Two Models of Alternative Dispute Resolution

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Introduction

Arbitration statutes enacted in the United States in the 1920s, on both federal and state levels, popularized arbitration as an alternate form of dispute resolution. Arbitration enabled litigants to avoid the long and costly process of trying their case in court. Instead they could designate a third party who would arbitrate their case. The arbitrator's decision would be binding and could be enforced in a court of law.

During the past 85 years, Jews in New York City made use of those arbitration statutes in two very different ways. One model, that of the *Jewish Conciliation Board* (and its predecessor), captured the imagination of the Jewish people in New York from the 1920s through the 1960s. The other model, that of *bet din*, is today the predominant method of dispute resolution for observant Jews in New York City.

In this article we discuss these two models of arbitration and analyze their strengths and weaknesses.

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Arbitration Boards

The Enactment of Arbitration Statutes. Prior to World War I, the judicial system in the United States had a hostile attitude toward arbitration. Following the war, however, the United States experienced a great upswing in economic activity, which led to an increase in business lawsuits and a significant backlog of court cases.

A solution was needed to relieve the pressure on the courts, and in response, New York in 1920 became the first state to enact a modern arbitration statute. This legislation recognized as binding an agreement by two parties to resolve their disputes by arbitration. The courts were now obligated to enforce an agreement to arbitrate just as they had always been obligated to enforce any other commercial agreement. In 1925 the Federal government enacted the United States Arbitration Act, eclipsing the state law and granting the same arbitration rights to all citizens of the United States.[1]

An arbitrator is not bound to follow the strict letter of the law in deciding cases, but is rather expected to use common sense and a general knowledge of business practices. That was made clear, for example, by the California Supreme Court in *Advanced Micro Devices, Inc. v. Intel Corporation* (9 Cal. 4th 362, 374–75 (1994)): "Arbitrators, unless specifically restricted by the agreement to follow legal rules, may base their decisions, upon broad principles of justice and equity…."

Decisions of arbitrators are final and can be enforced in court. If an individual went to court to try to overturn a verdict, the court would refuse to review the merits of the case,[2] and it is inconsequential that the court might have decided differently from the arbitrator. There are, however, certain behaviors of the arbitrators that may cause their decision to be vacated. For example, if the court finds gross misbehavior by the arbitrators, such as corruption, fraud,

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1 "[I]n the run-of-the-mill case, the role of state law in arbitration practices can only be termed marginal—and, as federal common law is spun out still further, that role can only diminish." Rau, Alan Scott, AAA, *Handbook on Commercial Arbitration*, p. 433. See also Stephen K. Huber & E. Wendy Trachte-Huber, ibid. p. 16–17.

2 There are some exceptions to this rule. For example, if the court felt that an arbitrator's agreement shortchanged the welfare of a minor, the court would vacate the arbitration agreement. More on this later.

undisclosed conflict of interest, or refusal to hear pertinent evidence, it can vacate the ruling of the arbitrator.[3]

Alternative Dispute Resolution. Alternative Dispute Resolution ("ADR") refers to any method of dispute resolution other than the secular court system.

To understand the primary types of ADR, it is important to differentiate between arbitration and mediation. Arbitration is the process whereby two or more parties approach a third party to decide on the relative merits of their case. Before the arbitrator agrees to arbitrate, the two parties generally sign a statement that they agree to abide by the arbitrator's decision. In mediation, by contrast, the mediator sits with the parties to the dispute and helps them work out a solution. The mediator can suggest various compromises but cannot force any solution on the parties.

To compare the various forms of dispute resolution, it helps to view them on a continuum from most control—the best method—to least control, the worst method. When a dispute arises it is always best if the disputants can resolve their differences without involving a third party. That is obviously the best way to resolve a dispute since it gives the disputants maximum control.

Next on the continuum is mediation, whereby the parties to a disagreement work with a mediator to work out a solution agreeable to all the parties.[4]

Following along this line we come to arbitration. With arbitration there are still the benefits of avoiding the long delays and costly fees associated with a court case. However, the parties to the dispute must place their fate in the hands of an arbitrator, who will decide the case for them.

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3 New York statute C.P.L.R. 7511 sets forth a variety of factors that may cause a court to invalidate or modify the ruling of an arbitration panel.

4 Many states require families to try mediation before family court. See, e.g., West Virginia http://www.state.wv.us/wvsca/familyct/cover.htm, "One of the most important changes to the new family court system is the requirement that parents who are not able to agree on shared parenting responsibilities must attempt to mediate their dispute."

Bet din, as practiced in the United States,[5] is a form of arbitration. In fact, almost no *bet din* in America will hear a case unless the litigants first sign an arbitration agreement. Signing an arbitration agreement at *bet din* ensures that the verdict of *bet din* is enforceable in a court of law. *Bet din*, however, is further on our continuum and closer to a court system in that a *bet din*, unlike an arbitration board, can issue a *hazmanah*, a religiously significant demand to appear before it.

Finally, the dispute resolution where the litigants have the least control is the court system. When a court issues a subpoena, the litigant must attend. The litigants often play only a minor role as their respective lawyers battle it out in court. And at the "end of the day" their fate will be decided for them.

American Arbitration Association. Following the enactment of the arbitration statutes in the 1920s, various organizations were established to help the business community resolve its disputes through arbitration: in 1922 the *Arbitration Society of America*, in 1924 the *Arbitration Foundation* and shortly thereafter in 1925 the *Arbitration Conference*. Finally, in 1926 these three organizations merged into the *American Arbitration Association (AAA).*

Today the AAA administers approximately 150,000 cases annually with its panel of approximately 8,000 arbitrators and mediators. The AAA also employs more than 700 people and has a board of directors of 90-plus people.[6] Its mission is stated as:

> "The AAA is dedicated to the development and widespread use of prompt, effective, and economical methods of dispute resolution. As a not-for-profit organization, our mission is one of service and education.
>
> "We are committed to providing exceptional neutrals, proficient case management, dedicated personnel,

5 *Bet din* in such countries as Israel, France and Great Britain derive their power from the government and can thus subpoena and enforce their decision with the full power of the state. However, the United States and other Western countries provide not only religious freedom but also freedom from religion.

6 The AAA is the largest arbitration organization in the United States. JAMS, established in 1979, is another example of a quality arbitration organization.

> advanced education and training, and innovative process knowledge to meet the conflict management and dispute resolution needs of the public—now and in the future."[7]

A review of the policies implemented by the AAA reveals why it has become a successful world-class organization that has earned the trust and confidence of the business community:[8]

- Neutrals (i.e., those who arbitrate or mediate) are bound by a strict code of ethics.
- Neutrals are obligated to keep confidential any information disclosed at a hearing.
- Neutrals are obligated to disclose any relationship that could potentially be viewed as a conflict of interest.
- Mandatory training is provided to ensure the competency and quality of the neutrals.
- Independent accountants audit their financial records and the results are made available to the public.
- Fees for services are clearly articulated and its rules are available to the public. Furthermore, the AAA has a fee-reduction policy for parties who cannot afford to pay.
- A panel of arbitrators with consumer expertise serves pro bono on consumer cases. When no pro bono arbitrator is available, suitable arbitrators serve for a reduced fee.
- Parties, clients, and neutrals may contact their case manager, supervisor, or vice president to address any complaints or provide feedback on service.
- Additionally, the AAA periodically surveys parties on discrete caseloads and attendees of educational programs to gather feedback on its service and neutrals.

Jewish Conciliation Board of America.[9] In 1919 the *Jewish Court of Arbitration* was established[10] by Mr. Louis Richman and Rabbi Samuel Buchler, and its first session began on February 18, 1920.[11]

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7 AAA, *Public Service at the American Arbitration Association*, p. 3.

8 See the AAA Web page: http://www.adr.org/sp.asp?id=22036

It was founded to provide a forum where Jewish people, particularly new Americans, would feel comfortable airing their grievances. They could, if need be, speak in their native tongue, which was often Yiddish. Furthermore, these new American Jews wanted to avoid the secular court system, which they viewed with a sense of trepidation, and in which they feared causing a *ḥillul Ha-Shem,* desecration of God's honor.

Despite the good intentions of the *Jewish Court of Arbitration,* its first decade was plagued with internal problems. That led Rabbi Buchler to disassociate himself from it, and in 1929 Louis Richmond, Executive Secretary, asked Dr. Israel Goldstein, the founder of Brandeis University, to join the organization. In 1930 Dr. Goldstein became its president "out of a deep concern for social justice and for Jewish dignity" (Goldstein 88).

Shortly afterward the name changed to the *Jewish Conciliation Court* and in 1939 the name changed again to the *Jewish Conciliation Board of America* (JCB). That final change in name was to make it clear that the tribunal had no pretensions to being a court of law and that its purpose was conciliation even more than adjudication (Goldstein 87–89).

In its first 50 years of existence, the Board solved over 27,000 cases.[12] Originally most cases related to rabbis, fraternal orders and

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9 I am indebted to the *Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati Campus, Hebrew Union College, Jewish Institute of Religion*, and especially to Vicki Lipski, Archives Assistant, for making available, copying and forwarding selected archived documents of the JCB.

10 Hurwitz, in 1930, lists 14 Jewish arbitration courts then in existence and another three in the planning stages.

11 Court sessions were originally held in the Grand Jury room of the New York Criminal Court building at 264 Madison Street. After the Madison Street Court House was closed down (ca. 1939), the sessions were held in the Jewish Educational Alliance building at 197 East Broadway.

12 Hurwitz provides a detailed breakdown of cases filed at the New York Jewish Court of Arbitration for the approximate ten-year period from January 1920 – July 1929: 1,076 cases were filed but failed to come to trial. 445 cases were tried and decided. In 25 cases the defendant refused to abide by the award and was given the arbitration agreement for use in civil court. That relatively high incidence of refusing to abide by the court's decision is reflective only of the early years of the Board when it was mismanaged. In 1930, after the Board was reorganized it changed for the better. In a press release issued by the JCB in early

burial societies. In the later years, the caseload shifted more to family matters, marital problems, business conflicts and disagreements among organizations.

Following is the description of two cases that came before the JCB. The first involves a practice that was common in the 1930s and 1940s but that seems a bit strange to us today (Goldstein 128).

> "A sexton, upon being hired by a congregation, would pay them a certain sum of money, usually about $2,000. On leaving his post, he would receive a similar amount from his successor.[13]
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> "A sexton approached the board with the complaint that his congregation refused to return the $2,000 which he had paid when he was first engaged. He was now seventy-one years old and unable to continue working.
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> "The president explained that the sexton was obliged to find a replacement who could then pay him the $2,000. The congregation would not assume the responsibility.
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> "The sexton testified that it was specifically the well-known attitude of the congregation which prevented him from finding a successor. No other sexton would agree to work for them.
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> "The rabbi on the panel, announcing the decision of the judges, said that he was aware that this was not the only congregation which resorted to such dubious practices. 'Every decent person feels a sense of shame that disputes

1945 it states, "Within the last few years practically every decision was accepted and carried out by the parties, and during the year 1943, not a single case had to be brought to the civil court to enforce our awards." The number of cases tried each year by the Board rose significantly. Weinberger, writing in 1953, states, "The Board handles about 500 cases a year but most of these do not get to the hearing stage. Most of these disputes are settled by bringing all sides into the Board where settlements are made. From 75–100 cases are aired formally before the board each year."

