HCJFH 4128/00

Petitioners:	1.	Director General of the Prime Minister's Office
	2.	Director General of the Ministry of Religion
	3.	Director General of the Ministry of the Interior
	4.	Director General of the Ministry of Police
	5.	Legal Advisor to the Prime Minister's Office
	6.	Prime Minister's Advisor on the Status of Women
	7.	Government of Israel

v.

Respondents:	1.	Anat Hoffman
	2.	Chaya Beckerman
	3.	International Committee for Women of the Wall, Inc. by Miriam Benson

Attorney for the Petitioners: Osnat Mendel, Adv.

Attorney for the Respondents: Francis Raday, Adv.

The Supreme Court

[April 6, 2003]

Before President A. Barak, Deputy President S. Levin, Justice T. Orr, Justice E. Mazza, Justice M. Cheshin, Justice T. Strasberg-Cohen, Justice J. Turkel, Justice D. Beinisch, Justice I. Englard

Further Hearing on the judgment of the Supreme Court in HCJ 3358/95 of May 22, 2000 by E. Mazza, T. Strasberg-Cohen and D. Beinisch JJ.

A group of Jewish women (hereinafter: the Women of the Wall) sought to pray together in the Western Wall Plaza while wrapped in *tallitot* [prayer shawls] and reading the Torah. The possibility of praying at the Wall in accordance with their practice was prevented due to the violent objection of other worshippers at the site. The Women of the Wall petitioned the High Court of Justice, which ruled that the Government must establish appropriate arrangements and conditions to permit the petitioners to realize their right to worship in accordance with their custom in the Western Wall Plaza. In its petition for a Further hearing, the Government reiterated its argument – that was rejected in the judgment – according to which the Government fulfilled its obligation toward the Women of the Wall by adopting the recommendation that they be permitted to pray in the area of "Robinson's Arch".

The Supreme Court held:

A. (1) The Women of the Wall have a right to pray at the Wall in their manner. However, like every right, that right is not unlimited. It must be evaluated and weighed against other rights that are also worthy of protection.

(2) Accordingly, all steps must be taken to minimize the affront that other religiously observant people sense due to the manner of prayer of the Women of the Wall, and by doing so, also prevent serious events arising from the confrontation of the opposing parties.

(3) In order to try to strike a balance between the opposing demands in this matter, the Government must prepare the adjacent "Robinson's Arch" site and make it into a proper prayer space so that the Women of the Wall will be able to pray at the site in their manner, inasmuch as the site, in its current physical state, cannot serve as an appropriate place for prayer.

(4) If the "Robinson's Arch" site is not made suitable within twelve months, and having found no arrangement acceptable to both parties, it is the duty of the Government to make appropriate arrangements and conditions within which the Women of the Wall will be able to realize their right to pray in their manner in the Western Wall Plaza.

B. (*per* J. Turkel J.):

(1) In deciding to designate the "Robinson's Arch" site for the prayer of the Women of the Wall, the Government acted within the framework of its discretion, and the Court should not intervene in that discretion. This solution should not be adopted "conditionally", but rather as a permanent solution.

(2) Adopting the said solution preserves the right of the Women of the Wall to access to the Western Wall Plaza itself, as long as they pray in accordance with the local custom while in the Western Wall Plaza. Thus, both their freedom of access to the Western Wall Plaza and their right to worship in their own manner is preserved.

C. (*per* E. Mazza, T. Strasberg-Cohen, D. Beinisch JJ., dissenting):

(1) The right of the Women of the Wall to pray according to their custom in the Western Wall Plaza was recognized without reservation in the prior judgments of the High Court of Justice in this matter, and there is no justification for restricting that right at present.

(2) The position adopted by the Court in the proceedings at bar in regard to the need to prepare the "Robinson's Arch" site as a prayer space that will serve the Women of the Wall essentially eviscerates their said right, and also upsets the appropriate balance between their right to worship in the Western Wall Plaza and the need to consider the feelings of other worshippers.

D. (*per* I. Englard J., dissenting):

(1) The Palestine Order-in-Council (Holy Places), 1924, deprives the High Court of Justice of jurisdiction to consider matters concerning freedom of worship in the Holy Places.

(2) The dispute between the petitioners and the Government in the case at bar concerns freedom of worship at the Holy Places and not freedom of access to them, inasmuch as no one is preventing the Women of the Wall from entering the Western Wall Plaza. Rather, the dispute is in regard to the possibility that they pray in their manner at that place. Therefore, the High Court of Justice does not have subject-matter jurisdiction over the dispute at bar.

(3) All the laws of the Knesset are, by their very nature, secular norms, but there is no principled reason that a secular law not refer to a religious system.

(4) The secular character of the Protection of the Holy Places Law says nothing in regard to the interpretation of the terms therein or in the regulations thereunder. Everything rests upon the legislative intent in using those terms. The presumption is that terms borrowed from a religious system should be interpreted in accordance with that system.

