Un JAM-ing Problems of the Din Torah

When the current from the vast ocean of Jewish law meets with the current of Australian civil law, the water at the meeting point may behave unpredictably. Inevitably issues arise when a community seeks to adhere to its traditions in a different social and legal environment. This opinion piece seeks to identify some of the problems and suggest some practical solutions to harmonise the two currents in the interests of resolving disputes within our community.

Jewish law requires that unless there are exceptional circumstances, Jews must have disputes determined in accordance with Torah law through a Din Torah. The judges of a Din Torah are most commonly, but not always, rabbis.

A Din Torah can take one of several structures. One involves the regularly constituted Beth Din of a city, whilst an alternative is by way of a ZABLA -- a Hebrew acronym for “zeh Borer lo echad” or “each one chooses one”. Thus each party appoints a Borer or representative judge, and those two Borerim appoint a third.

In many places the regularly constituted Beth Din undertakes the task of hearing disputes, as well as attending to other administrative functions, for example conversions, gittin, kashrut. Such is the case in London and other large cities, and of course across Israel.

However in areas of smaller Jewish population even if there is a constituted Beth Din, that organization is not staffed by full-time dayanim (judges). Instead it is constituted by a few communal Rabbis who may also have many other duties. They therefore perform “judicial activities” as best as they can in the limited time available to them. The position in both Sydney and Melbourne has long been that the regularly constituted Batei Din lack the time or human resources to properly deal with (or even deal at all with) significant disputes.

Secondly, there is often no external involvement in the selection of the judges. It appears that they may be appointed internally from amongst themselves, as distinguished from the Australian legal system where judges and arbitrators are externally appointed and accountable. Whilst there is no suggestion of impropriety here, it may diminish the public perception and confidence in the separation of judicial and administrative functions, which many lay people take for granted.

Thirdly, a problem common to small communities is that the members of the constituted Beth Din are often persons who personally know or have some form of relationship with litigants; this can produce significant difficulties in terms of both actual and apprehended bias.

Fourthly, the zabla has been demonstrated before Australian courts to be an inadequate system. The Mond v Caulfield Hebrew Congregation (CHC) dispute relating to membership of the congregation went before a zabla that rendered a partial award. The award was challenged in the Victorian Supreme Court. Justice Dodds-Streeton set aside the award and, in doing so, found that aspects of the conduct of some dayanim was such as to give rise to the apprehension of bias. There is presently another case before the Supreme Court of New South Wales in which the award of a zabla arbitration is the subject of challenge upon several grounds including that of actual bias.

Fifth, very often, particularly in monetary disputes, Halacha (the collective body of ever evolving Jewish law) may dictate incorporation of local law. In such circumstances the Beth Din must of necessity rule on matters of local law; a process with which few Rabbis are professionally trained.

Sixth, there can actually be confusion or uncertainty as to what legal principles, local law or Halacha, are to be or have been applied in a particular instance

Seventh, a further issue that arose in the CHC case related to the application of the Victorian Arbitration Act. There was a serious question as to the interrelationship between that legislation and procedure according to Jewish law. The court held that the question of whether or not conduct amounted to misconduct had to be determined according to the law of Victoria. The court further held that the zabla misconceived its powers to make the type of award that it did.

In the dispute that took place between the Bondi Mizrachi Synagogue and its Rabbi it was deemed necessary by one partiy to take the dispute to the London Beth Din, instead of having the dispute heard by way of Zabla. Moving a Sydney dispute to be heard in London turned out to be a very expensive and time consuming process involving as it did lawyers and the participants having to travel to London.

On the other hand the parties to a dispute between the Adelaide Hebrew congregation and its Rabbi did not agree to submit their disputes to a Beth Din and the matter therefore proceeded to a hearing in the civil courts.

The cases of Yesodei Hatorah College Inc. v Trustees of Elwood Talmud Torah Congregation8 and Horesh v The Sephardi Association of Victoria are two further examples of circumstances of community disputes going to the civil courts.

Clearly, despite the religious obligation to utilise halachic approaches in dispute resolution, there is undoubtedly considerable difficulty in convincing members of the Jewish community to go to a Beth Din. In many instances parties to a dispute have declined to embark upon the Din Torah process due to reasons of appended bias or lack of adherence to natural justice and procedural fairness.

Thankfully, as will be seen, there is some resolution to some of these problems by the harmonising the operation of both secular law and Halacha in certain circumstances as set out below.

Underpinning that solution are two important propositions. The first is that a proper award made in accordance with an arbitration agreement by a properly constituted Din Torah in accordance with the agreement is enforceable in the courts of this country. The second proposition is that if the parties so agree there is no Halachic objection to the parties submitting themselves to the decision of arbitrators even if such arbitrators are laypersons.

There is ample rabbinical authority for the proposition, particularly in money matters, that parties to a dispute may agree to a layperson or persons participating in the judicial process without infringing upon the rabbinical prohibition referred to at the outset of this paper.

The solution lies, in part, in having a system whereby the judicial function is administered by an independent party such as a Registrar who is responsible, subject to the party's right of objection, for appointing the members of the tribunal and administering the process remotely from the judicial function.

The problem of staffing is to be resolved by ensuring a far larger pool of qualified persons to hear the dispute. That pool is expanded by including appropriate laypersons as members of the tribunal and by expanding the number of rabbis able and willing to engage in the process. Fortunately in both Sydney and in Melbourne there is a sufficient supply of appropriate people who are able and willing to do so.

There are a significant number of rabbis and well-qualified Jewish lawyers (a number of whom have a significant familiarity with halacha), both barristers and solicitors who are able and willing, at a price well below their professional rates of charging, to assist in the process. The rates of charging are those allowed to district court arbitrators and is paid to both the rabbinic and legal members of the tribunal. These persons are available to devote the necessary time to hear matters to their conclusion and which might either be of the simplest or most complex kind.

It is the obligation of all practising lawyers to try and seek a negotiated settlement of disputes. This is in keeping with Jewish principle. A number of qualified mediators within the Jewish community are willing to assist in this regard.

Current legislative frameworks across Australia promote and often insist upon alternative dispute resolution processes. In NSW the present Chief Justice in Equity, Bergin J, recognised the appropriateness of a Din Torah in the Mizrachi case. The courts of this country will have no difficulty in requiring parties to undertake that process where deemed appropriate. However, this depends very much on the availability of the system which in turn must be unbiased, competent (to do deal with the particular type of case) and efficient.

One of the most significant principles requiring parties to go to Din Torah is as Rabbi Tarfon explained not to resort to a secular court because of the rabbinical Torah exhortation "These are the ordinances which thou shall set before them". To do otherwise, the Rama explains, may well lead to the nullification of Jewish law.

It is antithetical to those principles to perpetuate a situation (with no disrespect intended to our Batei Din) where the existing structure discourages members of the community from having their disputes determined by a Beth Din, and which lacks the safeguards that may well protect the decisions of a Beth Din from the intervention of the Supreme Court.

It is in the circumstances and in recognition of those matters that the Sydney Beth Din agreed with the New South Wales Society of Jewish Jurists and lawyers to establish J.A.M.S. (Jewish Arbitration and Mediation Service) which seeks to overcome the difficulties mentioned.

It is anticipated that Dayan Rubanowitz, who has provided advice and assistance to J.A.M.S., will be returning to Australia. No doubt he will provide advice to all those involved with the problem of dispute resolution in this country.