13 Weinberger explains, "A sexton of a synagogue, because he handles much of the money of the church, is often asked to post security in case he defaults in his duties or makes off with some of the money. Many times the synagogue will take this money he has deposited and use it to pay its running costs."

> of this kind must be brought here. The good name and honor of the Jewish people would suffer, were this type of case to come before the municipal courts. We should be grateful that we have a Jewish court to handle such cases.'
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> "The judges ruled that a successor should be found within four weeks, either by the defendant congregation or by the plaintiff. If this effort proved unsuccessful, the congregation would become liable for the repayment of $2,000 to the plaintiff."

The second case resonates very clearly in our modern ears (Goldstein 140–141).

> "Mrs. S. testified before the Board that she had paid $300 to a Yeshivah as tuition for her son. Although she had asked to be allowed to pay in installments, the director told her that the money would have to be paid in one sum. He gave her an address where she could borrow the amount. During the school year, her son had been suspended and she was informed that the tuition fee would be refunded. Thus far, the Yeshivah had failed to make any repayment.
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> "The director's brother, who was also the boy's teacher, said that he had been a troublesome student, that he refused to study, used profane language, and had broken a window. The boy had been suspended for a week, after which the parents refused to send him back to school. When the lad was questioned, he denied the accusations and complained that the other boys teased him. His mother added that the conditions at the Yeshivah were so bad that she had decided not to send her son back.
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> "The judge ordered the Yeshivah to refund the tuition.
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> "After this decision had been announced, another teacher at the school came forward and told the judges that the description given of the boy's behavior had been false. He had found him to be a conscientious, polite student. When the director's brother asked the Board whether the Yeshivah might be permitted to refund the tuition in installments, protesting that the school could not afford to pay the entire sum, the judges advised him to borrow the money from the same source that had been recommended to the plaintiff."

Each arbitration panel included a businessman, lawyer and rabbi (Orthodox, Conservative or Reform): the rabbi for his knowledge of Jewish Law, the lawyer for secular law, and the businessman for the practical side of the case. Panelists were all volunteers,[14] and the mediation was not rigidly structured.

The JCB functioned throughout in such a manner as to win the confidence of the Jews who turned to it for assistance. When the verdict rendered by the judges was unacceptable to one of the parties, the judges often took the time to speak to the party, to convince them of the justice of their decision.

The litigants were not permitted to have lawyers with them at the hearing.[15] Sessions were often held in the evening so that litigants would not be forced to lose a day's pay (Goldstein 89–90).

The conciliation board did not operate as a *bet din*. In the words of Goldstein, "We had no ecclesiastical jurisdiction, but the rabbi's presence was helpful in applying the spirit of Jewish law" (Goldstein 89).

The JCB was successful in getting good publicity, an advantage that helped reinforce the community's trust in its organization. An example of that publicity was the publication of three books describing the JCB.[16] In 1954 the JCB's thirty-fifth anniversary was the subject of an article by Eleanor Roosevelt in the New York World-Telegraph.

A play entitled "Court without a Gavel" was presented by NBC in "The Eternal Light" series. Also, over a period of six

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14 Not only were the judges all volunteers, many of them actually made contributions to the JCB. Address of Louis Richmond to the Flushing Jewish Center, p. 15.

15 Bringing a lawyer to *bet din* is viewed negatively by halakhah. (See Avot 1:8, Ketubot 52b, 86a, Rambam *Hilkhot Sanhedrin*, 22:10. For a detailed discussion see Broyde, "On the Practice of Law According to Halacha" *Journal of Halacha and Contemporary Society*, Number 20, (1990) p. 6, n. 2.) Also the JCB wanted to hear the testimony directly from the litigants before their attorneys could coach them in how to phrase their arguments. Today, however, a judge would vacate an arbitration decision if a litigant were not permitted to have a lawyer at the hearing. Thus JCB's policy changed. In an address before the Flushing Jewish Center in 1952, Louis Richman states, "no attorneys are present—although they may appear, if they so desire."

16 See Buchler, Yaffe and Goldstein.

months, radio station WEVD broadcasted a series of talks about the JCB entitled "Behind the Scenes of the Jewish Court."[17]

Many articles about the JCB appeared in the Yiddish newspapers The *Forward*, the *Morning Journal* and the *Day*. In addition, on August 24, 1962, Martin Tolchin wrote a sympathetic report in The New York Times about the JCB entitled "Jewish Family Problems Are Settled Out of Court." The article noted that "The board's work has been praised by such legalists as Supreme Court Justice William O. Douglas and such humanists as the late Ernie Pyle."[18]

Why the JCB succeeded. The Jewish Court of Arbitration got off to a poor start. During its first ten years, quite a few of its litigants refused to accept its decisions and appealed them in court. After Israel Goldstein became its president, however, it became an honest, efficient and well-regarded institution.

For an organization to be successful, it helps to have a leader who believes in the cause and devotes his life to it. Israel Goldstein, its president from 1930 to 1968, was indeed such a person. His resume read like a listing of the important Jewish organizations of his time.[19] Yet although he was busy with many organizations, he felt most strongly about his role in heading the JCB.

Furthermore, he was able to use his clout and prestige to convince others of the importance of the JCB, and was successful in

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17 Goldstein address on March 1, 1950.

18 I was amused when I read the following statements in the same New York Times article: "It is a descendant of Beth Din, the religious courts in which European Jews were allowed to resolve their own differences. *Some of these courts are still believed to be in existence.*" (Emphasis added).

19 "…Rabbi Emeritus of Congregation B'nai Jeshurun…President of the Synagogue Council of America, American Jewish Congress, Zionist Organization of America, Jewish National Fund of America, Chairman of the United Palestine Appeal and Cochairman of the United Jewish Appeal, Vice President of the World Jewish Congress and Chairman of its Western Hemisphere Executive, Chairman of the World Conference of General Zionists, and as a member of the Jewish Agency Executive and its Treasurer in Israel 1948–1949…" (The back inside of the dust-jacket of Goldstein's book.)

getting hundreds of people to volunteer their time to act as jurists.[20] Serving on the JCB was viewed as a privilege, and was an opportunity desired by the important and respected people of the Jewish community. Those prestigious judges thus gave the community and the litigants the confidence that they were being judged by the finest and brightest that the Jews had to offer.

Also, the JCB was not an ad-hoc board serving the needs of a narrow group of people. Rather it was, in a sense, a "sitting court" that served the needs of all Jewish New Yorkers[21] in a timely and efficient manner.[22]

Appearing before a panel of three rabbis as in a *bet din* can be an intimidating experience. When, however, one of the people on the panel is a businessman, the litigants are more comfortable that their motives, decisions and business actions will be understood.

By barring attorneys, the litigants were more apt to give an honest accounting of their side of the case. There was no lawyer standing behind them and telling them what to say.

The JCB was a non-coercive institution. It would send the defendant an invitation to attend, but he could refuse without any legal, religious or social consequences. The only motive that compelled one to appear before the JCB was a desire to resolve the dispute in an equitable manner.

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20 For a list of officers, members, board of directors, volunteer judges, consultants and patrons see Goldstein, 244–251.

21 When Louis Richman, the executive secretary of JCB, was asked, "…does any particular group of Jews sponsor the Jewish Court?" He answered, "No, not at all…It is an organization sponsored by every shade of Jewry—Orthodox, Conservative, and Reform. That's what makes it so thoroughly fair and representative of our people—it belongs to all and is respected by all" (American Jewish Archives). Yet Weinberger writes, "Like the Beth Din, the type of person who will appear before the Board has a Jewish problem which he wants resolved. He will not, however, be a very Orthodox Jew of the real "old school." By that I mean he will not be a strict observer of the Mosaic Law. The latter will take his dispute to a Beth Din, the board with its particular make-up being quite irreligious for him."

22 For example, of the 96 cases tried during 1928, the average time from date of filing of complaint to date of trial was 27 days. The decision was on the same day as the trial (Hurwitz p. 4).

Best of all, for those least able to afford the luxury of American justice, the JCB was free to any Jew regardless of religious denomination, affiliation or lack thereof.

Why the JCB ceased to exist. In 1981 Israel Goldstein published his book "Jewish Justice and Conciliation" documenting the history of the *Jewish Conciliation Board of America* from 1930 to 1968. Although the JCB would continue to function for another five to ten years, until about the mid 1980s we never hear from it again.[23] What was it about the board that caused it to burn so brightly, and then to suddenly disappear?

To understand the dynamics of the JCB, it is important to understand the two classes of Jews who encountered each other at the board: the judges and those who were judged.

On the one hand were the volunteers, patrons and all those who meted out justice. Those were second- and third-generation American Jews who had already "made it" in this country. Yet they were still anchored to their roots and familiar with the culture and religion of their grandparents. We call those people the "Americanized Jews."

On the other hand we have the new Jewish immigrants who spoke Yiddish, were poor, and clung to various aspects of their faith and eastern European culture. Those people came to the JCB to be judged, and it is those people whom we call the "New Jewish Immigrants."

It was thus the "Americanized Jews" who created the JCB as a social service organization to help the "New Jewish Immigrants."[24] As a side benefit, by keeping the "New Jewish Immigrants" out of

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23 Despite various email requests and telephone conversation with the *Jewish Board of Family and Children's Services*, the organization that took charge of the JCB in the late 1970s, I was unable to find out the precise year in which it took over JCB nor the year that JCB ceased to exist.

24 Goldstein's hints at this: "…it gave me an opportunity of being helpful not only to Klal Yisroel, but also to "Reb Yisro'el"… (p. xxiii.) "The Jewish Conciliation Board functioned throughout in such a manner as to win the confidence of those Jews, mostly immigrants…" (p. 89). "Many would talk their hearts out in their own *Mamme-loshen*, Yiddish" (p. 89). "…for the convenience of persons who could not afford to lose a day's pay" (p. 90).

secular court, the "Americanized Jews" kept the spotlight off the immigrants and prevented it from reflecting back onto themselves.

Unlike the *American Arbitration Association*,[25] the JCB was never meant as a solution for the "Americanized Jews." They would resolve their disputes the way all other Americans resolved theirs.

As the years went by and the descendants of the "Americanized Jews" assimilated and the descendants of the "New Jewish Immigrants" became successful, the need for the JCB diminished.

What about the new Orthodox Jewish immigrants who flooded the shores of this country after World War II? Didn't they also have a need to have their disputes resolved cheaply and efficiently, away from the hostile and unfriendly secular courts? Part of the answer is that many of the religious Jews who came to this country after World War II did not come here to leave their culture and religion behind. These were people who were driven out of their homes and wanted only to recreate what they once had in Europe, to transplant their *shtetle* and its warmth onto American soil. They would rebuild their *shuls,* their schools and their *gemakhs* (charitable organizations), and they had no need for a JCB. They would resolve their disputes as their parents and grandparents did before them, in a local and *heimish* (culturally familiar) *bet din*.

Another reason the JCB ceased to exist is that when Goldstein retired, the JCB lost its strongest advocate. There were good people who stayed on, but the all-consuming passion and the dedication of Goldstein were no longer there.

