation, all combined together because we're also a rabbinical membership organisation and we give rabbinic services to all our rabbinic members and we are also a kashrus organisation in addition to having a Beth Din.

<time marker 24:27>

C: and what sort of administrative support do you get in your role within the Beth Din for *momenos*?

Y: we receive good administrative support, we have our own executive assistant, our own menahel, and we have interns who work here from time to time. Right now we have a legal intern in the Beth Din, during the summertime we had a different legal intern in the Beth Din, and if we ever need IT services or things of that sort, that also is provided for us by the organisation as a whole

C: as a Beth Din, do the dayanim report to you? If there is a complaint about a Dayan, would you be charged to have a conversation with them?

Y: it would come to my attention. Technically the person who is responsible for handling and resolving any complaints of that sort is the menahel of the Beth Din, but generally he would bring it to my attention as well so I can deal with it appropriately.

C: is there a way which you seek or get feedback? Is there a formal route for someone who has a concern or a complaint, or they'll have to find their way to communicate that?

Y: we don't have a formal process for feedback, in terms of giving out forms to people afterwards to report whether they were satisfied or not, because it is assumed that if we have a case and its adjudicated properly that the one who wins will be satisfied and the one who lost will be less satisfied, but we do sometimes hear from parties afterwards, that even though they may have lost in their claim, they feel very satisfied that the Beth Din treated them fairly. So, I guess you could technically send out surveys along those lines to everybody afterwards but often Beth Din proceedings involve parties who are going through emotionally volatile times in their lives, and we respect the fact that they might be particularly distraught, and we are not looking necessarily to fan the flames of the fire if not necessary.

C: I saw within your procedure that there is a mechanism for appeal, how does that work, I'm assuming that comes to you, the *Av Beth Din*?

Y: yes the major causes for appeal are those that provided under Illinois law as well, that are grounds for appealing an arbitration decision, but this way instead of it being brought to court, there is a mechanism for it being brought to us directly. For example if there is a mathematical miscalculation or there is a mistake with respect to the description of any item or person or thing in the decision which could affect the ability to enforce the decision or there is a point that requires clarification – then for all of those reasons the matter can come back to us.

C: I'm imagining that when you sit on cases in the first instances…

Y: Yes, I generally sit on the cases … it doesn't make much sense for a mistake of Jewish law to be argued, as the higher authority at the Beth Din heard it the first time around. That type of ground for appeal that exists in, for example the Beth Din of America, which has a larger, more expansive roster of dayanim, as opposed to the Chicago Rabbinical Council where the *Av Beth Din* will likely have sat on the case in the first place, so the parties understand that they obviously can argue the points as strenuously as possible but whatever Jewish law resolution we are going to come to, that is going to be our conclusion unless we ourselves determine that we made a mistake. Then it would be our responsibility to correct it. However *ain l'dayan ela mah she'einav ro'os* we do our best to get it right and that has a degree of finality unless something is a *ta'os b'dvar Mishnah* as the Gemara says, such as if you just quoted something wrong, you missed the fact that it said *lo*, that it said 'no' – and it's really the opposite, but generally speaking that's not the way in which our judgements work, especially since we issue decisions that are along the lines of *pshara krova l'din* so whatever analysis we come to, that's our final analysis and they understand that they are getting our analysis. At the same time there are times that there are points that require clarification that may not have been explained fully and therefore that is something that can come back to us, and we'll issue that clarification.

C: thank you, I appreciate it.

Y: sure, my pleasure.

10.1.9 Interview with Rabbi Warburg

Interview with Rabbi Ronnie Warburg on 25 November 2022, at Teaneck, New Jersey, by Chaim Cowen

C: So here we go, I'm just saying for the sake of the recording that I'm here with Rabbi Ronnie Warburg, it's "A. R." what's the A for?

R: Aryeh Yehudah

C: okay, were here in Teaneck and we're having a conversation in Kehillat Bnei Yeshurun. First Rabbi Warburg, thank you for your time. To start with, can you tell me a little bit about yourself, your experiences, your training and what led you to the roll today that you have on the International Beth Din – that's correct, that's your role presently?

R: That's significant to this?

C: I'm looking to get an understanding as to what your perspective is in what makes a good Beth Din for momenos, part of it is to understand you personally as a Dayan, what has taken you to be where you are, and also your advice for an emerging Beth Din, what are the kinds of things that it needs to do to ensure that it will be a Beth Din that is going to be a good one.

R: okay, let me begin, a little bit about my bio. I finished smicha at YU in 1972 and from 1972-5 I was enrolled as a graduate student in Hebrew University Law School in Law, the precondition was, since I didn't have a legal background and I wanted to earn a doctorate in Mishpatim, specialising in Mishpat Ivri, I had to show that I had a legal background. I had two masters, one Masters of Jewish Education and the other one in Political Science, in Political philosophy, but no legal background. Basically, what happened was I was accepted into a doctoral program at Hebrew University based on the two masters' that were unrelated to the doctorate. So, I spent there 3 years, and I studied the basic courses of Law and afterwards I wrote a master's thesis in Jewish Law on the finality of a Jewish decision during the time of the Mishnah and the Gemara and expanded it into a doctorate. Shmuel Shiloh who wrote the classic sefer Dina D'malchusa Dina was my thesis advisor and it expanded only through rishonim. I wrote over 300 pages in lashon hakodesh on that topic. Afterwards I decided to return to New York but really it turned out to be to Teaneck and I decided for the time being I simply wanted to go into the family business, for 29 years I was in the family business. At the same time, I finished my Doctor of Law specialising in the area of choshen mishpat in 1985, subsequently…

C: this was an expansion of the master's thesis?

R: It went way beyond the master's thesis and at the same time, I had learned Choshen Mishpat pretty much on my own – I only have yoreh yoreh, I don't have yadin yadin. Yeshiva University asked me if I'd run the yadin yadin program, knowing that I didn't have yadin yadin. And I said, I really don't have the time as I was still in business, but I would be glad to give 2-3 shiurim a year and I was pretty much the only outsider to smicha boys from YU, I took a topic from Choshen Mishpat and Even HaEzer, those were my areas, and I gave it, for over 20 years I did that.

C: why did you not pursue a yadin yadin?

R: I just didn't have time. I'm a yekki and for mee, making a parnossa was very important. But I knew a lot to the extent so that when I started my first din torah – it was December 1997 – it was a divorce case and then by 1999 I was very much involved in the BDA as a Dayan, very much. I was taken in initially by Rabbi Reiss, he was my first talmid at YU when I gave these shiurim, and I was taken in

because everyone loved my article on Child Custody – it's a comparative view of American law and Halacha. In general, most of my articles…

C: where was it published?

R: it was published in the Israel Law Review; it was published there, and it was then cited two or three years later by Professor Menachem Alon. By that time, he was in the Supreme Court. Rabbi Reiss knew of the article and knew about me a little bit also. So, I became one of the members for the dayanus forum for the BDA generally. When I did *dinei torah*, I ran these *dinei torah choshen mishpat*…

C: as a *yachid*?

R: very good, usually it was a panel. Once or twice, I did a divorce case, I don't want to go into it, it was a famous case, where they were really worried, can I handle it, Rabbi Warburg, I said no worries, I can handle it. It was the first award ever given on a prenup where a person took too long to pay, to give the *gett*. It became the first one, since then I know of a second one at the BDA – there it was more difficult as they didn't have the address and they allocated $75,000, and I came to $10,000, we don't have time to explain how I got to that conclusion, but Rabbi Willig agreed with me, but based upon that particular psak they revised the prenup. Without going into what the revision was. Anyway, then there is a Rabbi by the name of Aharon Levine, does the name ring a bell? He was the only expert in halacha and economics. He ended up being a professor of economics, but he wrote sefarim in halacha and economics. So, he came to the BDA. Once he got to know me, he told the BDA, from now on, if you want me to be a Dayan on the BDA, I'll only do it with Warburg. We became friends. Actually, I was at his *levaya* many years ago. Whatever the case may be, I mention that the importance of having someone with a business background, he had the background. There was a fellow by the name of Leon Metzger from Riverdale, he was in hedge funds, he had a business background. That have to be smart enough, here I'm referring to someone who doesn't have *smicha*, that the award should be by speaking to someone who is a Dayan. Anything you can contribute business-wise, fine, but when it came to be machriya, you should follow the advice, I should say differently, they used to ask a Rav, lets leave it at that, and then they would be machriya – that became important. Anyway, for years, from 1999 that was my first year I had a zablo in NYC, the most prevalent forum for a din torah is a zablo, not the standing BD. They feel that if you are summoned to a standing BD your basically heimish with that BD and people don't want to do that. BDA happens to have an excellent record but still, sometimes they don't even recognise – there was a case, let's leave it out, not important. I sat for many years on the BDA, I am the only Dayan on the BDA and pretty much to the best of my knowledge the only Dayan in the US who says that even though halachically you don't have to give a *psak din menumak* – a reasoned judgement – it should be done for the following reasons. Number one, I picked it up from my exposure to the Rabbanut Batei Din and that's based upon the teshuva of Rav Uziel, Choshen Mishpat, Siman Aleph that one should give reasons, and there he talks about the appellate jurisdiction, if you have the appellate jurisdiction in the framework of a BD you need to have a reasoned opinion. So, I always did it. There were some people on the BDA, and very rare in the yeshivish BDs who would give reasons. But I pretty much, to the best of my knowledge, am the only one who gave reasons. I was there for many many years and then I had a zablo with Rabbi Landesman. I basically, when I do a zablo I am very concerned about the *sholish*, or the *shlish* – you hear different pronunciations – there were two who I use. One is Rabbi Rosenberg, he's a Vishnitz chossid, he used to read, probably still does, read Chief Justice Roberts decisions for enjoyment. What was important about him, not simply in terms of halacha, he knew the halacha and he only did, there was a time he did Even HaEzer, but he dropped out of that for personal reasons, he has only done Choshen Mishpat. He works every day of the year

almost, including the 9 days and the 3 weeks, whatever it is he's there. At least that what he used to be, I haven't been in touch with him in quite a few years. He, I would either ask him or Rabbi Landesman. So, I was involved…

C: this was as a Dayan in the BDA, they also did zablo?

R: the zablos I did on the outside

C: independent

R: right, what they did later on, they started which was a nice idea, they had a BDA zablo. This means each side could pick their own Dayan, but the Dayan had to be someone who was not a *toan rabbani*. There was a time they used a *toan rabbani*, by that time they weren't using a *toan rabbani*. As long as the parties agree, that's actually the psak of the Radvaz. I've written about a *toan rabbani*, I think I even mentioned that. So, they had a zablo, each side picks their own Dayan but the *shlish* had to be from the BDA

C: one of their dayanim

R: one of their dayanim, otherwise it doesn't work, and the decision would be put on BDA stationary

C: and follow BDA processes?

<time marker 12:00>

R: yes, they followed the process of the BDA, they have a process and generally I think it works out pretty well. They follow arbitration law, there are certain things, you know. But what they do very often, maybe all the time, is they have an attorney. Sometimes the attorney knows halacha so that's fine, but sometimes not, so then you have that issue of hachra'a, but the lawyer is there because of the issues

C: can you explain what you mean by hachra'a?

R: the decision, to make the psak.

C: are you saying the attorney is representing a party?

R: no, not representing a party. First of all, according to arbitration law, you have every right to have an attorney and if you don't tell the parties, either the director or the dayanim those are grounds to vacate the decision

C: if you don't inform them of their rights?

R: right. They can waive their rights, but they can change their minds afterwards, they may say 5 sessions down they want an attorney

C: but you are talking now about having an attorney on the panel

R: yes, I'm just talking about the panel. Let me see what we, anyway so, I was sitting on this case of Rabbi Landesman, who was the shlish or the sholish, this was a divorce case. The woman had excellent arguments, at the end of the day the fellow who was not frum anymore – I don't know how frum he was period. Turned to her and said "dear" pretty much "if you want to get your gett you have t drop all of your claims" and she did that. That bothered me, that never happened to me. Whatever I wanted to do I could do on a BD, I was really upset, then when I heard about the IBD being founded, I asked can I come on as a Dayan, so the answer was yes.

C: what is the IBD?

R: the IBD is a BD that is knows to deal with agunos, but they are known as only freeing woman without a gett, if there is a basis, and if there is a basis, I have three of four different techniques, its in my books. However what I made sure to happen, was the halacha is – as rabbi Moshe Feinstein – in a thin sefer called Mesoras Harav or Mesoras Moshe or Rav Moshe which came out years later, he makes the point that you cannot, before you want to free someone, it was a *cheit* if you couldn't free if there's a basis, if there's no basis you cant free. He basically said you have to pursue the *gett*. Before we do anything, we pursue the *gett*. In this particular case, with this particular Beth Din, we've been around for 8 years we have gotten a *gett* for over 80 women. I'm not talking in the conventional way that you… its conventional that you execute a *gett*, I'm not talking about the *seder ha-gett*, simply agunos 15, 25 years and fewer years we got a *gett* for them. There is no Beth Din to the best of my knowledge in the US who has done over 80. This week, someone over 80, a chassideshe woman from Brooklyn called me up, she called me a couple of times which is interesting, and you know how many years I have been consulting with her – never took the case – 5 years. After 5 years she got a *gett*. In other words, we deal with people, we open up a case, it usually means the husband doesn't want to give a *gett* and we summon him, or stam we give consultation. And we give consultation even if they are at another Beth Din as we have no guarantee that we have the solution, if there's another Beth Din and there's a hope possibly to be free so we do it. Also, we like to push the envelope. There is one Beth Din at least that because of my pushing that they don't even know about, that the woman was freed without a *gett*.

C: does the IBD deal with momenos as well or is it exclusively…

R: no, it's exclusively that, we don't deal with momenos, that's why…

C: and where does it sit, I am curious, where is its home?

R: its home is in Riverdale, New York, but since covid it hasn't been used and we do everything, like the world does, by zoom, it's all remote

C: does it have universal acceptance?

R: definitely not

C: not, why not?

R: why not, i would think for a couple of reasons: number one, there are some who believe that only *gedolei hador* can void a marriage, not *hafkoas kiddushin*, *mevatel kiddushin*. Qualified *moreh hora'ah* cannot do that. But regretfully that isn't the case, it's a minority opinion, there are many and that's a majority opinion that qualified more hora'ah can do it. I can give you just one proof, I don't want to spend…

CL it's a bit of a digression but it's interesting

R: the Beit Din HaRabani in Eretz Yisroel deals with voiding marriages. Most of the time they don't but they still deal with it – sometimes they do sometimes they don't. I have a list of over 30 Batei Din, with three dayanim in each panel who addressed it. Nobody addressed whether they had jurisdiction to do it, the assumption is they could do it and all the dayanim on there are not necessarily gedolei hador – has they been gedolei hador I understand why they didn't address it.

C: are you still involved in litigation in civil matters?

R: yes, I am from time to time. I am involved in *dinei momenos*. I also file briefs in court. Especially in regards to divorce. I had a $16 million, this was years ago, prior to the IBC, you asked me about sole arbitration, I did that once with regards to the *gett*, I said the prenup, but the more interesting one was a monetary one outside of this country. A $16 million suit, he was being terminated from employment from an Orthodox Jewish firm and I was the sole arbitrator in that particular case.

C: do you have formal links to the BDA still? Are you a Dayan there?

R: No, I basically do zablos

C: so, you are essentially a freelance Dayan?

R: that's how I was for many years

C: all the *piskei din* you have written up in Rabbinic Authority, are they from your sole practice or also from Beth Din of America piskei din?

R: Beth Din of America, zablos and even when I was a daas yachid I have one. And then I have from the International Beth Din – so I have all three.

C: how often are you getting cases, is this a full-time thing or a hobby? How regularly are you being a Dayan?

R: pretty regularly

C: is there a sense of how many cases will come to you in a year

R: I have no idea

C: I am interested, I am keen to know about best practice, are there Batei Din in the world that you would point to and say they are doing a great job in *dinei momenos* and I should *davka* go and interview and learn about their practices and procedures?

R: I don't know. If its regarding divorce, most people – forget about the *gett* that's separate – end of marriage issues what we call in Hebrew *yachasei mamon bein bnei zug* people end up in court, okay, because they are wary to go to a Beth Din because most Beth Dins will not operate with secular law. I've written about that also, the only BD that will operate with secular law with a divorced couple is the BDA, the IBD and Rabbi Landesman said to me years ago that he would always do that for a Modern Orthodox couple because he believes that they follow the Chazon Ish who says *dina d'malchusa dina machra'as ha'moed* – the law of the land determines the expectations of the parties and Modern Orthodox people expect that their matters should be resolved according to secular law. I would argue that it isn't just Modern Orthodox, if you go to places like Flatbush and certain places, Brooklyn, even though they may not be considered MO, rather Yeshivish, they would also want their matters resolved according to secular law.

C: so how important is it that Dayan has legal background

R: very important. It's extremely important, there's no question, because it can come into play.

C: where, take Australia for example, where there is a very limited pool of dayanim and of those none have a legal education, or if there is they are in the vast minority, what could they do to ensure that they are bringing in that legal knowledge?

R: take certain courses, you don't have to go for a law degree, but take certain courses

C: in the particular areas?

R: in the areas of contracts, torts… my legal background helped me numerous times, really numerous times. In one of the BDs that I was attending, they sued the BD. I got them out of the suit.

C: as in you represented?

R: no, I convinced the lawyer to drop it.

C: you've mentioned about the importance of having a legal background, do you think that there are any areas of secular law and halacha that are in direct conflict? Where those areas halacha might have a different view to the secular law which means that the BD is bound to fail in a sense? Are there conflicts of law?

R: there are plenty, just read all my articles

C: can you give an example of some and how you navigate them, to pick one or two examples?

R: well, one of the ways to navigate them is to resolve the matter according to secular law, certain things you can resolve according to secular law – monetary matters, monetary matters. The simple solution is that we *pasken l'halacha*, everyone agrees, that any time you have private orderings, in other words *masne al mah shekasuv batorah* as long as it isn't not *neged hatorah* it's a *davar shebamamon* you can do it. People are doing these things all the time. When you lease an apartment in Teaneck, and you have a lease, you don't have a halachic lease, it would never be recognised as a halachic lease. You have a lease that has been written according to secular law. How can you do such a thing? Because there's a possibility of being *masneh*.

<time marker 24:43>

C: So, then what is the relevance of choshen mishpat, if you are looking at a case like a lease, where does choshen mishpat end and where does secular law begin?

R: I don't know, where it begins where it ends? Something that involves *ribbis* for an example its an issur you can't get anywhere near that, that's *issura*

C: what about *dalet shomrim*, if a case comes to you of bailment will you generally look at it through the lens of *dalet shomrim* or through the secular law of bailment?

R: if they had a contract, even though the contract is not bona fide according to halacha, I would work in terms of that

C: could you argue that the more charedi Batei din which are not incorporating secular law, are actually accurate for their litigants who are probably also thinking in terms of Torah law when they are having their interactions, while the Modern or Centrist Batei Din which are incorporating secular law are really dealing to their litigants who would be having secular law more in mind when they are dealing. Is that fair? Which means each BD is giving a correct *omed hada'as* for their particular litigants?

R: okay, yeah. That goes back to what Rabbi Landesman said, *dina d'malchusa* is *machra'as ha'omed* for certain people yes, and certain people no, its in Sanhedrin Likkutim 15.

C: Take the role of female eidus, female witnesses, is that an issue – do you see – for a BD to accept?

R: depends, it can be construed as ne'emonus, if its ne'emonus and not eidus and there is such a distinction then it can be used. But we try to corroborate things with other… with men also.

C: I know you have written on the corporate personality and whether halacha recognises it, do you see any conflicts there between a Halachic view and a secular view on a company?

R: well, most poskim will say a corporation is not an independent entity, its shutfus, which means its governed by the laws of shutfus and not by the corporate.

C: do you then go by *omed hada'as*? If people are thinking a company, because the secular perspective on a company is dominant, does that then remove it from the category of a shutfus based on the omed hada'as of how they operate?

R: I don't know, I would think that *omed hada'as* could be determinative as long as you're not over *issurim*, if you're over *issurim* that's a problem altogether

C: I'm interested also, you mentioned Mishpat HaIvri is something you were studying in Israel, I'm interested in Mishpat HaIvri versus Choshen Mishpat, meaning when you are looking at psak din, will you consult Menachem Alon's Mishpat HaIvri or will you consult decisions of the Israeli courts?

R: Israeli courts all the time, my office probably has, there's probably no one here in the US, maybe one I can think of who is a subscriber regularly to piskei din rabani'im – that's not mishpat Ivri, I look at them all the time. If you open my index you'll see, its full of them. If you are really interested in it, if you go to Tzohar, ever hear of tzohar?

C: sure

R: there are one or two articles about Mishpat Ivri and Halacha, there's a person called Micho'el Avraham. Did you ever hear of him?

C: No, I haven't

R: he has an article, I don't know which volume it is – he may even have two articles, one for sure. But mishpat ivri is mishpat ivri, it's an academic discipline, it has nothing to do per se with halacha except in the sense that they formulate halacha legally. Why not? You can formulate halacha like a brisker, or you can formulate halacha like a lawyer

C: but its ultimately the same torah?

R: it should be the same torah, but I can't tell you what they do

C: Looking at the existing Batei din, is there anything you would say, that if Melbourne is looking to start one, what are the lessons we can learn from them, or what are the areas of improvement you see them as having that we can *lechatchila* try and build in to make sure that it can be a successful Beth Din and that it can be considered *oisgehalten*, accepted?

<time marker 30:00>

R: the first thing and that's probably the most important thing and how you do it you really need to focus on, is that they have to be honest. It's not necessarily the case, we'll leave it at that. That's number one.

C: that's the dayanim?

R: well, the dayanim – the litigants, it would be nice also !

C: you don't choose your litigants; you do choose your dayanim

R: people should have a certain reputation. Sometimes its hard to get down what the reputation of a particular Dayan is, but in most cases, you get to know them. Number two they should have a legal background – and guess what, most dayanim have yadin yadin, but there are many who just have yoreh yoreh – so a person who doesn't have yadin yadin, unless you know they have a background, I would not choose them to choose them to sit on a particular case. They should have a legal background – it doesn't mean they have to go to law school and get a JD, but they have to have taken certain courses. Like Rav Chaim Soloveitchik write his doctorate on mashkon, so he went to Yale Law school as he wanted to learn about securities, he didn't go for any other reason, a long, long time ago – and he wasn't going as a Dayan either, it was for his whatever his academic needs were. What else? They have to have the ability to be able to scrutinise problems, simple problems like if someone, if you don't get an address of someone who you have to be mazmin, just don't give up, you have to find out the address. These are simple things – this is aleph-beis. You have to be able to simply know what you are talking about. Rabbi Rosenberg, he spent, not half an hour, and he got paid by the hour, talking to the litigants to understand the business, the entity that they are dealing with. Many dayanim don't have the foggiest notion of the business entity they are dealing with. And if they don't know, they can't resolve halacha, and they can't – forget about halacha, even if you aren't doing halacha –you are using secular law for some reason you can't use that either, you don't know. That is a big issue from time to time. I hear that quite often.

C: I am interested in your view on appeals, should a Beth Din include the ability to appeal its own psak?

R: I would think so, yes. The International Beth Din has… I forgot for a minute; the Beth Din of America has. There is no other that I know of in the United States that have. But again, there are very few *dinei torah* standing Beth Dins.

C: You are saying it is a good idea?

R: yes, I think it's a good idea, definitely

C: do you have a particular idea on *toanim* and their place or lack of place in a Beth Din?

R: no, they belong in a Beth Din, I understand the problems and I have written about them years ago. They belong in a Beth Din that's all I can say.

C: where did you write – I want to know so I can look it up?

R: Rabbinic Authority Vol 1 or 2

C: great. What is your view on the efficacy of a *seruv* versus just a heter arka'os? Do you think there is a place for a *seruvim* in today's society?

R: the only place where I think it is… have you heard of ORA? ORA is the Organisation for the Resolution of Agunos. There was a time that they frequently did social demonstrations, they still do it, but not as many. But before they take a client, they have to get a *seruv* from a Beth Din – basically we are usually dealing with a husband who's *gett* recalcitrant, the wife summoned him, and he refused to come and a *seruv* is issued. Then and only then will they listen to the case. And it has to be approved, they have two rabbanim who are running the Beth Din, it used to be Rabbi Schechter and now its Rabbi Schechter and Rabbi Willig

C: Rabbi Herschel Schechter?

R: correct, yes

C: does a *seruv* have a place in *momenos*? Should it be used?

R: it can be used but I don't think it does very much. It can be used, there are people who get *seruvim* and they live with a *seruv*, if they want to go to court or whatever it is, but it's very important because there is a Beth Din in Brooklyn that doesn't believe in zablos, I wont mention the name, but Batei Din when they summon you – when I summon you, you don't have to come to my BD you can go to another BD – if I don't agree with that BD then you have to have the option to have a zablo where each side picks a Dayan, okay. If you don't have this three-step process then there is no basis in my mind that you can issue a *seruv*, you have to go through the whole process.

C: is a zablo inherently problematic in terms of bias? Meaning one of the dayanim will generally have a relationship or ex parte communications? How do you navigate that?

R: who you are picking is the sholish

C: explain

R: the sholish is the third one. Halachically according to most poskim, the borers pick them, but the minhag here and in a place called Australia, in Sydney's BD, from years ago I know, that the veto powers with the ba'alei din

C: they can veto the sholish?

R: they can veto the sholish. Even though *rov haposkim* don't hold that way, but that's what they do. So, if you end up, again there are certain dayanim are known to be honest and luckily, they also know halacha.

C: so, are saying the sholish is really a *yachid mumcheh* in a sense and the two *borerim* are *toanim*? Is that the reality of the case, of the situation?

R: that's a reality only if the personality of the *borer* is like a *toan*.

C: another question also, are there areas where the secular standard is higher than the halachic standard? I'm thinking specifically in procedural law. Correct me if I'm wrong but it seems like procedural law in halacha is not very well defined.

R: I would agree that its not… it is defined to a great extent but still not well enough, there are – one name I don't know, it's a one volume sefer I don't know – but Eliav Shochetman wrote a sefer

C: yes, it now three volumes

R: I use it, I use it all the time. We are actually personal friends, he was at our house, I was at his house, we know him from way back

C: I hope to visit him, I am going to Eretz Yisroel soon

R: so, you'll send my regards. Tell him we're in Teaneck and if you remember tell him the grass is still growing in the front of our house. He was very impressed when he came to our house because he doesn't have that much grass there – we'll see if he remembers

C: bli neder I will endeavour to remind him. So, with his sefer, I guess it lifts the procedure to a level

R: he put together a lot of mekoros from Beis Din Rabbani which no one even knew about, it was in the archives. Its not simply a reproduction of Shulchan Aruch, and I've used it many a times.

C: am I correct that it has chiddushim in it?

R: there are chiddushim because no one had it in their mind. Not so much there was a chiddush… there are chiddushim also

C: why is it do you think historically that procedure wasn't so fleshed out in halacha. The substantive law is very well fleshed out, but not procedural?

R: I can't, I don't know, I hear your question, it's a good question, I don't have an answer

C: could it have been that there was a more *haimish* approach to how…

R: no, I'm not saying that, no, no, no.

10.2 APPENDIX B – ISRAEL INTERVIEW TRANSCRIPTS

10.2.1 Interview with Rabbi Carmel

Interview with Rabbi Yosef Carmel, Av Bet Din and Rabbinical Dean of Eretz Chemda Gazit, Jerusalem on 19 January 2023 with Chaim Cowen

C: I'm here with Rabbi Yosef Carmel at Eretz Chemdah, and thank you very much for your time

Y: You are welcome

C: My first question is, are you able to give me a brief overview of Eretz Chemdah Gazit, how it formed, what its vision is and what its place is here in Israel?

Y: Eretz Chemdah Gazit system is trying to bring an opportunity to Israeli citizens to solve the problems and disputes in monetary cases according to halacha taking into consideration that we are living in a state with the law of the state which every citizen must obey as well.

C: and what is your formal role in the organisation?

Y: I am the *Av Beth Din* and I am the Rabbinical Dean of Eretz Chemdah

C: Were you here right at the beginning of Eretz Chemdah?

Y: Yes, Rav Ehrenreich and me, established Eretz Chemdah together with Rav Shaul Yisraeli, and it is our privilege to do it 36 years Baruch HaShem

C: how would you describe the relationship between the judgements given in Eretz Chemdah and the secular state law, is there a connection between those two?

Y: there is a connection, the secular courts of the state of Israel are sending cases to Eretz Chemdah because they approach the level of the system, they appreciate their honesty, they appreciate their professionalism and they want to take down the line and the number of files that they need to take. Israel is number one in the world in the number of files per capita.

C: that is happening in the court cases generally?

Y: In Jewish history, from the time of Yitro, we are dealing with such a problem.

C: I hear. Do you incorporate secular state law into your judgement, is it relevant in your rulings?

Y: In some cases it is relevant, in some cases it is not relevant. We check every time, what is the position of the secular state of israel inside the frame of din torah.

C: Would you say there is a difference between a Beth Din operating under Israeli state law versus a Beth Din operating under American or Australian state law – does it affect the Beth Din?

Y: Every place you need to be an expert in both and see what you can do and what you are supposed to do and what you are not supposed to do. There is not one answer to this question. But we are taking into consideration that if you are a citizen of a state in general you need to obey the law of the state and take into consideration that people who sign an agreement, sign it under the umbrella of the local law. You must take it into consideration, how [much] percentage you are taking when making the final decision, its very very, you cannot give a number, you need to check it every time.

C: Does *dina d'malchuta* have a stronger weight because it's a Jewish state or is it the same as if it were in America?

Y: Its one of the parameters, but if we are talking about a democratic state where everyone is equal before the law, this is the most important parameter.

C: what is the way in which you deal with a *nitvah* who refuses to come to the Beth Din?

Y: we are sending the *toveyah* to the civil court

C: so there is no issuing of a seruv here

Y: we are not enforcing people to make mitzvot. Its not a good idea. So if he don't want to come, he is losing a golden opportunity and please, go to the court.

C: Outside of choshen mishpat, what other areas of training would a dayan need to have too be a good dayan?

Y: first of all, he needs not only to know choshen mishpat, but to understand the system beyond choshen mishpat. To understand things in depth – not only to know what the… but to also have the ability to read in between the lines. This kind of knowledge which is not only wide but also very very deep is giving you the ability to deal almost with every question. This is the most important thing, first of all to understand in depth Jewish law, second to understand deeply the situation in the field. Only the combination between both is giving you one of the results.

C: How does one get a dayan to read between the lines, to get to that deeper learning?

Y: he is sitting here 12 hours a day for 8 years and Rav Ehrenreich and me and the other members of the staff are trying to teach to think, not to teach what to think, but to teach to think.

C: how would you describe the difference between Eretz Chemdah and other Batei Din here in Israel?

Y: I am not speaking about other Batei Din

C: what is Eretz Chemdah's unique thing?

Y: Eretz Chemdah is trying to be the best one in all aspects

C: and what are some of those aspects?

Y: I will give you one example, there is not any case in this Beth Din, in this system, in this chain of Batei Din that are giving a *psak* without explanations, a written *psak* that is very detailed with submissions. This is very important and this is one of the most important parameters.

C: the fact that halacha never mandated giving reasons, it seems that *ain Beth Din…*?

Y: according to halacha if one of the sides asks for explanation the dayan must give it to him. And today, when we are living in a modern time, its much easier to write down, to publicise it to open it – transparency is one of the most important thing in every legal system. Without written decisions there is no transparency.

C: and what would you say are some of the challenges that Eretz Chemdah faces?

Y: there is a lot of challenges, we worked many years before we opened the system to try to understand which challenges we will deal [with] and we are still working to give an update[d], halachic answer, to every problem.

C: are you able to say, in terms of the governance of Eretz Chemdah, is there a board or is it run as an internal organisation – how does the leadership work of Eretz Chemdah?

<time marker 8:10>

Y: the leadership of Eretz Chemdah means to go in the footsteps of Rav Yisraeli, who was one of the most appreciated dayanim in the world. He was a member of the supreme Rabbinic court of the State of Israel and every decision of hi[s], in this place became a masterpiece. Rav Ehrenreich and me are trying to take the system in this direction. Thank G-d, we have 10s and 10s of graduates – we are also bringing inside the system graduates of other Batei Midrash – and together it is giving a very good result, Baruch hashem.

C: Do you have a view on toanim rabbani'im and their role in a Beth Din?

Y: in the Jewish system, according to Halacha, the one who are making the investigations are the dayanim, not the toanim and not the lawyers, so the toanim and the lawyers have a place which is not like the place of the lawyers in the courts. I think that it brings more justice.

C: Do you have a rule that toanim are allowed?

Y: They are allowed but their place is not strong.

C: Who makes sure their place is not strong?

Y: the dayanim themselves and the system. Because to say that they are not and to describe the events in the back of the case must be by the sides.

C: are the cases all recorded?

Y: yes

C: you transcribe all the cases?

Y: there is a secretarial person who is writing down every word, it is recorded, and it also written in real time. We send it to the people right after the session and they can send their notes.

C: and zablo, do you have a view on that?

Y: Zabla is very problematic especially where the sides are paying the salary of the one they choose. In such a case its not a Beit Din, its two lawyers with one dayan and the majority are the lawyers. Even though they are under the title of dayan because they were chose by one side and he is paying for them. It's very problematic.

C: if a nitvah will say, I will only go to a zablo, will you give a heter arka'ot to the toveyah?

Y: we need to check why

C: you are saying its *talui* (dependant) on the case itself.

Y: yes

C: okay, last thing, I wanted to touch upon Simah Amir and that case – I don't know whether it has any direct bearing on Eretz Chemdah – but whether or not the Beit Din HaRabani has the ability to do *choshen mishpat*, is that something you have a position on, or have a view on or does it affect Eretz Chemdah in any way?

Y: it's a fact, it's not something to give an opinion on. Its only putting the responsibility on our shoulders.

C: by our shoulders, meaning Eretz Chemdah's shoulders?

Y: Yes

C: because, you are saying, cases now come to you rather than to the Beit Din HaRabani?

Y: they cannot go to the rabbinical courts

C: when it comes to seder hadin, is there a place within Shulchan Aruch where that is fully explained or is a lot of *seder hadin* common sense?

Y: both, especially halacha but also common sense and experience.

C: I know Prof Eliav Shochetman has written on that, is that the best work on *seder hadin*?

Y: you know, he did a wonderful work, but he's not suggestion *seder hadin* update – and we did it. We have our seder hadin, we have our ethical principles, and we are very very strict with it.

C: thank you very much, I think that covers some of the basic things *b'kitzur*. If there is anything you would like to share in terms of advice to us in Melbourne, if we are setting up a Beth Din for mamanot, obviously using the existing Melbourne Beth Din, what are things we should do to make sure it succeeds, to make sure it is something that will be accepted by the community?

Y: a Beth Din, like… I will say it another way: not only the Beth Din but also the courts, need to be appreciated by the people. I say not only regarding Batei Din, its also regarding the legal system, because they are supposed to represent the people and the justice for the people. *Kal v'chomer, ben beno shel kal v'chomer*, a system like us and other Batei Din which have no ability according to the law to enforce people to come, the base for their work is the appreciation of the people, and the more you will be makpid on sidrei hadin, on transparency, on quality et cetera, people will have the privilege to enjoy the way of Torah.

C: thank you very much

Y: you are welcome, b'hatzlacha.

10.2.2 Interview with Rabbi Lau

Interview with Rabbi David Lau, Ashkenazi Chief Rabbi of Israel and Rabbi Yehoram Ulman, Sydney Beth Din at Leibler Yavneh College on 14 November 2017 with Chaim Cowen

C: First of all, I want to say thank you Rabbi Lau for being open to having a conversation with Rabbi Ulman and myself about the Beth Din. I have been looking into *dinei momenos* here in Australia and we have had a number of cases over our history which have worked well and we have also had cases that haven't worked in terms of the secular court have overturned the ruling of the Beth Din. Generally, I think not generally, always, it has been on issues of procedure. They don't have an issue with the halacha itself but in terms of the way in which it has been organised. What I am looking into is to see how Australia can have a set of procedural rules that are not going to get them into any trouble with the secular courts so that we can run a *dinei mamanot* Beth Din without any problems. Being that you are the Chief Rabbi in Israel, and I know you formally have a role over the Beth Din there but I think also in terms of experience you know what goes on there, so I though there might be a few things you answer, maybe you can advise us. I will raise a few of the issues we are facing here and if you can tell us how they deal with these sorts of things in israel is that okay?

D: In israel it is not the same. In Israel the Beth Din of Israel the law doesn't allow us to deal with dinei mamanot only if it is around of divorce, so we speak a lot about dinei mamanot because if someone divorces what about the money what about the apartment… but not direct and if its not part of the divorce we don't allowed to use it. And because of that you can see a lot of private Batei Din of *mamanot* in every town in Israel and a lot of *balagan* because someone wants this Beth Din and another wants another Beth Din and it's not Beth Din of this city

C: so, there is no kavua Beth Din you are saying

D: no *kavua* Beth Din

C: so, if people want their *din torah* judged by *choshen mishpat* they have to go and find a court and do they sign then an arbitration agreement?

D: we have a big problem, because of that I asked to change the laws and if two sign an agreement the Beth Din can use with it and we hope that it will be that people will ask for it

C: so, who will enforce that judgement, if the two sides go to a regular Beth Din, not under the *memshala*, who will enforce the ruling? Who will make sure the *nidon* will actually pay? Is it the secular courts who make sure they pay? Do they sign a document in the beginning?

D: they sign a document called a *shtar borerut*

C: and that *borerut* can then be used in secular…

D: with the *shtar borerut* you can go to (unclear)

Y: in israel they overturn, sometimes the secular courts overturn… (unclear)

D: even if they make a lot of mistakes, it looks like that… but *l'rov zeh lo kacha* (generally this is not the case)

C: so generally they are not turned over?

D: (from Hebrew) the majority are upheld, the ruling is enforced

C: you are saying they generally enforce. Have you had involvement with *dinei mamanot* Batei Din in *chutz la'aretz*, in the diaspora?

D: no

C: so your involvement is more with Beth Din in *chutz la'aretz* in terms of Geirus and Gittin

D: yes… *gittin*, *giyur*, *kashrus*, but not *dinei mamanot*, maybe to give advice to speak with

C: yes but not formally. I just want to take you through a few of the things, if you look at point number 5, there are a few things we have had problems with, and I just want to know if there is a way that they deal with things in Israel that is perhaps different or that we can learn from. One is, do you know if Beth Din for momenos in Israel have some sort of appeals process. Is there a Bet Din L'Irur formalised in any way? I know there is an idea of *Beth Din achar Beth Din lo daiki* – is there a way you get around that?

D: we spoke a lot about it, I have a lesson I can send you the *mareh mekomos* of the lesson

C: but *b'poel*, in reality?

D: yes, in this subject. The way to explain it is that anyone who came to Beth Din knows that this is not finished in this Beth Din until the Beit Din HaGadol reviews… that is the idea. Everyone knows that he doesn't finish his way.

C: until it has gone through that process if they choose to go there, I guess. That's a way to build in *Irur* (appeals)

D: of course the Beit Din HaGadol cannot tell someone in the regular Beth Din that you must hear me, because a dayan in Beth Din said I am sorry I understand the *Rashba* differently so because of that I cant hear you.

Y: (in Hebrew) Once again, the Bet Din L'Irurim and the Bet Din HaGadol are only for matters of marriage and matters of divorce, and he [is speaking about] *mamanot*. There is not Bet Din L'Irur for *dinei mamanot*?

D: (in Hebrew) for all of these things there is not

C: so in *mamanot* there isn't, so *mamonot* you do it as yourself and that's it, okay. Is there any overarching body that makes sure that for example there is record keeping? Are there rules about each judge writing their reasons for their judgements?

D: it depends… every Beth Din is for himself. We try to organise them but we see that it is very big problem, because in the charedi neighbourhoods you can find a lot of Batei Din and it's a lot of questions of families and tradition and this rebbe and this rebbe so…

C: its hard to enforce it all over. Is there some sort of *shtar* which does lay out how a Beth Din for *mamanot* should operate, does it exist?

D: yes you have it a lot in the Beit Din HaGadol go according to the same rules and you can see. But because we have so much and in every city three people do it, it's a balagan, a full balagan. From time someone took the other side to Beth Din no one heard about him and of course the psak is not…

C: you are saying the dayanim themselves are people that no one knows about so there is no way of ensuring that a dayan is accredited…

<time marker 7:40>

D: … (in Hebrew) the Beth Din that have a *kesher* to the Beth Din of the *Moatzot Datiyot* we advise with them, we built for them and organise rules of work, including that anyone who is sitting as a dayan has *smicha* for dayanut, meaning it is serious. But the reality is that generally the dayanim who are selected are chosen from this group.

C: you are saying they are generally chosen from which group?

D: (in Hebrew) the problem is that in the charedi community where there every *shtible* establishes a Beth Din there is a balagan.

Y: what he is saying is that the Rabbanut had a certain accountability and a certain *shkifut v'cheshbon* (transparency and accountability) with their dayanim. But there is another very important point that is important to understand. In Israel from the times of Ben Gurion the law gives power and autonomy, obviously Bagat"z interferes sometimes, but generally speaking when it comes to anything to do with *ishus*

C: they have automatic, yes

Y: in other words, a dayan on a Beth Din, not just the Beit Din HaGadol, in Ashkelon or Ashdod or Be'er Sheva can call the police and get the husband to go to jail. In *dinei mamanot* they do not have that autonomy

C: so, its all done by private arrangement, it's the same as here essentially

Y: you cannot force a person to go to…

C: except you can use a seruv, you can use community pressure?

Y: israel, as we are over here, very careful about contempt of court. Once one goes to court we don't tell them you have to go out of court

C: sure, is zablo something that is commonly used, do people go and arrange their own zablo Batei Din? I would imagine that's used? *Zeh borer lo echad*

D: [unclear]

C: here in Australia the secular courts have looked at zablo and said 'wait a second, you have two people who are elected by the parties and they seem to be on a side', and they haven't been comfortable…

D: the government, who is let…

C; do the secular courts in israel have an issue with that or will they uphold a zablo, they won't say it's okay

D: zablo and they (unclear)

C: they will accept it?

D: yes

C: they don't have an issue even though its not a full level of impartiality, *bli hatayah*?