(5) The result is that terms employed in the Protection of the Holy Places Law that are borrowed from the religious world should first and foremost be interpreted in accordance with their religious significance.

(6) Accordingly, the expression "conducting a religious ceremony that is not in accordance with the local custom" in reg. 2(a) (1a) of the Regulations for the Protection of Holy Places to the Jews, 5741-1981, should be interpreted in accordance with its halakhic meaning, such that prayer in the Western Wall Plaza in the manner of the Women of the Wall falls within the scope of the prohibition established under the regulation.

(7) Additionally, there is support for the opinion that, in view of the halakhic situation, the judgment under review in this Further Hearing that would allow the petitioners to act in their style and manner would constitute a substantial intrusion upon the prayers of others or an excessive violation of the feelings of others.

Judgment

Justice M. Cheshin:

1. Why was the First Temple destroyed? Because of three things that prevailed there: idolatry, immorality and bloodshed.

> But why was the Second Temple destroyed, when they were occupied with Torah, mitzvoth and charity? Because baseless hatred prevailed. This teaches us that baseless hatred is of equal gravity with three sins: idolatry, immorality and bloodshed (TB Yoma 9b).

So it was in besieged Jerusalem when Titus, the representative of distant Rome, battered its walls. The enemy beset from without, seeking to destroy and extinguish a nation and a kingdom, and the People of Israel within Jerusalem – the residents of Jerusalem and those who gathered in Jerusalem from all the corners of the land of Israel – raised their hands at one another. Beset from without and beset from within. That is the nature of strife. That is the nature of hatred. For strife and hatred destroy all that is good, they completely undermine human relations, they destroy man and beast, tree and field. Such is hatred, such is jealousy, such is zealotry, and zealotry stands above them all.

The Western Wall is a remnant of our Second Temple, and now those who fight amongst themselves fight over it. Can we not learn from the history of our tortured nation?

Background

2. Our concern this time is a Further Hearing on the judgment of the Supreme Court in HCJ 3358/95 *Anat Hoffman et al. v. Director General of the Prime Minister's Office et al*., IsrSC 54

(2) 245. In that judgment, the High Court of Justice decided – *per* Justice Eliahu Mazza, Justices Tova Strasberg-Cohen and Dorit Beinisch concurring – to order the Government "to establish the appropriate arrangements and conditions under which the Petitioners will be able to realize their right to pray in accordance with their custom in the Western Wall Plaza." The Petitioners before the Court – the Government of the State of Israel and those acting on its behalf (hereinafter: the Government of Israel or the Government) – are of the opinion that they should not be ordered to act as ordered by the Court, inasmuch as immediately prior to the rendering of the said judgment the required arrangements and conditions had been established as required by the Court's decision. In its judgment, the Court rejected this argument, and the Government now asks that we find – in a Further Hearing – that it indeed fulfilled what it was required to do.

3. The Protection of the Holy Places Law, 5727-1967 (the Protection Law) – a law enacted some two weeks after the end of the Six Day War – instructs us in decisive, unambiguous language to protect the Holy Places against any desecration or violation, to protect the freedom of access of the various religious communities to the places they hold sacred, and prohibits the affront of feelings towards those places:

> *Protection of Holy Places*
>
> 1. The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.

The very same language, word for word, is conveyed to us in Basic Law: Jerusalem, Capital of Israel (the Jerusalem Law). The Protection Law – and later, the Jerusalem Law as well – was intended to change the *status quo ante* from stem to stern. For until the enactment of the Protection Law – thus during the Mandate period and thus after the establishment of the State, when the Western Wall and other places holy to the Jews were under the rule of the Hashemite Kingdom of Jordan – there were limitations, often severe and disgraceful limitations, upon the rights of Jews to their holy places. But from that point, the limitations were removed and the barriers were lifted.

The Protection Law was not created for the Jews alone, or perhaps we should say that it was created primarily not for the Jews. It was created for the Moslems, it was created for the Christians, it was created for the members of every other faith that have places that are sacred for them in Israel. The rights of all of these were established in the law, and not just any law, but a Basic Law. The status of the Jews in regard to the places they hold sacred was established like the status of all members of other faiths for the places sacred to them, with complete equality and without discrimination – each believer and the places he holds sacred.

We live among our people, and to date we have not heard a serious complaint of any violation incurred by the members of any other faith in regard to the places they hold sacred. The State protects their rights with utmost care, and there is no breaching and no wailing [Psalms 144:14]. Yet see how wondrous, or perhaps not so wondrous: we Jews are the ones dissatisfied by what has been done and by what has not been done in the places sacred to us – at times from here and at times from there. The matter before us in this Further Hearing is one of those disputes that have arisen among the Jews themselves.