Also, the JCB was an organization run by Orthodox, Conservative and Reform Jews. Israel Goldstein, its president for 38 years, was a Conservative rabbi. Julius Mark, who succeeded him, was a Reform rabbi. Moses Hyamson and Leo Jung, vice presidents, were both Orthodox rabbis. It was the era that the Synagogue Council of America (1926–1994) flourished, an organization comprising rabbis of all three streams of Judaism.

The Synagogue Council of America is now gone, and so too is the JCB. Both, to some extent, are casualties of the dynamics that today prevent cooperation among different Jewish denominations.

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25 "The AAA includes ADR clauses in its own contracts with vendors and resolves its disputes using a variety of conflict management processes." http://www.adr.org/sp.asp?id=22036.

Halakhic Overview of Arbitration and Mediation

Halakhah forbids Jewish disputants from taking their case to a secular court. That applies even if the law of the secular court in a particular case is the same as the Jewish law.[26] Furthermore, the prohibition applies even if both parties agree to adjudicate their dispute in a secular court.[27] Note that although halakhah refers to those forbidden courts as courts of עובדי כוכבים, idol worshippers, nevertheless, when halakhah discusses secular courts it makes no distinction between those of idolatrous societies and those of non-idolatrous societies.[28]

Midrash Tanḥuma[29] is one of our earliest sources to discuss the prohibition against resorting to a secular court. First it proves that it is forbidden to adjudicate disputes in a secular court even if the court's ruling would conform to *halakhah*:

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26 ותניא, היה ר"ט אומר: כל מקום שאתה מוצא אגוריאות של עובדי כוכבים, אע"פ שדיניהם כדיני ישראל, אי אתה רשאי להיזקק להם, שנאמר (שמות כ"א) ואלה המשפטים אשר תשים לפניהם, לפניהם ולא לפני עובדי כוכבים, דבר אחר:לפניהם ולא לפני הדיוטות. (גיטין פח ב)
כל הדן בדייני עכו"ם ובערכאות שלהן אע"פ שהיו דיניהם כדיני ישראל הרי זה רשע וכאילו חרף וגדף והרים יד בתורת משה רבינו שנאמר ואלה המשפטים אשר תשים לפניהם לפניהם ולא לפני עכו"ם לפניהם ולא לפני הדיוטות, היתה יד העכו"ם תקיפה ובעל דינו אלם ואינו יכול להוציא ממנו בדייני ישראל יתבענו לדייני ישראל תחלה, אם לא רצה לבא נוטל רשות מבית דין ומציל בדיני עכו"ם מיד בעל דינו. (רמב"ם הלכות סנהדרין כו:ז)

27 אסור לדון בפני דייני עובדי כוכבים ובערכאות שלהם, אפילו בדין שדנים בדיני ישראל, ואפילו נתרצו ב' בעלי דינים לדון בפניהם, אסור. וכל הבא לידון בפניהם, הרי זה רשע, וכאילו חרף וגדף והרים יד בתורת מרע"ה. (שלחן ערוך חושן משפט כו:א)

28 See for example *Teshuvat ha-Tashbetz* 4:6 that the injunction against secular courts applies to those of Muslim societies as well. See Krauss p. 37, note 6 for a detailed discussion of this issue.

29 לפניהם, ולא לפני עכו"ם. מנין לבעלי דינין של ישראל שיש להם דין זה עם זה שיודעים שהעכו"ם דנין אותו הדין כדיני ישראל שאסור להזדקק לפניהם? תלמוד לומר אשר תשים לפניהם, לפני ישראל ולא לפני כותים. שכל מי שמניח דייני ישראל והולך לפני עכו"ם כפר בהקדוש ברוך הוא תחלה ואחרי כן כפר בתורה שנא' (דברים לב:לא) כי לא כצורנו צורם ואויבינו פלילים, משל למה הדבר דומה לחולה שנכנס הרופא לבקרו אמר לבני ביתו האכילוהו והשקוהו כל מה שרוצה אל תמנעו ממנו כלום. נכנס אל אחר אמר לבני ביתו הזהרו שאל יאכל דבר פלוני ואל ישתה דבר פלוני. אמרו לו לזה אמרת לאכול כל מה שהוא רוצה ולזה את אומר אל יאכל? אמר להן החולה הראשון אינו של חיים לפיכך אמרתי להם אל תמנעו לו כלומר בין יאכל ובין לא יאכל ימות, אבל זה שהוא של חיים אמרתי אל יאכל דבר פלוני שלא יכביד את חוליו. וכן חוקות עכו"ם שנא' (ירמיה י) כי חוקות העמים הבל הוא וכתיב וגם אני נתתי להם חוקים לא טובים ומשפטים לא יחיו בהם (יחזקאל כ) אבל לישראל נתתי להם מצות וחוקים טובים שנא' (ויקרא יח) ושמרתם את חקתי ואת משפטי אשר יעשה אותם האדם וחי בהם. (מדרש תנחומא (ורשא) פרשת משפטים סימן ג' ד"ה (ג) ואלה המשפטים).

> *"Before them*" (Exodus 21:1), but not before idolaters. How do we know that if two Jewish litigants have a dispute and they know that the idol worshippers judge such a case similarly to Jewish law that one is nevertheless forbidden to be judged by them? It states, "*That you should place before them,*" before the Jews but not before *kutim.*[30]

Tanḥuma now gives two reasons why a Jew may not resort to a secular court:

> [31] For whoever forsakes Jewish judges and goes before idolaters he first denies God and afterwards he denies the Torah as it states (Deuteronomy 32:31), *Is not their rock like our Rock? And [now] our enemies judge us.*[32] To what is this comparable? To a doctor who visits a sick person and instructs the household, "Let him eat and drink whatever he wants. Hold back nothing." He enters [the house of] another [sick person] and he instructs the household, "Be careful not to let him eat such and such, nor drink such and such." They asked him, "To the first you said, let him eat whatever he wants, yet the other you instructed not to eat?" He answered them, "The first sick person [will soon] no longer [be] with the living. I therefore said to hold nothing back for whether or not he eats he will soon die. But for the other who is alive I instructed that he not eat certain foods so as not to exacerbate his condition."

The parable alludes to the thought process of a confused Jew who notices that another nation has laws that are different from his own. First he mistakenly considers those other laws as having

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30 See parallel source in *Gittin* 88b.

31 We split the *Tanḥuma* at this point although the word שכל seems to imply that what follows defines what preceded it. We do that based on three reasons: 1. The *beraita* in the first unit deals with a very narrow case in which a particular Jewish law is <u>similar</u> to a non-Jewish law, while the parable in the second focuses on the <u>difference</u> between Jewish and non-Jewish law. 2. No other source quotes those two units together, and 3. In מדרש תנאים לדברים פרק טז פסוק יח the midrash of our second unit reads similarly, ...ולא עוד אלא שכל המניח and in that context the word שכל is definitely not an elaboration of our *baraita.*

32 Our understanding of the parable implies a reading of the biblical verse that is different from the usual translation, "*For not like our Rock is their rock—yet our enemies judge us*" (ArtScroll, ibid.).

originated from that nation's god. After all, כי לא כצורנו צורם, *Is not their rock like our Rock?* He has thus denied the unity of God (כפר בהקדוש ברוך הוא תחלה). Second, since the laws of that nation are more lenient, he subjects himself to them, and ואויבינו פלילים, *our enemies rule over us*. He has thus also denied the Torah (ואחרי כן כפר בתורה). Those two rebellious actions are alluded to by both Rambam and *Shulḥan Arukh* as חרף וגדף and והרים יד בתורת משה רבינו.

Tanḥuma then explain that there is really only one God and that He created two sets of laws, one for the Jewish people (the laws of the Torah) and the other for everyone else (the seven Noahide laws). The set of stringent laws he gave to the Jewish people for our own benefit (e.g., to refine us). To the other nations He mandated only a minimal code.

We have thus established two reasons we may not resolve our disputes in a secular court: 1. It would imply that we recognize a multiplicity of gods: כפר בהקדוש ברוך הוא תחלה,[33] and 2. It would imply that our laws are inferior to those of the other nation: ואחרי כן כפר בתורה.[34]

In any case, based on the first part of the *Tanḥuma*, the prohibition against resorting to a secular court is clearly established, and when a Jew does so he is in violation of " אשר תשים לפניהם, לפני ישראל ולא לפני כותים." The definition of court is:

> A court [of law] is an official, public forum which a sovereign establishes by lawful authority to adjudicate disputes, and to dispense civil, labour, administrative and criminal justice under the law (Wikipedia).

To paraphrase, a court of law is an institution of the state that uses the laws of the state to, among other things, adjudicate disputes. Now since arbitration is generally not done by the court system of the state[35] but rather by a public corporation (for example the AAA), and furthermore, arbitrators are not obligated to rule based on the

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33 וכאילו חרף וגדף (רמב"ם וש"ע שם.) כשאויבינו פלילים זהו עדות לעילוי יראתם. (רש"י משפטים כא:א).

34 והרים יד בתורת משה רבינו (רמב"ם וש"ע שם).

35 We are specifically excluding arbitration that is done within certain small claim courts of many states including New York.

law of the state,[36] therefore arbitration should not fall under the prohibition of resorting to a secular court. There are threfore those who believe that any secular arbitration is permissible.[37] We will now analyze different permutations of arbitration.

Arbitration by a Jew who decides based on "common sense." It is widely accepted that two Jewish people may ask a third to mediate or arbitrate their dispute. In fact, there are some very explicit statements that permit this, such as that of R. Akiva Eiger.[38] In later responsa regarding arbitration in the State of Israel, we also have rulings from R. Shlomo Dichovsky[39] and R. Eliezer Waldenberg specifically allowing such arbitration.[40]

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36 See, for example, Advanced Micro Devices, 9 Cal. 4th 362, 374–5 (1994) mentioned above. See also Bressler p. 115 who cites the committee on Arbitration of the Association of the Bar of the City of New York: "The arbitrator need not apply substantive principles of law. The arbitrator is not bound by evidentiary rules; he need not give reasons to support his ultimate determination and his award is not subject to judicial review for errors of law or fact. The arbitrator, free from rules of law, may decide solely on the equities of the case."

37 See, for example, Michael J. Broyde, p. 127. "Ideally such mediation or arbitration would take place under the direction of a Jewish court (*beit din*) or even a panel of lay Jewish arbitrators, although both mediation and arbitration are certainly valid (i.e., not prohibited by the rules against Jews using secular tribunals) under the direction of secular arbitrators." See his note 3 ibid. for the different opinions of *aḥaronim* on this issue.

38 סי' ג' ה"א והם דנים. נ"ב בשו"ת מגן גבורי' סי' ה' כ' בשם הרש"ך ח"ב סי' רכ"ט על מחלוקת בין תובע לנתבע א' אומר שרצונו להתדיין בד"ת וא' אומר שאין לו להתדיין אלא בפני אחרים שכך הוא המנהג במקום שנעשה העסק הדין עמו כיון דבמקום שנעשה העסק יש מנהג להתדיין כפי דרך הסוחרים ולא כפי ד"ת מנהג מבטל הלכה והביא ההיא דאסטימת' עיי"ש. (חידושי רעק"א חושן משפט ג).

39 The Rabbinical Court of Ashdod (*Piskei Din Battei din Harabaniyim* 13:330–335) then under the leadership of R. Shlomo Dichovsky.