D: its *kayam* (upheld)

C: its *kayam* and its not an issue the idea of a zablo, okay. Also is there an issue with toanim? Do you have an issue with their being toanim at Batei Din? I know that for example the Beth Din of America officially according to their rules and procedures they don't allow a toan, because they say there is nothing to stop a toan from lying. If you are a lawyer, you can be struck off if you are shown to be misusing your role but there is no overarching body of toanim so as a result the Beth Din of America I know they say at least that they don't use toanim

Y: are you sure

C: they say this, according to their procedural rules and I spoke with Rabbi Shlomo [Weissmann], who is their *mazkir*

Y: I have never heard of one single Beth Din in America without a toan

C: he says that when both parties agree they will allow it and both parties have to agree to the presence of a toan but unless they get the consent, they won't allow it

D: In israel you will find a lot of toan[im], a lot of *orchei din*, even in a din torah, they are someone who helps to recognise…

C: his rights… but there is nothing that oversees toanim. If you are toan you don't have register to become a toan? You can be a toan and rock up and that's it?

D: there is a big difference between.. you need to understand there are three, the level is called *ishus*, not *dinei mamanot*, or *dinei mamanot* with the divorce and this is one way, and second for the other side in the charedi public you can find with lawyer, without lawyer, with rules, without rules

C: it runs like a black market, it does what it does?

D: in the middle you can find Batei Din with every city in the chief rabbinate – when I was the rabbi of Modi'in I had a Beth Din of dinei mamanot in Modi'in, and in Ramat Gan, Rav Uriel has a Beth Din for momenos and in Kiriyat Onu, Rav Arusi and in Yerushalayim Rav Jonty (?) created this and after Rav Korelitz and this is Beth Din of *mamamot* that is according to rules with organisation. From time to time yes, they suggest you to take lawyers, to bring your lawyer with you. You need to know that in Israel, three… another three different courts.

C: so, in those the *Av Beth Din* is essentially in charge of what he will accept within the Beth Din. To get a little bit more interesting, I know that when it comes to, I know what America does, but what does Israel do for women as witnesses in *dinei mamanot*, or is that again each dayan… is there an issue with women in *dinei mamanot* that you are aware of?

D: it depends on who the dayan is

C: its each for itself, I know the Beth Din of America says *kol tnay shebamoman kayam* so you can bring in. This may be a little bit radical but in the one of the shiurim put out by the Beth Din of America the topic came up of whether a woman can be a dayan in dinei mamanot because of *kol tnay shebamoman kayam*, and they said it's a possibility. Is that something which is *mufrech l'gamri*? I want to hear what Rabbi Ulman has to say about that as well.

D: in Israel we have other problems and other issues and other ways to help women find their place in the community and I didn't hear any women who asked to be a dayan in Beth Din *mamanot*.

C: not yet (laughter)

D: not yet, but its another society so you cannot compare the society in America and in Israel, its not the same. Why you need to speak about things that its not happened in Israel?

C: maybe this is a Rabbi Ulman question if you want to address it? Is women as witnesses, does that come up?

Y: as witnesses that's a different story, as witnesses in *momenos* the general *minhag* is you accept any witnesses and you decide on your own, because in *dinei momenos* as opposed to *dinei nefoshos* a lot depends on the *lefi ro'ois eynei hadayan* – certain things a dayan can use *intuition. In dinei nefoshos* you can decide to punish someone based on intuition, *dinei momenos* a lot depends on *umdenos* and certain… so you can have any witnesses you want and you have to have in mind to be able to base the *din*, not put the whole thing into the testimony of the non-kosher witness but to be able to use it as a…

C: and have you looked at the idea of dayanim or is that something you haven't gone into?

Y: personally, I think that it, there is a reason why even a witness is *pasul* and the reason we accept them as witnesses is not because they are kosher as witnesses but there are different reasons. But for dayanim the halacha is that…

C: if the two litigants are *maskim*, surely it's their money and they could be *maskim* to anything, *kol tnay shebamoman kayam* cant they simply say we accept outside of strict Torah law?

Y: even on an individual basis, not to do with the official Beth Din, they can ask anybody they can ask a goy, if they decide to have a non-Jewish mediator to be able to make the decision they can do whatever they want to make *shalom*, to make peace, but to have an official Beth Din to have a dayan who is a woman that's a different story.

C: I hear. So, I see that there isn't really any official government policy as far as how the Beth Din runs they each run on their own. Do you think that there is anything that the diaspora can be learning from what exists in Israel as far as *dinei mamanot*, is there anything you feel that, obviously you are in a community where…

D: you can learn from us, from the Beth Din that it is only dayanim that pass all the tests, they are the dayanim they can be dayanim, these are the people we take to sit in the Beth Din. So yes, the diaspora you need to learn from this that only people who pass all the tests and they can be dayanim in the regular Beth Din.

C: by regular what do you mean? Regular *ishut*?

D: [unclear]… second we have very nice rules. But I am sure that we can learn and teach each other.

C: *yashar koach* – thank you very much, that is more or less our questions.

10.2.3 Interview with Rabbi Mann

Interview with Rabbi Daniel Mann, *Av Beth Din* at Eretz Chemdah Gazit, Jerusalem on 18 January 2023 with Chaim Cowen

C: I'm here with Rabbi Daniel Mann, from Eretz Chemdah, we are meeting on the Eretz Chemdah premises on 2 Beruria St in Yerushalayim and we've mentioned that the transcript and any areas where he is quoted to send it to him before it is done. First of all thank you very much for your time, I appreciate that. The first question is, to understand your own personal journey as a dayan and then maybe we'll look at the Eretz Chemdah journey as well. If you are happy to share with me what's your personal journey, what qualifications do you have, what training, what has led you down this path?

D: I guess we'll start with smicha, I got smicha from YU sometime at the end of the 80's, in 1987 I finished off my time in YU and from there moved to Eretz Chemdah where I learned for seven years for dayanut. I have dayanut from Eretz Chemdah, I do not have dayanut from the Rabbanut, I did some of the tests and some I did not do – it didn't work out, timing etc. I originally did not plan to be a dayan at all, I wanted to be a Ram but it turned out that I have become a dayan. The first place actually I was a dayan was not here, but was in NY at the Beth Din of America which I understand you are familiar with

C: Yes

D: I did shlichut for two years 1997-99 in Memphis, Tennessee and in the summers I was in NY and my friend and classmate Rabbi Broyde who was reconstituting the Beth Din then in NY then asked me to join which I did for the summers of 98 and 99. I subsequently came back, that was before the Eretz Chemdah Beth Din began in the early 2000's Eretz Chemdah started working on forming a Beth Din. At some point it was possible that I would be the Menahel, but in the end I was not the Menahel.

C: is that the role that Rabbi Rechnitz went on to take?

D: Much later, you can ask him about that, I think he had two stints as Menahel. I was a dayan from the beginning. I remember the first case, I sat with Rabbi Carmel and Rabbi Ehrenreich, I was the junior member there. After a few years of doing that – usually it's the oldest of the dayanim who is the *Av Beth Din*, not 100% does it go by the oldest, but of the last close to ten years I almost always sit as the *Av Beth Din*. I used to sit, from Rav Carmel I learned a lot from.

C: what's Rav Carmel's role now?

D: He and Rav Ehrenreich are the rashei Avot Beth Din which means they have overall responsibility, in addition that Rav Carmel often sits as an *Av Beth Din* himself

C: so, you sit as *Av Beth Din* specifically in this location here in Yerushalayim?

D: almost always in this location, sometimes we are on the road, I sat once in Bet Shemesh, I sat I think three cases in Petach Tikvah, perhaps, I don't think I've sat in Ramat Gan. There are about eight branches, something of that nature. There are quite a few of us, usually people are based in one place and are borrowed to a different location.

C: I am also interested, did you have any non-Jewish legal training or is all your training in the dalet amot of halacha?

D: as a young kid I wanted to be a lawyer, I have a little bit of a proclivity to that type of thinking and work, but I have not formally trained in law. I picked up quite a bit, especially about Israeli law, I spent… after the time I began as a dayan here, I also spent another two summers in the 2000's on the Beth Din of America, a total of four summers. So, again I picked up some law on the job – if something comes up you need to figure it out.

C: has there been any other area beyond your formal yadin yadin training that you have found has come in handy? Or other skill you acquired that you feel is also important?

D: sometimes business / math are somewhat important

C: do you have a business background?

D: when I started in the Beth Din, I though business ethics and business in general would be worthwhile and I did some study of business and I have always been attracted to maths, my father is a maths professor. In general I find that the most important trait that a dayan needs, modern Batei Din – modern meaning contemporary, not modern versus charedi – is to be able to understand the material that is involved, to understand the case. I'm not a business mind that I can be in a hedge fund tomorrow, but to understand different constructs – that's incredibly important.

… [section removed as it was requested it be 'off the record']

C: so do you ever bring in an expert?

D: we bring in experts all the time, for technical things. I haven't been in a case where we brought in a psychologist or somebody to do… graphologist or lie detector, but usually on building cases we bring in experts a lot.

<time marker 7:27>

C: I know the Beth Din of America brings on people to their panel itself, do they do that here at Eretz Chemdah or is it purely dayanim?

D: purely dayanim

… [section edited out, due to request that it be 'off the record']

C: b'seder. Looking at Eretz Chemdah's context, can you shed some light, you mentioned they were originally a Bet Midrash

D: we are still a Bet Midrash, its where dayanim were being trained and where Rabbis who were going on shlichut are learning advanced post smicha learning, but not as dayanim but as Rav-Ir, that continues, that's the mainstay.

C: Let's look at that, the original version of Eretz Chemdah before it had a Beth Din as well, when did that begin?

D: 1987

C: okay and that was under the guidance of?

D: Rav Carmel and Rav Ehrenreich who were both young rabbis. Rav Carmel was quite young, Rav Carmel was in his early 30s and Rav Ehrenreich in his late 30's maybe early 40's I don't know. They met with, on sabbatical, and started dreaming about what they could do and thought of making a high level Kollel where they accepted high level guys and were very demanding about the work that people had to put in and the results, they took the idea to Rav Yisraeli who was the Rosh Yeshiva of Merkaz, a dayan on the Beit Din HaGadol

C: that's Merkaz HaRav?

D: Merkaz HaRav, and he encouraged them to run with it and said he would take responsibility. All the ins and outs Rav Carmel can tell you. I joined in 88 when I finished my learning.

C: what was their vision, what were they trying to achieve?

D: Their vision was to take guys who are post smicha and give them another seven, now the realise eight is more realistic, eight years of intense learning specifically on, mainly on, dayanut – Even HaEzer and Choshen Mishpat, at the same time they went through basically the whole Mishnah Brura or basically the whole Mishnah Brura, Tanach and they learned Machshevet Yisrael along the way to be broad talmidei chachamim with a focus on dayanut, to be *machshir* (prepare) dayanim and because someone has learned that stuff, whatever he is doing, if hes a *Ram* in a Yeshivat Hesder or a Rav in a Bet Knesset or a Rav Shchuna that he will be a bigger talmid chacham.

C: Specifically for the dati le'umi community?

D: for the dati le'umi community. In other words, for Israel, the feeling is that the dati le'umi is the one that can bridge the gaps between all elements. You had to be an IDF graduate, *boger*. I was actually a test case, I was the second year of the Kollel and as a new oleh I had not been drafted. I hadn't served in the army, but I hadn't rejected being served either and there was a possibility I

would do it in the future. So the question was whether they could accept me based on the rules or not. The ruling of the board was that I could be accepted if I promised that if and when I was drafted I would not defer, which I promised and I did not, I arrived a few years after that – probably my third year in Eretz Chemdah I started my service.

C: So what prompted it to become a Beth Din, to take on that arm?

D: The beginning it was just that, but the Rashei Kollel are very much dreamers how they can help Klal Yisrael. As the reputation of the place grew, they got down how to be a Kollel for dayanut, they thought we have these talented guys who are getting older. The average person started at 24-25, after five years the guys are already 30 and one thing after another, this project came up, that project came up. One of the big projects is the 'ask the rabbi' project which came about, again Rav Carmel would know better, but if I can save a bit of time, the Jewish Agency turned to Rav Yisraeli as one of the leading halachic figures in Israel and the world, if he could take questions from far flung communities throughout the world, sent by fax – which once upon a time was a *chiddush* (novelty) – at the time there were only two fax machines in Yerushalayim. If he could receive the questions and give answers to rabbis in Ecuador and Poland, which then had much less doing then it even has now. And also to places in Africa, South Africa and other places in Africa. He said he didn't have time, but if they send the questions to his Kollel and the Kollel comes up with the answers, he'll check the answers and agree or disagree, send back to us for improvements, which is what happened until… it started about 5 years before his death, it started probably around 1991-2 and he died in 1995. That is a project which is still going on they are now working on the tenth book of *b'mareh habazak*, those questions. So, the projects came to us – we have *koach* we can help with this, we can help with that. After finishing the first, already having graduates of the Kollel, somebody came up with the idea of why don't we start our own Beth Din with the Roshei Kollel and *bogrim* serving as the main minyan of the Beth Din. That's what they did, they started slowly, they worked very hard on rules and regulations – I actually translated for them, I got with permission, the rules and regulations of the Beth Din of America, I translated it. And that's one of the things that was considered. They had a whole staff of rabbanim and *orchei din* and people who were both rabbanim and lawyers working on it very hard to make the best possible rules and procedures, rules of ethics, all sorts of…

C: so it was modelled off the Beth Din of America rules?

D: No, that was *one* of things, it was probably more Israeli input

C: are there any specific differences or changes that…

D: Rav Carmel would know that, I wasn't involved deeply in that process, he was involved deeply

C: I am curious to understand, being that – correct me if I'm wrong – the Israeli courts, the Bet Din Rabbani already have choshen mishpat arbitration then, and if so why was Eretz Chemdah needed?

D: the exact date someone else will know better than I, originally when we started it was an alternative to the Rabbanut because some people didn't like the Rabbanut for better reasons or worse reasons. Things took a long time, sometimes people were unhappy. Sometimes people were unhappy that many of the dayanim, most of the dayanim were charedi. For different reasons not everybody felt comfortable in the Rabbanut. Not everybody feels comfortable at any Beth Din, a lot pf people say I want to go to a secular court, but there was a feeling that some people would do this and by having more options it would help expand – by trying to do the best possible job and to focus on this you'd do a better job. I don't know if we'd do a better job every time than the Rabbanut but it would help the world of Batei Din to have a new option which really, it was trying very hard. At

some point, not that very long afterwards there was a famous court cases in which the Supreme Court…

C: Simah Amir?

D: No… was it Bavli v Bavli? Perhaps. Where basically the Supreme Court said that Beth Din of the Rabbanut are not allowed to render rulings on dinei mamanot that are out of their jurisdiction. If it's between a couple, how to split their divorce, how to divide their property, that they have co-jurisdiction with the secular courts. To sit as a court as an arbitration, the Rabbanut is not allowed. Their only a court of jurisdiction, not arbitration. Even if the two sides say 'no we want the Rabbanut, we want them to do it' and that's what it used to be, if the two sides sign the arbitration agreement they could be arguing about loans or debts or whatever the case might be, property matters, then it was binding as an arbitration – they said no, they cannot sit as arbitration. This increased the need for the private Batei Din to step up and take from that void.

C: am I correct that the Beit Din HaRabani was acting as a private arbitration when it would take those cases, meaning it was under an arbitration agreement?

D: the private and public was sort of blurred, that was one of the complaints 'hey we are paying you to deal with geirushin, we are paying you to deal with personal status, why are you moonlighting on government premises with government premises, with government resources – with secretaries, with the stationary, with everything – when you are actually sitting as a court of arbitration. That was their claim.

C: was that the since the establishment of the state they were doing that all the way until the 2000's

D: I can't tell you exactly, I was born post state, but I believe that was even from pre-state, I would guess. As far as I know it was from the beginning until probably something like 2010.

C: once that case occurred did that create a shift in the amount of cases coming to you, do you notice some sort of change in society at that point?

D: Rav Carmel would know better than I, on almost anything except from what's going on in my life – even that he knows pretty well – there has been an increase, the first couple of years we did very few cases, in the first year there was one and then three the next year until word got out and then it started increasing, I'm not sure if there was seismic change when that came out, but if you compare now – now we have, files we have about 140 a year

C: that's just one branch?

D: no

C: that's across all the branches. Was there much competition – for wont of a better word – when Eretz Chemdah began being a Beth Din. Were there many other?

D: Charedi Beth Din there have always been

C: do they run more in their neighbourhoods or is there a Charedi well known…

D: there are a few well known ones, sometimes we have a chassidut, every major chassidut has their own Beth Din, I've got to believe, I don't know each one, I don't know what's considered a major chassidut also but Belz has, Ger has, Vizhnitz I have to believe has and in the Litvish world, it could be by place but there are certain famous ones – Rav Asher Weiss in the past few years is famous, Rav

Korelitz is famous, the Badatz of the Eidah Charedis is famous. The Rabbanut of cities also has, some of the city Batei Din, if I'm not mistaken they can still sit dinei mamanot, if I'm not mistaken.

C: are they under the government?

D: they are under the municipality

C: is that like a low level court, small claims and that sort of thing?

D: no, it's a separate… I'm not sure, ask someone else.

C: I'll have to look into that. What distinguished Eretz Chemdah from the other courts of Batei Din that were around at the time?

D: I think there were some, but there were not many Zionistic Batei Din. A dati le'umi person for the most part is not going to want to go to the *Badatz* of the Eidah Charedis or anywhere where he feels that they don't understand him, they don't understand his language – meaning they speak Hebrew, but they aren't of the same mindset – for the most part they give *dina d'malchusa dina* on average less of a place than a place like this. *Dina d'malchusa dina* is an important part, it's not like a rubber stamp, if the courts said it than 'boom' that's what we do, but there are many piskei din where we talk about should we, shouldn't we partially accept it, fully accept it. It's a major major discussion, it's sort of a mindset here that we are enthusiastic about the *medinah* and when the *medinah* gets something right then we are all…

C: you'll take it on board

D: using that, it's something which is responsive to society.

C: is *dina d'malchusa dina*, is that something you would use synonymously with *minhag socherim*

D: no

C: or is it something else entirely?

D: almost everything that we have a discussion of *dina d'malchusa dina*, we say if it's *not dina d'malchusa dina* then its *minhag socherim*. Its overlapping but it's not synonymous.

C: I imagine that's something I can read up on, there would be some literature

D: Rabbi Rechnitz can give you a tour of our website better than I

C: I have had a look at it a little bit myself

D: you can look at keywords, you can probably find dozens, many dozens of *piskei din* that talk about that

C: I am interested in exploring, because you are an American and because you have had involvement with the Beth Din of America, what would you say are the key differences between how the Beth Din works vis a vis the state here, versus how the Beth Din of America would work vis a vis the state there, are there major differences?

D: the major thing they have in common, I'm not that up to date on the Beth Din of America now, I have spoken to Rabbi Shlomo on the phone a few times, maybe I zoomed with him also, Rabbi Willig I am extremely close with but again, I spent four summers, it's not a little, but it's not a crazy large amount. What they both have in common is that integrity is 100% no compromising, I am not aware of any case, here or there that there was a dayan – again, there I haven't been recently, here I have

been the whole time – that a dayan was *shachud* on anything, taking something under the table or having a preference to one side or not letting… anything to do with ethics is 100%. I always say, me and I think just about any dayan here, if someone says to me listen, 'you've been sitting as a dayan for 20 years, you have made mistakes in halacha'. I'll say 'I know I have made mistakes in halacha, it's not possible that I didn't, I know what they are. I haven't gone back on anything I've said, but it has to have been that I made mistakes. People make mistakes, I'm a human being, I made mistakes.' If people said to me 'you did something that was unethical' that I would take like 'that, I would like to say that I could have made mistakes, it could be that I spoke too harshly to somebody and too softly, that I could, but unethical, that no, that I would be *moser nefesh* on.' I think that's true here and there, the way the operation works.

C: Yes, I guess that goes to the importance of personalities.

D: same thing goes for Chicago, I worked under Rabbi Yona Reiss at the Beth Din of America

C: was he the Menahel then?

D: when I started, he was just slightly involved, my first summer, in my second summer he was the *sgan* Menahel if I'm not mistaken, and my third and fourth summers he was the Menahel. Actually I came in to the Beth Din so he could have vacation, vacation for him was teaching Torah, so he was the Menahel and ran the office in his absence which means I spoke with him every day (laughter). He's as straight a shooter as ever has been born.

C: are there unique things that you have to look out for, being in Israel as opposed to being in America or vice versa

D: I would have to believe that there is. Here I think, my assumption is that the court system feels more in place to be critical of the Batei Din.

C: would they ever review the substance of the judgement or does the Arbitration Act not allow them to do that?

D: So there is concern that they do at times. They certainly do about ethical questions, legal questions about the procedure they definitely do and we have a very very good record on that. Many shoftim who are fans of Eretz Chemdah, some are religious and know it through the Modern Orthodox religious community and some may not but by our reputation, so they send us cases. (30:17) but there is still a feeling that we know Beth Din and we don't always agree with Beth Din and therefore we are going to… its politically correct for a secular judge to say, 'hey, no, you can't do that?"

C: Is there a division of church and state here like there is in America?

D: no

C: so, there isn't, which means that in America the judges will be very reticent to involve themselves in a decision

D: it will be like they are attacking the Jewish community

C: here they are more willing to be involved, so have decisions of your…

D: it's something I don't know, I know more about here then there, but my feeling is there they would be much more nervous about, the judge would be nervous about… we do something, they can *pasul* something if I understand correctly, ask Rabbi Rechnitz of Rav Carmel, they can *pasul*

something based on it not being for the welfare of society. We do a ruling that is fair for the cases, but if someone gets away with that then it's not good for society, so there are many laws here that are called – I know what it called in America, here it's called… its slipping my mind, it will come to me a little bit later, laws that cannot be waived. A law that cannot be waived, any law cannot be waived cannot be waived by the arbitrators either – cogenti – it comes from the English word 'cogent', a *chok cogenti*, they say that since its bad for society, for a worker to give up, say okay I won't get pension – I want this job so much I won't get pension – halachically we say 'you agree' – *kol davar shebamamon, tana'o kayam* – I can say that, but they say 'no, you are ruining the state, we don't want there to be a situation…' in Israel there is also a workers court, in some areas we do employment litigation, but there are certain things we aren't allowed to touch.

C: Do you have a lawyer who will advise you as to what you can or can't touch or where the law won't allow you to make a ruling?

D: we have several people who are experts in law, retired judges, lawyers, experts in the field who we will ask questions to on a regular bases

C: and how would you know it's an area that you can't touch if you haven't yet had an altercation with the courts?

D: first of all we have classes that are given from time to time by judges, that are given to the Kollel and/or to the Beth Din. We have a *kenes* every year dealing with a topic, Rabbi Rechnitz is usually the one who runs it – which is important background that everyone should know. We have had more than one dealing with *dina d'malchusa dina*, we've had them about employment law, we've had them about all sorts of questions. And the Menahel is there to ask questions to, sometimes he'll know based on his experience. Sometimes he'll say, ooh you know what I am going to ask an expert in the law field. I have a few connections to people in the field of law.

C: Have members of Eretz Chemdah moved on to Rabbanut courts?

D: I believe nine now, one is in the Beit Din HaGadol…

C: so there is a certain natural progression, would you say Eretz Chemdah is looked at as the pre-eminent non-government Beth Din in Israel or is that hard to judge? Is there a way of how you seek feedback or how you know you're standing in the community?

D: Rav Carmel more, because he is much more involved, he meets people at a high level all the time, Rabbi Rechnitz also meets people more than I, I am an American guy who lives in a charedi neighbourhood… we get what we call *dashim*, you know *dashim – drishat shalom*

C: regards

D: regards, in other words we hear 'oh someone told me that's the best Beth Din'

C: anecdotal, people are talking, word on the street

D: people are going to criticise us, sometimes the criticism has basis for it, we are human beings. Again, ethics…

C: that's your bar. What do you put in place that perseveres natural justice, if that's a legal term for the ethics. Is it the procedural rules that are what makes this Beth Din different, or are there other things as well that you put in place to ensure those ethics and to ensure the right dayanim are appointed?

D: I don't think it's the rules so much, I think the rules are more of a *siman* than a *sibah.* Because we take our relationship with the courts seriously, because our biggest chillul HaShem is if something we did is struck down by the courts – in other words, maybe someone else would say 'the courts again, they hate religious people, they hate BDs' by us know, they are not doing it because they hate us, we may disagree with them on a certain case, but if they think we did something wrong – we live in fear of that because of chillul Hashem, because it's not fair to the litigants, they have been through the process, someone wins and then it gets shot down in the end. And because we believe that yashrus is…

C: you've put it as that that's the *sibah*, would you say that's a cultural thing, it's not something that manifests in a particular training you get?

D: it's a cultural thing as far as coming in, it's also something you get throughout the 7-8 years of the Kollel. Some of the dayanim are not graduates of Eretz Chemdah but they went to similar places, Psagot…

C: How does that feature in the Beit Midrash, is it in the type of shiurim that are given? Can you quantify the ethics?

D: it comes up after mincha, probably two-three times a week Rav Carmel says something in his messages

C: so, it's from the top

D: Last week, on Sunday an important philanthropist dies, he spoke about her, the things you can learn from her. There will be these little 2,3,4,5 minute blurbs about different things that sometimes can be this thing about yashrus and kiddush HaShem, that's a major major thing.

C: I have a few rapid fire questions I want to shoot to you, but before that I want to ask, in terms of Eretz Chemdah's being appealed, does that happen often here? If it does how does the courts normally deal with those decisions, is there some sort of pattern?

D: that's Rabbi Rechnitz

C: that's a Rabbi Rechnitz question, okay, I'm happy to save it for him

D: I may know a couple of stories, but he would know the numbers. The truth is we might not always know if something is appeal, but usually it will get back to us. Our record is quite good.

C: We were discussing before

D: more than quite good, very good. I know two cases that we lost that was not our fault. One of the cases might be 5% our fault. There was a case where there were three litigants and one of them was on the quiet side, he wasn't fiery, he answered questions. Two years later when they were trying to enforce the ruling, so the family of the guy who had to pay a certain amount of money said he has Alzheimer's, and in fact he had Alzheimer's when the court case was going. Apparently he had not been diagnosed yet, certainly nobody said he has Alzheimer's, but looking back it turns out retroactively that he was at early stages of Alzheimer's, he was able to answer questions but he wasn't fully able to… he might have answered different things, so the courts said that's valid. We had met the guy for the first time, how do we know that hes not quiet? He answered questions, it was not like he said things that didn't make sense. That's a case where they did their job and our ruling, was… you could say that maybe we should have picked up and seen his age – I don't know, he was in his 60's – and the way he was talking, maybe, but it's not the type of thing that… it's the type of

things that you say next time how do we make sure this kind of thing doesn't happen? But Baruch hashem, we are very careful, and it shows.

C: Just to zero in on a few hot-button issues. One of them is zablo, we discussed it a bit before the recording, but what is your position on zablo generally? Does Eretz Chemdah have zablo that it is involved in? If you can speak about your thoughts on that.

D: Listen, zablo is in the Gemara, the Mishnah. So I can't speak too much against the concept of it, in some ways it's a very beautiful concept. But I think already for hundreds of years it basically does not work. Well it can work, but it makes it very likely for there to be unethical practices that the *zeh borer* and the *zeh borer* turn out to be lawyers for their side and paid by them – and its clear in advance that they are going to rule for them and fight for them, and even do some dirty, nasty tricks. My time in America, I heard horror stories. Eretz Chemdah basically basically does not do zablo. If there is a case that there is no choice and its otherwise just not going to be done – Rav Carmel did one that he worked on for years that he was very proud of.

<time marker 43:06>

C: he was the *sholish*?

D: he was the *sholish*, he would only do the third, and it would only be based on our rules

C: would you essentially say that a *sholish* is essentially a *yachid mumcheh*?

D: in many zablos that's what basically comes out

C: so there are two *toanim* and *yachid mumcheh*?

D: it's even worse

C: because the two toanim each have voting rights?

D: it's not always the case, *chas v'shalom* I don't want to be… everybody, I know when I was working in the Beth Din of America, they had a zablo threesome that they did on a regular basis that worked beautifully. In other words, if you would have in New York - I'm not sure if they told you about this, I'm not sure what they do know – in New York if you had a Modern Orthodox guy against a Charedi guy and Modern Orthodox guy is not willing to go to a Charedi Beth Din and the charedi guys isn't willing to go to a Modern Orthodox Beth Din, so they had a threesome, Rabbi Willig would sit with Rabbi Landesman

C: and Rabbi Aharon Levine?

D: no, he was with the Beth Din of America, at that time it was Rabbi Steinberg. That was the three and they worked together wonderfully – all three of them were as straight as straight as could be.

C: how is that a zablo? Isn't that a Beth Din, if you have three that sit together?

D: no, they came from three different BDs, one was Monsey, one was Manhattan and one was the Beth Din of America

C: so two of them would be *nivrer* and they would select the third one?

D: whatever Beth Din was you know, this is the way you are going, okay we've done this before, the MO guy says whoever the Beth Din of America sends, and the Beth Din of America says we send Rabbi Willig

C: so it's not a zablo where the parties are literally picking their own person

D: they are picking the Batei Din who pick the…

C: I understand

D: So it can be done, you can have a zablo where each of the dayanim is a tzadik gomur but very often it doesn't turn out to be that way

C: what about your view on toanim, the conversations may be a little interlinked, not just in your view, I'm interested more in Eretz Chemdah's view on toanim.

D: we have much better experience with toanim, then at least from what I know the Beth Din of America have in NY. When I was working for the Beth Din of America they had a rule that you can only be a toan if you are also a lawyer, do they still have that?

C: now they do not allow toanim full stop

D: even if he is also a lawyer?

C: if you're a lawyer you can be disbarred so I guess its allowed

C: that's exactly the point, you can be disbarred, so there is a certain amount of professional integrity. Whereas a toan, the dirtier, louder, more abusive, more willing to curse the rabbis, threaten them physically the more popular he becomes. Over here toanim have a degree and they can be [disbarred], I don't know the exact process, but they can be…

C: so there is an official, you get registered as a toan here and you can be disbarred from being a toan?

D: yes, I've never had to, I've never even threatened anybody

C: what's the name of the organisation that oversees toanim here, is it under the Rabbanut?

D: that's a good question, you have to ask Rav Carmel, but it's a government recognised degree and they are pretty professional. Did I like everything that every lawyer and every toan did? No. But was there anything that I thought was 'off', out of bounds, that was so ridiculous that that's criminal? No. Their job is to help their client win, and not to say I've been looking at this and I decided the other side is right – they are not going to do that.

C: And the issue of *al tehyu k'orchei hadayanim* – do you see that as an issue halachically with having a toan?

D: sometimes they help the process

C: but generally people coming to Eretz Chemdah will bring representation, whether it's a lawyer or a toan or *lav davka*?

D: I'd say it's close to 50-50. Listen the bigger money it is, if someone gonna… millions of dollars a lawyer is going to come

C: but legally here, people have a right to representation?

D: what we demand is that if you bring it you need to tell the other side

C: and they can choose to bring one or not

D: and we've had cases where somebody comes, 'hey I didn't know you were coming' 'oh it's my father' 'yeh but you were told to come by yourself or, no' or 'he's my Rav' so then the question, does he count as a toan, does he not count as a toan, sometimes we spend the first 5-10 minutes arguing about that and we usually work it out, sometimes we ask the person to leave, sometimes, okay fine.

C: how do you eliminate issues of bias among the dayanim? If someone who has a relationship with a dayan do you do some form or…

D: we are super machmir

C: how do you check, what's the process of checking that there are no relationships or conflicts?

D: usually by name, whenever Tzippy or Ido asks my 'are you available' first check the name, they like me to be here for English language ones – I'm not the only one who speaks fluent English – very often I know people, the American olim community is not that small [large] so very often I have to *pasul* myself. I had one case when in the middle of the second diyun, the second hearing of here, a woman who had a married name, she felt it was for some reason important to brag who her father is. She said her father's name, I don't know her father, but I know everybody with that last name is a cousin of mine. It was not a first cousin and I don't even think a second cousin, my guess it is that her father is my third cousin. It's a certain name that everyone knows – everyone who's this is related to Mann's. So it stopped, oh-oh, to make sure I heard the name correctly – so you mean you grandfather, your great-grandfather? Yep. So, I said 'okay, so it turns out she's probably my third cousin once removed, do you want me to recuse myself?' 'Do you have any connection did you ever meet at family things?' 'No I never met her father, never met her.' They said 'okay, continue'. We just had a case, where we have a litigant who has a company and also an organisation and the company is being sued and one of the dayanim found out that he teaches in a Kollel that once of the members in this Kollel, the wife works for the organisation which is run by the person who owns the business. So we said 'okay we are going to let the sides know' he just found out in the middle, and they said okay. In other words, there are certain times we say 'no we are not going to bring this up, it's too far flung' but we are really really stringent on that.

C: I am also interested in seruvin and heter arka'ot. Do you issue seruvin?

D: that's a machlokes if we issue seruvin, I think it's against the law. The classic 200 year old, that was used for centuries, that I think includes *cherem*

C: *harchokos d'rabeinu tam*?

D: I don't think *harchokos d'rabeinu tam* is for that, I think it's only for a *gett*, I don't think it's also for this. The classic language of seruv I think is against the law here. As you are cursing somebody, how can you curse somebody for just wanting to follow the law and go to court?

C: Is it seen as somehow obstructing the path to the Israeli courts?

D: right, in other words, if the guy wants to go to you fine – unless there's something that they think we don't have authority for – but you can't try to force him. He went to courts, so we are not going to give him an aliyah. Then you are taking away his civil right to government court. So the government are against that and we don't fight with the government on such things. If the politicians want to and they change the law, fine, but we are working within arbitration law. We are going to follow arbitration laws even when we don't agree.

C: so by definition, arbitration law is when both parties are willing.

D: correct

C: So when one party is not willing its stepping a little bit beyond the bounds?

D: I don't think the Beth Din of America either use the lashon of cherem, my guess, I don't remember.

C: I have a copy of it somewhere. I have to look.

D: Did I sign it? Could be I signed it years back. I prepared them, I didn't sign them – the Menahel would sign them. But in any case, it's a heter arka'os.

C: So you send the *heter arka'os*, you send that to the toveya or the nitba, it goes to who?

D: It goes to both

C: so the nitba who is refusing to come… you should know the toveya has been given a heter arka'os

D: very often we do it on seven days… if it looks like he's not going to do it, we given him a last chance. We have already wrote the heter arka'os, and now that he knows we are serious about this we give him seven days. If you don't come within seven days its considered that you have refused to come to Beth Din and the other one can take it to any litigation including the Beit Mishpat.

C: But zero issues in terms of their ability to go to the schools they are going to etc?

D: we have had times that we feel that a person is doing it in order to get the other side, in other words to make him look bad.

C: its vexatious, there's not a real case?

D: It may be a real case, but he also, he goes to secular court also, but he feels that he's going to get the other guy and embarrass him, hurt him, his standing in the community – things of that nature. Now we can't prevent that for the most part, we write the story, the Beth Din secretary called him and he said quote "I don't want to come to you or any other Beth Din" – that quote will be written. We'll say we sent to him by mail, and email and WhatsApp, and then we called and as soon as he heard it was Beth Din he hung up. There will be a description as to why we think he's not coming. If someone takes that and wants to make 5000 copies of that plaster that throughout all the buildings in the neighbourhood, we can't stop them.

C: it does act as a deterrent?

D: for some people. For many people who come for a heter arka'ot, they are suing a secular business…

C: that secular business is not *shayach* to the Beth Din?

D: almost for sure, but the toveya is frum and he wants to make sure there's no problem. So we go through the process – and every once in a while we are surprised and they say 'okay we will come' but usually you can know in advance, certain things are not going to come. So there's no embarrassment over there, but in other places there is embarrassment, you can have a Rav who refuses, we have had that.

C: I imagine there is literature on this, but is an Israeli court considered arka'ot, the literal meaning of arka'ot is non-Jewish, no?

D: no

C: isn't it the Greek word for courts?

D: I don't know what the etymology for it is, but it doesn't proport to try to follow halacha

C: so, any court that's not paskening based on halacha is considered arka'ot. Is that a controversial point or is that pretty standard?

D: that's pretty standard. There have been people who have gotten it in their head and claimed its not *arka'ot*, but that's a very minority thing. Again, we think it's wrong, in halacha there is a distinction between *aveiros* are *dash bakveyhem*, there are so many people who are in other ways very frum people – including many charedi people – who go to *arka'ot*. To say that you can't give them an Aliyah, that they are resha'im – you are going to have a lot of *resha'im*. So, we think it's wrong but…

C: can you think of a reason by people are *dash*, why people don't go to the Beth Din?

D: Some of it is social, some of it is the yetzer hara, some of it is historical

C: Are cases here confidential?

D: yes

C: will you let people view cases?

D: we will only allow if there is a special reason. We want to encourage Beth Din. So, if you have, we have a nice relationship with Bar Ilan Law faculty so they once a year bring students. They have a group that they can specialise in Beth Din… as some lawyers come here – even secular lawyers, but usually its frum kids, 25-26 years olds will come so we want to encourage them, they want to learn how a Beth Din looks like and how a Beth Din operates, so they can come. My son once wanted to come, the Menahel then – I think it was Rav Rechnitz, said no – why? because his father is dayan, he wants to see him, no.

C: fair enough

D: we do publicise almost all the *piskei din*, we remove the names and try to remove enough information that people can't figure out who it is.

C: where does that get published?

D: some have been in *techumin*, but mainly on our site. We have some joint sites with other Batei Din – Mishpetei Eretz, which Rabbi Rechnitz is very involved in, research centre for these things.

C: Mishpetei Eretz, is that the name of a Beth Din as well or only a research centre?

<time marker 59:15>

D: It's also a Beth Din I believe, Rabbi Rechnitz works for them also, he can tell you everything about it. We call it a fifth columnist, but the two organisations work in perfect harmony. The fact that he works for both is considered enhancing and not threatening – there is a really a feeling of *l'shem shamayim*. I think also Chicago and New York, we all have the same boss – the boss is HaShem and we are trying, everybody in their own ways, everybody has their strengths and weaknesses – but we are trying to be *mekadesh shem shamayim*.

C: I am interested in how Eretz Chemdah contrasts with other Batei Din, would other Batei Din send regular *seruvin* – I mean with the *cherem* – or would they now want to challenge the law?

D: My guess is *yesh v'yesh*

C: okay. And what about things like *eidus isha* – do you need complex halachic thinking to get around it, or what's the basis?

D: I experienced myself, it happened to many other people, I'm a fan of Rav Asher Weiss, I've gone to his shiurim several times, I've listened to his shiurim many times. I was once a shiur of his and some of this came up and he said – and hes got more experience than I – "I don't remember ever having two kosher eidim". There was a colleague of his, somebody who worked in his Beth Din, in my neighbourhood who was at the shiur, who said "Rav, do you ever remember having two kosher eidim?" he said "no". If you had two kosher eidim against an isha, then what are you going to do l'halacha, but we never have it, I will tell you what the eidus is b'zman hazeh. This is incredibly eidus, incredible ne'emonus – only questioned once or twice in my career – I'd say email, but now it's also WhatsApp's, maybe it would be twitter, I don't even know how to open it exactly, but that's eidus. It is eidus in so many cases. What exactly did we agree upon? So, they send the emails back and forth, you wrote the contract and then you changed it. You sent me a text message "I'll come to fix it" and then I sent it on this day and you didn't come until then and then you apologised a week later, don't tell me you came on time, why did you apologise in your text message or in your email the next day. One time we had someone say 'he forged the email'. We said, we'll go – I'm not sure exactly how to do it but I'm sure we can do it – we'll authenticate it. Half an hour later he said 'okay, I guess it wasn't fabricated'. That's eidus. They say 'no, there's a context, I only sent it because of this…' basically what does eidus do? Eidus causes the sides to respond. Every once in a while, we say this eid is a total liar, nothing that he says has any truth. If he says black its white, if he says white its black – hes just a liar. That's not usually what happens, they say he doesn't remember well, they'll say he's a little biased. Okay he said this happened, what do you say happens, no it wasn't like that – and he's going to contradict what he already said previously. Before he had said *lehadam*, now he says no, it wasn't exactly that way. So, what difference does it make if it's a Jew or a goy, a woman or a man, I don't think we've had kids, but whoever is going to elicit the sides to react, their testimony is going to be significant… In addition to the fact that we also have the authority to do *pshara shelo al pi din*?

C: is that *krova l'din*, is there a difference?

D: we can do both

C: by authority you mean based on the arbitration agreement

D: the arbitration agreement

C: that gives you…

D: we basically want to do a major *stiyah* from the Din, unless we ask the sides again.

C: as in you'll check with them that we aren't going according to..

D: I say listen, I see where we are going here, nobody is going to have 100% proof. We are not going to be able to do everything. This is the type of case, or you know what you are going to go back and forth, this is going to take years, I have a case going on years – a horrible personal situation – and its very ugly, and we told them years ago it's going to be ugly and neither of you want your reputations hurt, neither of you want the agmas nefesh. We hear the story, let us do a *pshara*. True, we are not going work this out, maybe you are going to able to prove this and maybe you are going to prove that, we got the basic story. So sometimes they agree. And sometimes they don't.

C: by pshara, do you mean mediation?

D: no

C: so it's a decision *shelo al pi din*, based on what you think is a fair outcome?

D: sometimes we do mediation

C: will you flip between mediation and arbitration, if you see mediation is not working…

D: I learned mediation a little bit, very quickly, we don't do the whole process. Exactly the setup of I'll meet with you, I'll meet with you – we don't do that. But sometimes we'll say, 'I think you should agree, you are not that far apart and each one hears the other one's claim, and there is a little truth here and a little truth there – lets work it out'.

C: and in that case you are not giving a judgement?

D: then we'll say 'can the two of you work it out, we'll give you 15 minutes, try and work it out yourselves'

C: you'll step out or you'll stay in

D: we'll usually go back there (pointing to room next door) and they'll stay here. And sometimes they'll say that we agree that we want to do it, but we can't come to a number, can you help us? Sometimes we'll say 'okay, give us the authority, we are going to give you a number between 10,000 and 15,000 – we'll have to think about it and come up with a number but that's what we are talking about. You each have two days to send extra things and were going to come up with a number between 10 and… it was a 25,000 thing and we'll come up with a number, we'll explain to them that why this side was a little stronger but on the other hand this, we think it should be something between here and there. So sometimes they'll say just give us a number and we'll say okay here's a number we think, you agree? Fine. And sometimes they'll say, no you are going to have to *pasken* and write up a full explanation but it shouldn't be all or nothing – the truth is its almost never all or nothing anyway, but they gave us the right to do it and again, sometimes it will include things like you are always allowed to do *pshara krova l'din* but sometimes a little bit stronger, the spirit of the law a little but more than halacha would give in the case.