4. This is the fourth time that we are addressing the subject before us, and we would express the hope that it will be the last. The first time was in HCJ 257/89, 2410/90 *Anat Hoffman et al. v. Director of the Western Wall*; *Susan Alter et al. v. Minister of Religious Affairs et al*., IsrSC 48 (2) 265 (the First Judgment or the First Petition). The second time was in HCJ FH 882/94 *Susan Alter et al. v. Minister of Religious Affairs et al.* (unpublished), in which the petitioners in the First Petition requested a Further Hearing on the First Judgment (the Further Hearing). The third time was the judgment that we are now addressing in this Further Hearing, that is, HCJ 3385/95 *Anat Hoffman et al. v. Director General of the Prime Minister's Office et al*., IsrSC 54 (2) 345 (the Second Judgment or the Second Petition). And now we meet for the fourth time.

In order to understand the disagreements and the arguments of the parties, we have no alternative but to review – if only in brief – the proceedings to date. Indeed, the aforementioned proceedings were like necklace beads strung one beside another to form a single strand, and before we string another bead, we should study and understand the nature of that strand.

The Original Events and the First Petition

5. The matter began on the Rosh Hodesh [beginning of the new month of the Jewish calendar] of the month of Tevet 5749 (Dec. 9, 1988), when a group of Jewish women, residents of Jerusalem, tried to pray together in the Western Wall Plaza. It is the custom of those women to wrap themselves in *tallitot* [prayer shawls] in prayer, and to read aloud from a Torah scroll, as is customary for the reading of the Torah. Thus the women sought to do facing the Western Wall every month and on special occasions. That Rosh Hodesh Tevet, the other male and female worshippers at the Wall were unwilling to permit the women to pray as they desired, and from the moment they began to pray, those other worshippers met them with violence. Prior to Rosh Hodesh Adar I, having learned from their experience, the women informed the police in advance of their intention to pray at the Wall in accordance with their custom, but to no avail. In the course of prayer, other women worshippers – soon joined by male worshipers – began to interrupt the group of women, to curse tem, shower them with insults, and even to grab the prayer books from their hands, throw objects at them and beat them.

6. Following that event, the women met with the late Rabbi Getz, who was the rabbi in charge of the Western Wall, and prior to the Fast of Esther of that year an arrangement was concluded and the women agreed to pray at the Wall without *tallitot* and without Torah scrolls. For his part, Rabbi Getz assumed the responsibility of seeing to the safety of those women and to ensure their right to pray. The arrangement did not succeed, as Rabbi Getz was unable to keep his promise. The prayer on the Fast of Esther became particularly stormy, and ultimately the police had to break up a violent, rioting crowd by means of tear-gas canisters.

7. On the day following the grim events of the Fast of Esther, on 14 Adar II 5749, March 21, 1989, those women submitted their first petition (HCJ 257/89). Thus began the first affair.

8. The opponents of the prayer of those women continued to act aggressively, but the women did not relent. They continued to arrive at the Wall on Rosh Hodesh and pray there, but the absolute opposition displayed by the other worshippers at the site – and the rabbi in charge of the Western Wall Plaza among them -- did not dissipate. The exchanges between the warring camps did not mince words – orally and in writing – and even violence showed its ugly face. The history of the struggle leading up to the judgment on the First Petition is described in detail by Deputy President Elon in the First Judgment, at pp. 277 – 292.

9. Towards the end of 1989, the group of women gained encouragement and support from another group of Jewish women, residents of the United States (the Second Group). These women established the "International Committee for Women of the Wall" – from that point on, the First Group and the Second Group have been referred to as the Women of the Wall – and also tried to pray at the Wall from time to time. The worship services of the Second Group was – and is – conducted in accordance with Orthodox halakha. Inasmuch as that group comprises women from various streams of Judaism, and in order for them to unite as a single group, the group chose to follow the strictest approach to prayer from among the various schools. These women pray together as individuals, that is, they do not view themselves as constituting a "*minyan*" [prayer quorum], and therefore refrain from reciting those prayers that are permitted only in a *minyan*, such as the *kaddish* prayer. They wrap themselves in *tallitot* and read from a Torah scroll – as is the practice of the women of the First Group – but at the same time, they take care not to follow the Torah reading practices that are permitted only in a minyan, such as reciting the blessings and being called to the Torah.