40 ולכאורה היה אפשר לדמות השאלה לפי מה שמבואר בגליון הגאון ר"ע בחו"מ סי' ג' וכן שמה בפ"ת מביא בשמו בשם שו"ת מגן גבורים ובשם מהרש"ך שאם מנהג המקום ללכת לדון אצל אחרים ולא לפי הבי"ד אז יכול צד אחד לטעון הכי והדין עמו כי לכתחילה הסוחרים דעתם היא ללכת אצל אחרים לדין אז מנהג מבטל הלכה ומותרים ללכת אצל אחרים, וכן מצאתי אח"כ גם בשד"ח מערכת המ"ם כלל ל"ח מביא בשם משנת ר' אליעזר בח"ב ד' כ' אות מ"א אם התובע או הנתבע רוצה להתדיין בפני הסוחרים במקום שנעשה המקח וממכר, נוהגים לפי מנהג הסוחרים שמנהג מבטל הלכה, מהרש"ך ח"ב רכ"ט והביא דבריו הכנה"ג חו"מ ח"א סי קנ"ח, ועיין מטה שמעון ריש סי' כ"ז עכ"ל, נראה מכל הנ"ל כי אם לוקחים דירה בבית

Based on the above, a Jewish arbitration board such as JCB is clearly permitted by halakhah to arbitrate based on "common sense."

Arbitration by a gentile who decides based on "common sense." Using a non-Jewish arbitration board without stipulating that it is to adjudicate based on the law of the land is also permitted by most *poskim*.

The *Shulḥan Arukh* 22:3 states that if a person accepted that a gentile preside over his case, his statement of such acceptance is meaningless, even if he accepted that with a *kinyan*. The Mordechai is then quoted that if the case has already been tried, the decision is binding.[41]

The Shach sees those two statements as contradictory. If one may not agree to be judged by a gentile, then how can his decision be binding? The Shach then makes a distinction between the statement of the *meḥaber,* which applies to a case where the person said, "I accept a secular court," and the case of the Mordechai, when a person says, "I accepts a particular gentile" to rule on the merits of his case.[42] The Shach thus suggests that a gentile may arbitrate for Jews.

The *Netivot ha-Mishpat* takes issue with the Shach[43] and says it is forbidden to accept a specific gentile to resolve a dispute.[44]

משותף ונוהגים כל דבר לפי החוק והתקנות ומנהג המקום של בתים משותפים אז יכול להגיד אחד מבעלי דינים שהוא רוצה ללכת אצל פקיד המוסמך להתדיין ואין בו שום חשש ערכאות אפילו אם יפסוק לא מהשו"ע חו"מ רק לפי תקנות ומנהג הבתים משותפים של אותו מקום. (שו"ת ציץ אליעזר חלק י"א סימן צ"ג).

41 אם קבל עליו עדות עובד כוכבים, כמי שקיבל עליו עדות אחד מהפסולים. אבל אם קבל עליו עובד כוכבים לדיין, אפילו קנו מיניה, אין הקנין כלום, ואסור לידון לפניו. (אבל אם כבר דן לפניו, לא יכול לחזור בו) (מרדכי ריש פרק זה בורר).

42 ואפשר שהמרדכי פליג עלייהו. ואם באנו לומר דלא פליג, נראה לומר דדוקא התם דמיירי להדיא שקנו מידו סתם לדון בדיני גויים דהוי אויבינו פלילים שמחזיק ערכאותיהם ודתם, משא"כ בהך דהמרדכי שקנו על גוי אחד בפירוש, הרי שגוי זה נאמן בעיניהם, ולא משום שמחזיקים משפטי הגויים ודתם, רק שזה הגוי נאמן בעיניהם וסמכו עליו, דמהני כמו קיבלו קרוב או פסול. וחילוק זה נכון מאד (שפתי כהן חושן משפט כב טו).

43 (יד) אם כבר דן. השך חולק על זה כיון דהקנין אינו כלום אפי' נגמר הדין אינו מועיל. ומחלק בין אם קיבל עליו משפטי עכו"ם אז אסור אבל אם קבלו עליהם לדון לפני עכו"ם מיוחד אינו כמחזיק דתם רק שהעכו"ם הזה נאמן בעיניהם וסיים בצ"ע וכן נראה דאפי' בפני עכו"ם מיוחד אסור לדון אפילו ברצון שניהם דהוי כמיקר שם אלילים. (נתיבות המשפט חושן משפט כב יד).

44 R. Bleich believes, however, that the case of the Netivot ha-Mishpat refers to a gentile who rules based on secular law. ומ"ש הנתיבות בסי' כ"ב

The *Arukh ha-Shulhan* disagrees with the *Netivot*. He says that accepting a specific gentile to act as a judge in a secular court of law is prohibited, but to accept a gentile to arbitrate based on common sense is permissible.[45]

There is also other precedence for permitting arbitration by a gentile. R. J. David Bleich (p. 24) writes as follows:[46]

> The permissibility of adjudication of disputes by a non-Jew (a) who is not a judicial official, and (b) who administers justice on the basis of general considerations of equity and fairness rather than on the basis of legal code, is reflected in a responsum of R. Raphael Ankawa (1848–1935), *Pa'amonei Zahav*, no. 26, s.v. *ve-im ken*. *Pa'amonei Zahav* reports that in his locale, in cases of altercation between Jews, it was a time-honored practice to bring the matter before the "ruler of the city." *Pa'amonei Zahav* defends the practice against the contention that it constituted a violation of the prohibition " 'Before them'-but not before gentile courts" on the grounds that the "ruler of the city" does not sit in "a place of judgment" and does not rule in accordance with statute but "as his eyes see fit."

During the course of compiling this article, two contemporary *poskim* were asked whether in a business contract between two Jews it is permissible to put a clause stating that disputes should be resolved by the AAA. They both answered in the affirmative.[47]

ס"ק י"ד לאסור לדון לפני עכו"ם מיוחד זהו רק להתדיין כפי נימוסי העכו"ם אבל לא הזכיר שם פשרה בפני עכו"ם מיוחד. (בנתיבות ההלכה חלק ב דף קעא).

45 אם קיבל עליו עדות ערבי מהני כמו שקיבל עליו קרוב או פסול אבל אם קיבל עליו לדון בפני דיין ערבי אינו כלום ואסור לדון לפניהם כמו שיתבאר בסי' כ"ו אבל אם קיבל לסמוך עליו ע"פ מה שידון ע"פ חוות דעתו ולא בדינם הקבוע מהני כקבלת קרוב או פסול [כנ"ל בכוונת הש"ך ס"ק ט"ו וכן עיקר ודלא כנה"מ] (ערוך השלחן כב ח).

46 Bressler similarly concludes that secular arbitration is permitted. "On the basis of all of the above, it appears that the practice of submitting civil claims to arbitration processes is based on solid halachic grounds, providing it is accompanied by a Kinyan (legal affirmation). This invariably takes place because all arbitration processes do in fact require written agreements." (p. 116–117)

47 On 8/9/06 Aaron Sonnenschein asked R. Yitzchak Abadi in a telephone conversation whether in a business contract it is permissible to put a clause saying that disputes should be resolved by arbitration. R. Abadi answered that any type of arbitration is permitted whether done

If you wish to put an arbitration clause into a business contract with another Jew[48] (especially if the other Jew is not religious and would never agree to a *bet din*), you should first consult your *rav* and your lawyer. If you decide to go ahead with it, the American Arbitration Association's *Commercial Dispute Resolution Procedures* (effective Sept. 1, 2000) contains this suggested clause:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules" (Garfinkel 132).

Arbitration based on a secular code of law. Instructing an arbitrator, whether Jew or gentile, to rule based on a specific secular law code would be prohibited based on the ruling of the Arukh ha-Shulhan (ibid. 22:8) and thus, according to this position, one should not add to the above arbitration paragraph that decisions of the arbitrator(s) must be based on and consistent with the law of a specific state or with Federal law.

See, however, R. Reiss' article מתנה על מה שכתוב בתורה בדבר שבממון in שערי צדק, in which he makes a halakhic case for allowing *bet din* to decide based on secular law if the intent of the litigants, when they entered into their original agreement, was to perform based on secular law.

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by religious or non-religious Jews, or by gentiles. He further indicated that this *pesak* may be quoted. On 8/10/06, Thursday, 10 PM, I called R. Dovid Cohen, the Rav of Gevul Yavitz of Flatbush (who was at that time in the Catskills), and I asked him whether, in a business contract with another Jew who is non-religious, I may put a clause that we will settle any disputes by going to the AAA. He answered affirmatively. When I asked if I may do the same with a religious Jew, again he answered yes. When asked if he may be quoted, he answered yes.

48 When specifying in a contract that "disputes should be resolved at *bet din,*" make sure to specify which (competent) *bet din* should be used.

The *Bet Din* Process

The JCB would continue to function through the mid 1980s, but even before its demise, *bet din* had already become the predominant venue for alternative dispute resolution for Jews in New York City. The basic workings of a *bet din* are as follows:

When a Jew wishes to initiate a claim against a fellow Jew, he speaks to a representative of the *bet din* and completes a form stating his claim and the name(s) of the individual(s) against whom he has the claim. *Bet din* then sends a *hazmanah*, a summons (lit. an invitation), to the defendant to appear.

According to Jewish law a defendant who receives such a summons must appear. When he responds to the summons, however, he may request to move the proceedings to a different *bet din*, provided there is no "established" *bet din* in the city (as is the case in New York). If the litigants cannot agree on a *bet din,* the judges are chosen by a method known as *zabla*, in which the plaintiff and the defendant each choose one judge and the two judges in turn choose a third.[49]

The parties may also decide on the type of verdict they want the *bet din* to apply, either *din*, strict justice, or *pesharah*, compromise.[50]

If the defendant ignores the *hazmanah* of *bet din* (in some *battei din* it is only if he ignores three invitations) and fails to appear, *bet din* may issue a *siruv*, a document stating the defendant refused to appear, and it may tell the plaintiff that he may, according to halakhah, initiate proceedings in a secular court.[51]

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[49] אין בית דין פחות משלשה. וכל שלשה נקראים בית דין, אפילו הדיוטות; (דאי איפשר דלית בהו חד דיודע סברות בדינים, אבל אי לית בהו חד דידע, פסילי לדון (טור בשם אביו הרא"ש ריש סנהדרין). ומכל מקום יכולין לקבל הטענות ולשלחם לפני מורה) (מהר"ם פאדווא"ה סימן מ"ג), והם דנים את האדם בעל כרחו, אם הנתבע מסרב לירד לדין או שאינו רוצה לדון עם התובע בעירו; **אבל אם רוצה לדון עמו בעירו, אלא שאינו חפץ בשלשה שבירר התובע, אז זה בורר לו אחד וזה בורר לו אחד.** הגה: כדלקמן סימן י"ג. **ונ"ל דווקא בדיינים שאינם קבועים, אבל אם דיינים קבועים בעיר, לא יוכל לומר: לא אדון לפניהם אלא בזה בורר, וכן נוהגין בעירנו**, וע"ל סימן כ"ב סעיף א'. (שלחן ערוך חושן משפט ג א).

[50] מצוה לומר לבעלי דינים בתחלה הדין אתם רוצים או פשרה (ש"ע ח"מ יב:ב).