C: I'll ask one last thing and we'll call it a day. You have mentioned areas… of conflict, such as where it's a *chok cogenti*, where you are possibly coming up against that. Are there any other areas that come to mind where you fell compromised halachically because of the secular law that exists, or not?

D: besides the *chok cogenti*… not too much.

C: I'm assuming *ribbis* is a big area of difference as you would have to come down hard on that where the state wouldn't?

D: There are two times when ribbis comes up. *Ribbis* can come up in which the sides had an agreement that was *ribbis*

C: without a *heter iska*?

D: without a *heter iska*. Usually, they will have a *heter iska*. But sometimes it goes beyond what a *heter iska* should be allowing – Rav Carmel is very machmir about this. Rav Carmel hates, everybody

should hate *ribbis*, but Rav Carmel, its *b'nafsho*, 'oh they have a *heter iska*, they can charge crazy *ribbis*, it's not…?' but the courts also have that – there is a limit to how much *ribbis*.

C: but I'm sure that's not halachic, if there is *heter iska*, I'm sure the courts aren't bothered by *ribbis*

D: 4% ribbis, if someone gave his neighbour his friend

C: but will you allow ribbis without a *heter iska*?

D: no, I don't see how we can. But we have had very few of them. The second time it comes up, where a guy says, you own me 100,000 shekel and he gives a hard time, and hard time and this and that and the other – and at the end of the day we find that yes, he owes him 100,000 shekel or 80,000. And he should have paid, okay maybe it's a claim on a few thousand shekel, but b'gadol he should have paid. Very often they do that, I have a complaint on one thing, so I won't pay anything. If you want to take 80% I'll pay, but then that's it you are *mevater*, if you want the whole thing I'm giving you nothing. And then it comes out that he has to pay. Until everything, until they came to Beth Din, this Beth Din that Beth Din, no, yes, no, they came here, another hearing another hearing and another witness and du-du-du and it takes months, so he gets his money but it's not fair. The other guy should have known that he was wrong, he should have paid. In that case we can make him pay the others legal costs, if he shouldn't have come to Beth Din. But what about the money, what about the time is money that he could have – if there is specific damages we can do that, but just the fact that time went by, maybe different dayanim do different things, but for the most part I don't want to give *ribbis*. Even though there are different *shitos* that you can be *somech* on, I don't want to do that, my personal shtick if you want to call it that, is perhaps if you are giving for damages, for the lawyers for the time you had to come to Beth Din, maybe I'd give more than I'd think probably…

C: are there opportunity costs lost there, rather than *ribbis*?

D: still would be able to. Actually, when I leave you, I'm working on a legal case, where they have a construct that they have in America, they don't have it here, about buying a tax lien. Do you know what a tax lien is?

C: no, I don't

D: somebody owes taxes that they haven't paid, so the government says okay, your house is a lien, or your business is a lien, if you don't pay it we'll take it. So instead of having to get their hands dirty, they go once a year and do an auction and people can buy their liens

C: the tax office does the auctions you are saying?

D: right, so the question I am working on now, is if the person who owes the government money is Jewish and I want to get that and I either get his house or, he owed $10,000 in taxes, but now that two years went by he'll have to pay $17,000. I paid $14,000 to the government and now I'm going to get $17,000 from him, through the government

C: so, it's like a middleman

D: is that *ribbis*?

C: fascinating. Thank you very much, I will pause the recording now.

10.2.4 Interview with Rabbi Rechnitz

Interview with Rabbi Ido Rechnitz, Menahel at Eretz Chemda Gazit, Jerusalem on 18 January 2023 with Chaim Cowen

C: I'm recording here with Rabbi Ido Rechnitz at Eretz Chemdah at the premises on Bruria 2, Yerushalayim, Thank you very much for your time

I: you are welcome.

C: I have a few questions for you. Can you tell me, number one a little bit about your role in Eretz Chemdah Beth Din?

I: You want to know the history or my role?

C: Both, maybe share a bit of the history and how you come into it

I: I was the manager of Gazit which was *reshet* – a network – of 10 Batei Din all around Israel, and one day we decided, we had the idea to get united with Eretz Chemda which had at this [time] one Beth Din in Jerusalem. We made an *ichud* (unification) and since then it has been Eretz Chemdah Gazit, which has these days 9 Beth Din, all around Israel, from the north to the south, especially in Jerusalem and Petach Tikvah. In the beginning I was the manager of the network, then I became a dayan for a few years. Now, one and half years ago, I became the manager once again.

C: so, the network that you ran, what sort of Batei Din were in that network before you joined Eretz Chemdah?

I: Very similar to Eretz Chemdah

C: How was Eretz Chemdah different, what makes it different to other Batei Din here in Israel?

I: There are many [ways] they make a difference. First, Eretz Chemdah has rules, it has *sidrei din* (procedures) and no other Batei Din as far as I know, has such things, maybe one. All the Batei Din that have something like that started to learn from us. We have policies in 12 *sugyot* (topics) and we get new decisions almost every year. This is very important because, in two ways, first for us, for our dayanim, we took those topics which are very *merkazi* (central) and in those topics, for many years – 70 years in Israel, or 60 years – *lo kiblu hachlatot* (there was no accepted decision).

C: can you give me an example of one?

I: I give you a small one and a big one. Small one: what is your policy about *hotzaot mishpat* (expenses of court), what is your policy? It was open, every dayan [did] what they thought was right and many dayanim didn't have the courage to rule in cases, because they said there is a big *machloket* (halachic dispute), how can I say who was right? When we get those decisions, and explain how we got to those decisions, but when we got to those decisions it helped the dayanim go with it and say okay, not everything is a *machloket*. I can say it shortly, the way we [did] it halachically is that the parties are signing the arbitration agreement that they accept the halachic policy of Eretz Chemdah and now I tell the dayan, that its not your decision, it's their decision – they decided to accept our policy, now you can rule it with no doubt. It was very very important; it was a great *kfitza* (leap)

C: that was the small or that was the large?

I: that was the small one. A big one: what we think about the rules of the state, *dina d'malchuta*, a huge *sugya* (topic), a big *machloket*, and it had a huge influence on our cases. In many cases it had a

big influence. When you don't know what you think about it, it's a very big problem. This is why this is so important for the dayanim. *B'nosaf* (additionally) it's very important for the parties. When two parties ask themselves if they want to come to Eretz Chemdah, they want to know what is Eretz Chemdah's policy. In other Batei Din, what do you do? You go the mikveh, you go to the Shul and you ask somebody, do you know, how does the dayan rule? What do they think about this topic and that topic? Last week I had one person call Eretz Chemdah and ask, what is Eretz Chemdah's policy about this and that. I told him you can go to our website and you can see, there is a decision about it and there is a ruling about it. It's put on our website and now you can know. It gives to our parties and to the public, what we call in Ivrit *vadaut mishpatit* (certainty of justice). You want to know when you are doing your business, what the Beth Din will think about it, you want to know it from the beginning, this is why it is very very important. We have *yiutz mishpati* (legal counsel)

C: is that *toanim*?

I: no, the Beth Din has *yiutz mishpati*

C: so you take advice, the Beth Din takes advice?

I: yes we have an expert, a real expert, I cannot say his name and his *tafkid* (role), a real expert and he is a specialist in arbitration law. As far as I know, let's say we have 1000 cases here, maybe in 2 cases the court will *bitel* (override) our ruling. And that is because we have this adviser and on every step and every question we ask him, so we know how to do it right. In most of the cases, it does not seem as the bad guy who is telling me to do things I do not believe. The opposite, usually what arbitration law asks it is what halacha asks and what every rational person wants, this is the way we should manage our cases. Give the parties the opportunities to say what they need before giving decisions etc etc. I do not know if any other Beth Din has this level of advisors. *Od davar* (another thing), we give salaries to our dayanim, when you pay you can demand. When you do not pay, they can say, I finished work, I finished to be with my family, I can meet the parties at 10pm for 45 minutes, in our Beth Din the *diyunum*, the *yeshivot* (hearings) are taking action on the morning, basically it will be in the morning or in the [after]noon, not at night. Sometimes it is *cheirum* (emergency) so we do it at night, *zeh nireh acharet l'gamri* (this makes things appear entirely differently).

C: are your dayanim full time or part time?

I: most of them are part time.

C: and how many dayanim do you have?

I: we have dozens.

C: and that's across all the different eight…

I: *nachon* (correct), not all of them get salaries, a few of them get salaries. But all of them get paid. Part of them are *ovdim k'vuim* (contracted employees) of Eretz Chemdah. We pay all of the dayanim and this is the big *chiddush* (novelty) anywhere. I think that what is more *tarbut irgunit* (organisational culture), our organisational culture is that we are one system. Most of the Beth Din, even the big Batei Din, they have the culture that every dayan works on his own, he can do what he thinks, there is no real *kesher* (connection) in between the dayanim. Here it is very very different. We go through every *psak din*, when we have one *ye'utz mishpati* for all Batei Din, every *psak din* goes through editing… both *arichut leshonit* (grammatical editing) which is basic, but *b'nosaf* (additionally) when I see a *psak din* that deals with a topic that I know was dealt with in a [matter]

that was a *psak din*, say of a few years ago, I tell the dayan, see the *psak din* please, see the policy please. What you wrote, that it can['t] be against the policy.

C: The *aricha* (editing) is done by someone who is a dayan themselves?

I: Yes and the *psak din,* I do half of the *aricha* (editing), half of the *piskei din*, I cannot tell the dayan what to rule, that is very clear, but when everything is streamlined, the chance that a dayan, when asking my questions, most of the time he will think about my questions, he will see other rulings, he will see the policy and he will change his *psak din* as he will say okay I understand, I am writing the *nimukim* (reasons) that another dayan wrote a year ago and he is right. Maybe he will *yachlok al ze* (argue with this).

C: if he argues on a dayan, is he allowed to?

I: He can, I will not ask the other dayan what he thinks about it. This is your *psak din*, write what you mean, what you think, what you believe – that's all. *Od davar* (another thing), we have *irur* (appeals). People are appealing in Eretz Chemdah. It's important, as when a dayan writes a *psak din* he should know, formally he can rule against the policy, I cannot stop him and I don't want to stop him if he doesn't believe it. But he understands that if he rules against the policy, if someone will appeal we will change his *psak din*. All of this creates organisational culture that makes it one system. *Od davar*, we don't have *herkev, ze k'ilo shlosha dayanim* – a panel of three judges – *zeh lo herkev kavua* – it's not a set panel.

C: so you can rotate different people on the panel for different cases?

I: and I do it all the time, all the time. It's true that the Beth Din in the north has a set panel. But even in the north, when I as a manager think that there is a case that needs someone else, say that he is more expert in labour law, I will send him there. When the dayanim are meeting, they are not in a set panel, it is less of a chance that I will get there one panel that has its own way and will be very different from all the *reshet* (network).

C: are appeals all done here in Yerushalayim?

I: No

C: they can be done anywhere. And who sits on the appeals?

I: On the appeals sits the *Av Beth Din* who did not sit on this case. He can be from Petach Tikvah or anywhere else. A *diyun*, a *yeshiva* (hearing) for an appeal can be here or Petach Tivkah.

C: how often is a case appealed?

I: often. I don't have the statistics but my feeling is let's say 25%, 10%

C: and how many cases are taken to the secular courts, you mentioned 2 out of 1000 are overturned but how many are challenged?

I: I do not know, as they don't have to tell me. But there are cases that I know what happens and *ani omer stam, ani lo batuach* (I guess, although I'm not sure) maybe 5%

C: 5% get taken there and only a small fraction succeed

I: I'll tell you why – because we have such good advisors they know they have no chance

<time marker 16:55>

C: will the courts ever look at the actual judgment itself and disagree?

I: no, in Israel they do not look. I will be more precise: 25% of the *bikoret shel habet hamishpat*, (review of the secular court) will be on the procedure. Did you give the parties the option to say what they want and what they think. This will be 15% of the inspection. 5% will be this is the law, when there is a ruling that is against…

C: *chok cogenti*?

I: *lo, noged et tovat hatzibur* (no, against public good) then they have the option to *haphoch et zeh* (to overturn it).

C: will they send it back to the Beth Din for review or they'll just say we are going to give you a ruling?

I: *chotchim, mevatlim* (sever it, annul it).They will start from the beginning in the court. In this case, or in this section, we have to be cautious, we are cautious. A part of our organisational culture is that my dayanim think about political, what will be the effect of their ruling on society. Lets say the most common example is that if two people make a drug deal, and one didn't pay for the drugs to the other and they came to the Beth Din and the Beth Din said you have to pay and gave a ruling, this ruling will be turned over in the courts. So, my dayanim will never say to someone to pay for drugs – it never will be in our Beth Din – this is the way they think. This is *kashur l'cogenti* (connected to *cogenti*). The courts think that if there is a cogent rule, it means that this rule is so important to the system, so you cannot say 'okay, *hu viter al zeh* (he waived it)'. Let's says, the best example is in labour law, in Eretz Chemdah we rule according to the labour law of Israel, because we believe it's right. I know that if I will not rule according to the labour law they will turn over the ruling. But the thing that my dayanim believe, really believe, that the labour law is *dina d'malchuta*.

C: they have been trained in choshen mishpat, so how do they know labour laws?

I: *sheila metzuyenet* (good question) (laughter) when I say it's a good question, I can say – it is all recorded.

C: if you don't want to say I can take a break

I: I can say it with caution. I would like that part of the choshen mishpat *limmudim* (learning) would be labour law. Unfortunately, it does not happen. I can say that the dayanim that come from Eretz Chemdah – after this wall (pointing) – make *shimush / staj* (apprenticeship), first they sit and can see how the Beth Din works and they learn from seeing and I can tell that now our team today of dayanim, know labour law. They know that they have to ask the questions, they know what questions they have to ask. And I will say it again, because we edit rulings before they get out, I can say to the dayan. Okay you wrote here something, you should know that there is a labour law about this topic specifically. *Savir sh'yeshana et psak hadin* (it is likely he will change the *psak din*). And we have experts of labour law in Beth Din, dayanim who are experts in labour law.

C: is that because they are lawyers, or they just become experts on their own?

I: No, they work in other work that they are researchers, and they make research on labour law according to Jewish law.

C: what do you mean according to Jewish law, is it not just labour law *yashar* (straight)

I: no because I think that the way we *mefarshim* (interpret) the law, we have the *samchut*, *anachnu mefarshim et hachok* (authority, we interpret the law) – how to apply it to this case.

C: and you will bring Jewish principles into the interpretation of it. Very interesting. There are a few areas I can go – one of them is understanding the structure

I: *Chashuv ladaat* (it's important to know), we never do *zablo*, we know how bad it is

C: what is the reason that you say it's bad?

I: You learned the *Rosh*, Rabbeinu Asher wrote that the problem with *zablo* is that every dayan, the parties are choosing the dayanim, the Rosh said that those dayanim should not be like lawyers of the parties. Unfortunately, what happens is the opposite of what the Rosh said. They act like they are lawyers: lawyers, liars.

C: let's say the parties come. Someone is *toveyah* a person and the *nitvah* says I'm not coming but I will go to a *zablo*. Will you give a *heter arka'ot* to the *toveyah* because you don't consider that a Beth Din?

I: first, it didn't happen many times. Most of the time people say I want to go to a different Beth Din

C: then you won't give a *heter arka'ot* right?

I: I would not give it.

C: correct because he is willing to go another Beth Din, but…

I: I would say to him find a Beth Din that will be *mefake'ach* (oversee) on this procedure. I want another Beth Din that will be responsible, who will oversee the *zablo* that it works well. I am not ready to do it.

C: so, if they will give someone who is willing to oversee it then you wont give a *heter arka'ot*.

I: yes. An interesting case that someone came in and both parties said we want *zablo*. So we told them okay we are ready to do it, but first thing, no one can speak with the dayanim anymore. All the information goes through the secretary, and she will give it to the dayanim. Second no one is paying the dayanim. All the money pays to Eretz Chemdah and we will pay the dayanim. They said, 'we don't want'.

C: the *borers* didn't want?

I: the parties didn't want.

C: they want someone they can have a handle on

I: and we, no way, no way.

C: I was talking to Rabbi Mann, you do allow *toanim*

I: yes, and lawyers

C: and he was saying the *toanim rabbanim* are registered by an organisation?

I: we do not care, you can come with a lawyer, a *toan rabbani* or your friend, your brother.

C: does it bother you if a *toan* is not formally trained

I: no

C: it doesnt bother you, they can come? The Beth Din of America is against *toanim*, they don't allow *toanim*. Do you have any issues with *toanim* do you find they lie or act improperly?

I: I can say very simply. If you want to know the truth you have to investigate the parties themselves, very simple.

C: as in the dayanim have to investigate the parties.

I: yes, and then, what we teach our dayanim is that when you start a meeting, in the court, even the Bet HaDin HaRabbani, the *toan rabbani* or the lawyer will stand and say I will say what we want from the other side, what is our case *tviyah* (claims). In this Beth Din we tell him, sit down please, we want to listen to the real party, not the lawyer. This puts the lawyer or the *toan rabbani* on the side. When you listen and you hear, when you listen to the parties themselves you have much more chance to know the truth. If the lawyer or *toan rabbani* is *tzoek* (screams) you send him out. *Gam chashuv* (also important), in many Batei Din there is screaming. There are dayanim that let them scream because they have to take out all the aggression they have. In this Beth Din from the beginning, we think the opposite, in order for the parties to be comfortable and confident to say what they think, what they believe happened, they have to feel safe. In this place there is silence. This is our mission, *b'ivrit omrim* (in Hebrew we say) to be *sterilised* (sterilised). We have to be very confident, we all the time tell the parties, when you speak, speak to us, not to the other sides. When they speak to the other side in a few seconds it becomes *tzoakot* (screaming), when they speak to the dayan they tell the other side, write all your notes – everything you want to say – you will have time to say what you think about what you heard right now. But everyone will speak in his time, *zeh me'od shoneh* (this makes a big difference).

C: my question is, is there *bichlal* (generally) in Israel any training for *toanim rabbani'im*?

<time marker 29:39>

I: there is, there are licenses.

C: but you are saying that if someone doesn't show you their license you are not bothered by it?

I: yes, he can come with his brother.

C: I hear, his brother could talk and represent if they want

I: I think the *hatzlacha* (success) of Beth Din is when you ask the lawyer do you have any questions to ask, and they say 'no'

C: I understand. I am also interested in understanding the structure. You have 8 Batei Din and you are menahel, you oversee all 8 at Eretz Chemda…?

I: yes

C: you also have *Av Beth Din*s of each Beth Din

I: yes, more than one *Av Beth Din* in each Beth Din

C: so, every Beth Din has multiple Av BDs?

I: most of them

C: and then you have Rav Carmel?

I: Rav Carmel is chairman of the organisation…

C: does he sit on any cases?

I: he sits in Jerusalem. I decide who will sit on every case and that is *hatafkid hachi chashuv sheli* (my most important role) and I feel responsible to help dayanim when there are problems with parties, with the law, with… sometimes they want an expert who will help them to decide.

C: and how many cases come through Eretz Chemdah each year?

I: nearly 200

C: nearly 200, that's across the 8 different places. I also understand you are involved in Mishpetei Eretz, is that right?

I: *ken* (yes), you heard about it?

C: I was recommended it, a fellow called Rabbi Michael Barris

I: *Betach* (sure)

C: someone recommended I meet with him

I: He was the founder of Mishpetei Eretz

C: whats the relationship of Eretz Chemdah and Mishpatei Eretz?

I: Mishpatei Eretz is a research institute and there is a good relations and *shituf pe'ula* (cooperation), *ha'emet she'yesh kamah dvarim aval hachi chashuv hu* (the truth is that there are many aspects, but the most significant is that) every year we have a conference and Mishpatei Eretz writes a paper for the conference and *magiyim* (arrives) dayanim from all over the country, but especially Eretz Chemdah, and after this conference dayanim from Eretz Chemdah turn the paper into an *inyan diniyut*, halachic policy paper, I told you before we have [policies], this is the way we write, as the dayanim don't have the time

C: they'll take a topical issue that people are struggling with you and they will form a policy out of it

I: *ken,* Mishpatei Eretz give a paper that is not a policy, as Mishpatei Eretz cannot decide for Eretz Chemdah, but after there is a paper the dayanim of Eretz Chemdah make it into a decision – they change things.

C: and Mishpatei Eretz have their own court?

I: no

C: they are purely research?

I: yes, and they write contracts, halachic contracts.

C:L where are they based, out of interest?

I: Ofra. The decision is that Eretz Chemdah is only court and Mishpatei Eretz is only research as it is not good *le'arbev* (to mix), *ani eten diguma* (I will give an example)*,* because I am the manager, when I see that dayanim get to a case where they do not really know what the halacha says about it, its not easy to find, we are taking a researcher in Mishpatei Eretz and say take this topic, write about it – it takes months – but after months you have an article, they send it to the dayanim. They don't have to rule according to it, but now they have the *mekorot* (halachic sources), now they can think.

C: fascinating. The judgments that they make, do you keep an archive of all the judgements, can the public see them – is it visible?

I: most of the rulings are on our website

C: all in Hebrew, I assume?

I: we have 5 in English, 2 in English. We have a great website, I love it. There is *tagiyot* (tags)

C: so you can see different topics, all the things that relate to it

I: there is a search engine so *yachol lechapes* (you can search) and we put something I love very much, when one ruling is based on another ruling you write it, so when you want to see *psak din manche* (repeated), a *psak din* that many other *piskei din* have quoted it, you can search it and see how many times it was referenced. We can say that a *psak din* that was quoted ten times, oh wow, its something *chashuv* (important). The lawyers are laughing, but in Eretz Chemdah we have 500 *piskei din shepirsam* (publicised *piskei din*) – there are rulings that we decided not to *lepharsem* (to publicise) as sometimes there are cases that are very *ragish* (emotive, sensitive) people are coming in because they want to be anonymous.

C: yes I understand that. What would you say are the challenges… what are some of the areas you find difficult or Eretz Chemdah should be improving in, or you want to work on?

I: first we feel that the amount of cases and the *koshi* (challenge) of the cases is getting bigger every year. When I left managing, when I came [back] after five years it was a *kfitza mamash* (real leap). When I came back, I thought it was a lot but I understood that we need the name that it should be work and not a hobby, and we started paying dayanim but it is not enough.

C: you need more dayanim?

I: more dayanim

C: do you have enough resources? The money comes from where, it comes from the litigants?

I: the money comes from the fees and from the *medinah* (State) they give us a small amount of money *yechasit* (relatively), we need much more. *V'achrei zeh magiyah* (and all follows this), this is all at the physical level, the *mazkorot* (administrative staff), the *diyunim efoh ata oseh et ze, betoch beit Knesset oi b'makom mechubad?* (hearings, where are they done, in a synagogue or in a more respectful environment?) *V'davar acharon, davar sheani choshev, shemarti et zeh kodem,* (Another thing, something I think that I spoke about earlier,) like you said before we need to make *hishtalmuyos* (professional development) to train the dayanim. When you pay the dayanim you can ask them to come, when you do not pay, you can't have those expectations, again it works but as the cases get tougher, we need dayanim that are more professional. If you want someone to be professional, you have to pay for it.

C: I hear you. One of the questions is, I know the Beit Din HaRabani used to do *choshen mishpat*. What was the name of the case that stopped them from doing it?

I: Simah Amir 2006

C: In that case, did Eretz Chemdah get a lot more cases as a result of the Beit Din HaRabani…

I: I do not know.

C: did people just go to the secular?

I: I don't think the Beit Din HaRabani did many arbitrations even when they had that power

C: what is the culture in the *dati le'umi* community, if you have a dispute do you go to Beth Din or to secular courts?

I: I think it is different depending on the areas. In the big numbers people are going to court, that's for sure. But in Yerushalayim, half of the cases are in Yerushalayim.

C: are you saying half the cases of the 8 Batei Din are in…

I: half of all the system is in Jerusalem. In Jerusalem, Yehudah V'shomron, people come to Beth Din. In Petach Tikvah is the second Beth Din in *G-del* (size) but in…

C: what do you think is the reason behind them not going?

I: I know that when we started, I felt that as the manager, I should explain that we are not as bad as people think of the Beit Din HaRabani. We are professional, we know the law, we have policies, we have procedures – that was very important, it is very important for people. Even now, though many people in Israel, *dati'im* (religious people) know about Eretz Chemdah, but not all of them. There are areas in Haifa and the South where no one heard about it. There are people who didn't hear about Beth Din at all, people who learn Mesechet Sanhedrin and think it is about the past, not today. *Muda'ut* (awareness) and we have to convince, especially the lawyers that we are good. We are under, *anachnu bashuk haprati* (we are in the private market) we have to fight to *lehochiach* (to prove) that we are good. When you deal good [well] with the case, people will say 'okay', next time they themselves or people who will ask them 'Eretz Chemdah is a very good Beth Din'. When you deal bad[ly] you lose them. I can tell you that parties, the first thing that is important to the parties is that you are professional, the second is if they win or lose.

C: do you get feedback from the clients?

I: not consistently. The people that think the Beth Din was very bad want to meet me, some of them are right, some of them do not know.

C: do you touch base with the parties after to say how did you find the Beth Din?

I: no, it's a good question, because I think about it. In Israel the problem is that the parties who are not lawyers don't really know how to compare you, but it is a good question if I should, I ask myself.

C: as a *dugma* (analogy) in Melbourne, in our Beth Din we ask for feedback. The best thing about it is that we get a lot of positive, so when someone has a bad story, you can say 'okay but 85% of our feedback is positive' which means at least you have the evidence that otherwise the bad stories make the publicity and the good ones are never known.

I: I ask myself, because I used to say we choose a bad job for ourselves, because half of the customers do not like us, because they lose. But I'm not sure I'm right because even those of who lose, some of them, it happens two times a year that someone lost in Eretz Chemdah and a month later he opens a new file, he comes back for a new case.

C: so, he believes in the professionalism

I: yes, but I think you are right, we should do feedback

C: I'm interested, I know Professor Shochetman wrote *seder hadin b'beit din harabani*

I: yes, we have it

C: was that written for the Beit Din HaRabani?

I: I don't know what his purpose was. Most of his *chomer* (materials), rulings are from the Beit Din HaRabani, all of his rulings are from the Beit Din HaRabani *shel medinat Yisrael* (of the State of Israel). *Hu mespaer ma koreh b'Bet Din harabani v'mavi harbei mekorot* (He recounts what happens in the Beth Din HaRabani and brings many sourcs) from himself. It's a very good book, *meod meod makif* (very, very comprehensive), we use it, but I don't know his purpose.

C: so it's not the basis of the rules of the court, but more a compilation of what is going on there. The Beit Din HaRabani don't use it?

I: I don't know – I believe they use it.

C: here you use his *sefer* (book) as part of building your own rules? Is that right?

I: when we have questions about the *seder hadin* we go to his book. Many times he will bring the two options and we have to decide, choose.

C: so, its more broad, bringing a range of views. I'm just seeing if there is anything else that I haven't yet addressed, I'll just take a look over here. You mentioned your fees is that all on your website, is it all clear?

I: yes, 1.5% of the suit

C: of the amount in dispute?

I: *ken* (yes)

C: is that paid by both parties or by the losing parties?

I: no and no, the *toveyah* (claimant) pays it and most of the time in the ruling we write that the *tzad hasheini* (second side) will pay half of it. This is the situation where both sides were acting well. If the claimant was too big according to the evidence, then he will not get it. If the claimant was not even a *tviyat sruk* (fraudulent claim) he just wanted to annoy, then he will not get a shekel, and *yesh gam* (there is also a) policy about *hozta'ot mishpat* (court expenses).

<time marker 46:54>

C: that's one of your 12 right, that's one you mentioned?

I: *ken* (yes)

C: in terms of having experts in business, or experts in complex cases that come here, and the judges don't know the business world. I understand from Rabbi Mann that you wont have someone on the panel who is not a *yadin yadin*

I: *nachon, lo oseh* (correct, we don't do that)

C: but you will bring in experts to the court to explain any area, that sort of thing?

I: *nachon* (correct)

C: and when a party comes to Tzippy (the secretary) and they want to start a case, will she let them know the rules and procedures? What will she send them?

I: it is written on the letter they get - you can see on our website all the rules and procedures

C: so, the parties will be informed of all that. Is there a special package that the parties get to explain how the whole thing works?

I: no, it is too long.

C: they are referred to the website and everything is there, they can find it. Just a clarification, the arbitration agreement and the *shtar brurin* is the same things, its one document they sign?

I: it's one document.

C: I think that's probably about it. I think we'll stop there. Unless there's anything else you think is worth mentioning? And please G-d because I'm here and you're here maybe I'll reach out if there are things in the future.

I: *ken* (yes), feel free to call me.

10.2.5 Interview with Rabbi Warhaftig

Interview with Rabbi Yaakov Warhaftig, *Av Beth Din* at Neve Nof, Jerusalem on 22 January 2023 with Chaim Cowen

Note regarding transcription: the dialogue fluctuated between Hebrew and English – Hebrew is the native language of Rabbi Warhaftig. As much as possible the original wording has been preserved with some translations of the Hebrew used, which were at times provided by the interviewer during the interview and at others not, included in brackets – with the exception of where the word has been previously translated, is a common term used in this research or is translated within the interview itself. In addition, the grammar has been edited slightly to ensure readability of the transcription.

C: I am recording right now with Rabbi Yaakov Warhaftig, in Machon Ariel here in Yerushalayim. Thank you, first of all for being part of this interview. So first of all, are you able to talk about the Beth Din that you are the *Av Beth Din* of, a little bit about its history and your role in the Beth Din?

Y: Okay, when we started *lehakim* (to establish) the Beth Din, there were some Batei Din of the *charedim* for *mamanot*, but for the *tzibur* (community) of the *dati le'umi*, most of them [went] to Bet Mishpat.

C: were there any Batei Din at all for *dati le'umi*?

Y: I think there was one in Efrat, maybe, when we began it we were almost *rishoni* (first, pioneers).

C: what year was this?

Y: *shloshim v'chamesh* (thirty five)

C: 1935, before the *hakamat hamedinah* (establishment of the State of Israel)?

Y: no

C: in the Hebrew year 5735?

Y: no, *lifnei shloshim v'chamesh shanah m'hayom* (thirty-five years before today)

C: oh, thirty five years ago

Y: *ani lo zaken kol cach* (I'm not that old) (laughter). Okay, we started and the *Moatza Da'atit* (Religious Services) of Jerusalem gave us the permission to do it. They wanted that we have the sign that we are from the *Moatza Da'atit*, they give us some money that the Beth Din needed.

C: are they a government body?

Y: it's the *Moatza Da'atit* of Jerusalem… under the government, yes. But they are… do[ing] it from the *chok haborerut* (Arbitration Act). Then someone, two sides came, and they sign that they ask [us] to be the *borerim* (Arbitrators), so after deciding what is the *din* (judgement) we give them this and they take it to the Bet Mishpat *ezrachi* (secular court) and they give approval and *nikam hapsak din* (the judgement is established). They can appeal to the Bet Mishpat, but most of the time, they rule the other way.

C: because of the document?

Y: most of the time, *kdei le'arer tzrichim mashe'hu mutzak* (to appeal they need a strong reason). In the beginning we took as the head of the Beth Din, Rabbi Zalman Nechemia Goldberg zt"l who was the most famous in *dinei mamanot*, he was the head, and all the dayanim were all his students or *shehikir otam* (those he recognised).

C: what was the name of the Beth Din?

Y: Neve Nof

C: it was based in Har Nof?

Y: Neve Nof, in Har Nof, I was the rabbi there for 38 years, until now. Now I have moved from them but kehillat Neve Nof (the community of Neve Nof) was a big *kehilla* and we *hikamnu* (established) the Beth Din. Our dayanim, one of them is now in the Beth Din Ha'Elyon, HaRav Michael Amos, one of them was the *Av Beth Din* in Petach Tikvah. Most of them… and we have a lot of cases because we were *k'mat yechidim* (almost singular/unique) in this way. Now Baruch HaShem there are more Batei Din for all of the *tzibbur* (community), the *tzibbur* of the *dati le'umi* and slowly slowly most of the people go to the Beth Din and not to the Bet Mishpat. Because to go to the Bet Mishpat they are *yoatzim* (advising) if you can go to the Beth Din you cannot go to the Bet Mishpat and if you go to the Bet Mishpat maybe you are a *gazlan* (theif), maybe. Because if they do something *lo k'mo halacha* (not in accordance with halacha), its *gezel* (theft).

C: is it also an *issur* (prohibition) of arka'ot, does that apply to…?

Y: *issur arka'ot gam yesh, aval bli zeh*… (it is also a prohibition of *arka'ot*, but even without that…)

C: what would you say is the most reputable, the most respected Beth Din today, here in Israel? Or are there many different Beth Din that are well respected? Is Eretz Chemdah a standout, is it seen as the top?

Y: No, Eretz Chemdah Gazit, there is another group of Batei Din that is *poreiach* (flourishing)

C: but is Eretz Chemdah seen as a good one

Y: it is seen as a good one, I think ours is a good one, but now we have less cases from two reasons. One: because they have *mi shetaram* (a donor), *mechashvim* (computers), *mazkir* (secretary) and we do it *behitnadvut* (voluntarily). The other thing is because most of the cases that come to us now, we finish it with *pshara* (compromise), we succeed to do *pshara* from the two sides and Baruch HaShem.

C: when did you become the *Av Beth Din* in Neve Nof?

Y: *ani hikamti oto*, I started it.

C: so Zalman Nechemia was the…

Y: he was the head

C: so was he the *Av Beth Din*?

Y: he was the head of the Beth Din

C: so what's the difference between the head and the Av?

Y: I was his student and I asked him to be the head of…

C: did he sit on cases?

Y: no, *lo yashav* (he didn't sit), but many of the cases I discussed with him.

C: How are *dinei Torah* in Israel different to dinei torah in *chutz la'aretz* (the diaspora)? Because you are in a Jewish state does that change you relationship to the *mishpat ezrachi* (secular law) here or is it the same?

Y: One difference is that in *chutz la'aretz* there is *dina d'malchuta dina* so the Beth Din has to know the law of the land and to take it *b'shikulim shela'hem* (into their evaluation). Here there is a *machloket* if there is *dina d'malchuta dina*. Most of the poskim say that in Israel *dina d'malchuta dina* but others say no, because Israel belongs to all the Jews and not to some *melech* (king) or something. But you have to know the law because you have to know if you will do it *lfi chok haborerut* (according to Arbitration Law) and you want it to be the standard of the Bet Mishpat, you have to know what the Bet Mishpat says. So we discuss *lfi ha'halacha*, *aval halacha mitchashev* (according to halacha, but halacha recognises [the law]), so you have to know what is… if we have an issue when we discuss a case and we wanted to know, for a building we ask (unclear)*, kablan* (contractor), *tzrichim anshei miktzoah* (we need [too ask] professional experts). If I want to understand the law, before the law, to understand the case…

C: to understand the situation itself

Y: if for someone says that he takes a *nagar* (carpenter) and he gives him something not good, we have to ask a *ba'al miktzoah* (expert in that trade) to know if he's right or not right. I'm not a *nagar*, not a *kablan*, not an *orech din* (lawyer).

C: so how did you find that out, you invited people into the Beth Din to give evidence?

Y: No, in the community we have doctors, we have lawyers, our community *yesh harbeh anshei miktzoah* (there are many professionals), its *lo k'mo bechevra hacharedim rack rabbanim* (not like the charedi community where there are just rabbis)

C: so you had people to talk to?

Y: yes

C: were any of the dayanim also *balei miktzoa*? Did they have professions or were they *kli kodesh* (purely involved in religious matters).

Y: I take Rabbanim from the Kollel, they learned *choshen mishpat*. Professor Tabory, he was one of the Beth Din, he told me, he said, *shmonim achuz mahadiyun zeh sechel yashar* (80% of the judgement is common sense). After this you have to know the law.

C: I have a side question: you are also the head of Machon Ariel, is that correct?

Y: until now, now…

C: retired?

Y: no, pension…

C: but you are still here, you are still involved?

Y: I am the head of the *yo'etzet halacha*

C: that is for women? Is that connected to Nishmat?

Y: from Nishmat

C: okay, we have to talk about it afterwards, my wife is very interested. In Machon Ariel, I know you teach dayanut here…

Y: I teach here Rabbanut, they have a separate dayanut

C: do they require, or do you think they should require anything beyond *choshen mishpat*, to do their job properly?

Y: *betach* (definitely)

C: what other thing…

Y: because the Shulchan Aruch was written before 400 years, from there, there are other *poskim* and all the *metziut* (reality) has changed, you must know what happens now, this year. You take the *tshuvot* (responsa) from then but you have to translate it to our days.

C: so do you need knowledge that is, so to speak, outside of torah?

Y: you must, that is what Rabbi Tobory said, you need *sechel yashar*

C: how do you teach *sechel yashar*?

Y: *sechel yashar, zeh hakadosh baruch hu…* (common sense, that HaShem…)

C: if you were advising a dayan?

Y: if you are young and you have no *sechel yashar* you cannot be a dayan

C: and you are saying that is something you are born with?

Y: you can be a *yoetz* (advisor) but not a dayan

C: *b'seder* (fine), does a dayan need to know anything about the *chok ezrachi*, the secular law?

Y: he has to, or there must be someone to give him advice. If I want something I ask a lawyer.

C: is that part of the course here, do they include as part of the course that *orchei din* come?

Y: No, we want to do it but *le'at le'at* (slowly, slowly), but in the Beth Din we ask, we advise with *anshei miktzoa*

C: what did your Beth Din do to ensure fairness, that the *seder hadin* was in a way that it was *yashar* (fair)? Did you do anything different or special?

Y: there are many details of the halacha that you must *lehatim otam* (to make them fit) with the *metziyut* (reality). Z*ot hatorah lo tihiye muchlafet aval hatorah mitchashevet b'hametziut* (this Torah will never be changed, but the Torah does give due consideration to the reality).

C: you are saying the torah never changes but it still considers the reality

Y: and in the Torah, you have how to do that. So *grama*, there is a *musaga* (concept) of *grama*, *grama patur* (one exempt from liability in a circumstance of causation).

C: *grama* means causation

Y: but if you do it people will go to the Bet Mishpat because they don't understand it. So Rabbi Goldberg says, that if you do it through *borerut*, for *grama* you have to give a *shlish* (third).

C: taking into account the secular law

Y: because when the two sides *chotmim* (sign), they give permission to the Beth Din to do something that *ma'ever l'halacha* (beyond halacha).

C: that's *pshara krova l'din*?

Y: Yes, *me'ever l'pshara krova l'din*. *Pshara krova l'din* is two things, *pshara krova l'din* is saying that we cannot do all the details of the halacha, *din* (strict law), women: women can be *eidim* or not? In halacha no, but now yes because they give their permission and we say we want that they know that we can do things… in *pshara*, there is something *me'ever*, we think someone has to pay the other $1000 but we say that the other, he doesn't know exactly because when two sides come to the Beth Din it is not something *batuach* (certain) [e.g.] someone wrote a cheque and didn't want to pay – *ain pshara* (there's no compromise) – [rather] someone says you did me *nezek* (damage) and the other side says 'no', so the truth is not *batuach* on the one side, the Beth Din is saying 'you know what, do something if you want, *ba'u taskimu* (make an agreement), we know that if they don't come to an agreement we say something, but…

C: but you try to get them to come to it…

Y: *zeh halacha, kodem kol lenasot pshara, im zeh lo helech*… (this is the halacha, first of all we try to compromise, if this doesn't work…)

C: then you go on. What do you use to know *seder hadin*, meaning is *seder hadin* found anywhere? All the *pratim* (details) of *seder hadin*, where does one know them from? Is it all in Shulchan Aruch or…

Y: no, its in Shulchan Aruch, in the law of the country

C: the law of the countries, so you bring in their *seder hadin* as well?

Y: of course, you know that the members of the government are not *tipshim* (foolish) and they think about something with *hegyoni* (logic). Not *tamid* is this *matim l'halacha* (not always does it fit with halacha) *aval yesh bazeh higayon* (but there is logic there).

C: would you say that *seder hadin* is more developed in the secular than it is in halacha or is that not true?

Y:*tasbir li b'ivrit* (explain that to me in Hebrew)

C: *ha'im seder hadin hu yoter mefurash bchok ezrachi me'eich shehu meforosh…* (is procedural law more detailed in secular law than it is detailed in…)

Y: *b'midah mesuyemet ken* (to a certain degree, yes)

C: why is this?

Y: because we were in the *galut* (diaspora). In the *galut*, we haven't had a *medinah mesuderet* (orderly country), so now, Baruch HaShem we have an organised country and we have to build in halacha and to the *sheilot*, *yesh tshuvot aval zeh lo mesadar kol cach, yesh sfardim v'ashknazim, v'yesh b'Australia uv'America*, (questions, there are responses but they are not so orderly, there are *sefardim, Ashkenazim,* Australian and American factors) now we have to build this. *Lifa'amim* (at times) in the law of the land it is *mesadar yoter* (more orderly) and we can learn to build it from them.

C: I am also interested in your view on a *seruv*, whether it has a place. Did your Beth Din use a seruv if a *nitvah* didn't want to come to Beth Din?

Y: If he didn't want to come to the Beth Din, we gave permission to the other side to go to the court.

C: so a *heter arka'ot*, but not a *seruv* with a *cherem*?

Y: no, no, no, we cant. [We say] if you didn't come to the Beth Din tell us another Beth Din you will go to, but if they say no we wont go, you can't say *lo yekabel aliyah*

C: is that used, that is common practice?

Y: *assur lfi hachok, aval talui lfi hachevra* (it is prohibited by law, but it depends on the community). If the community is *chazakah* (strong) and I tell someone come to our Beth Din and we say *lachtom* (sign) and he says no, only if… I told him if you didn't sign he wont be *mekabel aliyah* (receive an *aliyah*), he wont be *tehiyeh chazan* (be the *chazan*) and he *chatam* (signs) *aval lo tamid zeh* (but not always is this the case)

C: is that against what you are allowed to do in Israel, *be'ofen rishmi* (officially) they don't allow a *seruv*?

Y: *assur lehachrim, lo, seruv efshar, aval efshar lavo al pi hachok…* (one cannot put someone into *cherem*, no, a *seruv* is permissible, but it is possible to come in a legal manner)

C: more than that

Y: *aval yesh drachim* (there are ways)

C: within the community itself

Y: you can do it, you can do it.

C: what about *to'anim rabbani'im* do you have a view whether they should be part of a Beth Din or not?

Y: *to'anim rabani'im* or lawyers can represent. Sometimes he's good because not *kol echad* (every person) can explain themselves, so the lawyer or the *toan rabbani* helps them. But most of the time… someone came up to us and they speak and speak and speak. After this, I ask him, you wanted to say this? He said yes. I said why do you speak *kol kach harbeh* (at such great length)? Sometimes they are *milbalbelim bamoach* (confused in their minds). The dayanim are *b'etzem* (essentially) the *orchei din*. The lawyers and the *toanim rabbani'im* are the dayanim.

C: if someone comes with a *toan rabbani* there is no issue, they can have?

Y: yes

C: *toanim rabbani'im* in Israel has a licence to have one?

Y: yes

C: what is the *reshet* (network), the name of the organisation that they need to have a license?

Y: from the Rabbanut, to be a *toan rabbani*. But for the Beth Din, if someone, a talmid chacham came and he did not have the *teudah* (certificate) to be a *toan rabbani*, the Beth Din will still allow them.

C: I don't know what your knowledge is of secular law, of *chok ezrachi*, but would you say that in a Beth Din, the role of a dayan is different to a *dayan* in a secular court in that the *dayan* is a bit of an *orech din*, in that they are asking, has to be *choker v'doresh* (cross-examining) rather than just listening?

Y: no, no, no – in a Beth Din the dayanim do all the things, we hear and we ask…

C: and in secular, the *chok ezrachi*, the dayan doesn't ask?

Y: no *biglal zehv* (because of this), if a Beth Din is good we don't have to come with an *orech din*, why? Because a Beth Din says 'now we'll speak', 'you be silent – if you want you can write something, we'll see what you say after this'… we do the work of the *orech din*. Sometimes this *ozer, k'shehu lo yodei l'daber* (helps, when he doesn't know how to speak) so if he cannot *lehasbir et atzmo az tov sheyash, aval zeh hatafkid shel hadayanim* (explain himself well, then it is good that there is, however this is the role of the dayanim).

<time marker 28:55>

C: *aval b'chok hachiloni, hachok shel hadayan zeh ma'shehu achar, zeh lo lidrosh, b'mishpat shelahem, ha'orech din oseh kol hadrishot*? (but in the secular law, the law of the dayan is something else, its not to investigate, in their courts the lawyer does all the investigations?)

Y: *Lo, lo* (no, no)

C: *shteihem hem..* (both are…) okay. Also in your Beth Din were all the discussions recorded or did you have someone write down what the different claims were, what the *ta'anot* (claims) were?

Y: Our Beth Din because we didn't have money – we took money only to open the case, we have to take money for the dayan, we have to take it but only for this, after this we… there was someone who took months but didn't pay only once. Other Batei Din, Eretz Chemdah, take for the time. B'seder.

C: do you have an opinion about zabla?

Y: yes, zabla zeh… (unclear), why because someone wants to go to the Beth Din but he knows that from the halacha, if you gave the *toveyah* (claimant), the *nitvah* (defendant) has the *zchut* (right) he can choose what Beth Din. I wanted to go to this Beth Din, and he says no, he wanted to go elsewhere. Sometimes he takes the other side to a Beth Din that has not a good name, so there is, you chose one dayan and I choose one dayan and they both take another dayan and now zabla. *Aval zeh pachot tov* (however it is not as good).

<time marker 31:42>

C: is there an issue with each of the judges who have been *nivrar* (selected), that they are biased, that they have a *netiyah* (bias) towards one of the…?

Y: *kzat, lo netiyah, hu yachol lehtztig, ani botuach shehu yavin mah she'ani omer* (a little, not bias, he is able to represent, I am confident that he understands that which I am saying)

C: how would you make sure he doesn't have a *netiyah*? If I chose them maybe I'm choosing someone I know or someone who will support me?

Y: if he is a true dayan, he will say I can't be a dayan because he is my friend.

C: so that should be spoken out?

Y: everything, *shochad ye'aver eini pikchim* (bribes blind the eyes of the smart), *hoshiva shofteinu k'varishona* (restore our judges to their original state) we want that the dayanim and the civil mishpatim, should be *anashim hagunim* (upstanding people), *lo tamid zeh kacha* (this is not always the case).

C: do you write your *piskei din*? Do you give reasons?

Y: yes

C: and do you believe that's important for a dayan to do?

Y: yes, yes, yes because if I say you have to pay something. Why? I have to explain, because you are saying this and he said this and the Shulchan Aruch says such and such we said you have to give him.

C: is that a *chiyuv*, is that an obligation *mitzad* (from the perspective of) halacha for reasons to be given?

Y: *lo barur* (its not clear), but if you wanted that people want to go to Beth Din you have to be *galui* (transparent).

C: if a *nitvah* or a *toveyah* was not happy with the *psak din* in your Beth Din are they able to say *ta'ut bidvar Mishnah* (error in an matter of Mishnah) are they able to come back to the Beth Din, who would they come to, would they come to the *Av Beth Din*?

Y: they come to us and we say, okay we hear, and we decided with the other dayanim and after this we say okay, you are right, you are right

C: they come back to the same dayanim who gave the *psak*?

Y: *ain rshut irur* (there is no right of appeal)

C: *ain rshut l'irur* in the Beth Din that you have?

Y: but now there is some Batei Din, you go to them, they build in that…

C: there is *irur* as well, yes. What do you think are some of the areas of difficulty for Batei Din, what are areas that are challenges or that either need to be improved or are just a reality of the Batei Din here?

Y: *tasbir li mah..* (explain this…)

C: *Ha'im yesh etgarim shemofiah b'batei din l'mamonot kan?* (Are there challenges that exist in commercial Batei Din here?)

Y: *etgar rishon* (the first challenge); we cannot do it only with a *shtar borerin* (Arbitration agreement) we cannot say that something [must] come here. The Bet Mishpat can do it, if he doesn't come he goes to the *keleh* (prison) but we don't have this power. We can do only *borerut* with the *haskama*

(agreement) of the *baalei din* (litigants) and we have only the power to give to someone to go to the Bet Mishpat, or as you said, not be *mekabel aliyah*, depending if he belongs to the kehilla or does not belong to the kehilla. And if he is not *shomrei mitzvot* (religiously observant) they can't do this, because they believe we do it justly, but we have no *koach l'kfot* (power of coercion).

C: is that a good thing or a bad thing? Meaning do you think there should be *k'fiah* (coercion) in this area or better not?

Y: we believe that *kol echad* (every person) must go to a din torah, not to *ezrachi* (secular court). The din torah must *lehitchashev* (be given due consideration) in the law of the country. Because halacha deals with *dina d'malchuta dina*, but you cannot go to Bet Mishpat from the halacha, but *mah la'asot* (what can you do?)

C: this is the way it is. Are you familiar with the Simah Amir case that stopped the Beit Din HaRabani from having the ability to do dinei torah?

Y: because something you have to know, dayanim and judges cannot be *borerim* (arbitrators).

C: they cannot be *borerim*, that's the law here.

Y: *gam shofet* (also a judge), he cannot be a *borer* (arbitrator).

C: but they could in the past, before Simah Amir

Y: *lo, lo, lo gam* (no, no, no also) civil Bet Mishpat cannot be *borerim*, they can be *borerim* in their house but not in the courthouse

C: so you are saying that makes sense?

Y: yes.

C: so is the community… the Simah Amir case doesn't bother you, *lo mafriyah et harav* that they don't let it be in the Beth Din?

Y: *lo*, *lo, lo* (no, no, no) now *hanetzigim shelanu* (our political representatives) want to change it, to give the Beth Din a chance to do *borerut* in the Beit Din HaGadol because *shehaya pam* (it once was the case).

C: but they are still acting as *borerim*, they don't have the right to take the case. One of the challenges… are there any challenges between the secular and the torah law where, you mentioned for example *grama*, that's an area where halacha accommodates secular law and gives a *shlish* right even though *lefi* (according to) *halacha* pure, you get nothing. Are there any other areas you can think of where halcha and secular come to…

Y: the *eidut* for *nashim* (women)

C: and halacha gives way

Y: all the Beth Din rule that they can

C: by all, even in charedi Batei Din?

Y: I think so, I don't recognise all the Batei Din but I think so

C: any other areas?

Y: maybe we are more modern, maybe

C: and any other areas, there is *grama*, *eidut isha* any other areas where again halacha has either given way or…?

Y: *betach*, *tamun, eish patur al tamun* (definitely, hidden things, where fire damages something that is hidden, one is exempt from liability according to halacha)

C: those are areas again where halacha will look at the secular law?

Y: the *Torah Sheba'al Peh* (Oral tradition) gives us the challenge to do *takanot* and *gezeirot* (laws and enactments) that the torah and *chayim… torah tzrichah lihiyot matimah lehayom, avol mitoch latorah, lo… kreformim,* (Torah must fit with the contemporary world, however this has to come from the Torah itself, not like those who reform…) they do what… no. from the torah we have change, the *rashba kotev* (*Rashba* writes) that if you *yelech lefi hatorah lifamim machrivim et haolam* (if you follow the torah at times it can destroy the world)

C: where is that written, which *rashba*, do you know?

Y: not *b'diyuk b'milim eleh* (in exactly these words) why? Because I'll give a *mashal, ani eten dugma b'ivrit. Mah hadin shel mi sheganev?* (I will give an analogy, I will give an analogy in Hebrew. What is the law of one who commits theft?)

C: *kefel, ken?* (he pays double, correct?)

Y: *im modeh lo tzrichim… mah yikreh… im adam gonev v'achar ken yachzir, efshar lichyot kacha? Aval batorah assur lignov, mah osim im ben adam ken gonvim, az hatorah notenet sh'atah yachol lateken takanot* (if he admits, he doesn't [pay kefel]… what will happen… if a person steals and then returns [the stolen item and gets away with it], is it possible to live like that? The Torah states that it is prohibited to steal, what should we do if people nevertheless steal, the Torah thus gives us the ability to create [new] enactments [to deal with this issue].)

C: *limnoa et hagneveh* (to prevent theft)

Y: the torah gives us… (Rabbi Warhaftig used the Hebrew words for the following translation)

C: if people don't fulfil what HaShem wants the Beth Din have the ability to respond in a creative way to resolve that issue… that's the [function of] *Torah Sheba'al Peh*.

C: Are there any areas that halacha does not bend, I know for example *ribit*, there the secular law says its okay and halacha says its not okay – and its an issur so halacha wont bend… without a *heter iska*

Y: *heter iska* is *torah shebaal peh*

C: finding a solution

Y: the *chevra*, the community in the past was *chakla'it* (agricultural), now no, they are *asiyatit* (manufacturers). People *chayim acheret* (live differently). The torah must give us what to do in this *chevra*. Now without *ribit* you cannot do something, all the (unclear) is built on this. The Torah has the *keilim* (tools) of how to be *mitmoded* (deal) with this.

C: are there any, I'm sure there are many, many, but are there ideas that come to mind, you've mentioned *grama*, *eidut isha*, *ribit*…

Y: *onashim* (punishments), *hezakim* (damages) if there is *retivut* (moisture) from the penthouse and its coming down, in halacha *zeh habayah sheli* (this is my problem)

C: who are you? You live underneath? Its your problem

Y: Yes I have to… *avol hayom lfi hachok lifamim* (but today according to the law, at times..)

C: the upstairs person will be *chayav* (liable)

Y: and our Batei Din *poskim lfi hachock* (rule in accordance with the [secular] law).

C: why do they go *lfi hachok* (in accordance with secular law) and not *lfi halacha* (in accordance with halacha) in that case… is it because the *minhag socherim* is different?

Y: *ken*, *zeh biglal minhag, vgam shanchnu garim bchavra zot v'dina d'malchuta dina, vlo yachol lehiyot charig* (yes, this is due to the *minhag*, and being that we live in this community and *dina d'malchuta dina* and one cannot be *charig*)

C: whats *charig* (unusual)?

Y: *ani lo yachol lasot le'atzmi davar shekulam osim…* (I cannot make for myself a rule that all are doing [differently])

C: you can't stand alone

Y: *an agid hayom titaken zeh v'hu omer titaken atah… chayavim lechalit* (I say today 'he should fix it' and another says 'you should fix it' – one must make a decision)

C: so you have to make a decision

Y: *halacha omer kacha, vehachok omer kacha, v'chayavim lehachlit, mah gover al mi? Im dina d'malchuta dina or lo?* (the halacha says one way, and the law says another way, one must decide – which overrules which? Do we say *dina d'malchuta dina* or not?

<time marker 45:55>

C: so in that case why is it that *dina d'malchuta dina* is *gover* (overrides) on halacha and not *hafuch* (the opposite)?

Y: not *gover al halacha* (overriding halacha), because we live in this society, *dina d'malchuta dina* is the *heskama shel anashim* (the consensus among people)

C: is that *minhag socherim,* is it essentially *omed hadaas* (assumed intent) or something? *Umdena* (Assumption)?

Y: *chelek ha'hesber shel dina d'malchuta dina zeh heskamat anashim, anashim rotzim lichyot lifi zeh, v'okay. Halacha – hakol k'minhag hamakom* (part of the explanation of *dina d'malchuta dina* is that it is the consensus of people, people want to live based on this, and that's okay – all follows the customs of the place.)

C: interesting, so that means a dayan needs to know *minhag medinah*

Y: yes

C: and where does a dayan learn *minhag hamedinah*?

Y: he has to ask someone… now in Batei Din there is a *ye'utz miktzei* (professional advisor). If there is something built in, I ask him, the dayan doesn't know everything

C: so lets say there is a *din* in *dalet shomrim* (four guardians) that comes before the Beth Din and the *minhag hamakom* regarding *shomrim* is different to what is in the Gemara, which will you follow as a dayan? You know *choshen mishpat* very well because you've learned it. Are you going to follow that or will you follow *minhag socherim, minhag hamedinah*?

Y: its *taluy* (dependant)… you cannot *lakor din torah* (uproot a law of the Torah) but we have. Where yes it will go by the law, where not it will go according to halacha. (original in Hebrew)

C: I didn't understand that

Y: *yesh davarim shedina d'malchuta dina lo yaazor – im dinah d'malchutah dinah yagid shasur livnot btoch hachedr aron* (there are matters that *dina d'malchuta dina* will not assist with – if *dina d'malchuta dina* says that one cannot build a closet in one's room).

C: if it says you are not allowed to make a cabinet in this room

Y: in my…

C: in your private area, it wont help

Y: it wont help, if halacha says you can do it, you can do it. The law *lo yachol lehitraev bechol davar. Yesh halacha, halacha hi kvuah, bzeh shegam mitchashev, lo kvuah kacha* (cannot interfere in all matters. There is halacha, halacha is fixed, although this that it also takes into consideration means its not so rigid).

C: its set but it also takes into account…

Y: *hi habasis* (it is the basis)

C: so the role of the judge is to work out where to take into account and where to not take into account, where halacha will judge on its own

Y: in Australia, *lo chayavim* (we are not obligated) to do *rak* (only) the halacha. In Israel we say that the Bet Mishpat *haya tzarich leehitchashev* (it should have taken into consideration)

C: they should be looking at torah, so *dinah d'malchutah dinah* is not as strong here?

Y: *le'at le'at* (slowly, slowly) the members of the Knesset are bringing it in. my father was a minister and a doctor in Mishpatim. In many *chukim* (laws) he gave the *chok lfi halacha* (law according to halacha).

C: so in Chutz La'Aretz we need to recognise *dinah d'malchutah dinah* more than here. Here it's a question, but there a dayan would really need to know *dinah d'malchutah dinah*?

Y: if you ask me something in Hilchot shabbat, about *chashmal* (electricity) I must know all the *metziyut* (reality). Without the *metziyut* I cannot do it.

C: so the *metziyut* is to understand the *tnay shebamamon* (financial agreement), to understand what is in the minds of the two people who are involved

Y: and the *rechov* (street)

C: so it is possible to say that dealing with a charedi community you might be *machshiv* more with halacha and less of *dinah d'malchutah dinah* and dealing with *dati le'umi* community you might be *machshiv* more *dinah d'malchutah dinah* and less halacha because in their *heskem*…

Y: no, *mitzad* the laws, all the *dati'im* have to know *dinah d'malchutah dinah* and how we can give them justice, after, if they do it, do it.

C: is it possible for two dayanim in two different Batei Din one to be *machshiv dinah d'malchutah dinah* more and one a bit less and both be *lfi ha'emet*, both did the right thing as a dayan, each one just came to a different assessment

Y: *machloket, echad chashov cacha v'eechod choshev cacha… Batorah yesh eilu v'eilu divrei elokim Chayim. Eich lichyot zeh mah shehu acher*… (A dispute, one things this one, and one thinks that way… in Torah we say 'these and those are the words of the living G-d'. How to live based on this is another story…)

C: Okay I think maybe we'll pause there, unless there is something else you feel it is important to add. In terms of looking at Melbourne and starting a Bet Din for mamanot any advice, any think you think it would be… I know you started a Beth Din yourself so what's an important thing to think if when you are starting?

Y: first thing is *sechel yashar* (common sense). After to know good the halacha. To know now we have baruch hashem many books that *merakzim* (focus) the halacha with *metziyut* (reality) and with the law… (pointing to a sefer on his shelf) *Torah U'mishpat*

C: who is that by, who is *Torah U'mishpat*?

Y: *yesh hamon hamon sefarim, le'at le'at* (There are many books, slowly slowly). We build, because you come from the *galut* (diaspora), we build *mechadash* (aner) and *bagalut zeh sippur acher* (in the diaspora its another story). B'Australia *b'emet rachok shamah, lo mitchashev…* (Australia is truly far away, its not considered…)

C: the law there doesn't think about halacha

Y: *az halacha tzricha le'hitchashev* (then halacha needs to take into consideration)

C: halacha has to bend a bit more…

Y: *Lehitchashev* (to take into consideration)

C: It has to recognise

Y: *lo levater* (not to give up)

C: but you are saying it has to recognise the law there a bit more because the law there isn't recognising halacha so much

Y: here, *v'gam po* (also here) the law… but we *maminim* (believe) that it should be *chok torah* (that the law should be based on Torah) *beezrat hashem le'at le'at* (slowly, slowly, G-d willing).

C: okay thank you very much

Part 2

C: *od sheila achat* (one more question), if a toveyah a plaintiff/claimant comes to you and you look at the case, will you look at the case and say this has got *zchut*, it has merit and then call the *nitvah* or will you call the *nitvah* before you know what the *toveyah* is actually asking.

Y: no its two sides, if you wanted to something, tell me what you wanted and then I give it to the other side and…

C: and when you look at the *ikarei hadvarim* (main matters), when you look at that are you looking to see if its empty

Y: *lifamim ata omer lo, ain lech mah litboah* (sometimes you say 'no' there is no claim here)

C: and then you say we aren't giving a *hazmona* to the *nitvah*

Y: *adam omer, he ragiz oti, ani omer ma la'asot* (a person says, 'he upset me', I say 'what can I do?')

C: you only give a *hazmona* if you see that there is something substantial

Y: *im ani yachol lassot shalom, ani azmin shneyhem* (if I can make peace, I invite both of them) – if I think that the *tafkid* (purpose) of the Beth Din is to doing [make] *shalom l'alom, sheyesh shalom, zeh hatafkid, lachen katuv b'halacha lilchotz al pshara* (peace in the world, that there should be peace, this is our function, therefore halacha dictates that we pressure someone to compromise)… *sheyihe shalom bein bnei adam* (so that there should be peace between people) *Im yesh taanot chayavim liftor al zeh, aval basof hadavar lehagiyah l'shalom, zeh be'etzem hamatara shelah.* (if there are claims, we need to solve these, but in the end of the day to achieve peace, that is the essential goal.)

C: *b'seder, hevanti.* (Thanks, I understand)

10.3 Appendix C – Australia Interview Transcripts

10.3.1 Interview with Rabbi Berman

Interview with Rabbi Mordechai Berman, Dayan, Melbourne Beth Din, Zoom on 31 August 2022 with Chaim Cowen

CC: Ok, so thank you again. And we'll begin, so I've got questions and I'm also happy if there are things that you want to talk about that are beyond these questions, obviously feel free to do so. So the first question is, what is your role in the Melbourne BD?

MB: Ok so, as you know, the Melbourne BD doesn't do Choshen Mishpat so I do, I'm not sure officially if its called an associate Dayan or a regular Dayan, it's a bit of an issue apparently, but I'm one of the newer Dayanim in the last, it's already been three or four years, so when one of the three regular Dayanim is away there's a rotation between me and Rabbi Sabbach, we go in for Gittin and I'm involved with the assessments of the Geirus program which is a very ongoing process weekly involved in monitoring, very involved in the conversion program.

CC: Sure, and what qualifications do you have that enable you to serve on the BD or qualify you as a Dayan?

MB: I have Smichahs in, you know, regular Smicha and Yodin Yodin and I've been learning Choshen Mishpat for many many years and people come to me with questions, I've done Dinei Torahs here and I've been involved with Batei Dinim, I've been overseas to do the Shimush a bit and I even had a Shtar, an arbitration agreement that I've had written up. Well it actually belongs to a BD overseas but i got a lawyer here to go over it to make it compatible with the local system over here.

CC: Sure. So just to clarify, you're saying that you have your Yodin Yodin, your regular Smicha, and also a reputation you're saying that you've developed based off of your learning. Is that correct?

MB: I mean I think so. A lot of people come to me with questions regularly so…

CC: I understand you also have a sefer, is that on Ribis?

MB: Correct, yes.

CC: So I guess this links into what you just mentioned which is, what sort of involvement have you had in commercial cases?

MB: Ok, so in Australia there is no fixed BD doing commercial cases. There's not many people who know Choshen Mishpat in Australia, which is a problem. It could be, to run a Din Torah, you don't need three people to run a Din Torah based on arbitration, really one could be sufficient depending on how you set up the arbitration agreement, so it's very ad hoc. I've got over the last few years a number of inquiries, a number of them actually haven't come to an actual Din Torah because they then settled in some way before which is what we try to encourage. That's definitely, you know, encouraged. I haven't had, maybe only one was an official Din Torah but I've been involved with many more Shailahs or potential Din Torahs. That's why I got this arbitration agreement looked over by a lawyer here.

CC: So was that Din Torah a Zablah or, how was that…

MB: that was actually, that was just agreed upon Yechidi, by myself in that case.

CC: Sure

MB: There is a, I'm sure you're aware, there's a big issue with the Zablah that there is an argument with the Poskim. In America, I understand what often happens in a Zablah is that the parties act more like lawyers, not the parties the Borerim. You know how it works, each party chooses one and the two Borerim choose a third, one that's meant to be independent. So it's really like two people acting as lawyers for each side and then there's one person in the middle. Now, there is a source for that in halacha, in the Aruch HaShulchan. I know a lot of BD don't like that and they like it to be fully impartial, the Dayanim, the Borerim, and I don't think there's any doubt that secular law requires that. It could be done, I suppose, by setting an arbitration an agreement, that if you want to choose a party, they'll be officially termed as a lawyer

CC: Right, then there'll be one person set as the…

MB: There'll only be one person who will actually have the right to take the final say on the case.

CC: Yeah, sure. And did your, in terms of either your training or learning, was that mainly focused on the, sort of, what we call the substantive law, the halacha itself, or was the training or the learning you've done also to do with the Seder HaDin, the procedure of how the case should run?

MB: So, definitely a large, the bulk of the halachas which apply in Choshen Mishpat is the halachas themselves, a relatively small part is procedure. But nevertheless it is definitely a big part of halachas related to procedural issues which could involve for example, you know, there's basic things in protocol of how things run, who gets to say first, can you listen to one side without the other side and you know these types of things. That's pretty straight forward, and then there's also obviously, there's the issue of what happens if a person doesn't want to come to a DT, what do you do? And giving a heter to go to the secular courts and if a person does come and doesn't want to listen to the

psak of the DT, what's the course of the Dayanim or the parties after that. So there definitely is a lot of procedure, I have gone over the halachas, yes.

CC: Would you say that the amount, just taking the halachas from the Shulchan Aruch and the Poskim, is that enough to set up a comprehensive guide for how, from beginning to end, the case should run or does some of that have to be worked out by the Dayanim or made up and that might differ from BD to BD?

MB: Are you referring to procedural?

CC: Yeah, procedure.

MB: I mean, because for example, most arbitration agreements or really the custom in most BD is that they don't do strict Din when they Pasken. They always call Pshara Krova Ladin which is an enforced compromise basically. There could be a legal issue with that although from what I understand it's not really a legal problem. That itself is the basis of the arbitration, so that's one thing that's not strictly Shulchan Aruch. If you look in the Shulchan Aruch it'll tell you kshara is a desired thing and then there's din. That BD encourages to do that is a certain custom amongst BD, that's one example. You know, obviously in Australia or any country a BD has to have in mind the secular court, how they will view the psak, because if it is going to get knocked out in court there's no point of doing it. Another example, I know Dayanim will not want to do a DT if the parties refuse to sign an arbitration agreement, so even though according to halacha there's a whole course of how you can enforce something, most of that doesn't really apply today because, you know, you can't, as you've seen, if you try to issue a ksav siruv and these kinds of things where you try to put somebody into some sort of excommunication, it doesn't work at all today and often the Rabbis of the shule or the person themselves won't keep it and it's just a waste of time and it's not going to be accepted by the legal court. So, you know, you have to have in mind the end goal that you want, at the end of the day, some sort of resolution to the dispute which means you have to work with the situation you're in, so therefore in Victoria you have to make sure that it's going to be fair, that fairness and justice is carried out, you have to make sure you keep the rules according to the Arbitration Act of Victoria etc.

(10:10)

CC: Yes, so do you feel, and you can answer this in terms of whether practically now or looking at the future, do you think its important for Dayanim to have training beyond their halachic training in terms of the secular legal expectations, in terms of how good arbitration systems work outside of Jewish law?

MB: I think that we have to maybe put in priority as follows: definitely I think, lets say, in Australia it is essential for a Dayan to have some sort of training or at least contact with lawyers for the running of a arbitration, a DT which is run under the auspices, the legality is being an arbitration. I think that's essential. So that's definitely, and that would be part of simple professional training, I think that's pashut. I think that, let's call it the ultimate, though, the importance is that they know halacha. At least there's one Dayan who knows halacha because you could have an expert arbitrator but at the end of the day that's the easy part of it, you know, you could do an arbitration course in a relatively short period of time, i think they even offered one, if I'm not mistaken, over one day. You know, to know Choshen Mishpat and how it's done, that takes many, many years and if you get it wrong, you could be Me'avas es HaDin and that could be, even though it's compromise though, mostly a pshara, but still the pshara has to be karov ladin, it has to be close so the ultimate, you know, you have to make sure people know more or less where the halachic issues arise and how to

research them properly and I was, you know, a certain Rav who was involved in a potential DT with me, it didn't end up coming to fruition but he suggested for example, to have a lawyer at the presence of the DT and obviously the parties would put that into the expenses of the DT. Another suggestion I thought of is, maybe the lawyer doesn't have to be there but the lawyer would be employed to maybe give a one hour briefing to the Dayanim before the DT takes place. Another issue, and obviously and Shimush, you know, seeing how DT are run because obviously you want to make sure it's done at some kind of world standard and make sure the protocol meets things. And the legal aspects are something which is on the side, you have to make sure it's there but the main…yeah.

CC: So, you're saying Shimush with BD that run their BD in a way that is working, it's a _____ expectation (can't hear - 13:20).

MB: Right. I mean, even in Israel they have to have…sometimes the DT are taken to the secular court in Israel and they're challenged, so every BD in the world today, I don't think there's any BD today that's not going to have an eye to the law of the land. And, it's more than that. Many halachas actually apply to the secular law of the land whether it's because of dinah dmalchusa dinah or because of the minhag hamedinah, you know, many halachas in employee relationships are governed by minhag hamedinah which poskim say dina dmalchusa dina and hilchos shchainim many halachas anyway, so you find that Dayanim often know very well the law of the land in certain areas.

CC: So, this is moving to a slightly different area but related to procedure. In a BD, what recourse does a litigant have if they're unhappy with the psak?

MB: So, this is a big issue. I mean, officially according to halacha there's no such thing as an appeal. There is, you can maybe try to show that it was a mistake, a basic mistake, it's called a to'us b'dvar mishnah, you know, a basic mistake, a clear mistake, and then there's to'us bshikul hadaas which means that maybe you went against what most people would do but if you've got some sort of basis for what you did then it stands and you can't overturn it. Now in secular law from what I understand, you know, it's more flexible in terms of the rights of appeal. In fact, I think in the arbitration agreement that there's a clause in there saying there's no rights of appeal, so the lawyer wanted to strike that out because he said that's not going to hold up in the secular courts if you write an arbitration and say you can't appeal it. So, that's an example maybe where you have to, for the necessity of making sure it's enforceable, it would have to give a right of appeal. But another BD, if you appeal to another BD they'll only be able to look to see if there's a basic mistake, they won't be able to just say well let's redo the whole thing and maybe it will say a bit differently, but if they can't show it's a clear mistake then they can't appeal it. That's according to halacha.

(16:05)

CC: If you, let's say for example, a litigant is claiming a to'us bdvar mishnah, would they be bringing that claim to the Av Beis Din or would they be bringing that to a different BD? As in, who are they arguing to say that there is a to'us bdvar mishnah? Who are they telling that to? The original Dayanim or a different BD?

MB: I mean, usually, I'm not clear if there's any firm rules about this and it could be dependent on each BD, how they run their procedural… Generally, you should know, it could be you're aware, it is much more informal, the BD process, than regular secular courts. It's much more relaxed, and they try to do that purposely, they try to encourage people to come, it's quicker, it's more cheaper, the whole idea. So, you know, it could be that, I'm not clear if there's any firm rule about this, whether

you go back to the BD themselves or it could be it depends on each BD and whether they'll accept claims afterwards to reconsider or not. Could be certain BD do allow it, some don't, so not clear.

CC: So, one of the things that I've noticed, looking through the various cases that have happened in Melbourne and Sydney, I'm not sure whether you've looked into those cases that have happened, like there was a Mond v Berger or in Amzalak that were taken to the secular courts. So, some of the issues that they found with things like talking to one party not in front of the other or speaking Yiddish when only one party understood Yiddish or making statements that seemed to show that they were on one side. Would you say that's an issue with the particular Dayanim in that case or is that an issue where halacha is not aligning with secular law? Meaning, Is that an issue of professionalism or is it an issue that halacha and secular law simply don't speak the same language and therefore what's allowed in one is not allowed in the other and it's sort of an embedded issue?

MB:I think that, maybe it gets back to what I mentioned before that it's much more informal, a classical BD and in some ways maybe they want to encourage that because they want to make it open for people, easy for people to come to a DT and encourage that and make it easier. Now, I mean, it's not a reason to permit doing something against procedural requirements of secular law and like we said, it has to be kept in mind, so if the Dayanim didn't keep that in mind that's definitely a failure on their behalf, there's no doubt about that, and so, you know, that's why, like I mentioned, a lawyer should definitely be involved at least with some sort of briefing before the Dayanim, and on maybe a longer term the Dayanim should be trained, you know, as an arbitrator etc, and professional development, there's no doubt they need to do that and that if the Dayanim didn't do that, it's just an oversight. I think it's clear to say it's an oversight and it may be coming from this idea that is a more informal setting.

(19:40)

CC: So, I guess one of the other things that have come up also is the question of giving reasons for a judgment. So, do you feel, whether in today's day and age or just bichlal, dayanim should be required to give reasons when they're giving a psak in a matter of Choshen Mishpat?

MB: I mean, it's interesting. In the arbitration agreement from this particular BD, they have a clause saying that they don't have to give a reason.

CC: In which particular BD? You're saying the one that, the one where you had the…oh, the one from overseas you're saying?

MB: I asked the BD where I have a bit of a connection with some of the people there, I asked them for their arbitration agreement and then I used that as a basis and I got the lawyer here to go over it and, you know, we made some changes to that but, in their agreement they have a clause which says that the dayanim are not obligated. They're waiving the right to request a written reasoning from the dayanim. I think it's probably…I think practically they will give a reasoning many times, obviously that could help ensure the acceptance of the judgment from both sides, but I could see there's certain scenarios where giving a reasoning may be obstructive to the acceptance of compromise depending on the certain scenario.

CC: So the arbitration agreement you are referring to, are you able to say which country it comes from?

MB: from Israel.

CC: from Israel, OK.

MB: I can read you the clause that they wrote…I won't hold you up right now. OK, so let's continue in the meantime.

CC: If you can share it with me afterwards, I'd just be interested if you're happy to share that text or whatever it is. You mentioned that there might be areas where giving a reason would be not a good thing - are you able to elaborate on what you mean by that?

MB: I mean, let's say you have somebody who has a claim. Now again, this is something which there's no firm rule for, it's simply a matter…the goal is that you end up with a resolution which is going to last and you don't have some party trying to go to a court or another BD to try to, you know, undo what was done. That's obviously the goal and I think in the secular also, no one wants things to be appealed. Obviously, you want try to get things done the first time round so, you know, it could be a scenario where we have a person and if you give him the certain reasoning he'll say that, you know maybe he won't understand it the way the dayanim understand it, he doesn't have the same expertise and he'll use that to try to argue to say, "You got it wrong, that's not correct," and he'll work…you know, that type of thing. Now I'm not saying necessarily that should be practiced always, I'm just saying there could be a scenario like that I would imagine.

CC: Do you think that concern is more in Jewish law than secular law, meaning secular law obviously they do give a reason, they give, you know, lengthy judgments. Do you feel like the concern of people having a reason and using that as sort of to say 'I know better', do you think that's more of a concern in Torah law than it is in secular law?

MB: I'm not sure, it could be that there's less of a general inherent lack of respect for a BD whereas a secular court people have more respect. I think that could be the reality out there in which case you feel like, you know, they can challenge more and it's also easier to challenge because going to court, the court system is very expensive and takes a long time so…the system of BD is much easier so people feel like they'll give it a chance, give it a go and if they get a psak which they don't like then they'll leave that one and go do something else.

CC: And do you have any theory as to why people might respect the BD less than a secular court?

MB: I think it's a psychological thing, I mean definitely there's been mistakes made like you know, as in the…that's only in Australia but even in countries, in America where things are streamlined, and Israel, it's still I think the case, it's how people look at it. Maybe because it's more informal, perhaps they see in Shule they see the dayanim and they see them at simchas they're less aloof. So, you know, not every dayan is the Gadol Hador, the biggest Rabbonim, they become Chachamim but people see them more on a personal basis and therefore there's less necessarily esteem given perhaps.

CC: Sure. So, I guess moving onto something you mentioned earlier, you were speaking about areas of secular law which a dayan needs to know, for example you mentioned in hilchos shchainim or minhag socharim, you know, those areas - how should a dayan go about getting the knowledge they need in terms of the standards of secular law, what's the best route for that to happen?

MB: I mean, in this arbitration agreement permission is given to seek expert legal advice if necessary. I would imagine, I know I remember, I was sitting in listening to a DT in Bnei Brak and you know, Bnei Brak is very crowded and therefore most of the DT is in hilchos shchainim, everyone's on top of each other. So, the dayanim were talking about it and they said 'Oh, this ___ was not very

good' and they replaced it with this ___ and that's much better and, you know, talking about different council rules. And they had out maps and they knew everything, they were like councilors. They knew all the different areas and were very up to date with everything. Now, they're getting things all day every day, in Australia it's not going to be the same but, if one's not aware and you need to know what the law is then you'll need to get a, bring in some sort of legal expert to clarify what the law is where that's needed.

(26:46)

CC: I guess also I was interested in hearing your view on the place of toyanim. I know that there are different views out there in terms of whether toyanim are a good thing or not a good thing in a commercial, in a din anonymous (?) case, what are your thoughts?

MB: I'll tell you something I heard from a dayan in America, actually a certain person here asked me for some names for toyanim and I spoke to this dayan in America, in Lakewood, and I asked him, I was going to involve him in the DT and I said 'do you mind using toyanim?' So he said to me if they are erlich it's OK.' Now, you know what that means? You know, there's toyanim and there's toyanim. You can have a toyan who's very, very quick, smart and he can make a case which is not true al pi halacha simply to please his client and he's not, you know, you want to make sure that some sort of a truthful resolution will come out of the case who is _____ but ultimately you could get a scenario where the dayanim maybe are not as quick as the toyanim. I'm sure in the secular system also this problem arises with judges and barristers etc. So, you know, if someone is honest and is obviously just presenting the case of his client the best way possible then there's no reason not to do that. If he's trying to misrepresent things to achieve a goal then that's problematic so… But having said that, you can't stop a toyan.

CC: I feel like the question is how are we able to determine who's erlich and who's not? Meaning, once you open the door to toyanim you're sort of stuck with who you get, you know. Are you able to then push someone away or what ways are there of vetting who is an erliche toyan and who isn't?

MB: It's a problem, I don't know what the solution is to that. But I think to make a general rule that you can't have representation is going to be problematic because I think you're going to get some sides who are very meek and mild and cannot claim the case themselves and they could be standing against someone who is very confident and very, you know…and it could lead to injustice potentially.

CC: See, I could be wrong but i believe that the BD of America do not allow toyanim but they do allow legal representation, so you can have a lawyer but they don't allow you to have a toyan, and how does a model like that sync with here, you know, where you're sort of allowing representation which maybe the Act will require but at the same time you're not opening the can of worms.

MB: I mean, the only issue is that the lawyer who is going to represent a party, how much does he know of halacha? Now if it's something which is an area of halacha which, if it heavily relies upon secular law then it's not a problem but if it's an area which is basically mostly, like for example there's the halachas of yerusha, of inheritance, we don't go according to the law of the land, it says explicitly in Shulchan Aruch we don't do that so there is debate in the poskim about in secular law, could it stand up or not because maybe there is ground to uphold it but basically it's not run according to secular law, not like for example you mentioned shchoyanim and zkiros poalim, so if a lawyer is trying to represent a client it could just be he's not going to have what to contribute here. He could maybe just present clearly the case.

CC: Yes, that's right. And he could give complement to a litigant who otherwise feels intimidated or that sort of thing.

MB: Right.

CC: And you mentioned briefly earlier about your view, the issue of a seruv (?) - do you have a particular view as to how to navigate the problem of a seruv (?) I assume you have, I don't know if you followed the ___ vs. Ulman case where…

MB: Is that the one in Sydney?

CC: the one in Sydney that was overturned on the basis of the seruv being considered in contempt of the court because it was considered preventing access to the secular courts.

MB: Yeah. I mean, I'll tell you what I've heard from dayanim overseas who said you know, unless it's very central Jewish areas where there's a big Jewish community who follow things in a very traditional way and have a very established big BD, basically you don't do this today because like you mentioned, if you put somebody into cherem and you say no one can talk to them then the Rabbis of the shuls themselves usually don't keep it and if it's not going to be kept there's no point doing it. Now, that's from a purely halachic perspective, if it was by the secular law that's obviously another reason not to do it. So, you know, the other option is simply to give one party a heter to go to the secular court in such a case.

(32:31)

CC: You briefly also discussed zablah (?), do you have anything to add in terms of when you think zablah is an appropriate model to be used or not?

MB: I mean, zabah has definitely a ma'alah to it because you cannot have a scenario practically where two dayanim have a vested interest and have heard the claims etc. You can't do that, there's no doubt about it. Even al pi halacha, strict halacha, there are grounds for it but when you're dealing in secular there's no doubt about it, you cannot do that. So then what's the benefit of choosing your own dayan? The benefit is maybe you feel more comfortable or you have more trust in the integrity of that dayan etc. So in that respect maybe it's beneficial. I'm not sure in the secular world if there's this concept of choosing which judges you get - is there such a thing or not?

CC: It's a good question. I haven't researched it fully but I've been told that there are certain types of arbitration, I'm going to look into it further, but apparently there might be something similar.

MB: Right, right. So in that respect, just having the confidence in the judge who you trust will run the arbitration fairly, with integrity and come to a professional resolution and result, in that respect I think it is definitely desirable or you know, should not be stopped.

CC: Right, and we'll come to an end shortly but I thought I'd just, to wrap it up saying: do you see any obstacles in the process of, you know, we've discussed the idea that dayanim would need to have some level of upskilling in terms of understanding the secular law and the requirements of the arbitration act etc., do you see any obstacles or is there a better and a worse way of training dayanim, is there something you would recommend in that regard?

MB: I'm not sure, I mean you need professional development to make sure they understand the rules of the arbitration act and how things are run, so, you know, to maybe pick up some sort of

short arbitration courses and then some ongoing guidance from lawyers where necessary whether they feel, maybe dependent on the case as well, I think is in order.

CC: Great. Anything that we didn't discuss that you feel is worth mentioning or related to my topic?

MB: Yes, I think there's something which is an issue which I think comes up in Australia specifically, which is the concept of using dayanim from overseas via Zoom for arbitration because as you mentioned before there is not so many people who know Choshen Mishpat in Melbourne, so many times the question has arisen to make an overseas BD maybe with one member here and the dayanim from overseas Zoom them in. Now I've had conflicting views by…I'm not sure if there's anything tested in court whether that's acceptable or reason itself to knock out a judgment because they're not here, members of Australia, residents of Australia. I understand it's not a problem but it's something which maybe should be looked into to make sure, because that's definitely one of the viable options in doing a DT in many cases.

CC: And I'm also curious, in the Litvish community or in the Adass community, is the average person who is having a conflict finding a BD or a yochid mumche or are they going to a secular court? What is the standard in Melbourne?

MB: I heard from a lawyer here, the lawyer who actually helped me is in the frum community and he'd been involved in DT in the frum community, he's living in the frum community, he said most people, frum people, do not want to go to a DT and simply because they feel they'll get a better result in the secular system.

CC: Wow. Do you know, what do they mean by 'better result'? Why would it be better?

MB: I'm not a hundred percent sure, maybe they have more trust in the secular system.

CC: So it's more the process they're worried about more than the psak itself you're saying, they feel that they'll get a better hearing, is that the idea?

MB: I'm not clear why. He did mention also, sometimes people don't want to do an arbitration because they want to embarrass the other side in an open court system whereas in the BD it would be a more private setting, that's another reason why people maybe want to take it to a court.

CC: As in, they want to embarrass someone you're saying?

MB: Yeah, they want to take the other side, they want to make public that the other side should realise, you know, 'I'm going to threaten you, it's all going to come out, everything that you're doing' or they're alleging they're doing in a commercial environment so…

CC: Zoom has just warned me we've got less than a minute so it might shut off, so in case it does I just want to make sure to say thank you before it does. It's been very helpful and, maybe we can keep talking just for a bit about this point but if it does I just want to say thanks before that. Yasher koach!