[51] קרית חברך ולא ענך רמי גודא רבה שדי ביה (בבא קמא צב ב). מכאן פסק רב פלטאי ז"ל ראובן שיש לו תביעה על שמעון ומסרב לבוא לדין שרשאי להביאו לערכאות של נכרים כדי להוציא את שלו מתחת ידו. (ראש בבא קמא ח:יז). רמב"ם הלכות סנהדרין כו:ז. שלחן ערוך חושן משפט כו ב.

Usually the *bet din* requires the two parties to sign an arbitration agreement (*shetar berrurin*) in which the litigants agree to abide by the decision of the *bet din*. When *bet din* ultimately issues its ruling, the parties are expected to abide by the decision. If a party refuses to abide, the *bet din* may apply social pressure[52] and/or permit the judgment to be enforced in a secular court.[53] Note that according to secular law this must be done within 12 months of the conclusion of the arbitration.

In the United States, secular courts are reluctant to get involved in religious issues. Nevertheless, when a plaintiff and the defendant sign an arbitration agreement at *bet din,* such a verdict is enforceable in secular court under general arbitration statutes. It is therefore important for *bet din* to have the litigants sign an arbitration agreement and for the *bet din* to understand the arbitration regulations, for if it violates them, its rulings are liable to be overturned by secular court.

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52 אדם שנתחייב לחבירו בב"ד ועבר על גזירת ב"ד כותבין לקהילות ישראל פלוני גזרנו עליו דין וסרב ולא השגיח והחרמנו אותו שלא יתפללו עמו ולא שזמינו עמו ולא ימולו לו ואל יקברו לו מת והוציאו בניו מבית הספר ואשתו מבית הכנסת עד שיקבל עליו בדין. (דרכי משה טור שלחן ערוך חושן משפט יט).

For a modern application see Zwiebel p. 15. "Last winter, the Conference of Rabbanim of Agudath Israel Synagogues—the network of approximately 30 *shuls* in the United States and Canada that are formally affiliated with the Agudas Yisroel movement—adopted internal guidelines designed to isolate any person against whom there is an outstanding *p'sak siruv l'din* (a *beis din* determination that the individual has been recalcitrant in submitting to the jurisdiction of *din Torah* or abiding by a *p'sak din*). As a general rule of policy, such an individual forfeits his right to be a member in good standing of any Agudah branch *shul*, to be called to the Torah for an *aliya*, to be a *shliach tzibbur*, or to host any *kiddush* or *simcha*. In addition, the individual is to be explicitly advised that he is not welcome in the *shul*." In footnote 8 Zwiebel writes further: "A number of other individual *shuls* and *kehillos* have reportedly adopted similar guidelines, including Congregation Yetev Lev D'Satmar in Brooklyn and the Lincoln Square Synagogue in Manhattan."

53 הגה: ויש רשות לבית דין לילך לפני עובדי כוכבים ולהעיד שזה חייב לזה (בה"ת בשם ר' שרירא). וכל זה דווקא כשאינו רוצה להיות ציית דין, אבל בלאו הכי אסור לבית דין להרשות לדון לפני עובדי כוכבים (מהרי"ק שורש א'). (שלחן ערוך חושן משפט כו ב).

Challenges facing *Bet Din*

When litigants use *bet din* to resolve their disputes, they are complying with halakhah and increasing *kevod Shamayim,* honor of Heaven. There are also practical benefits in that justice is much quicker and less costly there than in secular court. Nevertheless, the challenges facing *bet din* are many and varied. We begin by listing those problems and afterward we discuss them in detail.

1. Problems caused by litigants
    - Refusing to respond to a *hazmanah*
    - Challenging a decision of *bet din* in secular court
    - Switching to *bet din* when they are losing in court

2. Problems caused by *toanim*
    - *Zabla*, blurring the distinction between *to'en* and *borer*
    - *Toanim* coaching the litigant
    - *Toanim* bringing business to *bet din*

3. Problems caused by *dayyanim*
    - *Ex-parte* communication
    - Conflict of interest
    - Confidentiality
    - Unprofessional behavior
    - Ignorance of business issues and secular law

4. Problems caused by the structure of *bet din*
    - No *bet din kavu'a*
    - No system that assures standards and quality
    - Lack of clear and unambiguous procedures
    - No oversight of *bet din*
    - No appeals process

5. Problems caused by secular law
    - Unenforceability of child support and custody
    - Requirement of legal counsel
    - Conflict between Jewish and secular law

6. Problems caused by bad public relations

In this section we discuss some very real problems facing *bet din* in our community.[54] This is not to suggest that the institution of *bet din per se* is not workable. In fact, Jewish law is the oldest continuously applied law in the world,[55] and the institution of *bet din* has operated remarkably well throughout Jewish history.[56] Rather, the issues have to do with how *bet din* currently operates. For example, we may say that a particular *shul* has problems in that its members are constantly quarreling with each other, or that there is continuous talking during prayers. These are not problems with the institution of *shul* but rather with the policy and procedures of a particular *shul*. So too, the problems we point out are not with the institution of *bet din* but rather with how it currently operates in our community.

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54 In researching this article we tried to interview as wide an audience as possible. In addition to face-to-face and telephone interviews with *dayyanim*, *toanim*, lawyers and litigants, four questionnaires were posted on the *Ḥakirah* web page www.Hakirah.org that could be completed anonymously. Each of the four questionnaires (for *dayyanim*, lawyers, litigants and other) had approximately sixty questions. A total of thirty people completed a questionnaire. The sample size was thus too small to be representative of our population group, and we therefore decided not to publish a statistical analysis of the data. Nevertheless, we do believe that the answers accurately reflect the true feelings of those who completed them. Whenever we write that "respondent xxx wrote," the reference is to a questionnaire respondent.

55 "The oldest system of continuously applied law in the world, Jewish law has been in constant operation for the past three millennia at every stage of human society and under a myriad of conditions: in agricultural milieus as well as commercial and industrial ones, in rural jurisdictions as well as heavily urbanized areas. It has been exposed to various religious and cultural environments and to radical changes in social and political institutions" (Schreiber 7).

56 Schreiber p. 353 writes as follows: "Jewish courts, on the other hand, were very scrupulous about handing down decisions within a very short time, since inordinate delay was considered scandalous and a great injustice. In fact, the honesty, good judgment, and prompt decisions of the Jewish courts often attracted many non-Jewish litigants to utilize their facilities." Schreiber supports this with the followings footnote: "Shlomo ben Aderet, Responsa *Rashba*, vol. 3, no. 76; vol. 4, no. 16; Epstein, Intro., *Arukh Ha'Shulkhan, Hoshen Mishpat* (Pietrokoff, 1893)."

1. Problems caused by litigants

Refusing to respond to a *hazmanah*. When someone receives a *hazmanah* from *bet din,* the person is required, by halakhah, to appear. Many observant Jews, however, simply ignore the *hazmanah*. They may be ignorant of the halakhah, cynical about *bet din*—or perhaps corrupt in their business dealings and their refusal to appear before *bet din* is just another maneuver to avoid their obligation.[57]

They may also rationalize that *bet din* is corrupt and that, in any case, no one else takes *bet din* seriously. In fact, there have been many high-profile cases that reinforce that cynicism, including those of members of *hasidic* dynasties who have taken their differences to secular court.[58] If they had legitimate halakhic reasons for doing so,[59]

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57 "A husband who does not want to grant a *get* may use stalling tactics such as attempting to delay the issuance of *hazmanot* or moving to change the *beit din* immediately prior to the issuance of a *seruv* in order to prolong the Jewish divorce proceeding." *Guide to Jewish Divorce and the Beit Din System*, p. 19.

58 See for example: Jewish Week, *Satmar Family Feud* by Jonathan Mark dated 10/7/2005, http://www.thejewishweek.com/news/newscontent.php3?artid=11485.
New York Times, *Amid Mourning Satmar Succession Goes to Court* by Andy Newman dated 4/26/06, http://www.wwrn.org/article.php?idd=21311&sec=35&cont=6.
New York Times, *Court Suspends a Ruling in Satmar Case* by staff writer dated 3/4/06, http://pewforum.org/news/display.php?NewsID=10123.
New York Sun, *Satmar Dispute over Many Millions to be Decided by Secular Court* by Joseph Goldstein dated 3/22/06, http://www.nysun.com/article/29556/.
New York Sun, *Court Says it Cannot Decide the Satmar Case* by Joseph Goldstein dated 7/12/06 at http://www.nysun.com/article/35858.
Times Herald Record, *Hasidic Feud Spills into Court* by Chris McKenna dated 4/27/06, http://archive.recordonline.com/archive/2006/04/27/news-camrebbepr-04-27.html.
Jewish Telegraphic Agency, *Court Asked to Decide Fate of Rebbe's Shul* by Sue Fishkoff dated 6/17/05, http://www.jewishaz.com/issues/story.mv?050617+shul.

they have not been successful in explaining them to the public.[60] Is it any wonder that a person feels, If a rebbe does not require his own leaders to go to a *bet din*, why should I?

In response to question 280 "Are *battei din* getting better, worse, or staying the same?" and the follow-up question "In what way?" respondent 1 added a heart-wrenching comment:

> "Washing our dirty linen in public has not helped our community in any way. Thirty years ago, the testimony of an Orthodox Jew in secular court was taken as true until proven otherwise. Unfortunately, today an Orthodox Jew is presumed to be lying by many jurist and a Hasidic Jew cannot step foot in a Courtroom. Although it would be easy to attribute this change in attitude to anti-Semitism, if we were subjected to some of the false testimony and chicanery that judges SOMETIMES hear from our community we too MAY have a different perspective." (Emphasis in the original.)

Challenging a decision of *bet din* in secular court. One of the reasons we are prohibited from taking our disputes to secular court is that it gives the impression that secular law is superior to halakhah. Yet since 1985 there has been a dramatic increase in secular court cases that mention *bet din*—many of which seek to overturn a decision of *bet din*.[61] Not only do such cases give the impression that

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Merkos L'Inyonei Chinuch, Inc., Plaintiff-Appellee, -against- Otsar Sifrei Lubavitch, Inc., Defendant-Appellant at http://www.cll.com/casesummaries/MerkosOtsar.cfm.

Jewish Week, *Family Feud, Bobov Style* by Jonathan Mark dated 5/13/05, http://www.thejewishweek.com/news/newscontent.php3?artid=10877&print=yes.

59 If the halakhic justification for going to secular court is based on ובעל דינו אלם, that their opponent refuses to subject himself to *bet din*, then that too is a problem.

60 A public statement by a leader of the *ḥasidic* sect stating his displeasure or expressing his pain that an irresolvable issue was taken to secular court might help allay that cynicism.

61 A search on LexisNexis using "*Bet din*," "Beth Din" and "Rabbinical Court" yields the following number of cases: 6 for 1926–1935, 18 for 1936–1945, 16 for 1946–1955, 12 for 1956–1965, 12 for 1966–1975, 19 for 1976–1985, 39 for 1986–1995, and 49 for 1996–2005. Those

secular law is superior to Jewish Law but even worse—that the process of Jewish justice does not work. The problem that we had meant to avoid by using *bet din* has instead been amplified. Chaim David Zweibel (9) expresses that sentiment succinctly:

> "If the mere resort to a non-Jewish tribunal constitutes a *chillul HaShem*, as *Rashi* states on the first *pasuk* in *Mishpatim*, how much more so is *k'vod Shamayim* degraded when the secular court is asked to sit in *post-facto* judgment on an already concluded din Torah."