MB: Pleasure, pleasure, pleasure. Ok, so…

10.3.2 Interview with Rabbi Greenwald

Interview with Rabbi Yisroel Greenwald, Dayan, Melbourne Beth Din, Zoom on 16 August 2022 with Chaim Cowen

CC: Shkoyach, here we go. Okay, thank you so much Rabbi once again, I appreciate your time. So as I mentioned in the email, the purpose of this is I'm writing a PhD at the moment, I'm researching, and one of the areas that I'm looking at is understanding what sort of training dayanim would require in order for us to have commercial Botei Din that would be successful in the Australian context. So I'll ask a few questions and obviously you're free to answer as you please. So my first question Rabbi for you is, can you tell me a little bit about your role in the Melbourne Beis Din.

YG: I'm one of the dayanim and what we do presently at the BD is conversions and gittin.

CC: And what are your qualifications that you have to date?

YG: So I have yodin yodin so therefore I'm qualified to be a dayan, and also learning the halachas, reviewing the halachas, getting shimush, getting experience by speaking to…networking with experts on the field, that's basically it.

CC: And is your yodin yodin, is that in areas that would allow you to be a dayan in Choshen Mishpat if that was something the BD would do?

YG: Yes.

CC: So that's across those areas. Have you ever had involvement in any commercial cases either as a zablah or in a formal BD?

YG: No.

CC: So in terms of your training and also maybe from what you're aware from the training that others have been through…I'm assuming that in the program that you did for yodin yodin you would have been with others who were also studying yodin yodin, is that right?

YG: Yeah.

CC: So in that training is the focus of the training on the actual what they call substantive halachic law or does it also look at the seder hadin, at the procedural law, is that also an aspect of what is studied?

YG: I think generally…I can't talk about generally but in our case it was just learning the halachas, the gemaras which are the sources and then the progression through the rishonim the laws of Choshen Mishpat.

CC: Sure. And I myself have not studied Choshen Mishpat in great depth yet, I hope one day to, but my understanding is that Choshen Mishpat doesn't…there are aspects of procedural law but there's no siman that really focuses on that specifically, it's more dealing with the actual substantive law, the halachas themselves but not the seder of how a BD should operate, or am I mistaken?

YG: No, there are sefarim. There's a sefer which I have called Seder HaDin and there's other sefarim as well which speak about, like you're saying, not the actual halachas of Choshen Mishpat but more the procedurals and how that works.

CC: And is that something that is typically learnt in a yodin yodin course or not necessarily?

YG: I think to get the qualification is more knowing the halachas of Choshen Mishpat. If a person is going into practice then he would definitely need to know the seder hadin as well.

CC: Sure. So I guess the next question is, and maybe this is not just relevant to the case of commercial areas which is something that you haven't had great involvement in, but in terms of gittin and gerus and the areas that you are involved in, what sort of professional expectations do you feel are on you over and above the halachic knowledge?

YG: Okay. We, the BD, we try very much to do things in a professional way, to treat all the people who come in with respect and with sensitivity and certainly in Choshen Mishpat those things would be the same. In Choshen Mishpat there is a certain aloofness which a person needs to maintain when conducting a DT.

CC: Would you say that aloofness helps with professionalism or detracts from it?

YG: It says in mishnah that we have to suspect people being lying, so they have to treat the dayan with a certain degree of respect. But even though I'm not involved in dinei torah I am certain that everyone who's involved with it should try to make sure that it's done with fairness and also to treat everyone in a respectful way.

CC: And I guess also in terms of fairness and professionalism there are different sorts of standards that different people might have so is there a way that you think or you're aware of that is a gold standard of what professionalism should look like in a BD, or is it each dayan for themselves?

YG: Yeah, I think that we're very fortunate in the Melbourne Beis Din that we have an excellent Av Beis Din, Rabbi Gutnick, and for me he serves as a role model of how a person should act and it's definitely a learning experience and a positive learning experience that I was able to gain from him, seeing how he deals with everyone. I think that you can't ask for better than that.

CC: So would you say that…and I'm not sure about the knowledge that you have about other Botei Din, but would you say that other Botei Din are also sort of dependent on the Av Beis Din leading the way in terms of being a role model for professionalism and fairness etc.?

YG: Yeah, I don't have personal knowledge, I'm not so involved in other Botei Dinim. I would very much like to get more shimush, going overseas to be able to sit in by botei dinim for what I'm involved in which is gittin and gerus, if I was involved in Choshen Mishpat I'd do that as well and wherever you go there's always what to learn, in every Beis Hamedrish it's a chidush that wherever you go there's always what to learn from.

CC: So the next question I guess, and this is really relevant to Choshen Mishpat but again I think it does translate across in giyur and gittin, what is a way in which someone who comes to the BD and isn't happy with the outcome…what are legitimate ways that you would say as a dayan are appropriate ways for them to be able to complain or ask for the matter to be revisited, is there a method and an appropriate way that they should be doing that?

YG: Yeah, so in halacha they don't have like you have in the secular courts where a person can go to Supreme Court to overthrow a decision made by a lower court, but according to halacha we have a principle of basar bei dinah lo daiki, one BD doesn't investigate another BD and therefore the only time they would overthrow a case is if there was something like tohu bidvar mishnah where someone is making a blatant mistake which is against halacha.

CC: And who would they go to argue that there is a mistake in a dvar mishnah, would they go to the very BD itself that made the mistake or, how would that happen in reality?

YG: I would say they should first go to the BD but if they feel that they did something which was to'us bidvar mishnah I imagine they would go to a different BD and that BD would try to speak to them about that.

(9:10)

CC: From I guess your experience, both practical experience and also your learning, what do you think would be appropriate training for a dayan to help them understand how to conduct a trial in a way that is fair and is sort of above board procedurally, the litigants feel they've had a fair go etc.?

YG: Right, right, that's a very good question. One is that they should receive professional training from professional dayanim who are very well respected, very successful from overseas. And like I mentioned before, getting shimush and the opportunities occasionally, it can be expensive to do it too often but once every couple years to allow people to get shimush so we have professional development. In the case of Australia, we had a very nice program done many years ago, Rabbi Kluwgant organised that, where it was like a mini arbitration course for rabbis and it was for a few days and they had lawyers present as well, they had roleplay and they had also lectures from judges. So that was a very intense course, it was very beneficial and I think to make that available again, you know, if they're starting to come to the court for Choshen Mishpat I think that would be very useful. I think that dayanim should be very familiar with the Arbitration Act and they should get also professional development from lawyers about relevant laws about the Arbitration Act that particularly dayanim have to know and a special focus in the Arbitration Act; the book that I got when I took that course, in the footnotes there was examples which were unfortunately from cases of Botei Dinim which were overthrown because they didn't do justice with natural justice, so special attention has to be done about that. I think in Australia or in Melbourne at least, we didn't have established Botei Dinim and because it's only ad hoc they're not so professional. A lot of natural justice is already in seder hadin so there's nothing different about the seder, the letter of natural justice is pashut halachas. So I think it might be useful in the beginning to have input from lawyers going through the Act, you want that it should be able to be held up and that is shouldn't be overthrown, and perhaps they should even be present in the early days maybe on a consultant basis, they should be there and present in the beginning to offer tips that it's being handled properly. Just until they get the hang of it, I don't think it's something long term that should be necessary.

CC: So you're saying that there should be some sort of legal expertise there at least to get the dayanim on their feet in terms of familiarity with the secular context within which they're operating.

YG: Yes, I would think that that would be a good idea but it has to be done in a sensitive way to the dayanim as well, in a way that would be l'kavod hatorah, so therefore there's two ways how to do it, it could be done in way of 'we have to make sure you're right because you don't know what you're doing' and that would be very disrespectful to dayanim, it has to be done in a respectful type of way.

CC: I hear what you're saying and I think it's a very important point because there is what to learn, at the same time it also needs to be in an oifen hamiskabel right, it has to be in a way that the dayanim are going to want to hear it and feel that they are being respected in their expertise. So is there a way in which you would recommend that would be sensitive and that the dayanim, you feel, would take it properly and feel that they are being respected as dayanim and at the same time getting the training that they need, is there a way you'd recommend that to happen?

YG: I think it's more respectful for the dayanim if this training was done prior to the starting of the dinei torah, that means getting these lectures, going through the Arbitration Act, getting guidance from overseas botei dinim, that's part of the training and then…you know when I started getting training, I used to be the safety officer at the kollel so I used to go to many courses about child safety and about preventing abuse so I heard many of these lectures, probably tens of hours all together, and after a while you know it, you know I could give the course myself I feel. So in the same way, those who are starting out before they're starting out they haven't been doing this previously on a regular basis so therefore I think they'll accept receiving the training and then at the beginning stages in addition to perhaps have a professional being present as an observer, but once they get the hang of it, once they're on their feet then maybe after that it would just be a refresher course from time to time.

CC: And do you presently in what you're seeing, and again I don't know the extent of your networks and who you know from other botei dinim, but do you feel that it's a norm at the moment for dayanim to get that sort of training or not really?

YG: To the best of my knowledge, and again I don't have personal knowledge because the dayanim that I connect with are the ones who are involved in gittin and geirus so I don't connect with those who are involved in botei dinim, but if I could take an educated guess I think it's not being done elsewhere but the reason that I think perhaps over here it is necessary is because the past history of many cases that were thrown out because it wasn't natural justice, so I think in Australia it would be beneficial.

CC: Sure, okay I hear that. So I want to dig a little bit into that. The Australian situation is obviously…it's very interesting, in a sense it's quite exceptional, I don't know if there's any other country that has as many cases that have been turned over by the courts. I've spent some time studying those cases, I don't know if you're familiar with them but the Mond and Berger case which was the Caulfield shul, there's Thaler and Amzalak which was another case, Koncepolski and ____, there was another case more recently (which was) Live Group and Ulman. So a lot of issues came up such as the judges talking to one of the parties without the presence of the other or speaking in Yiddish when only one of the parties was able to understand Yiddish or making statements that showed bias, for example one of the judges told one of the parties 'you can't fight city hall', you know, don't even try and fight the big institution, and other sorts of things. Do you feel that those issues are local issues in terms of the dayan (who) for whatever reason wasn't aware or are those issues that are somehow part of the halachic system and that need to be addressed, meaning is halacha more lenient in certain areas and it's a matter of things not being aligned? My question is essentially: is it an issue with the individual dayan or is it an issue with the system itself?

YG: Yeah, so I would say definitely it's not an issue with the system. Many of the example you gave, it's clear in halacha that the dayan is prohibited to speak to one side without the other side, you can't speak softly to one person and harsh to another person and to speak another language, that would probably be included to my understanding, it would be similar to making one person feel more comfortable than the other. So I would believe that the reason why it happened, and I'm only speaking about the ad hoc botei dinim that they're not doing this on a regular basis so this is not what they're doing all the time so perhaps they're not familiar with all the knowledge of these halachas, maybe it escaped them, but I think in established botei din everyone would know not to do that. Now about the 'can't fight city hall', I don't know what that meant exactly so that's aside.

CC: That's from the Mond v Berger case but anyway I won't go into it but it's something…

YG: Yeah, I heard about it but I don't understand what that meant 'you can't fight city hall', I don't know the background of that but talking to one party… Now sometimes halacha in a limited way allows talking to one party but again the halacha is very clear what you can do and what you can't do. That means that if a person wants to bring a case to Beis Din then they'll speak to one of the dayanim and tell them 'I want to make a din torah' so they have to know what is the nature of the DT, that would be allowed but you can't go into extreme detail, you can't present your whole case.

CC: Yeah, I mean I guess you could also ask: in an area where let's say secular law is stricter than halacha, should halacha follow the standard of secular law in that case? Should I give an example? Take a situation of zablah, so one of the challenges there is (in) zablah each party is going to be borer echad, they'll each choose their own dayan and then the two dayanim choose a sholish so what happens is you have in the court two dayanim who both have a pre-existing relationship with one of the litigants. So typically in secular law none of the judges are allowed to have relationships with the litigants right? So they'll say 'wait a second, you've got a judge here who's a good friend or is the rav of this particular person', so halacha in a sense is allowing something which the secular law isn't. So how should we navigate those sorts of questions?

(21:22)

YG: Okay so that's a good question. Zablah, it's not even so pashut that zablah should be the way that you described it where it's like two lawyers and one judge. According to some sources a zablah is also defined that each one chooses a judge but the gemara says that a person can't judge if he's a friend or an enemy so there are problems with the zablah system. I once saw in a sefer written by the ____ Rav, Rav Moshe Stern, and he was writing very much against zablahs and he described how sometimes it's the rabbi who screams louder that's the one who convinces the one in the middle how to rule. So zablah is a very problematic approach of doing a BD. Now, when you don't have an established BD in town very often that's the default way it's going to be, you're going to have a zablah, but the ideal way, and the overseas respected Botei Dinim are not zablahs, they're established Botei Dinim and if Melbourne has an established BD so you have people who are all not biased and that's the way it should be so you don't have this problem.

CC: I mean this is also interesting, do you see it as somewhat of an embarrassment that Melbourne doesn't have an established commercial BD?

YG: I wouldn't say I look at it as an embarrassment, we're a relatively new-ish community, we're much smaller than other overseas communities. I'm very grateful and I have a lot of respect for Rabbi Kluwgant where when he was the head of the RCV there were a lot of efforts made to make an established BD and he even brought out a candidate to be an Av Beis Din and I think from my understanding this shows that there was…you know, he's paying someone a salary for that role and the city didn't have the financial resources to back that. So it's something which I can't say that it's an embarrassment, every community starts one at one period of time and they didn't have it until that time, but I think it's a wonderful thing and a very important thing to have an established BD.

CC: Currently in the Litvish community or in the Adas community when they have a commercial dispute and they want to be mkayaim 've'eleh hamishpatim asher tosim lifnayhem', will they go to a zablah? Is that the standard or are there somewhat kavuah people who they would go to?

YG: Yeah, so I can't say for sure in the Adass community. There's a few dayanim so I imagine that Adass, you know you have Dayan Katz, I think that Rabbi Donenbaum serves as a dayan and also, he's not here anymore, from England, the son-in-law of Rabbi Beck who's also a dayan. So I imagine that they have a BD kavuah who could pasken but I don't have first-hand knowledge about that. And

in the kollel, Rabbi Burman who has tremendous expertise in Choshen Mishpat, so he's available and some people approached him about making a BD but I think it never got off the ground in terms of a lot of cases get started but they didn't…let's say the parties backed out before anything came out, before things got finalised.

CC: So coming back to I guess what we were discussing earlier in terms of the secular law and the interplay with a BD that's commercial, do you think that a dayan has to have a certain knowledge in secular law in order to be able to deal in commercial matters?

YG: You mean more than the Arbitration Act?

CC: Yeah, I'm saying for example let's say the case that's being disputed is about a complex share transaction or got to do with the setting up of a trust, different sorts of complex legal mechanisms that often exist within businesses etc. for rabbanim that don't necessarily have experience dealing in shares and option trading and who knows what that could come up in a commercial transaction do they need to have some sort of sense of the law to be able to navigate those questions?

YG: So I don't know, I'm not familiar with what's being done overseas by BD, how they deal with these cases, so it's a good question I can't answer that.

CC: Okay, sure. And what do you think can be done, I mean we've discussed this a bit but I guess if there's anything else that you think, if you were able to give advice in terms of what could be done to promote greater professionalism among dayanim would you add anything to what you've said previously in terms of what can be done in that regard?

YG: No, I think that what I've said covers everything. There's an interesting point which has to be addressed which is that even if you don't have a zablah, even if you have a free and established BD, how that fits in with the arbitration agreement is something which has to be ironed out and I think that there's some lawyers in town who put together documents to allow a BD to be able to fit into the Arbitration Act and they wrote a document of agreement that when a person comes to BD that should be able to stand up in court.

(27:29)

CC: I understand, I mean to my knowledge there's a shtar, I think it's called berurim, and there's similarities between that and the arbitration agreement that the Arbitration Act asks for. So I know Yonah Reece, he's from the Beis Din of Chicago I believe, he's written on the idea of shtar berurin (and how) it can serve… or what the overlaps are between those two documents. So my other questions that I'd be interested in your view on if you've given thought to them and have some knowledge, one is: you've mentioned about zablah, what is the place of a toyan in a BD? I know that there's some controversy about whether a toyan is a good thing or a bad thing in a BD, do you have a sense of whether they're a positive force in the BD or a negative one?

YG: Yeah, this is not my area of expertise.

CC: No, I appreciate that.

YG: I would say that…I one time was involved in a DT and I got myself a toyan. I lost the case so the toyan didn't actually help me. I think there are different types of toyanim as well just like there's different types of lawyers and just as there's some lawyers who might bend facts to make a case which is more favourable for their client so there is a danger that toyanim might, that a toyan who is

not of a high repute might be guilty of doing this same thing, but what's the policy of…could you weed these people out? I don't have a view on that, I'm not presently involved in that. I think though that it's important that if the community wishes to establish a BD, the idea of professionalism is things that should be done behind the scenes, what goes to the community is to say the BD is important as it says in the pasuk 've'elah hamishpatim asher tosim lifneyhem – vlo lifnei…' you know, you can't go in front of a non-jewish court and therefore it's important to establish botei dinim, and it would be a lot cheaper than going to the secular courts and that's what the halacha requires and this is what's done in cities around the world, and that's what's given to the public. The type of thing which you're doing to make sure that they're not going to be thrown out, that it should be done professionally, they should have training, that again as a respect for the dayanim and kavod hatorah, that should be done behind the scenes. To make a big noise about that in a public type of way, that I think is a bit of a chilul Hashem.

CC: Yeah, no I hear that and the purpose of my study is to be able to put something that is ultimately able to be there for the dayanim to use to go, 'okay this is what's happened in the past, this is how other botei din have navigated these issues', and to set a sort of manual for a dayan to be able to use to know what the possible obstacles are. So yeah, it's definitely not there…

YG: for public consumption.

CC: Correct. It's there for the dayanim.

YG: Yeah, you're right. So the main thing is that it should just be done internally.

CC: Yeah, I understand. Some other things that again obviously if they're things you're not familiar with we can skip over them but one of them is: do you have a view on the role of a seruv in today's day and age. I'm not sure if you're familiar with the Live Group and Ulman case but it sort of…

YG: Yeah, I'm a bit familiar with that.

CC: So should the BD only be for parties who both want to be there or do you think that the BD should be able to use whatever power it has to summon someone and if they don't come to put the various consequences of not coming?

YG: Okay, so I don't want to talk about that particular case but just in general from my knowledge of botei dinim around the world they don't do things like threatening cherem, that's not done today. What they do is the BD will conduct a DT if both parties are willing to go, if one party doesn't want to go so then the system is they send an invitation for the defendant to come to the BD, they give him three invitations, if he doesn't show up so then they write a document not publicly shaming but just saying that he was mesarev, he didn't show up to the BD, and basically the only thing that'll do practically is that it allows the plaintiff to go to secular court.

CC: So a heter arka'os essentially.

YG: Yeah, so that's really the purpose of the siruv.

CC: Yeah. And I'm just interested, there's something called a lo tzayos dinah, is that essentially a heter arka'os as opposed to a seiruv, are you familiar with it?

YG: I'm not familiar with that.

CC: I guess one of the other questions is also about reasons, so on the one hand my understanding is that historically botei din did not write reasons for their judgements and one of the reasons is because as you said 'beis din achar beis din lo daiki' so if you write reasons you're encouraging people to sort of find flaws and want to appeal. I know the Arbitration Act does require some level of reasoning so again I don't want to ask you questions that are beyond the breadth of what you've studied but do you have any thoughts about whether botei din should be writing reasons for their judgements?

YG: When I was learning the Choshen Mishpat…presently when I have time to study things which I relevant to me as a dayan I'm studying most of the time hilchos gittin so I'm rusty in Choshen Mishpat so please don't quote me but from my memory I've seen that, and maybe this is an opinion that is not custom, but that they could ask for a written opinion. So even putting aside halacha, the Arbitration Act requires it and the goal of the BD is that the judgement should stand up to the Arbitration Act so definitely a reason has to be written. And I think another interesting point which is worth mentioning is that the judgement which they're writing has to be written in a way which would conform with or not go against Australian law. That means, I remember there was a judge who spoke to the rabbis by that three day conference on mediation and arbitration, and one of the judges who spoke said that suppose two people want to come to the arbitrator and they sign an arbitration agreement and the arbitrator says 'we're going to be going according to Inquisition law'. That was the example which that judge gave. So, would the Australian government want to uphold that? And there they were saying that they're inclined not to uphold it because it's a set of laws which is contrary to the basis of Australian law. Now I heard off the record, the judge didn't say it publicly, but I heard off the record that the concern was that the Muslims are going to be using the arbitration agreement to support Sharia law, and they don't want to take part in that so therefore they're not going to be able to differentiate that and they have to say that they'll treat all religions the same way and for that reason the judgement has to be carefully written in a way which would not raise any red flags to allow it to be overturned because of the basis of the decision.

CC: Thank you. So, look I want to thank you for your time, I'd probably ask more questions but I appreciate it's getting late. Thank you very much, I appreciate what you've shared and that you've taken the time and your responses so thank you.

YG: Yes, yes. Would it be possible if before you publish my responses to show me my responses, because maybe I used a word which…you know because my intention was not to disparage any group or any person, I tried to be as careful as possible but the way the words came out might need some…

CC: Okay, absolutely. So I plan on writing this up, I'm actually going to Israel next year to spend time doing my writing so I'm going to write this up when I go there and once I've written up the transcript bli neder I will send it to you.

YG: Okay, we could do it like that or if you have a few statements that you want to…

CC: I have a few notes that I've just typed but I'm going to write a fuller transcript and I can send that to you.

YG: Fine, if you could show that to me.

CC: I'll send the notes right now to you so you'll be able to see that. Okay, thank you very much,

YG: Thank you very much.

CC: Kol tuv, rabbi.

YG: Kol tuv, all the best.

10.3.3 Interview with Rabbi Gutnick

Interview with Rabbi Mordechai Gutnick, *Av Beth Din*, Melbourne Beth Din, Melbourne on 20 October 2022 with Chaim Cowen

CC: Okay, so this is a meeting between Chaim Cowen and Rabbi Mordechai Gutnick of the Melbourne Beis Din, in Rabbi Gutnick's house on the 20th October 2022. So Rabbi Gutnick, first of all thank you, I appreciate you making the time for this, so I have a few questions to ask and obviously it may go in other directions and I'm happy to go wherever it goes and wherever you're happy for it to go. So my first question is a question that I know the answer to but for the sake of the interview I'll ask, and that is: what's your role in the Melbourne Beis Din?

MG: My role in the Melbourne Beth Din is I'm what they call the Av Bet Din, they call it Chief Justice of the Jewish Ecclesiastical Court of Melbourne.

CC: Thank you, and what are the qualifications necessary to have gotten that role?

MG: Well, the normal qualifications are, and that's what I have, is that one is not only ordained as a regular rabbi but you're ordained with yodin yodin which means that you have studied Choshen Mishpat, the sections of the Code of the Jewish Law that deal with financial issues, mainly financial issues but other issues as well like divorce, marriage, conversion which is actually not strictly Choshen Mishpat but it's still part of the thing that a dayan will learn. An ordinary rabbi does marriages but he doesn't really have the background that a dayan of a Bet Din is supposed to have and definitely he doesn't have the background that a dayan of a Bet Din is supposed to have in regard to divorce laws and conversion laws. The Melbourne Bet Din is mainly involved with those three areas, two areas plus another one, two areas are divorce, conversion, and the third one is jewish status which means that we have to trace sometimes people's heritage, ancestry and so on in order to go back and see that they are fully jewish and then we supply them with documentation saying that they are since many won't be able to get married if people are not known by the rabbi, not known in the community, they won't be able to get married unless they have a Bet Din that actually endorses the fact that they are of Jewish status and also that they are of single status and eligible to get married. It's not just a matter of being single it's also a matter of, they are various laws for instance as far as a cohen is concerned, one of the sects of the Jewish people are cohanim, priests, and they're not allowed to marry certain individuals and you have to make sure number one that they are a priest, if they're not then it doesn't matter so much but we check the lineage in that regard, and also as to who they're allowed to marry and who they're not allowed to marry.

CC: Yes. And were there any other short courses or areas that you did beyond the yodin yodin that you found beneficial in your current role?

MG: I did a lot of practical work even after I graduated, what we call shimush, and I did that practical work with Rabbi Zalman Shimon Dvorkin in New York and mostly also with Rabbi Hendrel who was the Av Bet Drin, the Supreme Justice if you want to call it that, of the Montreal Bet Din. My wife is from Montreal so I spent a lot of time in Montreal and I spent, before I came out to Australia to assume my positions, I spent about 6 months there and he took me through practically. You know, it's one thing knowing the halacha and the other thing is actually seeing it put into practice and he

took me through greatly. I attended quite a number of divorces there in Montreal, I attended a chalitzah which is a very rare thing to attend.

CC: Were there any commercial cases that they did? Were they Batei Din that were brought…

MG: They did commercial cases as well but I didn't attend any of those commercial cases.

CC: It wasn't your focus.

MG: I don't know why not, I did in New York when I was under Rabbi Dvorkin I attended a case that he was adjudicating. I actually sat on as a dayan in cases that he was adjudicating but I don't remember doing any in Montreal.

CC: That links very nicely to an area that I wanted to explore a bit deeper which is: what has your involvement been in commercial cases?

MG: Ok, so when I was in Sydney, Sydney did commercial cases, I became a dayan on the Sydney Bet Din and my step-grandfather Rabbi Abramson was in charge there. I did do commercial cases in Sydney so I got experience in that regard but in coming to Melbourne the only commercial cases I did were private cases, I still do them today. In other words…

CC: As in individually, you're saying.

MG: Yeah, people came to me for arbitration or mediation and I've done quite a number of those but I will only do it in circumstances where the parties involved agree to come to me, in other words I very rarely summon somebody to come to a DT against his will. I have done it once or twice in very important cases and in both cases they didn't want to come so what I did was I gave them, the other side, the party the right to go to court.

CC: A heter arka'os.

MG: A heter arka'os, because a lot originally you try to settle things within the community, within halacha, but if the party shows total disregard to halacha, you don't make the other party have to suffer if they're going to lose because the other side doesn't want a dayan because they aren't frum, isn't religious and so on. And therefore I have given a number of times I have given people permission to go to court.

CC: And with those cases that you did, were they formal with arbitration agreements under the commercial Arbitration Act?

MG: I have a submission to arbitration which I do in the first instance, I have a copy.

CC: So this document, is this a shtar borerus?

MG: Yes.

CC: So this is more a halachic document than a secular document, is that right?

MG: Yes, but it just ensures that the people know what they're getting themselves into.

CC: Yes. And have there been any cases where one of the parties has not been happy with the verdict and wanted it undone or anything?

MG: No, I've been very lucky I think. A lot of cases, they come because they want to do the right thing according to halacha and even if it goes against them. I had one fellow, he once told me that, he said, 'Rabbi Gutnick, I still think I'm right and I think you didn't rule correctly but at least I can say now that I was really right but the rabbi ruled against me so I had to go along with it'.

CC: Fair enough. And I'm also interested in…

MG: This is the shtar borerus, by the way.

CC: Ok. Is this a loose translation of it?

MG: Yes, it's pretty much the same.

CC: Am I able to maybe have a copy of these or take a photo of something?

MG: Yes you can take afterwards.

CC: Ok, thank you. So…

MG: I try to tell them that we're not necessarily going to go according to civil law. We're not going to go against civil law, we're not going to deny natural justice, but there may be certain intricacies that are involved that maybe a lawyer would be able to say 'hey, but that's not the way the civil courts would rule'. So, I tell them there that we're not bound by…and they should know that we're not bound by that and I don't think I've ever had anybody say differently.

CC: Yes. And I guess there's also there's in secular law they distinguish between what they call substantive law which is sort of, I guess, the law that's applied, and the procedural law which is the law of how the court itself works, you know, do you have both parties present when you have a plea is made etc.

MG: We do it in a Jewish way but it's pretty much the same as what would be in a secular court. Both parties have to present, they can't tell the judges involved whether it's me on my own or if I have two other people with me, they can't tell their case, they can say generally I have a problem with…they haven't paid rent. Something like that. But I won't listen to…if I do listen to some of the details beforehand, because sometimes I hear what somebody has to say before I realise they want to go to a DT, I've just given them advice, so then I tell them, 'Look, I really can't continue as the adjudicator here because I've done the wrong thing according to halacha and I've listened to you and that's not fair.'

CC: Is there a procedure that is either made clear to the parties or that you consciously reference or is it sort of more from your halachic knowledge and shimush that you have that sense of what is normal procedure?

MG: Normally I do tell them beforehand but it's oral because it depends on the case and I will tell them beforehand 'this is the way in which I'm going to approach this particular case'. And I ask them, I can consult them to find out, do they want a din, exactly according to halacha? And I warn them that according to halacha one person's going to get nothing or could get nothing and the other person gets everything, or do you want a pshara where we'll work out a way where both of you are

happy? The various details of how I'm going to run the case, how they're going to present the evidence, are they allowed to have lawyers present, sometimes one side objects and says you're not allowed to, I can't afford to have a lawyer so it's not really fair on me and so on, so whether they're allowed to have lawyers present, whether they're allowed to have other rabbanim to come, a dayan or at least somebody who's going to be a toyan on their behalf. We settle all of that but that's usually done orally because of the fact that each case is different, for example one person might want a lawyer and the other person might want a toyan and so you've got to come to some sort of conclusion on how are we going to settle that. Yeah, so that's basically the way it's done so I don't really have a set of rules for them to follow but I do explain it to them beforehand.

CC: And do you feel that there is any secular specialist knowledge or training that is good for a dayan to have?

MG: Yeah, I think so. The Institute of Arbitrators did a course for us a number of years back where they had judges talking and they had barristers talking and so on and giving us various information that we should know if we're going into arbitration, what the secular courts would assume that we should know. They were very pleased, as a matter of fact, that we were doing arbitration because we help unclog the courts. The only trouble is you have to be very careful to make sure, the main point they stressed was natural justice, you know you have to make sure that you're not doing anything that's going to be a disadvantage to a particular person where that disadvantage really shouldn't be granted to them. So all of them actually stressed that very strongly, and at the end of which they gave us two cases to sit down and work out and see how would you arbitrate in this particular case and we had to present them with our findings and yeah, I passed.

CC: Baruch Hashem. But was that course something which was mandatory for dayanim or something which was optional? What inspired you to take it, in what format was it offered?

MG: It was just offered as something that would be helpful for rabbanim that are involved in Dinei Torah. It may have been that if we would have had a dinei mominos beis din in Melbourne, maybe we would have made it compulsory, but because it was really applying to people who do DT on their own…we had a big crowd, we had about 9, 10 rabbis.

CC: From a cross-section of the community?

(13:29)

MG: From a cross-section of the community and there's some who just came just to get some knowledge. Rabbi Telsner was there, quite a number of people turned up.

CC: So in the event that let's say the Melbourne Beis Din would choose to have a commercial arm, which interestingly I know in its constitution it allows for it, it has a…

MG: You know why we never went ahead with it?

CC: Why is that?

MG: Because we couldn't get insurance.

CC: Oh, there you go.

MG: It was your guys, you've got the ba'al habatim of Melbourne, it was the board who said we're not letting you…

CC: It was definitely before my day, I can't take the blame.

MG: For some reason or another they tried a few places and they couldn't get insurance.

CC: This was in the time of Meir Shlomo.

MG: This was in the time of Meir Shlomo and Romy Leibler. They forbade us to do a DT even if it's in part with the court, in gets or whatever it may be, don't get involved in DT because if somebody sues you we're not taking the liability.

CC: So in the event that let's say that was not an obstacle, would it be your opinion that the dayanim should have that training, arbitration training and that sort of thing?

MG: Yes, definitely.

CC: And also how do you feel about the idea of having let's say for example if it's a complex financial case that involves matters that you might even need a specialist in finance to explain etc., do you see that as a critical part of a BD in providing those sort of experts to demystify…

MG: What we do is we tell the parties concerned, you've got to present your case so if you have a complicated case and you need to have experts, by all means bring along your experts, bring along accountants, bring along your lawyers, whoever it may be, and we'll listen to what they have to say. But, in the end run, it's up to them to present their case, so in other words we're sitting back and we're saying, we're not going to institute accountancy law or whatever it may be because we don't know that, we're not involved in that, but if you want to raise those issues then by all means raise them and let the other side have a chance to answer back. But basically we try to settle things in accordance with halacha, with Jewish law.

CC: One question, I know I've spent a bit of time studying some of the cases that have come out of the secular courts where various zablahs have been overturned, and some of the examples of issues that have come up in those cases are things like dayanim speaking to one party without the other ones or speaking in Yiddish where one party didn't understand or appearing to show bias like I think this is an issue in zablah cases where one of the dayanim had a pre-existing relationship with one of the people. The question I have about that is: is that an issue that is halacha holding a lower standard of what is acceptable or is it the dayanim misapplying halacha?

MG: I think it's a dayan misapplying halacha. I mean, I know that in one particular very famous case here in Melbourne that eventually went to court, and the judge who ruled on that case actually came to the session and said to us, 'I didn't really want to rule on it but when I heard some of the things that were going on…', like one of the dayanim said to one of the parties, I think it was the plaintiff, you can't fight city hall, in other words to say that the people which you are fighting against have a special status and you can't fight that, and that's not right, that really wasn't right. And that was what the judge who was involved, it was a woman judge that was involved in the end and she said 'that's where I picked them out, you can't do that.'

CC: Yes.

MG: I asked her, is that natural justice, against natural justice? And in a sense it is because you're telling somebody no, you have no right to challenge this party because this parties on a higher level than you, and that's bfeirush against halacha, you're not allowed to look at somebody who's a gvir and say 'oh, I'll go according to the gvir' or even look at the poor person and say 'well, I'll go according to him because he needs help' when the gvir has a really good case. So, that is found in halacha and he went against it. Misapplication.

(18:07)

CC: So it's lav davka a clash of halacha and secular law, it's actually just a misapplication of those halachas themselves.

MG: Look this case, the famous case in Sydney where they got fined…

CC: The one with the seruv you're saying? The Live Group and Ulman one with the seruv?

MG: Yes, and you know, in a case like that I don't know whether it was…I'm not sure of the exact details, my brother ad hayom says that he thinks they were right and it could be that if the Supreme Court would have taken it on they might have been able to argue. They claim that they had a barrister telling them that they were entitled to do what they did, but the Supreme Court wouldn't take it on.

CC: It's interesting as an aside, I mean I've been speaking to…I've had a lot of correspondence with American Botei Din and law professors there and they all tell me that in that case in America the judge would have sided with the dayanim. America would not turn over, would not even mess with religious law, it's very much, it doesn't touch it. In Australia there's a little bit more intervention.

MG: Well I think the reason the Supreme Court didn't want to take it on was because they didn't want to set a precedent as far as, because they were worried about the Muslims, fatwas being issued and all sorts of things that they would then have to uphold because they upheld the Jewish thing, so they said they just…

CC: They shied away from it.

MG: They shied away from it.

CC: Yes, I mean that's a very interesting case there and I think also, I mean you mentioned for example how when a party doesn't want to attend you simply give the other party a heter arka'os as opposed to a seruv.

MG: Yes. I could issue a siruv and I could tell the shul that they go to and so on but it won't be adhered to.

CC: Yes so that was my next question - do you think a seruv has a role in today's day and age?

MG: I think it would have a role if the BD was a recognised BD for the whole city. To a certain extent we've got that status now in the RCV, if the BD will pasken a certain way all the Rabbis will go along with it but that doesn't mean all the balabatim will go along with it and the presidents of the shul and so on, and I think that's the problem, it's because it's unenforceable. I called up Rabbi Groner once, I wanted a siruv to two of his balabatim and I wanted to have a DT and one of them went

against my ruling and I said to Rabbi Groner, 'what would happen if I put him in siruv? Would you adhere to it?' He said, 'I can't. He's a big supporter of mine.'

CC: So I guess the question is from a sense of your understanding of our community, of the Australian community, do you think that seruv has a place here, to go down that realm?

MG: I think it could if, as I say, if it had the backing of the balabatim and the community I think it could have a place but I don't know if that's ever going to happen. I mean, if you make a siruv in Sydney, they're a lot more cohesive in these areas than we are because there aren't very many frum communities that have rabbanim of a stature. Here in Melbourne you have the Yeshiva, you have the Adass, you have the Beis HaTalmud, even Mizrachi, you have so many different rabbanim who are considered as authority.

CC: So in terms of being considered a BD kavuah…

MG: That's what you need.

CC: So is Melbourne Beis Din, in your opinion, not a BD kavuah for that reason?

MG: I think we're not, not in that way.

CC: As in you don't have automatic jurisdiction, there'd still be others.

MG: I think we're pretty much a BD kavuah in regard to gittin and in regard to gerus, everybody accepts us, even Adass accepts our gittin.

CC: Will Adass go through other people for their gerim or no? Do they have their own process?

MG: Well, we had a case once where there was a lady who came from Adelaide and she married a guy and became very frum, I don't know what the gerus was but anyhow they came from Adelaide and they joined the Adass community, the kids went to Adass school, peyos, the whole works, came for the kid's Bar Mitzvah and somebody, it's very rare that this happens by the way, somebody decided we've got to check on this, they're not after all part of us. They checked and they found that her gerus was very questionable so she came running to us, 'what am I supposed to do?' So, they said to us if you go ahead and are megayer this lady we will fix up the kids, we'll do the ourselves.

CC: Aha, using their own internal BD.

MG: Yes using their own rabbis because it's easier to do it with young kids under Bar Mitzvah, it's easy to do, so they had Rabbi Katz, Rabbi Beck and I think Rabbi Heimlich, they did the kids and they gave them all brises again but they were very happy with the lady coming to us and we did it actually quite quickly because she was totally frum, she was shaven, taharas hamishpacha, the works, and after about two or three months we just took her to a mikvah and they were done. But very rarely do they…we've had Adass gittin where they've come to us. Sometimes the people involved are kanaim and they say, 'oh, we're not going to the Melbourne BD and Rabbi Beck used to do, and I don't know if Rabbi Cohen has ever done one, Rabbi Beck did a few gittin and he was very reluctant to do it, he would pass people onto us because he was very reluctant to do it, he said he didn't have the experience in it and he used to sit on the phone with a dayan in Israel who would be on the phone through the whole session and he went and did it. But Adass is Adass you know? I once went to Rabbi Beck and I said to him, 'why can't we amalgamate our shchitahs?' He won't accept the Lubavitcher shochet, he won't even accept a Litvishe shochet, he's got his thing. I know in South

Africa, I was involved in a case in South Africa where they asked me advice what we would do here so I told them what I would do, I said that we don't have an official policy from the BD, and they issued a siruv against a guy and the guy took it to court and the court came out on the side of the BD.

CC: There you go, interesting, which is I guess the opposite to what happened here. That's the opposite of what happened in Sydney, I mean obviously in terms of the cases…

MG: Well, Sydney didn't really rule against them.

CC: They said the Rabbis were obstructing free access to the secular court by issuing the seruv.

MG: I think that could have been avoided if they would have written it correctly. I think the way that they wrote the letter of the siruv was really challenging in the whole secular system.

CC: You're saying they could have been more be'nachas?

MG: Yes.

CC: Also, another area which has come up is the question of writing reasons for the psak.

MG: Yes, that's what they told us.

(25:44)

CC: Yes, so I'm interested, do you see…is there any issue writing a reason for a psak din?

MG: Well, a side always has the option to be able to say 'meheichon dantuni', that's a concept in halacha, and then the dayan will come out with his reasons. It's not something that's always upheld, in other words it's not something that automatically is done, usually the dayanim could just come out with their psak but if someone says 'meheichon dontuni' you have to tell them.

CC: And how comprehensive does that have to be? Do you have to sight the teshuvos and the whole back and forth…?

MG: Yes, yes, yes. I've only had that once.

CC: Okay. And the question also then is, I guess from giving reasons the next question you move to is appeal, and…

MG: No, there is no appeal.

CC: That's another interesting one. I'm understanding there is a principle of 'BD achar BD lo daiki', there's no appeal, I'm also aware though that in Israel the botei din which have been instituted by the government, from what I've learnt Rav Herzog was able to find a heter to create appeal by the rationale, I might be wrong but I think the rationale was to do with the fact that you can't pasken in front of a senior rabbi and because there is a senior BD in town their din is not considered closed. So if someone appeals it, it can go to a higher BD for that.

MG: I didn't know that. I know that there is appeal in Israel but it's only an appeal to a higher BD, it's not an appeal to a secular court.

CC: Yeah, I saw within the BD of America for example they enable you to appeal to another BD, I guess because there they have multiple dayanim so lav davka in a BD is everyone on the cases so it builds in the capability of a second chance.

MG: That's understandable.

CC: If one day Melbourne were to go down that path, insurance wasn't an issue and having a BD for momenos could be something we could do, what things would need to be done to promote the professionalism of dayanim to ensure that…?

MG: Well, first of all I think that we have to make sure that the dayanim are indeed well-versed in Choshen Mishpat in the areas of which dinei momenos is found in halacha because it's not just a matter of knowing one se'if here and one se'if there and one simon there and one simon there, it's a matter of being well-versed in it and preferably also somebody who has had experience. I know when Meir Shlomo and Romy Leibler were contemplating it, they were contemplating on bringing out a dayan from overseas for a few years at least, an experienced dayan to help set up the BD here because none of the dayanim here had really had experience in a BD. I had some experience in Sydney but I didn't want to take the achrayus, and that way I think that would need to be done, we'd have to bring out (someone) even if he only comes for a few months at a time, a few months now, a few months then and so on, go through a few cases with the BD and in that way gives his expertise, I think that would be something that would be necessary. I think it would also be necessary, as I said before, for the dayanim to get a little bit versed in the secular system as well. I really enjoyed those sessions that we had with the judges because there were issues raised that I had no knowledge of and they were very good and explained it to us and they were very helpful, they really wanted us to do some service, not necessarily arbitration but mediation definitely.

CC: So as you mentioned, it's doing a favour for the secular courts.

MG: Yeah, they said that. They said 'we will support you, it's not a natural justice issue if they want to come along and claim, and start the whole case again in court, we'll tell them no, you went to arbitration, you went to mediation, you signed a mediation document and so on…go live with it.'

CC: You've got to accept it. I guess one area that we haven't really upon, we tangentially did, but that's the question of whether zablah, I don't know whether you have a view on it, whether it's inherently problematic or not in the sense that you have obviously the two dayanim who by definition would have some pre-existing relationship with each of their nivrarim or whatever the term is for the people who are borer them, so do you have a view as to whether the zablah should be happening in our community or not?

MG: I think it's an alternative, and basically if both sides have agreed on a dayan to act as a machria then that does help to overcome what appears to be maybe bias because if that particular dayan goes according to one of the other dayanim then at least you know that there's two against one which is majority which is okay. So, I would say that in the absence of a regular BD kavuah I think zablah has a place.

CC: This is a thought of mine and you tell me whether you agree with it, do you think a zablah could work where as far as the formal arbitration is concerned we call the shalosh a single judge and in a sense those other two judges are borerim or toyanim, they've got a status where we're actually not telling the secular courts or anyone that these are actually judges and that way their bias can actually be embraced in a sense. Does that make sense?

MG: It does make sense, very nice stuff.

CC: And the other question also in regards to toyanim generally, I know that in America and around the world there's a lot of discussion around whether toyanim should ever be allowed in a BD…

MG: I had toyan in one DT here in my living room and one side brought him as a toyan, he didn't bring a lawyer, and I told the other side they could take whatever they want, you want a toyan, you want a lawyer, you can take whatever you want, and the other side brought a lawyer and the toyan got up before we started the talk and he pointed at the other lawyer and said, 'you have to keep quiet, everybody knows you are a noef.' I said 'I'm sorry this is out of order! I'm closing the DT now if this is how you're going to act, if they bring a lawyer you've got to listen to what they have to say. You want to argue against him, you can argue against him but at least you've got to listen to what he has to say.' So, I did calm it down in the end but it was…

CC: But do you think, can toyanim mislead dayanim meaning is that such a thing or…?

MG: I know there are toyanim that the dayanim would feel that they didn't want to go against him. The way some of the toyanim work and the way some of the toyanim talk is that if you don't rule according to what I'm saying then you're a liberal rabbi, an am haaretz. I heard once a toyan say, 'oh the dayanim here are am haaratzim, you could see that they're am haaratzim' and so on. They could be intimidated.

CC: So what are mechanisms that can protect a future BD from that? Is it stam outlawing toyanim or having some sort of registering system where toyanim have to have accreditation?

MG: I don't know whether you can actually outlaw a toyan but you can control them, you need to be able to control them. And if the BD has the backing of the city, it's a BD kavuah, then there's no way in which a toyan would be able to intimidate the BD. It's only when you've got a private case, a zablah or something like that where you'll get toyanim who might try and intimidate you. And there is one particular toyan who operated here in our town and that was his methods. His method was intimidation until finally I had a few cases where I refused to accept him as a toyan. I said if you want to have a toyan take somebody else, don't take him. I'm not saying any names but you probably know who I'm referring to.

CC: I'm trying not to guess. One interesting thing that I've reflected on but don't necessarily have a clear answer, it seems quite unique that a city like Melbourne doesn't have a dinei momenos right, so all the big communities established probably of lesser size than ours do have. Number one, why? And number two, do you see that shifting?

MG: I think the reason why is because people are not used to going to BD to settle their disputes and if they go to BD to settle their disputes they're quite happy with having their local rabbi or one rabbi, not necessarily a BD. The ones who are not happy with having a rabbi will say I'm not going to BD, I'm not going to zablah, I'm not going to anything, I'll go to court. And they want to have that opportunity to be able to go to court because if it's a BD kavuah then they can issue a siruv and so on and then they'll be in trouble, so I think it's actually the balabatim who are not demanding it at this stage that is the cause for it. And even in Sydney where they do have a BD kavuah they don't have that many cases, I don't know, you probably know better than I do.

CC: Yeah, I don't know exactly how many, I'm not sure there's a record of it.

MG: Because people don't use botei dinim today. The only time I really have had people who I'm surprised came to a BD was when there was a lot of money involved. I had a case of literally millions of dollars, they had a business development that was done and the building wasn't good, it was condemned by the council and so on, and the fellow came and sued the architect and we're talking about here it was literally three, four million dollars which was good money and I said to them, 'why are you coming to me, you're both secular jews so why are you coming to me?' They said, 'because if we go to court it's going to cost us both more than what we'd have to pay, we're talking about hundreds of thousands of dollars, so we'll go to the rabbi.' It's different, and they were happy with a pshara, I said that I'm not going to do a psak here, I'll do a pshara if you're happy with that and in the end they both were very happy with the result and then they came to me and said, 'obviously, we want to pay you for your time'. With a BD kavuah you can set fees and so on, a private rabbi it's hard. They said, 'we're going to buy you a leather-bound shas together, so it's not as if one side is buying and not the other.' I'm still waiting.

CC: Okay, fair enough, very interesting. So do you think that in the event that let's say a BD was established here and over time it built its reputation as transparent, trustworthy etc., do you think the Melbourne community would have an appetite for it given the lower cost, given the delays of the courts, all that sort of…?

MG: Yeah, I think the community would probably go along with it. I mean, I know there are a lot of rabbanim who do not necessarily dinei torah but sit down and do mostly mediation, and people are happy with that. And if there would be a BD kavuah, maybe they'd say all right why do I have to settle for mediation and lose half my money when I could go to a BD kavuah and I could maybe get more. It's just that it's not part of the psyche here.

CC: Not yet, and also it's gotten a terrible rap, I mean all the famous cases have come out all on the side of the botei din not doing the right thing.

MG: Yes.

CC: There's one other area…

MG: You know, there's many cases that come out not on the side of the BD, I would say there's probably ten times as many of them conducting probably and without any problems.

CC: One other area which I think is a bit of nuance but I wonder whether you've given it any thought and that is: I know in secular law they have an issue with…someone who enters into mediation often will say things that are confidential, that they wouldn't want a judge to know, they'd talk about how they're willing to settle for this amount or they'd sort of give away their cards in terms of where…how strong or weak they think their case is. So, my understanding is that a BD has the ability to move from pshara to din and if it does that, does it jeopardize its own ability to then judge din having heard what the parties are willing to give up in pshara, does that question make sense?

MG: It does make sense and I would say that in such circumstances it may be necessary for at least the senior dayan and the BD not to be part of the pshara. You need to have enough dayanim like the BD of America has where they can try and work on pshara in the first instance and if it doesn't work then they'll refer it to other dayanim to take on the case. Just recently I was looking at the website because I was looking at a particular rabbi that was mentioned to me and I didn't know who he was so I went on their website, they have about twelve, thirteen dayanim involved in the cases and that's precisely for this reason I think, I don't know I've never asked them but I assume that that's the reason. If they do try a pshara and it doesn't work…I know that I had a case in America, in Monsey

where I was involved in a case where one party was here and one party was in America, and they tried a pshara and the dayan who was working on it said, 'look, if the pshara doesn't work I'll refer it to our BD.'

CC: As in, he won't touch it if it…'

MG: So there are ways of working around it.

CC: But it is a recognised idea within halacha that once you've done pshara you can't touch it meaning you can't flip with the case.

MG: If the sides agree for pshara then pshara is pshara. They can't appeal on that. But if the sides say we'll go for pshara first and if that doesn't work, if that's part of the arrangements that are made at the beginning in the discussions at the beginning that if it doesn't work then we want to go for din, then if the BD accepts that, if the dayan or whoever it is that is running it accepts that and both sides accept it then that's the way it could be done.

CC: As in, it can be done that pshara will move to din with the same judges if everyone's on board, okay.

MG: In other words a pshara is not binding.

CC: Yeah. Thank you very much, those are the questions I've prepared, if there's anything else that you think is worth mentioning or discussing I'd be very interested.

MG: This was the Institute of Arbitrators and Mediators, they gave us model contracts.

CC: And this is based on the Arbitration Act I assume, okay.

MG: Now, I happen to choose not to involve the Arbitration Act because I'm afraid then lawyers will get involved, barristers get involved and so on. But there have been times in which I have said that this is going in accordance with the Victorian Arbitration Act.

CC: But they haven't signed anything formally to say that. They sign this one here but does this have to have special lashon from the Arbitration Act for it to be considered binding under that Act or…?

MG: I don't think so, I think it just has to be that both sides agree they they'll go according to the arbitration. I have somewhere, I don't know where I have it but I used it once… This is the Melbourne Beis Din for Commercial…this is what they came up with at that time.

CC: That was drafted, yeah, there was a barrister, Hampel, he was involved in drafting those procedural rules.

MG: It never got off the ground.

CC: What was the reason that failed, do you know? Because of the insurance?

MG: I think so. I'm assuming so because that was the original reason given to us why it didn't work, and also because I think they didn't get enough support from the rabbis. The rabbis were worried about who's going to be on this BD, they wanted to bring somebody from overseas - who were they going to bring from overseas? There had to be some way in which this was controlled and then Meir

Shlomo dropped out and Robbie went overseas and it just died a natural death. And I don't think there was too much that was really against this whole concept…

10.3.4 Interview with Rabbi Tayar

Interview with Rabbi Shabsi Tayar, Dayan and Proprietor of the Mehadr Beis Din Tribunal, Zoom on 6-7 September 2022 with Chaim Cowen

CC: Okay. Thank you again, Rabbi. So as I laid out to you, I'm doing research into how commercial Batei Din can best operate within Australia specifically. I'm also looking at overseas models of BD as well to see sort of ones that have operated best, with the intention of being able to help BD here. That's the idea, so people should be able to take their disputes to a DT without worry about the law. So I've got a number of questions and obviously feel free to respond as lengthy or whatever way as you want, and also at the end, if there are things that I didn't raise that you feel you'd like to also discuss, I'm very happy to entertain other areas as well. So, my first question is, are you able to just give a bit of background and explanation as to what the mehadr BD is and what your role in it is?

ST: We had a 3-hour DT yesterday, and I'll run you through what transpired. About a month ago the claimant contacted me, and he said that he has a dispute with someone and that he would like me to send this person a hazmono. A hazmanah essentially is an invitation or request of another party, to attend a DT. The parties bind themselves legally to the halachic process and to the final opinion of the arbitrator(s). The claimant can send the hazmono directly to the other person, or the Rov or Beis Din can send it on his behalf. The written invitation would be something like, 'I'm calling you to a DT …(or so and so is calling you…) please respond within…', usually 7 days, but if it's urgent, for example if the other party successfully applied for an urgent court hearing within a couple of days, you could write, "I don't want to go to court and I would prefer to have the matter dealt through a DT. Due to the urgency of the matter, please send me your response to my Hazmono within 12 hours. If you deny me a DT, I will need as much time as possible to prepare for Court." If the Hazmono is sent by the claimant, he would copy a Rov of Beis Din into that invitation in order for them to assess their ability to grant him halachic permission to attend court, if the person ignores the request or clearly refuses.

CC: So just to clarify, is the Hazmanah a set template or is that something that each toveah will use their own template?

ST: I'll send you a link to our application form. If the claimant uses his own stationary, he would include a short description of his claim, what he's ready to accept to resolve the dispute, and a time frame for a response.

CC: Sure, thank you.

ST: Essentially, he would write that he's happy to go to a DT with three dayanim or even just one dayan - which has its advantages as we'll discuss soon, and that the response should be within a certain time frame. Now if I send the Hazmono on their behalf, it ends up being a bit more formal, it comes with the Mehadr letterhead. I'll give you two examples, both within the last 7 days. One was yesterday and the other was another DT, well actually it didn't come to it but I'll run you through that as well, that person chose the other option. Both scenarios worked out very well. My fee to send the Hazmanah is $250, and essentially the DT can be without cost to the parties. Adjudicating is an obligatory mitzvah and for mitzvot one isn't allowed to charge money. But a DT can be costly. Especially if the parties do not want a quick and simple DT, or they want to bring a to'an, which is similar to a lawyer. The dayanim would then charge the parties. I can send you a schedule of our current fees.

CC: Would love to see that.

ST: So here are the two examples that I mentioned before, one, the DT which was transpired yesterday, how that worked out, and the previous, the other case which transpired over the weekend and that also went well BH, of course without names. The DT which we did yesterday: The person asked me to send the hazmanah and we gave the other person 7 days to respond, and he did. He wrote simply: 'Yes. I'm happy to come to a DT.' The hazmanah should say that if a response isn't received, a heter arko'ois, halachic permission to go to court, might follow. This way the person knows it is a formal request; if you don't respond you might have to go to court. The consequence here for the respondent is that he'll be out of the halachic domain. The claimant knows that he isn't allowed halachically to go to court until he receives permission, and this can only be given once the other person was offered the opportunity to settle the matter in BD. The heter arko'ois could be issued orally at no cost to the applicant, and if the person prefers it in written form, then (usually) there's a fee. Ok, so then we set a date, it took about two and a half weeks until we found a date that both sides were happy with and close to the date, which was yesterday, there was further discussion as to whether it was going to be in person which is preferred or whether it will be done online. At the end we had the meeting in person. There are two options to a DT, one is Din which means the award follows strict halacha and the second more preferred option is pshara, which is a sort of compromise, and this is an award, a Psak din, that is less rigid; in general terms, neither party wins or loses entirely, it could also include a payment plan etc.

(10:37)

CC: So do the parties initially sign up to din or pshara? Is that, they have to choose?

ST: Excellent question. Some Batei Din trick and pressure the parties to agree to a pshara by threatening with a Ksav Siruv. Such threats are dishonest, not Halachicly sound and possibly illegally. A dayan must have express permission from both parties to issue a pshara. They can agree in advance to Pshoro or they can inform the arbitrator during the hearing that they accept.

CC: Is that written in the arbitration agreement or the shtar bororus or is that…?

ST: So that's what I was getting to, in some places around the world, the BD pressures the parties by placing into their standard agreement that they're allowing the dayan to pasken according to din or pshara, and they fail to advise the disputants of their Halachic rights. They trick the person into accepting a pshara by presenting this to him as the only available option as a religious Jew, occasionally with the pressure of a ksav siruv, which is a form of excommunication and defamation. Such behaviours are Halachicly unacceptable and undermine their legal authority as arbitrators.

CC: Would you ever use a siruv?

ST: I only ever issue a heter arko'ois. I.e.: 'You're an Australian citizen, you have the legal right to the secular courts. Use it'.

CC: Why don't you use the siruv?

ST: Siruvim tend to backfire. In a strictly religious community that strongly supports this and where it is backed and supported by the government and its Courts of Justice, it would be a healthy apparatus that could help Rabbonim fight injustice. Regrettably, this isn't the case.

CC: Just to clarify, by 'pshara' do you mean 'pshara lekrova ladin' or is pshara stands separate to din?

ST: You're already now going into nitty-gritties.

CC: So if it's a tangent I'm happy to leave it but if there's a short sort of answer I'm just curious.

ST: Pshara krova ladin could include a scenario where the respondent must take an oath in BD and instead the ruling is that he pays a fraction of the claim. Pshoro refers to an equitably decision with the inclusion of an advisory opinion.

(16:19)

CC: Can you tell me a little bit about the history of the Mehadr Beis Din, how long has it been running for and also how many cases does it get, you know, that sort of thing?

ST: I registered Mehadr Beis Din approximately 7 years ago. Around 1 in 10 cases end up in BD. I ran a handful of Dinei Torah last year, but sent many Hazmonos.

CC: And I'm assuming both parties would be frum people in all cases, is that right?

ST: I've invited even secular individuals and adjudicated such cases as well. You'll be surprised to hear about many less overtly religious Jews agree to Halachic Arbitration and many overtly religious individuals and religious institutions ignore their Halachic duties. Indeed, one shouldn't judge someone's religiousness and Halachic observance by external appearances.

CC: Okay, so you mentioned that sometimes it's a yochid mumche, I guess sometimes it's three dayanim, so who are the other dayanim involved in the BD? Is that sort of on the public record or do you find people as you need?

ST: The Rabbonim that currently adjudicate have insisted on anonymity.

CC: You don't have to. I'm saying if there are people that are sort of formally part of it…?

ST: I'm the only one formally associated with the Beis Din. The parties are told of the advantages of one dayan and of three. With three dayanim the responsibility of the award is shared, there's more discussion. Also, the dayanim might feel less afraid to express their true view and together give out a psak in one person's favour because their might be a dissenting view that the loser will never find out about. Advantages of one dayan is that the process is a lot quicker and efficient and it's a lot easier for him. The dayonim that I use include individuals residing in Melbourne; it's not always a rov, it could be a lawyer, or an expert witness, and when held over teleconference, especially when the dispute is overseas or especially if the parties want three dayanim, I could ask rabbonim from other places to join.

CC: And it's not a zablah, am I right? People don't get to choose the dayanim, as in the litigants don't choose.

ST: In the absence of a Beis Din Kavuah (a democratically elected Beis Din), the disputants have the Halachic (and legal) right to choose the dayonim. The hazmanah sometimes names three potential rabbonim as a suggestion and the respondent could write back: 'we don't want those three', in which case, the disputants each choose a dayan and the two dayanim choose a third. The hazmanah usually stipulates that the disputants can agree on one dayan.

CC: So essentially it can be a zablah if that's what the parties want.

ST: Oh for sure! That's their right, of course.

CC: So if it's a zablah, then it may end up that you're not a dayan, is that correct? It could just be…

ST: Absolutely. I don't have to be part of it. In the cases that I've initiated, I was either the one dayan or one of the three, but I always make it clear that I don't have to be involved in that capacity.

CC: Cool. So just in terms of your own background that led you to this, what sort of qualifications do you have that give you the ability to do what you do?

ST: Technically, one does not have to have Yodin Yodin to adjudicate. All you really need is some knowledge of Choshen Mishpot. Yodin Yodin confirms that you have mastered the halacha to an acceptable extent. But essentially, a DT with a zablah could be any three people, that's the way the chachamim set it up. If a claimant has a claim against someone, he can choose any three people off the street and he says, 'You're a BD, I'm appointing you as a BD. Please tell us who's right!' And the other person could either say, 'Okay, I accept these three' or 'I don't want these three; I want a different three or I want a zablo etc'. The so called qualifications of Yodin Yodin are irrelevant as far as one's Halachic authority to adjudicate is concerned; the Halachic and legal authority is 'created' by the parties. L'Maaseh, I do have Yodin Yodin as do most dayonim that adjudicate.

CC: Yeah. And do you expect any dayanim who are operating under your BD to go through any particular training or is it sort of more you get a sense of them and you make a judgment?

ST: Sorry, can you repeat the question again? It's very nuanced.

CC: Is there any particular, I guess, knowledge or experience that you would require of a dayan who would be operating under your BD?

ST: I require that arbitrator possesses a basic understanding of Halacho and a strong desire for justice.

CC: Sorry, I just wanted to pick up on the idea of knowing how to run the Seder HaDin, is there a written procedure or a guide as to how your cases run? How do you base that Seder HaDin, where do you base that from?

ST: I follow my understanding of Choshen Mishpat and "Seder HaDin".

CC: Who's that by, do you know?

ST: I'm sorry?

CC: Who authored that? Do you know off hand? I have a sefer at home called Sefer HaDin baBet Din HaRabbani which is by a guy, Eliav Schochetman, but that's more written in Israel for the Batei Din that operate I think within a government…

ST: This is *Seder* HaDin, by R' Avrohom Yehoshua Heshil Derbremdiker.

CC: It's called Seder HaDin baBet Din HaRabbani.

ST: Oh, Seder.

CC: Yeah, Seder HaDin.

ST: Right, no this is just Seder HaDin and it's quite good.

CC: Okay, and is there something that the parties receive to sort of know how things are going to operate or is that something that you're informing them as they go?

ST: They're given this information at the hearing. I'd inform them both that whenever they have to make a decision, their options will be presented to them and they'll have the opportunity to make a decision at the time or if they need advice we could take a break, they could make some phone calls, we could reschedule' etc.

(27:47)

CC: So do you allow toyanim in your BD? Do you have a particular view on whether a toyan should be allowed or not allowed?

ST: It's usually better if the disputants self-represent, but a toyan could bring to the discussion certain halachic arguments that the dayanim haven't thought of. The toyan shouldn't be allowed to hinder the arbitrator's job of digging for the truth. A toyan can sometimes be disrespectful of the dayanim tell his client 'don't answer that'. The dayonim find it difficult because they can't punish his client for his poor behaviour. A disputant on the other hand would never speak like that for it could be used against him. In truth, the dayan should say, 'you have to answer that or your silence might be used against you', and he could require the toen to leave, but the dayan might be intimidated, and it could weigh on his mind. I personally have no issue with toyanim and if the disputants don't want to come alone, then I will charge the parties full fees.

CC: But do you require both sides to have a toyan if there's a toyan or will you allow one side to have a toyan and one side not?

ST: Any modification or variation to the default structure of a Din Torah requires the consent of both parties and the default position is that only the claimant and the respondent are to appear. They can't even bring family members or friends or lawyers without the consent of the other party and the dayan.

CC: So a toyan needs to be consented by both parties for it to be present?

ST: Yep, all three parties really.

CC: Do you ever open up the cases to other people to watch or is it just again sort of done privately between the parties?

ST: Arbitrations are generally confidential. People often prefer arbitrations over Court for this reason. Personally, I wouldn't have an issue with spectators, if the parties agreed.

CC: And what about giving reasons for the psak, is that something that should be done? Shouldn't be done? Do you have a view on that?

ST: So there is what halacha says and then there's also what the commercial arbitration act of Victoria 2011, what that requires. Halacha doesn't require reasons initially but the losing party could request

it and they'd prepare something so that the dissatisfied litigant could take the psak to another dayan to review it, and perhaps show that the Psak is flawed. The dayan should consider his Psak and if he made a mistake, change it. The problem is that for an Award to be enforceable it must be final. To address this dichotomy, I'll offer the parties an indicative ruling which tells them where the Psak is heading. They could take it to a Rov or to a lawyer. If they don't want that, the psak is indeed final, so that it can be enforceable in court. The arbitrator is henceforth *functus officio*.

(32:56)

CC: I'm saying, when you're giving a final psak, are you normally giving a full-blown reason for the psak or are you normally writing it in a different form to that?

ST: It depends on what the parties want. If, in their arbitration agreement, the parties did not require (written) reasons, then the reward could be upheld with greater ease. On the other hand, they run the risk that the dayan could issue an inaccurate Award arbitrarily.

CC: So there also seems to be an area here of understanding the Arbitration Act and maybe even beyond that which is also, well you tell me, does a dayan need to have some understanding of secular law? And if so, what needs to be their understanding?

ST: It would be helpful to have some legal knowledge of protocol, and guided by a lawyer. I can send you also a letter that Mr Silberman, Dov Silberman, wrote to me a month or two ago, offering his service to potential litigants; he is prepared to oversee the process from the siging of the arbitration agreement until the issue of the Award. He's there to assist the dayanim and to make sure that whatever they do is acceptable legally. I occasionally seek advice from Mr Silberman.

CC: Is there other areas of secular law that a dayan needs to know just in terms of, I guess, complex commercial matters that come up? And how do you navigate when something comes up and you have to know minhag hasocharim or understanding sort of how commercial practice works, so what is something that a dayan would do to be able to judge a case like that?

ST: Australian law is generally irrelevant notwithstanding dinah d'malchusa (law of the land). It will however consider the mindset of the parties. When you have a particular custom or a particular standard, it can often be assumed that the parties have agreed to transact as such. So, to give you an example: a person rents a house and something goes wrong, who has to fix it? The common practice is that the landlord must fix it; he arranges the electrician or the plumber, whoever it might be, at his expense. Halacha ascribes the issue to the mazal of the tenant, the tenant has to fix it. As soon as he takes possession of the property, if something goes wrong his mazal is to blame, and he has to pay for it. But poskim write that common knowledge of practice is that the landlord has to fix it, and therefore their an assumed agreement is that the landlord will take care of it. So later on if there is a dispute about a DT and the guy says, 'oh I found out, my rabbi told me, that in Shulchan Aruch it says that it's the tenant' who is responsible, the dayan would respond, 'yes, it does say that but it also says in Shulchan Aruch that we follow the minhag hamakom and the minhag creates an implied agreement otherwise.'

CC: This meeting is going to expire in a moment so I'll send a new link when it's done even though it's probably just a few more minutes, but just letting you know it's probably going to expire any moment. Maybe I'll end it and I'll send a new one now.
Part two:

CC: Ok, yes, sorry about that. Just, I guess to wrap up that idea, so the dayanim need to understand what was in the agreed mind of the parties when they entered the transaction. Does that mean they need to know a certain amount of secular law or do they invite an expert to give that view? How do they discover that?

ST: We're only concerned with common knowledge oft the average person to form an implied agreement. The parties can invite their own expert witnesses if they want for arbitrator's consideration, as that can be sometimes be relevant.

CC: Sure.

CC: Another question is relating to appeal, is there a mechanism that litigants have if they aren't happy? Do you sort of inform them what to do if they're not happy with the decision or what's your next step if a litigant isn't happy?

ST: Look, they could appeal to the courts but Courts generally do not want to deal with halacha. I always include in the arbitration agreement that the parties do not want the courts to give an opinion on halacha nor do they want the courts to deal with any of the issues of the substance of the dispute.

CC: But is there anything internal, for example if they don't want to go to the courts but they just feel that these dayanim made let's say a mistake, is there something internal they can do within the BD itself to have it reviewed?

ST: If both sides are unhappy, they can agree in writing to go back to the dayan or to another dayan or to the same panel etc, to have the matter reheard. As soon as they sign another agreement, that re-empowers the arbitrator to be able to rehear the matter. Or, as I explained above, they can agree to first issue an indicative Award.

CC: If only one party is unhappy then you're saying, that's sort of the way it goes.

ST: Generally.

CC: Yeah. One of the things that I've done as part of my studies is that I've looked at the various cases that have come before the courts like the Mond v Berger, Thaler v Amzalak, Live Group v Ulman, there are a number of cases and I don't know whether you've taken a look at them as well but some of the reasons that cases have been overturned are for things like speaking Yiddish when only one party understood Yiddish or talking to one party not in the presence of the other, saying things that looked like they were biased like 'you can't fight city hall', there were certain phrases, my question is: are those things that are issues also in halacha or are those issues…

ST: Some of those issues are indeed improper. Halacha mandates an equal treatment of the parties. You might have heard that one side will go to his dayan and speak to him first and that dayan has already been "bought" so to speak, and he will rule that his 'client' is right. I've seen this firsthand on more than one occasion. These arbitrators are either inexperienced or dishonest. Regarding a zablo BD, there is a common misconception that the dayan that you chose is on your side. Even worse, that you get to speak to him and pay him. If this were to happen, then the only authoritatively empowered dayan is the *Sholish* and the other two dayonim can not take part in the issuance of the final judgement.

Part three:

CC: Ok, thank you Rabbi Tayar. This actually ended up being part three because yesterday was sort of divided into two sections. So, I just wanted to sort of pick up from where we left off yesterday, we were discussing the various cases that have come up that were reviewed by the secular courts and were turned over and you mentioned that the issues that they courts found, they were not just secular law issues but were also halachic issues - so was there anything that you wanted to add to that?

ST: I think perhaps a clarification. I can't agree or disagree with their findings. Firstly because I don't know what actually took place, and when making a judgement you have to hear the particulars first hand and in the proper forum. Some inappropriate behaviours do not Halachicly invalidate the Award but displaying apparent bias can. The other dayonim have the responsibility to ask him to recuse himself. Otherwise, they are equally responsible for any injustice that may ensue. Their failure in this regard can be due to their lack of confidence or lack of affinity for justice.

CC: Yeah. So this leads to another question which I think is really a very important one which is: we're seeing dayanim, some of them, who aren't holding up to the standard even within halacha, right, certainly not, you know, to the secular law standard, and then there are people who are reputable and are doing a good job overseas or there may be examples of that locally. But, what is something that we can do to promote a professional standard, meaning, for the purposes of my research, what do you think would be an effective model that someone who wants to be a dayan, this is something they need to do before first sitting in a case - how can that there is a standard that dayanim are held to so that they're not going to be making these sorts of mistakes whether they're halachic mistakes or secular law mistakes?

ST: I think the secular standards aren't as high. Halachic standards are found at the beginning of Choshen Mishpat. Namely, Hilchos Dayanim, Laws of Dayanim. There one can find the parameters of how a judge has to behave, no *ex parte* discussions, equal treatment of the parties, hearing them out equally and so on. But it wouldn't hurt for student dayanim to take a course that goes through the Act and the basic rules that govern arbitration. If we wanted to create healthy parameters these would only be through a recognised body that was ready to teach these comprehensively. I tried setting this up, but I couldn't find the support and interest required to start something like this. But I would be agreeable to help run such a course.

CC: So just to clarify, that course would be looking at the halachic side or the arbitration side?

ST: Both.

CC: I mean, tell me if I'm wrong because I don't know if I've read this inside, but I once heard it said that the halachic standard for bias is a little bit lower in the sense that for example zablah, let me explain this, zablah for example, you're allowed to have a pre-existing relationship with that person so they can be, not necessarily relating to the case, but it might have been that you've had this person over for shabbos meals or this person's invited you and they haven't invited the other litigant, you know, there's clearly a pre-existing relationship with the one side and then the fact that that person now can be considered one of the judges, yes the sholish is outside of the bias but you still have sort of halacha permitting one member of the court on each side to have a close relationship with the party, a pre-existing relationship. Is that fair? Is that true, what I'm saying?

ST: By consent, each side can even speak with their chosen dayan before the hearing. The default structure of a BD however is that each litigant may choose a dayan that he's close to (but not too close) so that it can be balanced. Even so, such 'biases' are to be disclosed to the litigants and this is legally acceptable too if the parties consent. In some places the dayanim are known to rule in favour of the side that chose them because it gets them the job in the future and that means more money

for them because they charge for every case they adjudicate. This undermines the integrity of Batei Din and the Halachic process.

CC: And I guess there is also the concern that even if they do agree, the secular law might overturn it because of the bias meaning even though halacha…that's obviously a question for a lawyer, am I right? Meaning, if they consented to an arbitrator but the arbitrator is, there was a known bias…

ST: Known bias definitely is okay if…

CC: If there's a known bias and everyone discloses it…

ST: Right, that's okay legally as well.

CC: But I'm imagining though that that would be a question for a lawyer to answer meaning if there's a known bias and the parties agree to it, will that still hold up under the Arbitration Act? That's a question for a lawyer to answer I assume.

ST: I've received advice that it's acceptable, but you could seek your own legal advice.

CC: Right, yeah. I guess there's also one other thing, I know there's so many different areas we could talk about here but one question is also about pshara and din, my understanding in the secular system is there's a very important difference between a judge and a mediator meaning, a mediator things come on the table that people want to say even though they wouldn't want this known to a judge because let's say for example they're willing to compromise a bit but when they're going for din they wouldn't want the judge to know that they're happy for that compromise. There are things that they'd say sort of without prejudice in a mediation. Do you think that because halacha does…is there an issue where you have people possibly flipping from din to pshara, they become aware of where the parties are happy to settle and then that effects their ability to go to din properly?

ST: Negotiations take place in the dayan's absence during a recess. If there was some sort of mediation performed by the dayan, then depending on what may have been disclosed by the parties, he might have to ask them if they wished to proceed with arbitration. But in contrast with traditional mediation where the mediator may suggest caucusing with each party individually to discuss possible proposals, at a Din Torah the dayan is careful during the "mediation" stage not to compromise his ability to issue a Psak Din if mediation fails. Importantly therefore, a dayan's involvement during "mediation" is limited to helping the parties appreciate the other's perspective with the hope they reach a voluntary and binding solution. The dayan will not hold discussions with one party without the other being present, nor will he offer advice or make suggestions.

CC: Getting consent.

ST: When I feel the parties are ready for a discussion, I will either walk out first, or I will ask them to step outside to discuss a settlement. I tell them to consider the principles we've just discussed and to try to arrive at a fair compromise on their own so that I won't have to rule.
I'd like to ask to go back to something I mentioned earlier, which was that one should send a Hazmono to someone who called him to Court. I wanted to add or clarify: If you receive a summons to appear in Court, ideally you should try to persuade him to change course. And if you tried this by sending him a Hazmono and he ignores you, the Beis Din could accord you a Heter Arko'os, and you would then be halachicly entitled to accept 'costs' awarded by the Court should you win.

CC: Sure, well I think maybe we'll stop there, obviously I think there's a lot of areas that we could probably be digging a bit deeper but I think it's an excellent start. Thank you very much and look, as things progress if I do want to reach out and have a further conversation I hope you'd be open to it.

ST: No problem.

CC: Okay, yasher koach. Thank you again, I appreciate it Rabbi Tayar.

ST: You're welcome, all the best.

10.3.5 Interview with Rabbi Ulman

Interview with Rabbi Yehoram Ulman, co-*Av Beth Din*, Sydney Beth Din, Zoom on 8 November 2022 with Chaim Cowen

CC: Ok, yeah we are recording.

YU: Ok, so first off all I just want to put on record that I would like to approve any recording or any transcript that is being publicised in my name, and we have this understanding.

CC: Yes, understood. I'll send it to you.

YU: So, I think what we should do today because we have a limited time is I'll go through some of the questions over here and I'll discuss with you, you can ask me questions and then Ieave…whatever we don't discuss now we can do another time.

CC: Perfect.

YU: So, first question is 'what is your role in the Melbourne Beth Din?' None.

CC: So, it should be the Sydney Beis Din, correct.

YU: My role in the Sydney Beth Din - I am a co-Av Bet Din which is a unique position which is very rarely seen in Batei Din, that we are on equal basis running the Sydney BD. 'What qualifications do you have?' I have Rabbinical qualifications, I have qualifications as a dayan, my qualifications as a dayan I have from a number of great what's called 'Gedolei Yisroel', great sages of the Jewish people. The first one that I received was from Rabbi Hisprung, Pinchas Hisprung who was the Chief Rabbi of Montreal, he was a graduate of the Chachmei Lublin Yeshiva, a great boki of our time, a very famous boki. And another one, one of the other ones that I received, I'll talk about Yodin Yodin, the qualifications of a dayan was from a very unique personality that I was fortunate enough to be close with for many, many years, close to thirty years, his name was Rabbi Zalman Nechemia Goldberg, and he's given me a very personal…you know, sometimes there's more of a regular type of Yodin Yodin, he gave a very personal Yodin Yodin and he's a person that I…he passed away two years ago and that's somebody that I believe was one of the giants of our generation and I was very, very fortunate to be close to him. Apart from that, I was involved over the years in all areas of Jewish law, Even Ezra, Choshen Mishpat, which are reserved for dayanim. The question over here you have: 'have you ever had any involvement in commercial cases?' Many, many cases. I know that some of them were infamous, some of them became known, became famous, for example the famous Mond case which didn't have such great publicity. But for all the couple of negative cases were dozens and dozens of commercial cases that I have which were conducted in very interesting ways. You know at a certain time I came to a smaller commercial case, smaller means under $100,000, we conducted them in a way of a zablah but the zablah was based on the concept that each person, each ba'al din,

which means each litigant, can choose a friend, it doesn't have to be a dayan. So I was the only dayan involved in the case and each one involved a friend that he trusted and this was a very, very successful way to conduct this particular litigation because once we started out with the shtar borerus, which means the arbitration agreement, we had, all the people involved where somebody that the people themselves chose, they chose their own fence and they signed an agreement to accept the psak and in each one of those cases we did it for a number of ba'al habatim in the community plus a number of shuls that came to us and asked us to conduct a DT on their behalf, and I've still got all the files from all those cases and they were all very, very successful. Just in the 1990s and in the first decade of the twentieth century there were a number of cases that were running very, very successfully so it's always that you have a couple of very publicised cases and sometimes it creates a certain negativity… but you literally have dozens of other cases that were run in a way that in the end both parties were happy with the results. I mean, just a few months ago I conducted an international case, I also do international cases sometimes, and in this particular case I really wanted to go out of the yodin (?) and both parties really insisted that it should be dayan yechidi which is really not to my liking, I usually don't like to be don yechidi but it ended up quite successful. It was a divorce case, and the division of property after divorce and certain accusations, and at the end of the day both parties were quite happy with the outcome. It was done differently to a regular case, instead of conducting a DT for example on Zoom, it was done over written submissions that each party was to send and to respond to, and that was…as long as both parties agreed to it, it was quite successful.

(6:16)

YU: Now, I'm going to come to the question of procedural and substantive law because in Jewish law they're not really…you can't really separate them. I do appreciate the fact that we live in a country where there are certain procedural norms and I do understand that it is the benefit of the DT that even though these laws may not be important in halacha but sometimes it is important to uphold them in order to be able to…if any situation of a challenge to the case occurs, that it'll look acceptable in court and they'll accept it. But not always does civil law and halacha see each other eye to eye, not always. I can see a number of questions that you have over here, you have for example you have a question of speaking a language. I know you were informed of all of the cases that occurred in the past, so you're asking about the dayonim speaking a language which only one party understood. Now, I do agree with you 100%, I was 100% sure that both parties understood Yiddish at that particular time and in my professional work with other dayanim, we talk to one another in Yiddish not to be able to talk to each other in a language which others don't understand, that's the language we communicate in. So for example, in the past I've communicated with them… I've communicated with them only in Yiddish because that's the language they would speak. With Dayan Katz even more so, I'm not sure, Dayan Berger at least I know his English is impeccable, Dayan Katz I don't know, even 'til today I don't think his English is very good. Certainly the language we always communicated with is in Yiddish. In the Mond case it didn't really make a difference, nobody complained about the fact we spoke Yiddish, they just made a transcript of all of our Yiddish conversations at a particular time. In the case that you're referring to, to do with the Koncepolski case, had I known that the other party didn't speak Yiddish I would not have spoken Yiddish. I do agree with you that you have to speak in the language of both parties if one party doesn't. If none of them will understand the language I don't think there's any problem with us speaking Yiddish, if both of them don't understand, but if one party understands and the other one doesn't, I definitely agree with you that it's not the correct thing to do.

CC: Can I ask a question, just generally relating to that is: are the halachic standards and the secular standards very different in regards to procedure or would you say that they're mostly aligned?

YU: Well, I'll tell you sometimes they're very, very different. I'll give an example, again I'm going to talk to you very openly because of the record and whatever, I can choose whatever will be on the record.

CC: Yes, I'll send it to you for you to do that. Yes.

YU: So, I'll share with you a situation that I had in the famous contempt of court case with Justice Sacker, right?

CC: Mmhmm.

YU: Something happened over there where if it would have happened in the BD, the BD would automatically be disqualified in conducting the case. What happened with Justice Sacker was that when we went to court, it was the very, very first session in court and he was just listening to the claims. I just want to make sure you're listening because…

CC: Yes, I'm hearing everything. All clear.

YU: Right. So, the initial claim against the BD was obstruction of justice, and Justice Sacker told the barrister from the other side, he said 'Why go in that direction? Why shouldn't your claim be contempt of court?' And it caught them by surprise and they asked for recess. Now all of this is something you could check in the transcripts, it's something that is not hearsay, it's quite well-known in the legal community because this particular scenario is something which received many, many letters from European lawyers and from American lawyers and so on and so forth. Now, they asked for a recess and they came back and said 'yeah, we would like to change our claim to contempt of court.' Now, I immediately told our barrister, I said 'how is it possible for this judge to uphold the case in our favour if he suggested to them how they should now…what their claim should be.' And he said 'don't worry about it, it's ok'. It's something that would never ever be possible in a BD that a judge, a dayan, should feed the claim to the litigant. You follow what I'm saying?

CC: Yeah, I mean my question is that I feel like in a BD that would be more allowed because the dayanim are also the *orech din* meaning in a regular BD situation without a toyan the judges have to do everything. You sometimes have a very simple person who doesn't know what to claim.

YU: The judge cannot feed arguments, it's a *mefuresh Mishnah.* In halacha, a judge cannot feed arguments. 'Lo te'hiyu ke'orchei hadayanim' - it's a quote from Mishnah Pirkei Avos. Okay, that's one example. So there are particular types of…in a DT. One particular DT that I was in, and I'll tell you it without talking about negative, I'm talking about positive. The DT with Mond, I was extremely impressed with Dayan Berger in his ability to be a borer and not confusing the job of a borer with a toyan. I thought he was extremely professional in that respect, you understand what I'm saying?

CC: Yes.

(13:07)

YU: Because unfortunately, in reality according to halacha those particular…one of the questions was what is the position of a toyan?

CC: Yes, how do you feel about toyanim?

YU: I personally feel that it's not correct, in my opinion. It's funny to see it all, it became the norm in today's DT. I once asked Mori V'Rabi, my revered teacher Rabbi Zalman Nechemia Goldberg 'what is the halachic premise for a toyan?' Many years ago I asked this question, for sure more than a decade ago, probably 15 years ago. And he said to me 'Look, it's hard to say because there's really no Chazal or Talmudic premise for a toyan, perhaps the only way to explain it is to be a murshah' that's what Rav Zalman Nechemia said. A murshah, that means someone that is almost like someone that is, someone that is able to speak on your behalf because the person himself feels he can't talk, he's someone that you organise, a proxy so to speak, right? But a toyan today became a job. I personally believe that a respected dayan, and don't publicise it because there are respected dayanim who act as toyanim, but I believe that a respected dayan should not be a toyan.

CC: Mmhmm. What do you see is wrong with toyanim?

YU: A toyan is a person who is employed by his party and he basically is obligated by his position, I wouldn't say obligated but that becomes a de facto rule to, as the Chazal say, 'to be metaher a sheretz b'kama ta'amim' to basically argue no matter what for your position, and in Israel, if you would ever come to Israel and observe the relationship between a dayan and a toyan you will see that it's not the most respected position, they're looked at exactly as a lawyer who is employed to argue the case and he will use all of his knowledge to argue the case whether it's halachically correct or not, you understand? You have to bend sometimes…

CC: Is it different to the idea of allowing a lawyer, meaning a lawyer is quite acceptable in the secular world so is a toyan worse than a lawyer or the same as a lawyer?

YU: It's actually the same. A toyan who studied in Israel to be a toyan rabbani, he's more knowledgeable than a lawyer because he will argue from a…he will quote a chapter and paragraph in Shulchan Aruch, you understand? So they're trained to be able to do that but the place that a toyan has in halacha is no different to a lawyer and therefore he's not a judge and that's why I always feel, I never accept…I've been asked many times to be a toyan, I've never accepted to be a toyan.

CC: But do you allow toyanim in the cases that you are a dayan?

YU: I would allow if both bring a toyan because it's an accepted feature today, and I'll tell you why I would allow it: because ultimately a good dayan would not allow a toyan to cloud his judgement, he will always remember that he's only an extension, he's only a learned arguer, if you may, but that's all he is.

CC: Can I also ask you, because you mentioned zablahs before and that you've been involved in several successful zablahs, do you find that a zablah is an issue because of the fact that you have two people who are dayanim but also connected to the parties? Does that create problems?