On page 10 of the same article Zweibel continues:

> "…taken collectively, the numerous attacks in secular court against din Torah proceedings cast an extremely unflattering spotlight on *batei din*, and more generally on the Torah community at large."

We cannot prevent unscrupulous or disgruntled individuals from trying to overturn *bet din*'s decision. If, however, *bet din* acts ethically and adheres to arbitration statutes, it can minimize the risk that its decisions will be overturned. Although a secular court will not usually override *bet din*, nevertheless there are exceptions, especially when due process is violated. Fried lists the following actions that would cause a court to overturn the *pesak* of *bet din*:

Lack of Prior notice. "Civil Practice Law and Rules section 7506 (b) (84) states that the arbitrator must appoint a time and place for the hearing and notify the parties in writing personally or by mail no less than eight days prior to the hearing." A *bet din* cannot issue a *hazmanah* to a woman, for example, to "Appear at *bet din* by tomorrow for custody hearings if you ever want to see your *get*."[62]

Right to attorney. "Each party is entitled to attorney representation, which cannot be waived by agreement." If a *bet din* says a litigant cannot bring an attorney to *bet din,* the *pesak* of *bet din*, if challenged in court, will be thrown out.

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numbers represent only the "reported cases." The total number of cases is actually much higher.

62 Such a statement could also cause a *bet din* decision to be overturned by secular court because of the issue of duress.

Child custody and visitation. "As a safeguard preventing any arrangement from violating New York's 'in the best interest of the child' standard, disputes over child custody and visitation are not subject to arbitration and will not be confirmed. Similarly, although child support is an arbitral issue, decisions of child support are subject to a court's supervisory power to intervene."

Deciding child support and custody issues at *bet din* is fraught with great pitfalls. If a party is dissatisfied with the decision and appeals it to the secular courts, there is a good chance that it will be overturned. Perhaps *bet din*, or a mediation board, should first try to work out a solution acceptable to both parties.[63]

Limits constitutional right. "A court may also vacate an arbitration award on public policy ground if the award contains a clause that limits or deprives a party of his or her constitutional right to seek redress or protection under criminal or civil law. For example, a clause that forbids the participants from obtaining an order of protection, or one forbidding the reporting of information to Child Protection Services without permission of beth din, would fall under this category."

Duress. "A contract [to arbitrate] entered into under duress is voidable by the victim." It would be considered duress, for example, if *bet din* were to tell a woman she will not receive a *get* unless she agrees to her husband's demand for financial compensation.

Fraud and misconduct. "Arbitration agreements may be vacated on the grounds that … [they are] a product of fraud, misconduct, or lack of impartiality." This includes practices such as *ex-parte* communication, or the failure to disclose a potential conflict of interest.

Switching to *bet din* when they are losing in court. A defendant who has refused to appear at *bet din* decides halfway through his secular court hearings to "repent" and appears at *bet din*. Perhaps he is looking to delay the process or perhaps things are not going the way he had hoped. While we should all "rejoice" that the defendant has finally decided to follow halakhah, we must realize that the plaintiff is probably very upset about this sudden change. Just when

63 Many states require that a family first try to mediate its dispute before bringing the case to family court.

he starts feeling that justice will prevail, he now sees further delays as the case is retried at *bet din*.

What should *bet din* do in such a situation? *Beth din* of America has a policy to allow such defendant back into their *bet din* but only if the court had not yet issued any rulings (preliminary or otherwise) on the case.

2. Problems caused by Toanim

***Zabla*, blurring the distinction between *toen* and *borer*.** Since we lack a *bet din kavu'a*, a *bet din* established by the community as a whole, a defendant who receives a *hazmanah* from *bet din* has the right to request a change in venue. *Shulhan Arukh* (HM 3:1) rules that the litigants are to use a process known as *zabla* in which each party to the dispute chooses one judge (known as a בורר) and the two judges then choose a third. That solution was introduced so that both sides could choose a qualified judge with whom they are comfortable.

The reality of *zabla*, however, is frequently different. It often degenerates into a process in which each side chooses not a judge (בורר) but an advocate (טוען).[64] That type of *zabla* is the cause of much anguish as the "judges" chosen by the respective parties are more interested in fighting for their client (sometimes by just arguing endlessly to delay a decision) than in seeking out the truth.[65]

The *Bet din* of America has gotten around that problem by insisting that the person chosen by each side be a judge from a recognized *bet din*.

***Toanim* coaching the litigants.** Many *battei din* allow the litigants to bring a *to'en* to fight their case. Although that is currently a

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64 Colman writes, "The procedure of Zabla where each party has the right to choose one dayan and the two appointed choose the chair, should not be used. The abuses to which zabla is prone are many…"

65 For example, in response to question 220 "What percentage of your cases in *bet din* is decided with *zabla*?" respondent 026, a trial attorney, wrote, "I will not participate in a *zabla* bet din. To me it is a recipe for disaster."

In response to question 490 "What would you suggest to help improve *bet din*?" respondent 9 wrote: "Judges must not be appointed by an[y] of the parties. Like in civil court."

permissible practice it is, nevertheless, against the spirit of halakhah, which mandates (*Avot* 1:8) אל תעש עצמך כעורכי הדינין.[66] Coaching a litigant on what to say and how to say it is against halakhah.

Also, there are no consequences when a *to'en* misrepresents facts before *bet din*. If a lawyer were to lie in court he could be disbarred and suffer other consequences. If a corrupt *to'en* lies in front of *bet din* there is no mechanism to bar him from being a *to'en* or for imposing sanctions.[67]

There are half a dozen *toanim* in our community who are known for their "talents" in manipulating *bet din*.[68] They cause a ruckus, argue endlessly and issue threats. They may be helping their corrupt clients in the short term, but they are perverting the justice demanded by halakhah.

Toanim are responsible for bringing business to *bet din*. Many *battei din* cover their budget and make money from the cases they hear. Although the litigants pay for the *bet din* services, it is often the *toanim* who advise their clients which *bet din* to use. A *bet din* therefore knows that if it takes a strong stance against an unethical *to'en,* he will no longer recommend clients to that *bet din*.

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66 For a full discussion see Reiss זכויות בעלים, טוענים, עורכי דין ויועצים.

67 In response to question 140 "Have you ever experienced unprofessional behavior from the *toanim*? If yes, explain," respondent 15 wrote: "Influence peddling and *ex parte* communications."
In response to the same question, respondent 16 wrote: "Lying."
In response to question 140 ("Have you ever experienced non-professional behavior from the *toanim*?") respondent 6 wrote: Condescending "make fun" attitude towards other side; opinions formed based on arbitrary feelings; decisions and tactics made on the basis of "knowing" some of the Dayanim and using that as "pull."
In response to the same question, respondent 27 wrote: "The plaintiff's toen used lawyer tactics, bluffs, and falsehoods to trick us into an admission, but we refused!"

68 "Unfortunately, some *toanim* are corrupt and/or untrustworthy. Rabbis of integrity often refuse to serve on a beit din when *toanim* are appearing. Some *toanim* have been known to take bribes from spouses, offer bribes to dayyanim and switch their representation from one client to the other." *Guide to Jewish Divorce and the Beit Din System*, p. 20.

The best solution is that the salary of the *dayyanim*, and the budget of the *bet din,* be covered not by the fees charged to the litigants but by the community.

3. Problems caused by *dayyanim*

There is no agency in our country to certify the qualifications of *dayyanim*. Literally any rabbi could establish a "*bet din"* and start issuing *hazmanot*. It is therefore no surprise that many so-called *dayyanim* are unqualified to judge and often violate basic ethical standards required by both secular law and halakhah.[69] These include:

***Ex parte* communication.**[70] While *bet din* takes a break, one of the litigants notices that a *dayyan* is speaking privately to his opponent or to his opponent's *to'en*.[71] He thus has no ability to dispute what is being discussed. That is, of course, unethical and a violation of halakhah.[72]

Conflict of interest.[73] A typical example of conflict of interest is when someone who acted as a *to'en* for a litigant on a previous case is

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69 "Similarly, some *dayyanim* are known to be corrupt. Rabbis of integrity often refuse to serve on a *zabla beit din* when such *dayyanim* are participating." *Guide to Jewish Divorce and the Beit Din System*, p. 20.

70 אסור לדיין לשמוע דברי בעל דין האחד שלא בפני בעל דין חבירו. וכן הבעל דין מוזהר על כך. (ש"ע ח"מ יז:ה)

71 "Sometimes one of the parties may try to have ex parte (private) communication with the beit din." *Guide to Jewish Divorce and the Beit Din System*, p. 20.

72 In response to question 120 "Which *bet din* did you find to be particularly bad?" and the follow-up question 125 "What was bad about it?" respondent 6 wrote: "Illegal, private advice to litigants; distractions and joking around; allowing uninvolved persons to attend; forgetting appointments; misplacing items held in escrow; destructive delays in responding with documentation; adding notes to already signed documents; unreasonable or impossible demands to one side, etc."
Also, in response to question 130 "Have you ever experienced non-professional behavior from the *dayyanim*?" respondent 28 wrote: "Yes, requested outside opinion from 'experts' not in presence of litigants."

73 אסור לאדם לדון למי שהוא אוהבו, אע"פ שאינו שושבינו ולא ריעו אשר כנפשו, ולא למי ששונאו, אע"פ שאינו אויב לו ולא מבקש רעתו, אלא צריך שיהיו השני בעלי דינים שוים

now acting as a *dayyan* for the same litigant on a current case. There are other permutations as well.[74]

Confidentiality.[75] A lawyer who represents clients at *bet din* notes that he often hears the *dayyanim* discussing other cases in his presence without any effort to conceal the identities of those being discussed.[76]

Unprofessional behavior.[77] The *dayyanim* often appear to have no fixed procedures and/or fail to follow and enforce them uniformly. *Dayyanim* have also been observed in *bet din* making small talk and

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בעיני הדיינים ובלבם. ואם לא היה מכיר את שום אחד מהם ולא את מעשיו, אין לך דיין צדיק כמוהו (ש"ע ח"מ ז:ז). כל דבר שיש לדיין בו צד הנאה, אינו יכול לדון עליו (ש"ע ח"מ ז:יב).

74 In response to question 130, "Have you ever experienced unprofessional behavior from the *dayyanim*? If yes, explain" respondent 15 wrote: "Refusal to recuse themselves when close relatives, friends or business associates are before them as litigants."
In response to question 480 "Which do you prefer, *bet din* or secular court?" respondent 8 wrote: "Secular Court [because] *battei din* are skewed toward the one who has more 'connections.' "

75 אי זהו רכיל זה שטוען דברים והולך מזה לזה ואומר כך אמר פלוני כך וכך שמעתי על פלוני אע"פ שהוא אמת הרי זה מחריב את העולם, יש עון גדול מזה עד מאד והוא בכלל לאו זה והוא לשון הרע, והוא המספר בגנות חבירו אע"פ שאומר אמת, אבל האומר שקר נקרא מוציא שם רע על חבירו, אבל בעל לשון הרע זה שיושב ואומר כך וכך עשה פלוני וכך וכך היו אבותיו וכך וכך שמעתי עליו ואמר דברים של גנאי, על זה אמר הכתוב יכרת ה' כל שפתי חלקות לשון מדברת גדולות. (רמב"ם הלכות דעות ז:ב)
והמספר דברים שגורמים אם נשמעו איש מפי איש להזיק חבירו בגופו או בממונו ואפילו להצר לו או להפחידו הרי זה לשון הרע. (שם הלכה ה)

76 In response to question 140 "Have you ever experienced unethical behavior from the *dayyanim*? If yes, explain" respondent 1 wrote: "It is quite common to hear talk at a Yeshivas Bes Din of another case that the Dayanim/Toanim are working on, with names and details revealed."
Guide to Jewish Divorce and the Beit Din System warns, p. 19, "A litigant should exercise caution about what he/she reveals to his/her rabbi because it has not yet been established to what extent communications with a rabbi are considered privileged in either civil court or a beit din."