YU: It does create problems, it shouldn't. A zablah is really, in halacha it's… I wrote a teshuva in my sefer, in my book I have a short teshuva on zablah, a very short teshuva. The sefer that I wrote wasn't a sefer that I intended to publish, I didn't write it for the sake of publishing it so a lot of the teshuvas are very short because I only wrote it to target a particular question, but I have a very short teshuva on zablah, and the way that zablah is looked upon in the eyes of the Rishonim is very good, in other words they really think that it's an optimal way of a BD, but unfortunately, in the world that we live in, as I've said before I've sat as a dayan on quite a few very prominent DT of zablah. Some of them, and Dayan Berger's included, he was able to really separate, not to confuse the position of a borer with the position of a toyan. But unfortunately it's not the case always, unfortunately many times when people choose a particular borer he feels that his position is to be able to win the case

for his party, and you're watching and in front of your eyes he's acting as a toyan, the way he talks, the way he argues. It's not the way a borer argues, he became a lawyer, you understand? And that is why in theory I think if you have the right people it's very good. The reason why it's very good is because in halacha it's also very important not just to do a fair DT, but it should be perceived as a fair DT. The reason why small litigations were successful is precisely because it was a zablah, because once your own borer signs a psak and says you owe the guy 25 grand, if my guy signed it, he was the person that I chose, you understand? He feels he has somebody who really has his back and he signs it, so he accepts it, you understand? So in halacha there is a very important concept that a DT should be also that a Baal Din should feel comfortable and not feel that he is being cheated in the DT.

CC: So you're saying there's arguments on each side.

YU: There's arguments on each side but it all depends on the case. I've seen zablah which were extremely good and some zablah which were extremely bad. Now the reason why I think it's so important that the litigant should feel comfortable, and that was our position from the very beginning when there was a very big case in Sydney, I wasn't involved, I was more facilitating but I wasn't the borer or anything else, but one thing which was always our principle was that even though we consider ourselves a Beis Din kavua in Sydney, sometimes we could tell the person that we are entitled to judge the case even if you feel uncomfortable (but) we never, ever play that card. Whenever there was any situation where a particular ba'al din felt that he was uncomfortable either with one of the dayanim or all of them, we always recused ourselves in every single case. You won't find one case in Sydney, a case which went to the court with contempt of court, we actually told them we're prepared to recuse ourselves, that was the (position) from the very beginning, we weren't in any way insisting on being on the case.

CC: Yes, so can you explain how…I know there was a siruv in that case…

YU: There was no siruv.

CC: There was no siruv?

YU: There was nothing, there was no siruv. There was a request to come to a BD to discuss and there was a threat of a siruv.

CC: Do you believe a siruv should ever be used?

YU: My opinion now, at this point, is that siruv should only be used for people who are mesarev haget.

CC: Yeah, but you're saying not for dinei momenos.

YU: I wouldn't be interested in using siruv for dinei momenos, I would at the moment be comfortable to sit on a DT where both parties come to us and they're both interested. I wouldn't do a siruv on dinei momenos anymore.

(22:20)

CC: Can I ask you one more question, I know we're short on time, I just want to sort of go into one point which is: you've obviously had a lot of experience, both successes and also the cases which as you've mentioned became infamous, but from all of that learning, do you believe that a dayan should have some level of secular law training and if so what should that be?

YU: A hundred percent, I always believed that. I always believed that we should all have secular training and we should always be trying to learn and perfect ourselves, and we do study. I talk to lawyers and judges and barristers all the time, and read, and everything else. I do also believe that it's also very, very prudent that in cases of purely commercial law, to have a neutral expert, either a lawyer or someone of that nature to actually sit at a DT and to advise the judges. It doesn't mean they will always take his advice because there are certain halachas that do take into account minhag hamakom and sometimes not, sometimes the halacha is very clear that despite the minhag hamakom we will do differently. But I do believe that it is important when it comes to a complicated case of civil law to have a lawyer being present, and that's something which we have started to implement here in Sydney.

CC: Right. And what about giving reasons for judgements, do you have a perspective on that?

YU: It depends on nature, sometimes it's a must. In the small cases that I had, we had an agreement in the first place beforehand that no reasons would be given, and there was an agreement from the two sides that that would be the case.

CC: What would be the reason for no reasons being given?

YU: There was a period time where we had a lot of such cases and that took a lot of our time and we explained to them that we were prepared…it was almost a favour to them, they asked us to sit on this case, it wasn't that we summoned somebody to court and we said you must come and appear, it was that both parties came and said 'please, we'd like you to adjudicate'. And we said, 'listen, we have a certain amount of time and we're prepared to do it in such a case.' I've always written down myself the reasons for (rulings), it's in my files, but I told them that we reserve the ability to be able to give a psak without giving them the full details, because once you give details, again, I think sometimes it's very important, in some cases it's a must, but in those small cases they were happy with it, they just wanted to resolve it, they wanted somebody they trust to say that's the halacha and they wanted to move on with their lives, that was basically the atmosphere of those cases, you follow what I'm saying?

CC: Yes. And do you think also, should there be some room for appeal or some way of, if a litigant's not happy…I know there's an idea of to'us bidvar mishnah and that sort of thing…is there room within halacha for someone to say 'I'm not happy with the psak'?

YU: It's a very, very interesting question, something that I really want to think about how to answer you because I think it's not a black or white answer, right? I personally believe that for example in Israel at the moment, I don't know if you're following what's going on in Israel with appeals and the nature of BD, but for a number of years the government took away the right from BD to judge in Choshen Mishpat or the Even HaEzer, hopefully it's going to change with the present government hopefully they'll have the power to change, '_____' as they say. But I personally think that in Israel it was a good thing that they have a court of appeals, I also discussed it with Mori V'Rabi Rabbi Zalman Nechemia Goldberg about this concept. You know, the law of appeal doesn't appear in Chazal bichlal generally, or Rishonim, there was only a hierarchy, if you look in Rambam hilchos maamorim, there was a hierarchy of knowledge and referring to higher courts when there was no conclusion or a level of lack of clarity on the ruling, but you'd never find anywhere in Shulchan Aruch the question of appeal. For whatever reason, which I'll discuss with you another time because I know we're already almost out of time, I think that it's a good thing that in Israel there is a Beis Din L'Irurim . When it comes to Choshen Mishpat I think it depends on how it's done, I think Mond case was a chilul Hashem, I was privy to all the small things that I can discuss with you privately later on, I

think he lost his mind. As far as anything he wanted for the case, he won. I wasn't prepared to be his toyan, I was only his borer, but everybody said that he won the case, almost everything that he asked for in his taanos he won, and he had a meltdown which I witnessed and he completely had almost a nervous breakdown and he decided to go to court. Now when you do that, it's a chilul Hashem. In the case of Benny Amzalak, I think that he had no choice. I think that I also was privy to it, and again that's something that I wouldn't want to publicise but I'm telling it to you personally, but there's no question that it wasn't conducted properly and I on the day of the DT was asking for some things to be done and it just wasn't done, right? So I think that Benny Amzalak had no choice but to go to court because he wasn't given…even after he brought evidence and asked the other dayanim to consider his evidence and to reconvene, they refused to do it, you understand?

CC: Yes.

YU: So, in his case I think that unfortunately they didn't give a choice because they didn't conduct the DT properly, there wasn't a good DT. Again, I'm not trying to excuse myself and in the beginning I was part of it, later on I consulted some of the gedolei haposkim when I could leave, you know when they started to go with siruvim and so on, when they're trying to put him into siruv and they're trying to kick the kids out of school I put a record that I'm not part of that, that I disagree with it. The only thing which they, the judges were very kind to me because they saw that I was out of it so they didn't call me to appear at the court, the only thing which they accused me of, that was the only thing which wasn't nice, was lack of knowledge of Yiddish but that was later - there was a certain statement I made which was mistranslated by the translator into Yiddish and it was…you speak Yiddish, yeah?

CC: I could read a sicha, but not more than that.

YU: Yiddish is my language, I spoke Yiddish from when I was brought up so I spoke Yiddish quite well, and this is not going to go public right?

CC: I'll send you the transcript and you can tell me which is in and which is out.

YU: You can turn off the button because this is…

CC: Can I ask you one last question before I turn it off, and that is: I'm interested in approximately how many momenos cases would come to you in a year?

YU: Lately there weren't too many.

CC: And overall? Is there a great demand for it do you think?

YU: In Australia unfortunately there isn't, and I've talked to Melbourne rabbonim and for some reason in Australia it's not happening a lot. There was a time when it was, there was a time, for whatever reason maybe things come in waves.

CC: And in its peak, how many would you say in a year? Do you have a sense of that?

YU: Well, one particular year I had maybe, I'd have to look it up in my files but probably 8-10 DT a year, something like that.

CC: Okay, I'll stop recording here.

10.3.6 Interview with Reverend Aron

Interview with Reverend Yossi Aron, Historiographer of the Melbourne Jewish Community, Melbourne on 8 September 2019 with Chaim Cowen

CC: Chaim Cowen here meeting with Yossi Aron and we are discussing the origins of the Beth Din in Australia and all things related. Today is the 8th of September and it's now 6:35 p.m.

CC: Ok so we're talking about Rabbi Goldman's book here

YA: I'm giving you to have a look at a copy of Rabbi Goldman's book I think he did a master's thesis on the history of Victorian Jewry in the 19th century and his book really serves as a resource because he seems to have gone through the relevant newspapers and he of course being the assistant minister at the Melbourne Hebrew Congregation had access to their amazing archive which is probably, if not the Victoria Archive, the closest to it. I've just added an interesting point here I read some years ago that supposedly the greatest archive in Victoria of the AMP Society which began in 1849…

CC: What does the AMP stand for?

YA: Australian Mutual Provident which is in big tzores at the moment But anyways the archives of the Melbourne Hebrew began in 1841 and has every minute book bar one which got water damaged. It is an amazing 88 archive box lot of documentation… which is being preserved in conjunction with the state library, the Latrobe library, they're interested in it, whatever.

CC: When was Rabbi Goldman…?

YA: He was the assistant minister before the war and then again after the war… He went as a chaplain to Palestine, we have his diaries somewhere, he went to Palestine with the army as a rabbinic chaplain when he came back, he was back at the synagogue he was disappointed that he didn't get a full minister job but anyway

CC: Was he born in England?

YA: He must have been English his daughter taught me English his daughter is married and now lives in Manchester somewhere. And then he retired from the Melbourne Hebrew Congregation and still did a bit of locum work and he actually died while serving the Adelaide community on Yom Kippur in I think 1961 roughly. The point is, his book, he went through the relevant sources of the Melbourne Hebrew Congregation archives and perhaps some other archive that he got to and certainly the newspapers of which The Australian Jewish Herald was the important one. Before the Australian Jewish News it was the Australian Jewish Herald - it went back to the last decades of the Nineteenth century and it lasted until 1969. The Jewish news that you know today began in about 1932 under other name in Melbourne but it later connected to a paper that had already existed in Sydney which is why they claim to be 120 years old but not in terms of Melbourne. In my childhood my father would get 4 Jewish newspapers 2 in English and 2 in Yiddish; the Jewish Herald and the Jewish News and the 2 Yiddish versions… there wasn't room for that many papers.

YA: Ok now the beth din… *(Discussion about lending Goldman's book to the interviewer)* [Goldman's book] is a hard book to read, sources written on on top of the other and not in any particular order sort of chronological order but not particularly.

The BD: I don't need to tell you what it is it is a rabbinic court. A Rabbinic Court has a number of functions, in as much as it also should serve as the peak of the Rabbinic organisations in a community. Batei Din have a number of functions, the function for which the BD in Melbourne, which was the first Beth din of the colonies and for that matter the first Beth Din outside of what is called today n the United Kingdom (I am not sure what it was called then) by the then Chief Rabbi established anywhere outside of England.

CC: Before South Africa?

YA: Before anywhere else and before anywhere in Australia the BD was established in Melbourne now you have to understand that the Melbourne Jewish community, the Melbourne Hebrew congregation, had it's Origins in 1839, 4 years after the commencement of white settlement in Victoria. There was then an attempt to have services for the high holidays in 1839 - ironically 9 turned up you can imagine how they would have felt - but then for Yom Kippur they had 10 (this was in a pub in the city). In 1841 they formalised themselves before the high holidays into what became the Melbourne Hebrew Congregation which initially had a property granted to them as other religions had a property granted to them in the central business district on Bourke Street between Queen and William Street, Synagogue Lane is on the corner the council put that up. It's the building next to synagogue Lane with those pillars they were maintained when the shul was destroyed. From 1849 that's Synagogue had a Reverend, a minister, they didn't call them rabbis in those days they will called reverend

CC: Is that because they didnt have *smikhah*?
YA: That's because the chief Rabbi called himself the only rabbi, he didn't allow it.

CC: Did they in fact have *smikhah*?
YA: No, I believe he did not he was called in Hebrew "*hahaver*" (a name which is familiar to me) rather than *harav* but he was *shohet* and *mohel*, or at least he acted as such.

CC: What was his name?
YA: Rintel, Moses Rintel. If you go today to the corner of Exhibition Street and Little Lonsdale or Little LaTrobe where there is a Chinese restaurant one small building in the middle of that that building was the first building of the East Melbourne Shul later, because Rintel later moved to East Melbourne, and they have kept the name their "the Rintel room" anyway that's all not relevant to the BD.

YA: The problem in the Jewish community was even greater than the problem in the general community of the gender imbalance who came all this distance to Australia leaving aside the question of convicts were basically men seeking their fortune, if women were to come if they were brought out afterwards, and many of the men who came with single men who came from basically England and the related areas.

CC: They were coming to get fortunes, but also as convicts?
YA: Victoria never had convicts, we were a respectable state, the convicts were sent to NSW and Tasmania and West Australia but not Victoria, and initially they came as Settlers hoping to get land and the government did setup stations and of course in 1850 we got the gold rush, or 1851, and then many people came to make their fortune and then again men came and not women. Now if that was the general situation that was certainly the situation in the Jewish community so therefore those who obviously didn't want to live alone without female companionship, if they were Jewish and they could find someone, in many cases they would find someone who was not Jewish. There

was a member of Parliament Ephraim Zox who swore to his mother that he would never marry out and he didn't and he remained a Bachelor all his life…

CC: Ephraim, was he a religious Jew?
YA: I don't want to go into the whole story, but there were people who kept what they could and there is the famous letter to the Chief rabbi in about 1846 saying that the *mezuzot* and *tefillin* here are a problem, please send them out. Another interesting question they asked was whether the *mohel*, they had a *mohel* before him (Rintel) a doctor whatever, was allowed to use the newly discovered chloroform as an anaesthetic interesting questions regarding *mashiv haruach* was asked already in the 40s. Rabbi Apple just wrote a piece about that, he sent it to me asking if I had any comments on it.

YA: The point was that what this situation created was mixed partnerships, not marriage - partnerships. As time went on many of these men, who were affiliated with the synagogue, wanted to regularise their situation from a religious perspective and a couple of the Reverends who were around – Rintel being one of them – were asked to do for example circumcision for a case like this. Rintel was very hesitant to do it and when he did do it he got into a fight with his board who said he shouldn't have done it and so on… the fight over this bris in fact led to East Melbourne being started. He was censured by [the board]. By then there were so many Jews around there was a room for two synagogues because of the Gold Rush influx. There's always something that brings it to a head but there was already room for two. That was 1857, 3 or 4 years later you had about 5 in the Goldfields - you had Ballarat and Bendigo, [of which] only Ballarat is left. I'm not sure if the Geelong building exists anymore. Bendigo certainly doesn't. Ballarat is still operating, they're going to have a Shabbaton on the Shabbat of *slihot*… They have a monthly service there nowadays at Ballarat and Ballarat is important because at one stage the home of the Beth Din was in Ballarat because Ballarat in the 1880s…lets get there chronologically.

YA: The problem was the need to regularise by approving conversions. The Chief Rabbi of England was very unhappy with the whole concept of conversion anywhere. In England it was not the done thing and they were worried, however he realised that down here you had to do something. The heads of the synagogues and by the late 1850s there were two, East Melbourne and Melbourne, were complaining.

CC: Who was the chief Rabbi at the time?

YA: cup that was made in 1854 that was presented to chief Rabbi Adler. An amazing piece of work with a kangaroo and an emu in recognition of his spiritual guidance. He was getting all these letters from people saying we've got to do something – "what do I do about this mixed couple and the children of the mixed couple?" because the children were getting to barmitzva age and they wanted to have their barmitzva within the synagogue. In response to that, and [taking into account that] there were a number of people who arrived in the colonies who were reasonably religiously knowledgeable, particularly there was someone by the name of Samuel (Shmuel) Herman who was associated with both Geelong and Ballarat, but not with Melbourne.

YA: Geelong and Ballarat we're associated with each other. You have to understand that originally it was quite possible that the capital would be Geelong the Port of Geelong and the initial railway line went from Geelong to Ballarat. This Samuel Herman was a Talmid Chacham. There is in the archive a written *hidushei torah* thing which we believe was his, it couldn't have been anyone else. I do not know why he came out and some of them who came out didn't come directly from England There were number of religious functionaries (*shohtim* etc) who came directly from South Africa. They had gone to South Africa and then they can here. The [way the] boats travelled the first stop was Perth

and the second was Melbourne – nobody went to Adelaide because that's up in the bite. That's the real reason why Melbourne developed before Sydney. Sydney had it's little [Jewish Community] from the convicts time but the Immigrant Jews whether the Anglos of the 50s, to the Russians of the 90s, to the pre-war of the 1910s and the Feiglin's for example, and everyone that came later from the *haimish* Jews all ended up in Melbourne. Sydney never had a Carlton because of the geography, the way the boats came. A few came across the Pacific but very few.

CC: Its interesting that Perth didn't get a strong community.

YA: Perth did, interestingly. There was at Palestinian group from Palestine – the Mandate of Palestine as it was – who settled in Perth and there are descendants of them, some Jewish and some non Jewish, who are farmers in Perth and lower Perth in various areas Perth, did get. Perth was all-together later in development when the Gold Rushes came to Melbourne there were synagogues in Kalgoorlie and Coolgardie. Yoseph Gutnick wanted to re-establish one of those synagogues when he was in his gold mining heyday.

YA: Back to BD. The Chief Rabbi approved the establishment of some sort of BD with Shmuel Herman at the head. This development took place, you can't give it a moment, but it took place between 1862 and 1864. By 1864 there was a BD. Before that there were some conversions by some of these Reverends and one of these things that brought it to a head was the arrival here of that great travelling Rabbi, Yaakov Sapir. When Yaakov Sapir arrived here, he went around and in Bendigo he assisted with the making of a convert. This was in 1860 [and] this led to a major scream from the boards of the synagogue that this visiting Rabbi - there were a number of *meshulochim* who came her – including a Chaim Tzvi Schneerson – who were collecting for Eretz Yisrael. Sapir was an amazing guy I don't know what he had with him but when he realised it was about to be Purim he wrote his own *megilla* which sits in the Adelaide Hebrew Congregation to this day. Sapir wrote a letter – there's a sefer called *even sapir* – all about his voyages all over the far east and these other places. [In it] he blamed the Chief Rabbi for the state of Judaism here in Victoria. He felt [the Chief Rabbi] was not doing enough. He justified his making of this particular convert together with a couple of guys, including a guy from Bendigo – Reverend Friedman who originally come from Hobart, I don't know how he got here but he was there – who must have known something and he got together with him and another *baal habayit* and formed a BD and made a convert. All of this coming together, in a sense forced the Chief Rabbi's hand he had to do something. He approved the establishment of a BD. Let's be very clear what this BD was for: it was for conversion. Initially every case had to be sent to the Chief Rabbi. It was for conversion subject to there being no religious impediment - say a Cohen etc – and he would allow conversions to take place.

CC: There was a *mikveh* or they would use the ocean?

YA: Melbourne had a mikveh from 1864 and it wasn't built for conversions. A committee of young married men approached the Chief Rabbi and wanted a *mikveh*. Think about that! these people were not *hasidic* and they approached the Chief Rabbi for help how to do it. They agreed that when their was running water in Melbourne they would build a mikveh. The *mikveh* was at the back of the shul in Bourke Street and it survived until the 1890s. By then it was [in] a very bad situation Can you believe we have a book with a list of the women who attended? There were only a handful of women who attended in the end but there were. I'm not sure how *makpid* they were on mikveh or the fact that it was a public bath. People had public baths in those days, rather than in the home. The fact is the *mikveh* was used by women and it existed and after it came to an end Klonimus Wolf Davis, ancestor of David Stone, built his own mikveh because he had daughters. And then when the city baths were built [it was] arranged there should be a mikveh in the city baths which still exists. The Reform Rabbinate still use it for *giyur*.

YA: Back to the topic I'm not able to say definitively what happened in regards to *gittin*. The BD was not authorised to do anything else. There was no BD in Sydney but when Rabbi Joseph Abrahams arrived here in 1883 sometime after that he married the daughter of the Reverend Davis who was the reverend of the Great Synagogue as it existed then in Sydney. Davis, despite being his father-in-law was subordinate to him because he had *smikhah*. Abrahams had *smikhah* from Hildesheimer. He was called the Reverend initially but later when they were certain disputes and he resigned and he came back the condition was that he be called Rabbi. That was a condition with the Chief Rabbi during the 80s. The BD would sit in Ballarat when they had to. There was Goldreich - you have to check the names.

CC: What was Joseph Abrahams role in the BD?

YA: After Samuel Herman the rule became that the head of the Melbourne Hebrew Congregation, the Chief Minister of the Melbourne Hebrew Congregation, was the Av BD. Samuel Herman was not a Rabbi [of MHC] he was just a yid, Talmid Chacham. Subsequently, once Abrahams came, there were shochtim. Fascinating story why these people were here, but there were *frum* people here. There were shochtim… its been 25 years, so I'm not familiar with all the details, but one of them got into trouble with Melbourne Hebrew [Congregation] – he used the Bet Yaakov siddur not the Valentine, pre-Singer siddur and then one day he was called in and was carpeted by the board how come on a Saturday morning he had crumbs in his beard, he had had *mezonot* before *davening*. They started *davening* at 8am and had a break and kiddush and *kriyat hatorah* at 10am. They carpeted him [as] it was against the rules.

CC: Joseph Abrahams was the rabbi of MHC and the first formalised Av BD in that new arrangement?

YA: There were some Rabbis briefly, not so long who also were involved. Some of the Rabbis/Reverends who preceded him also were at the helm of the BD but really it was Abraham's who made it what it was. He was there for a really long time. He was from 1883 until 1919 or something like that, and only in 1923 did his successor come, which was Brodie, who later became the Chief Rabbi of England, he was the successor, subsequently he remained on the BD. I always feel like that I had some connection with him actually because he remained on the BD. He died just at the time that Rabbi Rudski of South Caulfield arrived and Rabbi Friedman. His secretary… Edna Berlinan who was one of our congregants at South Caulfield who died in her 90s and kept on the lounge table a photo of herself with myself at some functions, she told me how she sang in the choir of the Melbourne Hebrew Congregation. In Abrahams later years, she was his secretary. She said they all called him "doctor", they didn't call him Reverend or Rabbi. He had a doctorate as well one of these *doctura matura* that you got from European countries.

CC: So Abrahams was the Av BD until 1919?

YA: Yes, he was still around and then Brodie took it over. During the intervening years, he was around but not the Rabbi of the synagogue. He died in Melbourne, he passed away [in] 1938. This is the connection between the old rabbinate and the new rabbinate, the European Rabbonate. He retired, his wife had not been well. He established something called *hevrat beth Rivka*, they davenind in Ashkenazit, where he gave shiurim in *ein yaakov* in the Montefiore home in St Kilda Road.

YA: BD in the 1880's: it often met in Ballarat with Goldreich at the helm. At the time he came in – this is all recorded in Goldman's book in detail – the point is it was always conversions and perhaps occasionally *gittin*. [With] regards to other matters, because of what you asked me, I have tried to

trace. I see no reference anywhere to the BD doing commercial disputes I cannot find anywhere such a thing. I know personally that in the post war period there were Rabbis approached by the European types, who are used to the concept of going to a Rabbi, who approached various rabbis – Chaim Gutnick being one of them.

YA: Heilbrunn will tell you that he did a number of dispute resolutions. He is a much later arrival, he only came here in the 1980s or arrived in Australia in the late 70s – in 1982 I just came back from my fellowship overseas. Back in the day that I was with the government. I came back in January 82 and soon after that I was in Sydney for a wedding for the son of one of the presidents of South Caulfield which was held at North Shore where Heilbrun was. He had just arrived to become the chazan before he took on Adelaide. Rabbi Fabian was there [in the North Shore] at the time. That's more modern times.

YA: Until after the war the concept of going to a Rabbi for a *din torah* didn't exist. What about *kashrut* and *shehita*? *Shehita* and *matzot* were very important to the community. *Matzot* were brought from Sydney right at the beginning in the 1840s. Somebody made *matzot* in Sydney in 1871. A fascinating dispute as to whether machine [made] *matza* was acceptable – initially it was said not to be acceptable by order of the chief Rabbi and notices in the shuls and they advertised it in the Argus which was the daily paper. It said you cannot use *matzot* made by a machine. But the following year already they did [allow it]. The point is that the BD get themselves a little bit involved in these things. They did begin to get involved in the *kashrut* area. This is just before Abrahams – under the guys between Herman and Abrahams (in Ballarat and whatever). What I'm saying is that the BD had minimal involvement in that. There was kashrus but the BD "as BD" didn't get involved in that. They approved people to be a *shohet.* I suppose they showed [them] their *halaf* but there was no formal arrangement. It was only after the first world war that we begin to see formal arrangements that went beyond the Synagogue responsibilities. [Until then] everything was the synagogues responsibilities, [even] burial was the synagogues responsibility. In Melbourne there were two *shehitas* in the 1800's because Melbourne [Hebrew Congregation] had its *shohet* and East Melbourne had its *shohet*. The rabbis were responsible and they either did it themselves or they approved various people to do the shehita. The butchers would advertise – you can look at the chapter about kashrus – that [their meat had] the approval of [the BD] but it wasn't really the BD operating formally. It was with rabbis, and that was a problem that existed until about 20 years ago. There were rabbis who did kashrus and they may have also been on the BD but they didn't do it through the BD there were doing it in the personal capacities. Sydney [is] still this way until the present day.

YA: Certainly after the war and I'm talking about the Second World War, and I jumped here, the BD definitely became involved in *kashrut*. In regards to issuing lists, in regard to Pesach. The 'kashrus commission' was formed. The BD based at MHC issued lists of what was approved for Passover. Before that *kashrut* hardly existed. Brodie in his capacity as Chief Rabbi of MHC - not the BD – issued [this] and there were advertisements constantly in the Jewish papers in the 1930's for a company called 'Nutro oil'. It's interesting that concern with oil, this has been a problem right until now with kashrus. The problem was in those days many oils were fat and tallow based, animal fat based. He gave a *hekhsher* on something called 'Nutro oil'. There may have even been a picture of one of the advertisements in my book. And then when Friedman came, Freidman came following Brody in 1938 and he was a Rabbi until 1945 of the MHC, he gave a warning about bread that was baked in pan that were greased with non-kosher fats and oils. Freedman by the way is the father of Ruth Symons, Phil Symons wife, the old grandfather. Freedman translate *mesekhtas* of the Soncino Shas - he did a lot. He was an academic more than a Rabbi and when he left he went to New York and worked with publishing companies in New York. He was for a while a rabbi in Central in Sydney and then he moved here [to Melbourne]. He was originally English and then he moved back here because his

daughter was married here. He lived as he pointed out at 613 Inkerman Street. We used to see him walking his dog. He came into the yeshiva gedola and gave a shiur and got very upset about *lizman hazeh* v *lazman hazeh* - people remember that shiur - he felt it was very wrong. He was a *Talmid Hakham* and an academic. He was Av BD for a while then there was a guy called Stranski later in 47, I can't give the exact year. Sometimes there was a break for a year and it was during one of those breaks before Friedman came that there was the famous fight between Gurevitch and... and that's important. That Gurevitch we have to talk about because he established his own BD that's [19]32 during Brody's time. When he came in 32 he represented... you have to understand what happened here communally. In the late 20s there were problems in Poland There was a group of people who came here from Bialystock. The Slonim family can trace back to that time. The establishment of Elwood Shul by a guy called Fisher who was the grandfather of John Gandel who was frum. Gandels *mucheten* Beson. Eva Beson told me that as a 5 year old girl she remembers taking the food out to the sukkah in the father's house there in Elwood. When the Europeans came they were different as you can understand. As distinct from the British. To quote your Zeida (Sir Zelman Cowen) to me once to him the ultimate Rabbi was… he thought highly of Rabbi Danglow and he said to me your father would not agree with him. The point was that when these people came Rabbi Danglow was not going to be their rabbi. Gurevitch was persuaded… Danglow was in St Kilda shul from 1904 till about 1961 a hell of a long time… His *yedios* were not exactly great. There were jokes about some woman – in the olden days in the 40s after the war *shchitas oifos* you went to Victoria Market you bought a chicken took it back to Carlton and Rudski or one of the other shochtim would come and *shecht* it in their backyard. So a woman plucks a chicken and she says she's got a problem. What do you do with a *shailo*? You go to a Rabbi. Who's the Rabbi? They say Rabbi Danglow. I don't know if this is true or not but this is the story told to me by Moshe Cantor and I've heard it elsewhere. Rabbi Danglow looks at the chicken, he didn't know but knows that if she has a problem she might well be right, so his question was how much did it cost? Two and Sixpence. So he gave her the money and says go and buy another one. That's the apocryphal story.

CC: Would they accept Brodie?

YA: Brodie was ok. Europeans wouldn't go to him because he was gone by 37. In the post-war period he was no longer there and Friedman was gone in 44-45. There's no Rabbi. Stransky came in 47, exactly I can't say. These rabbis these people who come this was not their style of life something I can say in Danglow's *zchus*, there's a lot you can say in his *zchus* is he spoke about Shabbat he spoke about kashrut. I don't know how much he kept, whatever. The one thing he did is he used to have a *hevra kadisha*. He said the setup going on here is no good. He came from Krakow where he was used to it and in 1909 there was a *hevra kadisha* because of that, because of Danglow. The point was that the European Jews in the early thirties when Rabbi Gurevitch turned up here collecting money for Eastern Europe he came back a second time and they said "come on we need you here to stay". He stayed and he became the Rav of Carlton. The point was that he learnt *b'havruta* with Brodie or some years. Brodie saw that he knew and Brody learnt with him put it that way. He set up the North Carlton BD and that North Carlton BD lasted until the 50s. I don't know when it started but there were approving meat locally and for the purpose of sending to Palestine. In 37 Brody left and Gurevitch writes to the rabbis in Tel Aviv that you cannot rely [on the *kashrut* of Melbourne meat] because Danglow doesn't know what he's talking about.

CC: Danglow doesnt have anything to do with the BD?

YA: When Brodie left who was to become the Av BD? Some of the shuls said Danglow [as he was] the senior Rabbi and should be the Av BD. But the Carlton crowd would not have a bar of it. Gurevitch with his BD told the Israeli rabbinate but there's no way, you cannot rely on it, then afterwards Freidman came and things calmed down again and that was that.

CC: There was a *hava amina* that Danglow would be the Av BD?

YA: Certainly he was the senior Rabbi and there was no one here but it didn't happen because Friedman was given it because he was from Melbourne Hebrew congregation.

CC: Was it in the MHC constitution?

YA: I don't know the MHC constitution but the constitution of the BD probably was that it had to be from MHC and it remained that way until Rappaport resigned/retired in 1979, it remained that way. Now again, we have a problem with the minutes of the BD in the 50s and 60s and 70s they're not there. I found one book of minutes but I gave it back to the BD and with the current problems at Melbourne Hebrew congregation there's no way I can go there. It is said, you've probably heard in your Rabbinic role possibly in regards to *gittin* or *ketubot*, there are no records for the BD from the 50s until the end of the 70s until 1980. The Urban Myth is that Rappaport when he left, he had fights he had *broiges*, he burned them, he destroyed them, he took them, they disappeared. I have reason to cast doubt on that myth. Now after Rappaport left the BD moved to Caulfield shul, because Sholem [Gutnick] took it over. If you want to know the fight of Caulfield shul when Sholem took it over - there was a major fight – in 1979-1980 – I have some papers on that which I cannot dig up now. You have to read my book on Caulfield shul for that. I just published it now a few months ago in May about the 75 years of Caulfield shul. What happened anyway was that there was a fight not everyone said that Gutnick should have it who was the longest standing Rabbi and he did become the Av BD. For better or for worse.

CC: What was the basis for moving it from MHC?

YA: Because Sholem was the long-standing Rav and it was time… MHC did not anymore represent the community, the very Orthodox weren't there.

YA: We've jumped. In my search for material to write that book I suddenly came across BD minutes from the 60s, a small part of the ones that we're missing. Now I haven't seen all of them [as] there's a problem with the Caulfield shul archive. There is a serious problem which I never got the bottom of and one day somebody will. I think in the context of the big fight they had 20 years ago or whenever it was (Mond v Berger) stuff was taken as evidence including minutes and whatever and it was afterwards packaged up and it was never… It's somewhere under the Shul. There is a whole lot of stuff under the shul… so I don't know, the point is I did find this, and this suggests to me is that the missing minutes, without anything negative about them, when Sholem moved the Beth Din to here some of them came here. The question is where they are now, those minutes. I'll be careful not to mention the person's name; there were minutes to do with an adoption of a person who is the respectable person of the Addas everyone knows there's a whole *mahlokes* about her adoption and the BD got involved in solving that, in dealing with that problem with London and whatever. But I haven't got those documents anymore. Clearly the BD by the 60s was involved in some outside areas, outside of geirut. Now the other thing is that kashrus had developed and shechita… there was something called 'the shechita board'. They looked after paying the *shohtim* in the 30s rather than just the shul, which was associated with the BD in some loose way and I don't know exactly how. And then in 1948-9 came the first serious attack on *shehita* in this country. As a result of that they established the 'kashrus commission' and the 'kashrus commission' was to get tools together initially to build what is called a casting pen which was the solution that satisfied the authorities. The way the animal would be held and there would presumably be less cruelty involved [which] satisfied the authorities. As an interesting aside, what happened when this fight went on, most of these rabbis besides Danglow didn't speak English very well. If you think about people who were the rabbis

at that time. And who saved *shehita* for Melbourne for Victoria in 1939? [Rabbi Dr Hermann] Sanger from the Temple! He went to the government and you said, "I'm a refugee from Germany, from Berlin, and the first thing the Nazis did was ban *shehita*. You don't want to be in the same boat." And that saved *shehita*.

CC: I heard Gurevtich and Sanger got along?

YA: Gurevtich and Sanger got along well of course with the exigencies of the war they spoke together. And yes, Sanger was more sympathetic to the refugees and unfortunately the impact of this was that some joined the Temple. He was much more sympathetic to the refugees then Danglow was. Danglow was a patriot. He didn't come to terms with Palestine becoming Israel until after it happened. Once it happened he came to terms with it but before that he was of the Julius Stone... Julius Stone was pro-Zionism and Sir Isaac Isaacs was anti, and he was of that [Isaac's] ilk. Danglow was of that philosophy. Now the BD did have some involvement in *shehita* in 1973. My crowd was the first of the post holocaust back from yeshivas here in Melbourne. The great Harry Reicher who I'm sure you know about (the lawyer Moshe Reicher), Joe Krycer, Avi Paluch (Kathy's husband), we were a group of young marrieds who were concerned for *kashrut* in this town what was around and what wasn't.

YA: At a meeting with Dr Weiner who was the head of the Council of Synagogues (COSV), I remember to this moment he sat… on an armchair [and] we sat on a couch and I said, "Dr Weiner can you tell me something, why is it that we have the Beth Din shochtim Elchonon Loebestein, Old-man Wajsbort, I couldn't doubt his people in any way shape or form, why is it that nobody *bshem yisroel yechuneh* eats from their kashrus?" People only ate from the Addas there was no other. All the frum people only ate from the Addas they wouldn't touch the BD kashrus. He said to me "Yossi, I'll tell you, it's got nothing o do with the *shohtim*. One day they shechted 19 animals and 28 tongues turned up at the butcher shop." In other words the problem was the *hashgacha*, it wasnt the *shehita*, it was the *hashgacha*. Weiner was very involved in this fight over the BD [arguing] that Sholem shouldn't take it over and that it should be properly setup.

CC: Why was he against Sholem taking it?

YA: [Sholem] was seen as someone who was taking it over only for himself [and] the thing should be done by the community. What sort of happened later in the Romy Leibler-and-my era subsequently in the so-called "reformed beth din". Do you know about all that? Because I was heavily involved in that, we are going to run out of time because I have to take my wife somewhere we may have to reconvene.

CC: What can you tell me in the time we have?

YA: Just a minute… some of the stuff I gave to the BD they put it in their archive. Weiner a few weeks before he died gave me a phone call: "Yossi I need to talk to you." He know what was happening. This occurred a few years ago. He called me and he said he see those boxes over there after I've gone they'll go in the bin you can use them. They had in there a whole lot... You need that stuff, now where the hell is it? Is it in the BD? or is it in Caulfield? I've got a search for it.

YA: The whole fight of who should take over the BD by Sholem and that the BD should be properly community setup and so on and when Sholem retired that's when it was decided to take it over (that was 2003) and that was when Romy Leibler and I were working for the COSV. One of the first things I did (where can I find this stuff?) my background was in town planning, working for the government, I have a Masters in planning, Urban planning or whatever, and they wanted a plan for the BD. [I]

actually came up with something similar to the way that you have, that the BD would be the legislating body as it were, that the rabbinate would be the policy setting side of it and other community and the COSV would be the executive side. I don't know if I can find that paper, but I wrote that paper at the time. I wrote that paper in the late 90s and came 2003 actually that was the way it was. The COSV was to approve the dayanim and that sort of thing. I've got somewhere the papers…

CC: It was reincorporated as a new BD?

YA: Yes, in 2003/2004 and in that year Mottel took over. Mottel took over and called himself "Senior Rabbi" he did not call himself Av BD.

CC: But now he does?

YA: Now he does. If you see that document on the wall *(points to a document hanging in his living room wall)* which was a document presented to me after 40 years of communal work. I was given the title of *chaver*. I didn't want to be given the honorary title of Rabbi - in German Jewry [*chaver*] is a very prestigious title. When you are called up to the Torah you are called *hachaver.* It's a really meaningful title. So I didn't want to be given an honorary title of Rabbi – that's nonsense, not interested – the point is that I didn't even twig. To get this done on parchment properly I had to go to Eli Gutnick who got a *sofer* to inscribe it and there he (Mottel) writes himself as *Av Beth Din Tzedek*. That's last December. I'm getting you a copy… *(presents me the Caulfield Shul book he wrote).*This is the book that we just did, it came out on May of this year. In here you will find… there was a major fight in the community and it's all related to this BD issue *(flipping pages)* this is page 119, [and] it goes back to previous page: "Proposed plans for the re organisation of the MBD." That's that, okay?

CC: Is it possible that Gurevtich did commercial matters?

YA: Yes, I think it's very likely but I don't know that it's documented.

CC: Under the MHC would there have been commercial matters?

YA: I don't think they would. You might want to talk to Moshe Trebish. In the early days of the yeshiva that have a concept of the *shiva tuvei ha'ir*.

YA: There are a batch of papers to do with the 1980 dispute and with the reorganization of the BD including correspondence with [Chief Rabbi] Jacobovits. Because at that stage they still saw themselves… this is another interesting story, when did they cease to be bound to London? It didn't really happened formally because even in more recent times leaving aside the Caulfield "Abrahams fiasco" of more recent times, the very fact that he went to the London BD was because of the connection of Melbourne and the other dayamim of the BD at the time. [Dayan] Ehrentreu and he worked together in *kashrut* and whatever. Yonason Abraham was English of Portugese-Sfardi background. Interestingly, there was always this connection with the London BD. I think to this day almost it's only very recently, you'll have to talk to [Rabbi] Mottel [Gutnick] about that, the connections have changed and if they do have a shaila it goes… I know of a certain shaila that I was involved in regarding an *aguna* issue where we couldn't get the *gett* out of the husband and we finally got the *gett* out of him and he said "you know I signed it by force" he said that to us *dafka* after signing. After all these *tzoros* we went to [Rabbi] Zalman Nechemia [Goldberg]. It took another 3 months before we got him to re-sign. It was a disaster, but the point that I'm saying is on that occasion the *shaila* that I was involved in was asked to Rabbi Zalman Nechemia in Eretz Yisrael.

Before that *shailas* would always have gone to the London BD. At a Rabbinic conference that I attended and I can't date it, in the earlier 2000s, when Rabbi Sacks was here and he was asked about this relationship between Australia and London and his response was, "*ki mitziyon teitzei torah* right, perhaps it was time to shift the alliance." That was his response, but I can't date it. I wonder if someone else could. That's it I can't remember when it was I think the Rabbinic conference was summer in Sydney.

CC: It's interesting because the privy Council stopped in the 80s it's kind of around that time….

YA: Exactly, you know there are similarities. You'll read that following federation there was a proposal that all the shuls should meet in Sydney and form a Federal Union of Synagogues that might have involved the BD as well. It was because Abraham's then was concerned about Boaz from Adelaide because it got into his head a *mishugas* hat he was going to reform things and introduce to triennial reading of the Torah…

CC: That was the Eretz Yisrael method?

YA: Yes, some of the conservatives shuls have taken it up. There were moves towards very small reforms; [at] St Kilda there was a guy by the name of Jacobs who had all sorts of *mishugasin* about reform. There was even a Reverend Dattner Jacobson of the Melbourne Hebrew Congregation who had a library including *sifrei kabala* which ended up in the state library… Dovid Freedman had a look at it and said there was a *sefer kabala* that is unknown anywhere in the world and he was interested in reform. His reform boiled down to davening mariv and rattling off aleinu very quickly and a few other things like that. It wasn't real, it wasn't anything in the way of real reform. Real reform began in the 20s here.

CC: Was there a controversy in 2003?

YA: There wasn't a level of controversy that had been in the past but not everybody was overly enthralled with it.

CC: Was that because people wanted it to be affiliated with Caulfield shul?

YA: No, no. The question there was should it just be in the hands of the rabbis or should the lay leadership have some say – and the lay leadership wanted some say. We (the lay-leadership) will pay for it and that's when what was previously a $10 levy for the Eruv became a $25 levy to pay for the administration of the BD which it has done ever since for better or for worse.

CC: In the 80s who was paying? Was it Caulfield Shul?