77 צריכים הדיינים לישב באימה, וביראה, בעטיפה ובכובד ראש. ואסור להקל ראש ולישב לספר בדבר בטלה בבית דין. ויראה הדיין כאילו חרב מונחת לו על צווארו, וכאלו גיהנם פתוח לו מתחתיו, וידע את מי הוא דן, ולפני מי הוא דן, ומי הוא עתיד להפרע ממנו אם נוטה מקו הדין. וכל דיין שאינו דן דין אמת גורם לשכינה שתסתלק מישראל. וכל דיין שנוטל ממון מזה ונותנו לזה שלא כדין, הקדוש ברוך הוא נוטל ממנו נפשות. וכל דיין שדן דין אמת לאמתו, אפילו שעה אחת, כאילו תקן כל העולם כולו, וגורם לשכינה שתשרה בישראל (ש"ע ח"מ ח:ב).

joking around in front of the litigants. Such frivolous behavior is not only unprofessional, it is against halakhah.[78]

Ignorance of business issues and secular law. To understand who is right, it is necessary for the *dayyanim* to be attentive to what the litigants are saying and to have an understanding of the business issues involved. They also need a detailed understanding of the law of the land so that they understand the intent of the parties when they entered into their agreement. We often hear cases of how the *dayyanim* were unable or did not make the effort to comprehend the complexity of the case they were hearing.[79]

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78 In response to question 120 "Which *bet din* did you find to be particularly bad?" and the follow-up question 125 "What was bad about it?" respondent 20 wrote: "Lack of professionalism on the phone, following up on *hazmanos* and procedures for sending *hazmanos* and communicating with the *ba'aley din*.

In response to question 130 "Have you ever experienced non-professional behavior from the *dayyanim*?" respondent 14 wrote: "Trying to change their *pesak*, reopen the case."

In response to question 490 "What would you suggest to help improve *bet din*?" Respondent 6 wrote: "Revert to *Bet din* as it is described in Gemara: No fees; no *Toanim*; no *Hazmanos* in their present form; personal certification ('*smicha'* or '*kabbala'*) from publicly recognized Sages; staying with a case with no delays or days off (i.e. no *Inuy HaDin*); an atmosphere of serious *Yir'as Shamayim*."

In response to question 425 "Are you cynical about being able to receive justice at *bet din*?" respondent 2 wrote: "Yes, They are part of the corrupt rabbinic oligarchy, which runs *Yiddishkeit* for its own benefit as a family-held corporation, and protects itself by calls on *daas Torah*, keeps important information from its adherents—especially financial information. Hence all the scandals."

79 In response to question 150 "Have you ever felt that the *dayyanim* did not understand the issues involved?" respondent 20 wrote: "The assigned rabbi did not really understand the financial matters at hand."

In response to question 170 "Have you ever felt that the *dayyanim* did not have a grasp of the halakhah?" respondent 1 wrote: "Yes…there are times that you walk away feeling that the *dayyanim* either completely misunderstood the facts of the case or failed to take into account the "Fifth" section of the *Shulchan Aruch*."

In response to the same question, respondent 15 wrote: "They don't understand the business environment and business custom and practice or the terms of the deal."

Jachter (191–192), aware of those ethical lapses, writes:

> "Due to the reported existence of unscrupulous *battei din*, we have chosen to add a few criteria by which to assess a beit din's credibility. An honorable *bet din* must avoid conflict of interest (*Shulchan Aruch*, C.M. 7:12 and 37:1), anything that even slightly resembles bribery (C.M. 9:1), and excessively high fees (C.M. 9:5). In addition, they may not accept the testimony of one litigant when his adversary is not present (C.M. 17:5), and they must thoroughly investigate all facts (see Rashi's commentary to *Bereshit* 11:5). Indeed, the Chazon Ish is often quoted as saying that most erroneous halachic rulings stem from a deficient understanding of the facts."

It is important to note that in every dispute there is usually one litigant who gets less than expected, or who has to pay more than he wanted. We should therefore not be surprised if such an individual complains that *bet din* was unfair or that it did not understand the issues involved. Statements of ex-litigants must therefore be taken with a grain of salt. However, when those complaints are numerous and widespread we have no choice but to listen to them and try to devise solutions to prevent them from recurring.

4. Problems caused by the structure of *bet din*

Due to the strong tradition in this country of separation of church and state, there is no mechanism in place whereby the Jewish community could establish a single unified system of *bet din* that is sanctioned by the government.[80] That, unfortunately, has led to fragmentation of the *bet din* system and is the cause for very uneven justice.

No *bet din kavu'a*. Halakhah recognizes that if there is an established *bet din* in a city, everyone is required to go to that *bet din,*

In response to the same question respondent 6 wrote: "Any complicated matter (financial, medical, personal) was heard impatiently, and opinions were formed based only on the first sentence or two."

80 For example, the *Va'ad Arba ha-Aratzot*, Council of Four Lands (ca. 1500–1764) operated under government sanction and was composed of representatives from Great Poland, Lesser Poland; Red Russia, Podolia and Galicia, Volhynia, and Lithuania.

and a litigant cannot stall and say he would rather go to a different *bet din* or demand *zabla*. In our community, however, we have no *bet din kavu'a*.[81]

No system that assures standards and quality. Since *bet din* is not regulated, there are no uniform standards. That which is allowed at one *bet din* is disallowed in another. A shrewd *to'en* can thus advise his clients as to which *bet din* will work best in a particular case.

Lack of clear and unambiguous procedures. Litigants often do not know what to expect at *bet din*. Will they be given additional time to present new evidence? Can they request a postponement? Can a specialist be brought? If regulations and procedures are not in place, then different people get different treatment, and that is not justice.[82]

No oversight of *bet din*. There is no person or agency to oversee the system of *battei din* to ensure minimal standards and adherence to halakhah.

No appeals process. A decision of *bet din* cannot be appealed within the *bet din* system. That is a frightening prospect. A litigant must sign an arbitration agreement that is enforceable in court, and yet he has no one to turn to if he believes that *bet din* made a grievous error. If an appeals process were in place it would assure that the *dayyanim* would work harder and be less autocratic, knowing that their decisions are subject to peer review and critique.[83]

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81 "There is no single institutional rabbinical court that serves the entire Jewish community in America. In New York there are at least a dozen such courts." Jonathan Reiss, Beth Din of America, "When a Jew Sues: How do Rabbinical courts work?" *The Wall Street Journal*, May 12, 2006.

82 Sometimes even written rules cannot guarantee what to expect. "Keep in mind that a beit din may reserve the right to diverge from its own written rules and procedures." *Guide to Jewish Divorce and the Beit Din System,* p. 19

83 In response to question 460, "To whom could you complain if a *bet din* were lacking in any of the above qualities?" Respondent 1 wrote: "…we can greatly improve the system if we develop a method of allowing for appellate review. If you were to pick up the Law Journal on any given day, you would see that there are hundreds of Orthodox litigants who should be in Bes Din. If we were to improve the system with appellate review, we would allow for enhanced respect for the system. Enhanced respect, with the knowledge that an arbitrary decision could be

There are those who argue that halakhah does not have an appeals process to question the *pesak* of a *bet din*. That is true, but neither does it prohibit us from setting up a procedure in which unethical actions or incompetence can be investigated.

It is also important to note that the *Shulḥan Arukh* rules that if a *dayyan* made a gross error in a civil case it should be reopened and retried.[84]

5. Problems caused by secular law

Unenforceability of child-support and custody. The state sees itself as being responsible for the welfare of a minor. Therefore, secular court will overrule *bet din* when the former feels that the latter issued a ruling not in the best interest of a minor. It therefore behooves *bet din* to be in synch with the thinking of secular court. For example, respondent 11 wrote (a composite from her various answers) as follows:

> "Beth Din had no understanding of my son's special-ed needs and refused to allow me to choose schools that could help him…I chose schools that had "intervention" for my sons. My ex wrote a letter saying he disapproved of the school because they were [deleted]/ modern and that he wanted our kids put into foster care. The Bais Din ruled the kids should go to foster care…Yes [I refused to follow the *pesak* of *bet din*]…When they ordered that my kids be put into foster care, I went to [deleted] Family Court…Yes [the *pesak* of *bet din* was thrown out by the court]."

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appealed, would go a long way to reducing Chilul Hashem in our community."

Respondent 2 wrote: "That's the point; there are not fail-safe mechanisms in Orthodoxy, except to a slight extent the press—especially the *New York Times* and, for a while, *Yediyot Aharonot*! And now bloggers."

Respondent 4 wrote: "Your spouse, unless it's a divorce case then no one."

Respondents 7, 8, 9, 10, 11 and 13 all wrote similarly: "No one."

84 כל דיין שדן דיני ממונות וטעה, אם טעה בדברים הגלויים והידועים, כגון דינים המפורשים במשנה או בגמרא או בדברי הפוסקים, חוזר הדין ודנין אותו כהלכה (ש"ע ח"מ כה:א).

Requirement to allow legal counsel. Ideally, in Jewish law a lawyer should not play a role at *bet din*. Yet, upon appeal, a secular court will overturn the ruling of a *bet din* that did not allow a litigant to have legal counsel during the hearing. *Bet din* must therefore allow lawyers to attend. It should be noted, however, that although halakhah frowns upon the presence of a lawyer at a *bet din*, Rabbi Reiss argues that lawyers are less a halakahic problem than are *toanim*.[85]

Conflict between Jewish and secular law. We are aware of basic rights guaranteed us as citizens. Included in them is attorney/client privilege, which prohibits an attorney, in most cases, from disclosing confidential information. We also take for granted that once a ruling is issued by a judge, he will not modify it. Yet Jewish Law sometimes has a different outlook on those issues.

For example, Jacob Bazak discusses the differences in Jewish and secular law regarding the ability of a judge or an arbitrator to change or amend a decision after it is rendered. Bazak writes that "According to many legal systems, a judge or an arbitrator, having rendered his judgment, is no longer entitled to change or amend it, except in the case of clerical mistake or error arising from any accidental slip or omission" (9). To contrast this, Bazak quotes the *Shulḥan Arukh* (*Ḥoshen Mishpat* 20:4)[86] that "If a judge was mistaken in his judgment, the case should be reopened and retried correctly" [87] (10).

Another example is confidentiality. Bleich (38–74) discusses the tension between secular law and halakhah as follows:

> "Judaism does not recognize a particular fiduciary obligation of confidentiality in association with any professional relationship. Thus, for Judaism, there is no specific physician-patient, attorney-client or clergyman-penitent "privilege." But, at the same time, Judaism binds

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85 Reiss, p. 201.