YA: Funny the Rabbonim weren't really paid they did it as an honorary thing. Generally the so-called dayanim werent really dayanim they were the rabbis of the shuls. Schreiber, Rutzky, others.

CC: In terms of your knowledge of the Sydney BD and its origins do you have that?

YA: No I don't. All I can say is as I indicated earlier that Abraham's married Davis's daughter and Davis then began to do things, but really as a secondary to the Melbourne Beth Din. Melbourne was the only one at that stage that was authorised by the Chief Rabbi and I don't know what happened. I haven't done Sydney. Go to [Rabbi Raymond] Apple. Apple is the guy… without any question he has researched it, more so Sydney than anywhere else. [He lives] in Jerusalem but I can give you his

email he'll be happy to answer. He just sent me a piece that he wrote about the history of *mashiv haruach* and *vsein bracha* here in Australia.

YA: If you want to know some more about Gurevitch in Carlton and possibly doing *dinei torah* speak to David Haven… David Haven and I do not always see eye to eye but we talk. He's probably the other person who's done a lot of work on… I can give you...

YA: Moshe Trebish was involved in the COSV before me he would know more about the constitutional stuff about this 2003 stuff. The other person is a key person you can ring him, is Romy Leibler. Get a hold of Romy, he'll be very happy to talk about it. He was the president of the COSV for I don't know how long he worked very hard at it.

CC: One person you didnt mention - the very first BD that ever sat in Australia was under Rabbi Aron Levy?

YA: I don't know if they sat as a BD. He came here to settle an *aguna* and stayed in Sydney for six months organising the kehilla

CC: He did a giyur

YA: Not surprising that was 1831/32

CC: I read this in Jeremy Pfefer - do you know Jeremy Pfefer?

YA: The name rings a bell

CC: He has written a book called "From one end of the earth until the other" – it's all about the London BD and the colonies

YA: Oh really so what do you want from me?

CC: That only gives you until the 1830s

YA: Levy was an interesting person with an interesting story

CC: He has a he has a great grandson living in Sydney now

YA: I didn't know that

CC: Philip Levy could be a president of the Great

YA: Possibly he's a *macher* in the Great

CC: I know he's got a lot of memorabilia from Aron Levy

YA: From that time?

CC: He was a calligrapher, he was an artist

YA: I see, I see

CC: In Pfefer's book he has a lot of pictures of it

YA: Anyway we're going to have to wrap up. I'm going to have a look at hope I haven't given it to the BD

CC: Thank you very much

10.3.7 Interview with Rabbi Levi

Interview with Rabbi John Levi, Historiographer of the Melbourne Jewish Community, Melbourne on 5 September 2019 with Chaim Cowen

CC: We are at the house of Rabbi John Levi and we are having a conversation relating to the PhD research by Chaim Cowen which is looking into the procedures for the BD here in Australia.

So John you have a lot of knowledge and skill, and one of those areas is in history particularly in Australian Jewish history.

JL: First of all you have a big resource with the Australian Jewish Historical Society. The last 20 years it has been batted backwards and forwards between Melbourne and Sydney. You'll notice a difference in the context and often the quality of the two journals. At the moment Dr Susan Rutkins is running the Sydney show but it had a few problems before that. And the Melbourne journal has been consistent. It's a great achievement for a small community there's nothing like it in the Christian communities.

CC: Who publishes it?

JL: Well the Society does. It's gotten a bit scrappy now it's lost some of the oomph of the typed version. They do a different procedure but the journal is very good and I have just been looking through it and there are a couple of articles by Raymond Apple which will fit straight into your topic about the histories of the Beth din and the rabbis and the dayanim.

CC: Where does one go to locate the copies of these articles?

JL: Well, there is the Victoria State Library, The Bailiue library, and it's very likely that if you write to the secretary of the society you'd be able to buy a whole set. And of course the Lamm library. also I have two copies of this book - Israel Porush's history of the Great Synagogue

CC: That's in Sydney?

JL: Yes the BD in the early days moved back and forth between Melbourne and Sydney and Ballarat and Hobart *(hands the book to the interviewer)*

CC: That's very kind of you thank you very much

JL: Pleasure. Here is my book on Rabbi Danglow which has quite a bit on the BD because he was the secretary. The third book you should take away is this book on Rabbi Sanger which of course mentions Dora and your namesake. *(hands the book to the interviewer)*

CC: That's very kind. So both of these books were authored by you? Thank you very much...

JL: You've got to start with the chief Rabbi of London of course. There's good anglo-Jewish historical stuff grab it. There must be about 20 books…

CC: It seems that the English rabbis had jurisdiction over the colonies and at some stage the colonies became independent…

JL: The Jews used the Chief Rabbi as their religious key to being recognised within the Australian society. The Chief Rabbi without knowing it became the Archbishop of Canterbury because the Catholics were always talking about the Archbishop of Canterbury and that's how the rabbis ended up with dog collars. And that's why the Great Synagogue for example in Sydney looks like a cathedral… there's Hyde Park and St Mary's Catholic Cathedral on the other side, there is the Great Synagogue diagonally on the other side of the park and the Anglican Cathedral one street behind. You will read in Porush's book, that they had great trouble trying to find someone who would be authorised by the Chief Rabbi as a dayan on the BD

CC: Why what was that?

JL: Jealousy…

CC: So it was mainly politics not to do with qualifications?

JL: Very much to do with qualifications. The rabbi in Melbourne was really very important. It was Danglow's predecessor he was from Melbourne Hebrew Congregation and Danglow was from St Kilda. He actually had smicha. He was born in England. He and his brother went to Germany to do postgraduate studies and to get a PhD. Joseph Abraham's came back to Melbourne and was actually interviewed by England to become the Chief Rabbi of the British Empire… he was British born he was the first British Rabbi. Porush talks about him. Porush's English is a bit strange. He spoke with a strong German accent, sort of stilted - it doesn't flow. He got a PhD in maths.

CC: who was Porush? what was his role?

JL:He was the chief minister of the Great Synagogue in Sydney

CC: when did he live? how long ago?

JL: He must have died 1970. he was Isi Leibler's father-in-law

CC: Was there much happening in Melbourne at this time? does he reference Melbourne at all?

JL: A bit because the Sydney Synagogue and the Melbourne Synagogue often had…. But the community didn't have an Executive Council of Australian Jewry until the 1940s and they were frightened to do that because they were scared that it would appear as though the Jews were teaming up together. And that's the reason also why in those early days making a convert was so difficult because the Jews didn't want to be accused of stealing Christian souls. They were very sensitive about that. When Temple Beth Israel got goin, although they were not under the jurisdiction of anybody, they were very scared of making converts.

CC: they were worried about anti-semitic backlash?

JL: Yes. It's very difficult to imagine how this was. It was a social anti-semitism that really pervaded all of Australian society which makes Zelman's meteoric rise and Isaac Isaacs amazing, or John Monash's.

CC: Was this manifest in any way? did things happen?

JL: As far as I know nothing ever happened but then again very few people became Jewish. Before the German refugees arrived the community was too small to sustain itself and people whose family have remained Jewish through two or three generations while remaining in Australia had no way of bringing the other part of the family into the community. So conversion was rearing up the front and then of course you'll see in the Danglow book the problems of kashrut. And then there was a shohet called Super in Melbourne And he enabled the community to have kosher meat. Super was an assistant to Danglow at St Kilda synagogue

CC: What would have been the first formal structured BD here in Melbourne?

Jl: I think that was in Tasmania they actually had a rabbi briefly who had good training he teamed up with a minister in Ballarat so Victoria at the first bd

CC: So this Rabbi from Tasmania…

JL: his name was Helzeo

CC: and he would come into Victoria for cases?

KL: Yes

CC: Did the Beth din deal in commercial or arbitration matters?

JL: Never. too complicated

Divorce was very rare if you look at the first Commonwealth census, and it comes out in big books you can find in the library, you will see that the Jews have more divorces than the rest of the community's put together because at least we had a mechanism while the anglicans and the Catholics - the Catholics never had divorces there was no mechanism they had to have it approved by Rome and the Anglicans I don't think I have a… for divorce. So you will see that 16 people were divorced in Victoria in 1901 and 8 of them were Jewish.

CC: and would they have done their divorces by a Beth din or would they have done it civilly

JL: Good question I don't know that something worth finding out. The minute books of the MBD do exist

CC: dating how far back?

JL: I'd be surprised if they went any further than 1900

CC: so the Melbourne Beth din what was operating in 1900?

JL: oh yes sure

CC: and was it known as the Melbourne beth din?

JL: Yes

CC: has it been running consecutively since then?

JL: the Melbourne Hebrew congregation had the Beth Din under their rabbi. Because they have a Rabbi with a proper smicha. Abraham's started in 1898 or something. They would have had a BD. Danglow was a minister he was trained at Jews College and the Chief Rabbi did not grant graduates of the rabbinical seminary in London with the title of Rabbi until they proved themselves with 25 years of good behaviour and he retained a power in this way. I don't know if it was malicious it was just the way it was

CC: do you have a sense of when the Beth din may have started doing commercial matters?

JL: only the last 10 to 20 years

CC: I was just wondering if anything dates back further. I imagine the Jewish community would have resolved some of their disputes through some rabbinical mechanism is that right

JL: I doubt it

CC they would have just gone straight to the courts?

JL: yes it wouldn't have occured anybody to settle things rabbinically

CC: So the BD was mainly for ritual matters? there was no commercial aspect?

JL: it would certainly be posted Second World War if there was because the community was transformed by the arrival of the survivors it doubled in size and they were people who are reluctant to entrust their lives to non Jews. you've got to talk to Louis Waller he would have knowledge in this area
CC: I know that he does. In fact he was the one who recommended that I include a section of the PhD on the history. I was initially only going to be looking at the last 20 years he advised me that I look more broadly and trace the origins of the Beth din structure in Australia in general.

JL: the last time I saw him he looked terrible so I would suggest that if you want to get stuff from him, he is so brilliant, but do it sooner rather than later

CC: I will make a time to interview him. I will also be interviewing Yossi Aron. Do you have much to do with the Yossi?

JL: yes of course from his history of the Melbourne Hebrew Congregation. He is a very nice man. He would have seen the minutes of the Beth din

CC: is it the minutes of the Beth din or the minutes of the Melbourne Hebrew congregation?

JL: both. and Henry Friedman was the secretary of the Beth Din for years

CC: this is in what decade?

JL: Probably from 1940 to 50 I don't think they were very busy. Danglow kept the books he was the secretary I recognise his handwriting he was very neat and clear and in the 1930's the chief Rabbi allowed Danglow to call himself "Rabbi" but I don't think that the Beth Din did.

CC: was that because he didn't formally have smitha

JL: he didn't. His training finished in London and then he came out to Australia what was he going to do and then came Rabbi Gurevtich..

CC: tell me about him

JL: he was an *iluy.* He was amazing. He came up just before the Second World War I think from Lithuania, he must have been a Litvak. And Gurevitch was snapped up by the Jews of Carlton, by the foreign Jews, and he became their Rav. And in the late 1950s I would go to the Carlton Synagogue, which no longer exists, and he was blind by that time and I would go there on the second day YT because reform Jews like the Israelis don't have a second day of YT. So we would go up to Carlton shul and he would conduct a service on Shmini Atzeret with no sight at all - it was all in its head, he was brilliant. He was actually rejected by the Anglo-Jewish ministry here. I think they felt intimidated by him. The only rabbi in Melbourne that he got on well with was Rabbi Sanger because they have nothing to quarrel about

CC: Rabbi Sangar is the Rabbi you have written a biography on?

JL: Yes

CC: so who was Rabbi singer tell me about him?

JL: he was Hymie Wittner's Rabbi… at Temple Beth Israel.

CC: was he the first Rabbi then?

JL: You will see he was number four. The first three rabbis came out from America during the depression. They all came from the Southern States of America they came from the extreme non-traditional wing of the Reform movement and they went down like a lead balloon because they were too radical and they were never here long enough to tune in to Australia so they all left pretty quickly. And then it was 936 and Sanger, who spoke good English and perfect French and was a brilliant Rabbi, received a phone call in the middle of the night saying tomorrow evening you will be in London. The phone call came through at 3 a.m. in the morning so he took the hint and left everything behind and was in London the next night. So he came to this little miserable congregation. Hymie Wittner was frantic because he had to have a Judaism that he could pass on to his children and grandchildren and he knew we couldn't do it through the Orthodox synagogue.

CC: why not, why did Hymie feel that the Orthodox could not pass that on?

JL: Well there was no Jewish education and at St Kilda Synagogue if you wanted to be Bar Mitzvah there was a Miss Ferlow(?) and she taught every kid to read the Torah like a parrot and that was their Judaism. It was finished. There was nowhere you could learn anything in an adult fashion about Judaism until Rabbi Israel Brodie came to Melbourne Hebrew congregation and he started a young adults Study Group of which Zelman was a part of. And he got kids to get through matriculation Hebrew, quite an achievement! Brodie went on then to become the Chief Rabbi of England. He had

to do some more studying. He was a good speaker, so was Sanger, and Sanger looked after all the Europeans that arrived

CC: so Sanger got along with Gurewitz?

JL: Yes he did. Gurewitz was a remarkable man, and Gurewitz's correspondence files were stolen, they came from all the famous Rabbis from Eastern Europe writing to Australia saying "is there a place for me?" "can you find a job for such-and-such?" He ended up with documents signed by all the *gedolim* of Eastern Europe and they were pinched. I have a pretty good idea who pinched them.

CC: they were pinched during his lifetime?
JL: no after he died

CC: who do you think did it?
JL: Lubofsky. He was a famous collector of Judaica, anything that had a Star of David on it. He had a mania for pinching things that's why he started the Jewish Museum. He admitted it, it wasn't something that was gossiped round and nobody was interested. And poor old Mrs Lubofsky was left with something of a wreckage she didn't know what to do with it.

CC: so Gurewitz, was he a member of the BD?
JL: he formed his own BD, he put the others to shame.

CC: just by himself?
JL: Of course not

CC: who else was on it?
JL: I don't think he was ever part of the Melbourne BD.

CC: what was his BD called? Did it have a name or was it ad hoc?
JL: I think it was ad hoc.It was Carlton, Carlton Hebrew Congregation.

CC: so he was the Rabbi at the Carlton Hebrew congregation?
JL: he was it

CC: how many synagogues were around in those times?
JL: Carlton, Melbourne which had left Bourke Street in the 1930's and moved to St Kilda Road because St Kilda Road had all the trams going down it. It's current location actually occupies the place where the cables were which then became redundant. And the Melbourne Hebrew congregation copied the temple in Richmond South Carolina, its size and its shape is exactly the same and it never crossed their mind when they built the building that the women would have to be up in the balcony. It was only when Brodie came that they had to quickly change the plans.

CC: Were they intending mixed seating?
JL: [Yes] it became normal in St Kilda as well. St Kilda had a section for the women who could not climb stairs they could be in a block downstairs.

CC: so it's not mixed, it was partitioned?

JL: not partitioned but different sections. So there was Carlton, Melbourne and St Kilda, who were angry when Melbourne Hebrew Congregation turned up on St Kilda Road because it was really not very ethical, right on their doorstep maybe a half an hour walk between them. Anyway you caught

the tram that's why the shul was there. Nobody thought that was wrong. Then there was Temple Beth Israel which began in 1930 also nearby but not opposite they could have bought their old shul but they didn't. Just beginning in the 30's was Elwood shule for the new arrivals.

CC: so was Carlton shul very different with a Lithuanian *iluy* for a Rabbi while the others were British and less knowledgeable?
JL: Brodie and Joseph Abrahams. Joseph Abrahams was a scholar his brother was also a famous Jewish scholar… in England. I don't think he was Orthodox I can't remember... no he played a very important part in writing the Singer prayer book which was the prayer book of the english-speaking world. Are you familiar with the singer prayer book?

CC: I have heard of it but I haven't used it.

JL: Sanger by the way was ordained. He studied in Bresslau in Berlin the Jewish Theological Seminary "Breslau" which trained Orthodox and Liberal rabbis together and when they graduated they chose which stream they wanted to join. We had a Rabbi Feiglin who was a graduate of Breslau who was in Adelaide and finally the North Shore of Sydney. He was actually a classmate of Sangers.

CC: if Gurewitz was running his own, was the official BD the Melbourne BD? St Kilda shule, TBI, they didn't have their own BD?
JL: St Kilda shule had the secretary of the BD and TBI wasn't Orthodox.

CC: even though it wasn't Orthodox didn't have some form of BD of some description?
JL: Yes. Well not originally but he had some colleagues and obviously there was a need for a BD from time to time. The temple would refer people who had halakhic problems on to the BD

CC: the MHC BD?
JL: it wouldn't help them to have a certificate from the Temple. On the other hand often Henry Friedman secretary of the MHC would send people on to us if they couldn't cope and the problem could not be solved by the Orthodox BD. And it all worked until the arrival of Rabbi Rappaport who became the Rabbi of the Melbourne Hebrew congregation and who was extremely intolerant. By that time it was a secular Jewish Board of Deputies and the community actually became secular. And today for example we are talking about the Religious Toleration Bill we are represented there by Peter Wertheim who is the secretary of the Executive Council of Australian Jewry - not by a rabbi. But that's another thesis.

CC: Does the Temple nowadays have a BD that is connected to it?
JL: Yes, every convert we have appears before the BD.

CC: and the BD is comprised of who?
JL: Well we have enough rabbis to go around

CC: so is it at hoc just whoever is available?
JL: Yes there's no hierarchy and now and then we have to do a gett because people need a gett who are not halakhically Jewish and were married religiously.

CC: At what point did the BD become independent of any Shul?
JL: When you read Porush's book you will see that this became a very important thing for the Sydney community and the board of the Great Synagogue had to approve who was going to be the rabbi.

CC: Rabbi of the BD?

JL: Yes. That didn't happen here because we had Rabbi Abrahams (MHC)?

CC: he was seen as a very illustrious…?
JL: Well he was - he was interviewed to become the chief Rabbi of the British Commonwealth which meant a great deal.

CC: from when to when was Rabbi Abrahams?
JL: first part of the Twentieth Century.

CC: and for all that time he was serving as both the Rabbi of the Melbourne Hebrew congregation and the Av BD?
JL: Absolutely. I don't think it was very onerous

CC: there wasn't that much business?
JL: No.

CC: So you don't know when it branched off and became its own entity the MBD - something for itself?
JL: Porush tells the story and I've just been reading it and I refer to it a bit in the Danglow book. Well you've got to read these books about Anglo Jewry. Bernard Cowen by the way was president of Temple Beth Israel when I was there as a young Rabbi. He'd come from St Kilda because he'd had a row there and he'd come from the Melbourne Hebrew congregation because he'd had a row there. He moved.

CC: So that row occurred after my grandfathers barmitzva? Because my grandfather's barmitzva was in Toorak shul after he'd had a *broiges* with St Kilda shul and they moved to Toorak.

JL: Then they had another *broiges*.

CC: So the second *broiges* happened after his barmitzva and then he moved to TBI. What role did he have there?

JL: He was a board member And ended up President

CC: So Hymie was also president, was that right?

JL: No, Hymie was the treasurer.

CC: Were they at the same time?

JL: I'm sure they overlapped. Anna will tell you…

CC: So the Cowens and Wittner's knew each other?

JL: Zelman made off with Anna very early in the piece. Very cleverly and sensibly too.

CC: Couldnt agree more.

JL: No, you've got no alternative.

CC: So in terms of learning more in this area your recommendation is to go through the journal archives?

JL: And find the records of the BD

CC: where do I find the records?

JL: I think the Melbourne Hebrew Congregation. The Historical Society rescued ithem. They were kept in a subterranean sort of cave with stalactites and water dripping down. Historical Society got them out of the cave.

CC: where was the cave?

JL: one of the cellars of the MHC. I was thin in those days and when they didn't have a Rabbi before Rabbi… turned up I got beneath the floorboards of the Melbourne Hebrew Congregation and took all the records that I could find there to the State Library. So you'll find things like plans for a casting pen for the first shochets and all sorts of sundry things. The state library has them under the holding of the Australian Jewish Historical Society and they will dig them up or bring them from Ballarat where the old stuff is kept. You'll also find there the early minutes of the executive Council of Australian Jewry, which I also took when the Executive Council moved our offices and nobody cared, and I cared, so I rescued them.

But the cave must have had the minutes of the BD because I don't remember find them under the floorboards and I do remember going through them because I had to to write the book on Danglow.

CC: so those minutes are minutes of the dealings that they had…?

JL: Yes
CC: Minutes of what the actual dayanim were doing?
JL: Yes. I don't think they met more than once a month, if that, for many years. Danglow was from 1905 to 1948…

CC: He was at St Kilda
JL: St Kilda, yes.

CC: ok I think that gives me a good starting point to read and learn. Obviously speaking to people like yourself is far more valuable than books.

JL: There is one character I will refer you to and his name is Jeremy I Pfefer… he has an English background. There's an Anschel Pfefer, a journalist in Israel very well known. [Jeremy] is clearly very Orthodox and he has been through the minutes of the BD in London and studied their references to Australia. He is not very pleased with me I don't think I measure up to his standards but I haven't been through all the stuff he's been dealing with and I never got to see the minutes of the BD because they all said they didn't exist. He persisted and found them so he deserves a lot of credit. I don't know how you find him. I looked him up I couldn't find him, [there was] a lot about Anschel but nothing about Jeremy. I may have been looking in the wrong place I am sure Jeremy would be pleased to hear from you.

CC: so Jeremy lives here in Melbourne?
JL: no he lives in either London or Israel. I don't know how old he is. He did spend a few months in Tasmania and went through the convict records and so on. He didn't get in touch with me…

CC: thank you very much for these important leads.

JL: Pfefer next to Louis Waller would be the next person to search for.

CC: Why does Louis Waller have this knowledge? Was he involved with….

JL: No, I think he was a horrified bystander... during the dates of Rabbi Rapaport - he'll tell you.

CC: I will have to make a time with him

JL: He's very nice and very knowledgeable. He gave some lectures... he was the legal expert on artificial insemination, everything he said has come true… brilliant and he was the person Zelman chose to be his successor and beat his record.

CC: the youngest ever
JL: pretty terrific
CC: just want to say thank you very much it has been very illuminating
JL: I hope so
CC: it's slowly taking form in mind, I'm understanding it better.

10.3.8 Interview with Professor Waller

Interview with Professor Louis Waller, Professor of Law and member of the Melbourne Jewish Community, Melbourne on 11 September 2019 with Chaim Cowen

CC: This is Chaim Cowen here and I'm speaking with Professor Louis Waller at his home in Hartley Avenue. It's the 11th of September and the time is 7:06 p.m.

Just to put this into context I've met with the number of people over the past week; I met with John Levi and I met with Yossi Aron, both of them have giving me books in addition to their time so there is lots of reading to be done. I'm looking to learn from you about the history of BD in Australia. In particular one thing that John and Yossi weren't able to help me with was the Sydney BD and it's origins.

LW: I can't either. In some ways, although it is not the most satisfactory, is Hillary Rubinstein's book. Do you know her book?

(gets the book by Hillary Rubenstein, "Jews in Australia")

LW: Hillary's book covers the period from the beginning [of Australian Jewry] until after World War 2 and it contains various accounts of developments that occurred in Australian Jewry. It is my recollection that that book states that the first BD in Sydney was brought into being in 1906 which is late in the day because the first BD in Australia to my recollection was convened in Melbourne in about 1860. Perhaps the most overarching consideration or the foundation stone of the Australian Rabbinate and it's emanations was the almost take it for granted notion on the part of the Jewish Settlers who were both free men and people who had been released on licence, they came to Australia as convicts, their aegis was going to be the jurisdiction and ambit of activity of the chief Rabbi of the British Empire. The person who had that particular title was a chap called Herschel this goes back a long way, I think to Napoleonic times.

CC: In which country?
LW: In England

CC: He was the first chief Rabbi?
LW: I think he may have been all the way I'm not sure. This book is authoritative in that regard. Two people who made the biggest impact were father and son [Chief Rabbi] Nathan Adler and [Chief Rabbi] Herman Adler who had strong German Ashkenazi connections. They were graduates of yeshivot and seminaries in Germany. Then there was another particularly distinguished scholar in that era whose name was Hildesheimer who founded a seminary that carries his name which really continued its activities until the outbreak of World War 2 and has produced a number of distinguished Rabbonim. In Australia the most distinguished was Rabbi Porush. Have you heard of Rabbi Porush?

CC: I have a book he wrote…

LW: He wrote several books. He was the "Chief Rabbi" as he liked to call himself. Israel Porush, Rabbi of the Great Synagogue.

CC: He wrote the history of the Great Synagogue?
LW: And he wrote a memoir of his own family and the connections that he made here which I think is quite interesting from a socio-legal position. Particularly interesting I think, that the big developments in the establishments and maintenance and activity of a Beth Din that dealt with the whole gamut of matters with which Batei Din traditionally dealt with. The big works was *giyur* and *gittin*. *Agunot* were not really receiving the kind of attention that they have been in the last 30 or 40 years throughout the Jewish World, Australia included. One of the other characteristics that is particularly interesting of course is the 20th century Rabbonim. Rabbi Porush was the unchallenged Orthodox leader not just in New South Wales, he had an Australian reputation. He often represented the Australian Jewish community .

CC: Holding a formal overarching position?
LW: No there was no such thing. The same thing happened in Melbourne with the Melbourne Hebrew Congregation which was the principal congregation. The Melbourne Hebrew Congregation had many Rabbonim of significant reputation. One was Rabbi Dr Joseph Abrahams who, when a vacancy occurred in the Melbourne Hebrew Congregation in the late 1890s, was elected. He was appointed and then interestingly enough there is a well-documented story that he was regarded as the most likely successor of Rabbi Dr Joseph Hertz who was originally based in South Africa. And when I first came across this I was really surprised: he was a graduate of the Jewish Theological Seminary of America which was the Solomon Schechter conservative - Mesorati.

CC: Did they have also have an Orthodox track at the JTS?
LW: I don't know. I think the Jewish Theological Seminary in the last years was really English Style Orthodoxy in terms of *nusach* and other matters with one or two significant differences between it and the traditional Orthodox, going sort of from light grey to black. The two main differences as I remember them... Solomon Shechter was a very great scholar incidentally, and he was very involved in the Cairo *geniza* papers and was obviously a very considerable force in that body as you will witness there are a number of Solomon Schechter schools scattered throughout the English-speaking world both in America and in England. The story is as I said that Dr Abrahams was the hot bet to be the successor of Rabbi Hertz but in fact instead of him was appointed Israel Brodie.... Hertz was the chief Rabbi until sometime in the 40s.

CC: Brodie was appointed in place of Hertz?
LW: Yes

CC: He went to England?
LW: He was originally an Englishman… He became the Chief Rabbi. He was the Rabbi of the MHC just after World War One ended … Brodie came from a Newcastle family in England and his sister…

CC: What brought him out here?
LW: An appointment at the MHC

CC: He was the successor of Abraham's?
LW: Yes

CC: Where did Abraham's go?
LW: He retired.
CC: Retired to live in Australia?
LW: He lived here and is buried in the Fawkner cemetery in Melbourne.

CC: Abrahams was a runner for the Chief Rabbi of the UK but he didn't get it?

LW: Yes. The story is that he didn't get it because the council had legal legs - legal outside of the boundaries of Halakhah - it was recognised by statute. Anyway it's all there *(points to book)* and I can't speak with any particular knowledge or authority that isn't captured there. I don't think Hilary Rubinstein is the greatest historian in the world, but she is very meticulous in collecting and identifying the sources.

CC: So what I understand is that if you go all the way to the beginning you will have the London BD running the show and it is sometime sending delegates. You have [Rabbi] Aron Levy who came out in 1830 and convened a BD for an *aguna* case and apparently he also did a conversion and later on down the piece in the 1860s you have the MHC setting up a BD that was sanctioned by London which had certain jurisdiction based in Melbourne. And the rule there was that the Chief Rabbi of the MHC was the Av BD - that was in their constitution. That ran until 1979 or 80 when Caulfield Shule took it over. [Rabbi] Sholom Gutnick took it over and it moved from MHC to [become] a Caulfield Shule entity.

LW: I can't remember but it sounds right. Sholom Gutnick from that well known family and his brother Chaim, who was a very highly regarded darshan and public speaker was part of a large family of which one part was the Gutnick family and was also related to the Feiglin family that came from Eretz Yisroel where they had been doing agriculture to Shepparton, a country town here which

for a time had a Jewish community made up of these sorts of people which, although they didn't come out in the open until effectively after World War 2, were Chabad people. But Sholom and Chaim were Londoners and before WW2 broke out, Chaim went to Mir, the most famous Yeshiva in Poland. And he was one of the hundred or so *yeshiva bachurim* who held passports and got out of Poland before the war broke out and before the Soviet Union entered the war and they crossed Russia to Vladivostok. Some of them were lucky enough to get onto the last ships that we're taking passengers to Melbourne. Amongst those people were Chaim and Sholom Gutnick - I think Sholom was younger - he got his *smicha* I think in Lithuania and Chaim Gutnick was one of those who were lucky enough to get to Sydney. And they had a stepfather - I think their father had died - and Sholom Gutnick, whom I knew quite well, was more interested in general philosophy than Jewish learning and took a BA at the University of Sydney. He became the Rabbi of what was then the very young Caulfield Hebrew Congregation in about 1951. Chaim Gutnick on the other hand never took a secular degree but ultimately, and I don't know what his whole history was, he was appointed as the Rabbi of Elwood and he succeeded. And a most remarkable man who we knew well was Rabbi Dr Harry Freedman…

CC: He was at the MHC wasn't he? Did he moved from MHC to Elwood?
LW: No the other way around. He succeeded Brody when Rabbi Brody became the chief Rabbi. Brodie succeeded Herz. When Brodie left to become Chief Rabbi there was a bit of to-ing and fro-ing and Rabbi Freedman went first to Elwood he had a row with his congregation over a matter of a will but that is all in Yossi's book.

CC: What can you tell me about Rabbi Gurewitz?

LW: His name was Joseph Lipman. Rabbi Gurewitz was an *emeseh* Litvak from Vilna and he became the Rabbi of what was then a baby congregation called the Carlton Hebrew Congregation after WW1

CC: Was it called the Carlton United Hebrew congregation?
LW: Possibly yes. A very handsome shul was built in Carlton which has since been demolished sadly and that particular congregation is defunct in that it's not a Lonely Little Petunia there's a lot of them.

CC: The football team remains
LW: So far

CC: So he started an alternative BD is that right?
LW: Yes sometime in the 1930's

CC: To your knowledge was that the first alternate to the MHC BD?
LW: Yes. What would have been in existence before was the BD that had been established in Melbourne in the 1860s under the authority of the Chief Rabbi. As you can imagine there are a lot of personal strands interwoven into this fabric the relationship between the various Rabbonim and their Boards of Management and there were whopping great rows from time to time. But there was a separate BD and it's most significant manifestation was in regards to frozen kosher meat. There was a big firm of butchers here in Melbourne "The Smorgon brothers." The family still exists and are very very wealthy, they left meat for steel. And he *paskened* that the *din* was kosher meat had to be washed down every 3 days and therefore frozen meat was not acceptable even though it was a very profitable business. And there were refrigerated ships - the Argentine of course supplied an enormous amount of meat to Europe and on to Palestine.

CC: Do you know if he was involved in commercial matters?

LW: I am sure he was

CC: What makes you sure?
LW: Talk.

CC: Talk of whom?
LW: Gossip in the community. It was well known that some people took their [commercial] matters to the BD.

CC: But MHC BD would not do commercial matters is that right?

LW: I dont know enough. You would have to go through their files to ascertain what the story is.

CC: What about in Sydney? You mentioned that Rabbi Porush has written a book - is that the source to find the origin of the Sydney BD?

LW: It would be a place I would look to.

CC: Do you know if the current Sydney Beth din is related to that entity that existed them?
LW: I'm not an Australian Jewish historian…

CC: Do you know anything about the Adass community? They seem to run their own Beth Din…

LW: I know as much as anyone who was growing up in Melbourne at the time. Adass Yisroel began in a shop front in Brighton Road opposite the St Kilda Town Hall and its initial composition was of Jews from Germany and Austria - very much a Yekkish [community]. Its personality changed with the change of its congregants because it became a synagogue where is congregants came from Hungary or Czechoslovakia and its powerful influences were therefore from that particular neck of the woods. I don't know how it got into the kashrut business but what I do now that when Wendy and I, having married in England came immediately here to set up house, one of my misphacha said that there are a number of kosher butchers High St, St Kilda [number] 304. One was a *goyishe* firm that had a kosher branch called “Watkins” and I remember them well. In a little street of High Street quite near to the St Kilda Shule. We would buy meat from Watkins because it was convenient. It was the closest Kosher butcher. I was out of secondary school and going to university so this is in the early 50s. A majority of butcher shops we're not under the aegis of the Melbourne Beth Din [however] Watkins was, And so was one or two other shops in Carlton but the other butchers were under the aegis of the Adass Yisroel. That was probably because of the usual reasons, “you’re not frum enough” type of thing. But my mishpacha, she died a couple of days ago, she told Wendy my wife that the best butcher to go to was a fellow called Kramer and he was very much an Adass Yisroel butcher. Not surprisingly there has been a settling down and a weeding out. Now there are three kosher butchers - Solomons which is Chabad, Continental and Melbourne Kosher which is Adass.

CC: So the Melbourne BD and its origin: because still today it doesn’t do commercial matters… the Sydney BD have done that. Is that a different approach?

LW: There's one thing you may not yet have come across. I was talking to people over the weekend about this quite by chance. There was quite remarkable man called Michael Pitt - I don't know what is original name was. And he did what we would call today ‘mediation and arbitration’ with the approval of the parties who would appear before him and in circumstances where they would sign the necessary documentation required by arbitration legislation to give it legs so-to-speak. And he

did a great deal of commercial work particularly in respect of cases, quarrels and so on concerning the making of garments. Flinders Lane, or unfortunately as it was sometimes called Swindlers Lane, was the centre of a thriving, almost completely Jewish, manufacturing centre. To a certain degree there are still quite a few Jewish manufacturers who go there - I don't know who does that sort of work now…

CC: So who was Michael Pitt?
LW: A chap from Poland

CC: A religious man?
LW: I don't know. I never knew him I will tell you who does know. A number of people who can speak about him as someone they knew even though we're there was a big age difference is - do you know Ben Slonim?

CC: Remind, me, which slonim is that? I know Adam Slonim

LW: Adam Slonim is the son of Morry Slonim, who is the son of Yudel Slonim. There were 5 brothers and Yudel Slonim was a considerable lay figure. First in Carlton, the core of the traditional Jewish community in Melbourne and then in Elwood he was one of the founders of Elwood Hebrew congregation and here again Yossi Aron is your source he has written a little book on it - have you seen it about the Elwood Hebrew Congregation? It's worth a look.

CC: Okay. So when you were growing up, if two *frum* Jewish people had a commercial dispute where would they go?

LW: Some would have gone to Michael Pitt, particularly if it had to do with business. I really don't know anything chapter and verse I didn't have anything to do with these things. There are two matters I do know something about because I was involved and they are much more recent and they are to do with complaints that will levelled against the behaviour of the local Beth Din, of the Melbourne Beth Din. And those complaints arose out of non-commercial cases, particularly out of *giyur* but also out of gittin and this already takes us into the 1980s. If you go and search out the appropriate articles that were printed in the Australian Jewish News or in the paper that no longer exists the Australian Jewish Herald, there are comprehensive collections of both of these in the public library, in the State Library, you will see there was a very nasty both allegations…

CC: This was Shalom Gutnicks Beth din?

LW: He was the Av BD yes

CC: What was your involvement in those complaints?
LW: I was involved in the sense that a body called the Council of Orthodox Synagogues here in Victoria, which at the time was chaired by Romy Liebler who has now gone to live in Israel. You have heard about the Lieblers?

CC: Well my brother in law is Romys son

LW: So there you go.

CC: He was president of the COSV in the 80s?

LW: He was the president of the COSV and when these complaints were levelled the man who stuck his neck out in that regard was Rabbi Steven Link who became the Rabbi of the Kew Hebrew congregation long on the way down the slippery slope sadly and who is still around. How did I become involved? I became involved because complaints were leveled at the [BD] and the COSV decided to set up a committee to enquire into the form and contents of these complaints. The committee consisted of 3 people; of a lawyer called Leon Friedman who died some months ago - as a matter of fact I think his yahrtzeit is just now - he had a lot of involvement in the again uncertain-of-a-future kehilla called the North Eastern housed in *ekvelt* there (Doncaster) - he was a member. The second member was another solicitor who is still alive called Peter Cohen who was a former president of St Kilda Hebrew Congregation and I was there because I knew something about Jewish institutions and so on. We had statutory declarations made by a number of complainants who were all women about various pieces of what we would call today improper behaviour. Allegations that the Beth Din as a body had also behaved with no great propriety.

Then there was the notorious case of Mond against the Caulfield Hebrew Congregation. Have you heard of it?

CC: Yes - but that was not the Melbourne Beth Din though. That was an ad-hoc Beth Din. But none the less gave rise to judicial review

LW: That's right yes. And in Sydney, if we move away from that, there was this very recent case Ulman v LiveGroup and both of them received a great deal of unwelcome publicity not surprisingly. I didn't have anything to do with the second

CC: You were involved in Mond v Berger?
LW: No only as a fascinated onlooker.

CC: The severe case of impropriety in the 80s... (LW: it was earlier than the 80s) ...was that something that ultimately hit the media?

LW: It certainly hit the Jewish media

CC: Did that cause some sort of reform?
LW: Yes it did
CC: Was someone dismissed from the Beth din as a result?
LW: Not that I can recollect but what I did bring about was a lay oversight body. Although I'm not the person to talk to about that because I didn't get mixed in. But it has been functioning for a number of years.

CC: Yes since 2003 the COSV and the RCV oversee the Beth Din. That is obviously a number of years after the 80s.

LW: It took a while. There's a lot of written and otherwise recorded material around whether you can get your hands on it is another matter

CC: Ok well I certainly have my reading cut out for me. I think I have quite a few texts.

LW: When you had your candidature committee for which I was a member, your proposal, I made the observation that I thought it was very important as we say in Yiddish (quote in Yiddish) "see where the feet grow from." So start at the bottom. Then we have the current situation.

CC: Yes the context is obviously important and you have shed some light on that so I appreciate that.

10.4 APPENDIX D – PROCEDURAL FLAWS IN MOND V BERGER, THALER V AMZALAK AND LIVE GROUP V ULMAN

Procedural Flaw	**Paragraph in *Mond v Berger***	**Paragraph in *Thaler v Amzalak (No 2)***	**Paragraph in *Live Group v Ulman***	**Relevant section in the BDA rules**
Lack of internal appeals process		[8], [240]-[241]		s31
Lack of procedure to detect and deal with apprehended bias of a *dayan*	[56], [61], [66], [100], [117], [168], [233], [234], [235]	[58], [106]-[109], [166]-[167], [175], [198]-[205], [206]-208]	[75], [213], [217], [225], [227], [228]	s1, s5, s6
Lack of pre-hearing conference		[129], [138], [236]		s8
Lack of procedures concerning evidence		[122], [130], [230]-[234], [236]-[246]		s16, s18
No determination of points in issue	[353], [360]	[186]-[192]		s4
Arbitrator may not decide on matters beyond the arbitral reference	[39], [41], [72]; [117], [267], [271], [272], [276]			s4
Arbitrator using a language that is only understood by one party	[36]	[220]-[227]		s11
Incomplete record keeping of the proceedings	[143]	[9], [12], [57], [80], [105], [110], [112], [170]-[174],		s10, s32
Lack of procedural rules	[4], [72]; [156]	[184], [209]		All sections
Lack of sufficient detailed reasons for the decision in the award		[18], [19], [134]-[153]		s27
Lack of proper notice of proceedings		[104], [129], [138], [175], [177]-[178]		s1, s9
Issuance of a faulty award	[68], [72], [321], [335]			s27
Litigants lack of awareness regarding their right to representation		[206]-[208]		s12

10.5 APPENDIX E – ETHICS DOCUMENTATION

10.5.1 Information to Participants Involved in Research

INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH

You are invited to participate

You are invited to participate in a research project entitled "Reconciling the procedural rules of the Beth Din with their Australian legal context"

This project is being conducted by a student researcher Hyam Cowen as part of a PhD study at Victoria University under the supervision of Professor John Zeleznikow and Professor Daniel Sinclair.

Project explanation

I am studying the current procedure that has been used in Australian Batei Din, and assessing where it has fallen short of the expectations of the Australian legal system. My goal is to assist in greater compliancy at the Beth Din of Australia with Australian legal requirements and to ensure that going forward civil cases brought before the Beth Din are not overturned.

What will I be asked to do?

You will be asked to answer questions regarding Australian Beth Din practice and its integration with Australian law.

What will I gain from participating?

You will assist in the production of a thesis which will advocate for greater mutual accommodation between the Beth Din and the Australian courts.

How will the information I give be used?

I may include answers that you have given to questions in my thesis in terms of proposing potential solutions to some of the procedural issues that the Beth Din is facing in Australia.

What are the potential risks of participating in this project?

In the event that you say something that you don't want to be published in your name, please ensure that I am made aware.

How will this project be conducted?

I will be studying material available from Australia and overseas jurisdictions to get a sense of how the Beth Din is operating in Australia and what is being done overseas. I will also be interviewing key individuals whose knowledge may contribute to the study.

Who is conducting the study?

Hyam Cowen
8 Blanche St
Victoria, Australia

Any queries about your participation in this project may be directed to the Chief Investigator listed above.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001, email researchethics@vu.edu.au or phone (03) 9919 4781 or 4461.

10.5.2 Consent form for Participants Involved in Research

CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH

INFORMATION TO PARTICIPANTS:

We would like to invite you to be a part of a study into the procedures of the civil Batei Din operating in Australia and examining their consistency with the expectations of the Australian legal system.

CERTIFICATION BY PARTICIPANT

I, <name of interviewee>

certify that I am at least 18 years old* and that I am voluntarily giving my consent to participate in the study of

the procedures of the civil Batei Din operating in Australia and examining their consistency with the expectations of the Australian legal system being conducted at Victoria University by: Hyam Cowen

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by:

Hyam Cowen

and that I freely consent to participation involving the below mentioned procedures:

- Interview

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the researcher

Hyam Cowen
+61433308584

If you have any queries or complaints about the way you have been treated, you may contact the Ethics Secretary, Victoria University Human Research Ethics Committee, Office for Research, Victoria University, PO Box 14428, Melbourne, VIC, 8001, email Researchethics@vu.edu.au or phone (03) 9919 4781 or 4461.