86 Bazak is probably referring to *Ḥoshen Mishpat* 25:1 כל דיין שדן דיני ממונות וטעה...חוזר הדין ודנין אותו כהלכה.

87 However, in discussing a case in which a *dayyan* is asked to clarify the intent of his written ruling, Bazak notes that *Rema* in *Ḥoshen Mishpat* 23:1 states that "…if, however, the arbitrator had already written the award and signed it and gave it to the parties, he is not entitled anymore to add or to omit anything even though he says that that was indeed his intention."

> each and every one of its adherents, laymen as well as professionals, by an obligation of confidentiality far broader than that posited by any other legal, religious or moral system. Nevertheless, the privilege is neither all-encompassing in scope nor, when it does exist, is it absolute in nature." (45)

Perhaps *bet din* ought to be cautious in cases where secular law is perceived as being more stringent than halakhah. When we have such a conflict, and the issue relates to ethics, *bet din* might wish to abide by the more stringent secular law. There are two reasons:

1. When a decision of a *bet din* is challenged in secular court and a litigant can prove that the *dayyan* acted unethically (even if the action would not be considered unethical in halakhah), the secular judge will overturn the ruling.
2. In an era in which the public's cynicism of *bet din* is so high, *bet din* ought to act above and beyond the basic requirements to ensure that it is perceived as acting ethically.

6. Problems caused by bad public relations

As mentioned previously, even in a perfect *bet din* it is inevitable that one or both litigants will sometimes walk away unhappy with the verdict. Such people might then tell their friends that *bet din* was unfair or did not understand the issues involved.

It is therefore necessary not only to make *bet din* as good as possible, but also to educate people and explain to them that reputable *battei din* do function properly, and that it is possible to obtain justice there that is quicker and less costly than in secular court.

It is also important that all who are summoned to *bet din* be provided with a booklet that explains the *bet din* process and informs them of their rights and obligations.

Education is a powerful tool in fostering acceptance of *battei din*. While it is perhaps counter-intuitive, in speaking and interviewing various people it became apparent that those who have worked with *bet din* and understand the system are less skeptical than those who have not.

Steps in the Right Direction

Mishpot Sholem.[88] A number of years ago the Satmar community was fed up with the goings-on in a certain *bet din*. The *toanim* were creating a ruckus at *bet din* and preventing and perverting justice.

The community had a *kollel* of very learned people and decided to create its own *bet din*. The first thing this new *bet din* did was forbid certain unruly toanim from appearing there. While that was a great idea, the retribution was swift. It has been alleged that whenever anyone would come to those *toanim* and tell them they would like to use Mishpot Sholom, they were told by the *toanim*, "Why would you want to go to that *bet din* of *ganovim*, thieves?"

COLPA. Zweibel (10, n.4) writes in 1993 that "An effort is currently being undertaken by the National Jewish Commission on Law and Public Affairs, in consultation with several prominent rabbanim, to develop standardized guidelines for *battei din* that would further insulate *piskei din* against secular attack." The guidelines were eventually compiled and were modeled after those of the American Arbitration Association.

What ever happened to those efforts? One who was involved relates that when the first *bet din* was approached to get it to accept their standards, they were "excoriated" and told, "What, you think you are going to tell me how to run my *bet din*!" Needless to say, their efforts were stillborn and the project was dropped.

Beth Din of America (BDA)[89] was founded in 1960. It is affiliated with the Rabbinical Council of America (RCA) and is sponsored by the Union of Orthodox Jewish Congregations of America. Initially its focus was on family law, Jewish divorce and personal status. With its recent reconstitution through the efforts of the Orthodox Caucus, it broadened its scope to include arbitration of financial disputes.

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88 The mailing address of Mishpot Sholem is 543 Bedford Avenue, Suite 27C, Brooklyn, NY 11211. Its telephone number is 718-387-0739.

89 BDA is located at 305 Seventh Avenue, 12th Floor, New York, NY 10001, Phone: 212-807-9042, www.bethdin.org, menahel@bethdin.org.

BDA is headed by Rabbi Gedalia Schwartz, *Av Bet din;* Rabbi Mordechai Willig, *Segan Av Bet din;* Rabbi Michael Broyde, *Chaver Bet din;* and Rabbi Jonathan Reiss, director.[90]

Rabbi Reiss received *yoreh yoreh semikha* from Yeshiva University in 1987 and *yadin yadin* in 2002. He graduated from Yale Law School in 1992 and is a member of the American Bar Association.[91]

BDA has an impressive *Guide of Rules and Procedures* comprising 39 sections (15 pages) outlining its rules and policies.[92] Utilizing a pool of about 15 *dayyanim,* it currently handles 500 cases a year.[93] In only a handful of cases have its decisions been challenged in secular court, and none have been overturned.

BDA has some well-thought-out policies that enhance the quality of its services and help prevent some of the abuses common in other *battei din*. Those policies are published in booklet form and are also available on its web site:

- BDA allows lawyers to attend (as required by secular arbitration law) but not *toanim*[94] except in unusual circumstances.[95]
- Its members are sensitive to the special needs and concerns of women.[96]

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90 For biographies see http://www.bethdin.org/mission.htm.

91 See www.rabbis.org/news/article.cfm?id=100630.

92 For a complete listing of BDA's rules and procedures see www.bethdin.org/rules.htm

93 The breakdown is approximately 350 cases of *gitten*, 85–100 commercial disputes, 20 cases of "mediation/arbitration," and a handful of personal status cases. In "mediation/arbitration" the *bet din* first tries to get the parties to agree to a solution using mediation. If they reach an impasse, *bet din* will then impose arbitration based on an arbitration agreement that the litigants signed before the mediation began.

94 For a full halakhic defense of this position to allow lawyers but not *toanim,* see R. Reiss' article, שערי צדק in זכויות בעלים, טוענים, עורכי דין ויועצים especially pp. 201–203. "המנהג שלנו בבית דין דאמריקא שאיננו נותנים בדרך כלל לאנשים להביא טוענים רבנים לדין תורה" (201).

95 BDA will allow a *to'en* to attend the proceedings when such action will help prevent a woman from remaining an *agunah*. For example, when a husband says he is ready to grant his wife a *get*, but only if he is allowed to bring a *to'en* to the custody or child-support hearings, the BDA will allow the *to'en* to attend.

- All its cases are written up, and the reasoning behind the ruling is recorded. In addition, all its sessions are tape-recorded.
- A litigant who ignored *bet din* and took his case to secular court cannot return to *bet din* unless the court has not yet issued any rulings on the case.
- BDA allows *zabla* but only in the classic sense. If a defendant refuses to be tried by BDA and requests *zabla*, the BDA will provide an impartial *borer* (i.e., a *dayyan*) and insist that the other defendant name an impartial *borer* (not a *to'en*) from a recognized *bet din*. The two *borrerim* then select a *dayyan*.
- A litigant can appeal to the *av bet din* or *segan*. During the appeals process, the *av bet din* or *segan* can read the notes of the case and listen to the recordings.

One problem BDA faces is its very tight budget. It is thus forced to use volunteers from Yeshiva University's s*emikha* program. Those volunteers, while very motivated, work only a limited number of hours each week and thus lack the continuity and the proper training to properly follow up on issues. Additional funding by the Jewish community to hire full-time professional support staff would help alleviate this problem.

Beis Din Zedek U-Mishpat. In December 2006 a new *bet din* opened in Brooklyn under the auspices of Rabbis Hillel David, Yaacov Horowitz and Yisroel Reisman. The primary innovation of this *bet din* is that its *dayyanim* are salaried. (Funding has been set aside for three years of operation.) Thus the earnings of the *dayyanim* are

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96 The BDA has a policy of encouraging a husband to grant his wife a *get* even if she had insisted on going to a secular court to resolve the support and child-custody issues.
When a woman appears at the BDA, the *bet din* will often ask another woman to attend and guide her so that she will not feel intimidated by an all-male *bet din*.
An intern who had worked at the BDA related how a woman once called the BDA on a Friday afternoon saying that her ex-husband had failed to bring over her son for the weekend as was stipulated in their custody agreement. Rabbi Reiss immediately got to work, called the ex-husband's rabbi and succeeded with him in convincing the ex-husband to abide by the custody agreement.

unrelated to the fees charged by the *bet din*. *Toanim* are thus not empowered to affect the income of the *dayyanim*.

It currently has a pool of four *dayyanim*, three of which are used for each case. *Zabla* is not allowed, but the litigants may be represented by attorneys and *toanim*.

There is no ability to appeal a *pesak* of the *dayyanim,* but litigants who believe that *bet din* acted unethically can bring their grievances to the attention of the rabbis who oversee the *bet din*.

Bet din Zedek U-Mishpat is also committed to publishing a clear set of policies and procedures that are understandable and available to the litigants.

Building upon our successes

Ideally we should as a community put our efforts and allocate resources to create a single outstanding *bet din* that will be used by the entire community. Unfortunately that will never happen. There are too many diverse groups who will never give up their right to run their own *bet din*.

One possible solution is to create an oversight board comprising respected rabbis and laymen from all segments of the observant community.[97] They would develop and publish a set of standards, and *battei din* that agree to implement such standards could become eligible to be certified. Those standards would include:

Clear and Unambiguous procedures. The *bet din* being certified would make a commitment to accept the policies and procedures outlined by the certifying board.

Code of Ethics. The *bet din* would accept the code of ethics as established by the certifying board.

Dayyanim. *Dayyanim* would be required to pass an exam or produce certification they are competent to serve as *dayyanim*.

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97 Certifying boards are already being used in New York to supervise other religious areas. For example, Kashruth Information Center (KIC), made up of *rabbanim* from a cross-section of the community, supervises *kashrut*. AARTS, made up of s cross-section of laymen, audits *yeshivot* to ensure that government funding for education is properly allocated.

Toanim. The *bet din* must either disallow *toanim* or have a procedure for controlling them and limiting their influence.

Zabla. When *zabla* is employed, the *dayyanim* chosen by each side must be certified *dayyanim* and not *toanim*.

Knowledge of arbitration statutes. The *bet din* must be knowledgeable about Federal and state arbitration statutes.

Transparency. All fees and financial matters of the *bet din* must be made available to the public and be subject to audit.

Oversight. The *bet din* would have to agree to annual reviews.

Appeals process. The *bet din* must have a process whereby charges of unethical behavior at *bet din* can be investigated.

Public relations. After steps are taken to improve our system of *battei din,* we need to embark on a public relations campaign[98] to notify the public that indeed the problems of *bet din* have been addressed and rectified, and that litigants can get justice at *bet din* quickly and efficiently.

Any *bet din* that chooses to be certified would be audited, and the findings of the certifying board would be made available to the public. Anyone who had a bad experience at *bet din* could write to the certifying board, which would be obligated to investigate the complaint.

Finally, along with each *hazmana* should be sent a booklet informing the defendant of his or her rights and obligations before *bet din*.[99]

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98 As previously mentioned, some lawyers who are involved with the *bet din* process are less cynical than the general public. That might be due to their understanding the system and having learned to work with it—despite its problems.

99 I would like to thank all those who read earlier drafts of this article and offered valuable comments and suggestions. I would also like to thank all those who responded to our survey and especially those who agreed to be interviewed for this article. In any event, any errors or inaccuracies in this work are solely mine.

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