10. The women of the Second Group wished to pray at the Wall – together, as is their custom – on Rosh Hodesh Kislev 5750, but when they arrived at the Western Wall Plaza, wrapped in *tallitot* and carrying a Torah, they were prevented from entering the women's prayer section. This incident led to an exchange of letters with the representatives of the Ministry of Religious Affairs, and when it became clear that this correspondence would not bear fruit, this Second Group also petitioned the High Court of Justice. This petition – submitted to the Court on June 3, 1990 – was the petition in 2410/90 *Susan Alter et al. v. Minister of Religious Affairs et al*. The proceedings in that petition were joined with the proceedings in the First Petition, and the two petitions together composed the first affair. For the sake of completeness we would also add that the groups composing the Women of the Wall are of various hues – like the other groups we have become accustomed to seeing in Judaism – but for our purposes they are all united in the demand that they be permitted to pray together at the Wall, wrapped in *tallitot* and reading the Torah aloud, just as men wrap themselves in *tallitot* and read the Torah aloud without fear.

11. To complete the picture, we would also add the following. Under the provisions of sec. 4 of the Protection Law, the Minister of Religious Affairs may, after consulting with, or upon the proposal of, representatives of the religious communities concerned, and with the consent of the

Minister of Justice, make regulations as to any matter relating to the implementation of that law. The Minister of Religious Affairs has exercised that authority on several occasions. In regard to the Western Wall (and other Jewish Holy Places), he promulgated regulations called the Regulations for the Protection of Holy Places to the Jews, 5741-1981 (the Protection Regulations). On Dec. 31, 1989, after the First Petition was submitted to the Court – that is the first petition of the Women of the Wall – and before the Second Petition was submitted, the Minister published an amendment to those regulations – after consulting with the Chief Rabbis of Israel – adding subsection (1a) to regulation 2, as follows:

> *Prohibited Conduct*
>
> 2. (a) In the area of the Holy Places, … the following is prohibited:
>
> (1) …
>
> (1a) Conducting a religious ceremony that is not in accordance with the local custom, that offends the sensitivities of the praying public in regard to the place;
>
> …

We will return to examine this subsection further on, but for the meantime we would only add that it would appear that is was on the basis of this subsection (and reg. 4 of the Regulations) that the rabbi in charge of the Western Wall Plaza sought to prohibit the entrance of the Women of the Wall to the women's prayer section of the Plaza.

The Judgment on the First Petition

12. The petitions of the Women of the Wall – that in HCJ 257/89 and that in HCJ 2410/90 – came before a panel of the High Court of Justice composed of President Meir Shamgar, Deputy President Menachem Elon, and Justice Shlomo Levin. After the passage of no small amount of time during which the parties were unable to come to terms, the Court issued its decision. The judgment was delivered on Jan. 26, 1994, and the three justices wrote three separate opinions. All three agreed "that the Petitioners are entitled to pray in accordance with their custom in their

communities and synagogues, and no one will stand in their way", that "the freedom of worship of the Petitioners stands" (*per* Elon D.P., *ibid*., at p. 350), and that the prayers of the Women of the Wall "are not halakhically flawed from a formal perspective" (*per* Elon D.P., *ibid*., at p. 321). However, differences of opinion arose among the justices on the question of whether the Women of the Wall could, in practice, pray in accordance with their custom in the Western Wall Plaza, and thereby realize their fundamental right to freedom of worship.

13. Justice Elon was of the opinion – in a decision that is worthy of being called monumental and encyclopedic – that the Women of the Wall do not have the right to pray in the Western Wall Plaza in accordance with their custom, and he constructs his decision as follows. First, the Deputy President holds that the prayer area beside the Western Wall is a synagogue, and not merely a synagogue, but "the holiest synagogue in the halakhic and Jewish world" (*ibid*., p. 318). Elsewhere, the Deputy President holds that the prayer area beside the Western Wall "must be treated like a synagogue and even more so" (*ibid*., p. 319). Second, the manner of prayer of the Women of the Wall, although not contrary to halakha, is a manner of prayer that is "unacceptable", that is to say, unacceptable in an Orthodox synagogue, in that it is contrary to the manner of prayer in an Orthodox synagogue. In conclusion: the manner of prayer of the Women of the Wall is, in the opinion of the Deputy President, a manner of prayer that stands in contradiction of the "local custom".

In this regard, the Deputy President reminds us of the provision of reg. 2(a) (1a) of the Protection Regulations – a provision that prohibits conducting a religious ceremony "that is not in accordance with the local custom, that offends the sensitivities of the praying public in regard to the place" – and he further holds that this provision "expresses the principle of maintaining the status quo – 'local custom' and the status quo are one and the same" (*ibid.*, p. 344). The Deputy President further states "that prayer conducted in the manner of the Petitioners – prayer that … violates 'local custom' – leads to severe, tangible harm to public order, and thereby leads to desecration of the Western Wall" (*ibid*., p. 345). Indeed (*ibid*., p. 329):

> The present reality is that the overwhelming majority of halakhic decisors, including the Chief Rabbis of Israel, see the granting of the Petitioners' petitions – even that in HCJ 2410/90 – as constituting a desecration of the customs and sanctity of the synagogue. Such is the case in regard to the prayer customs of the

> synagogue, and all the more so in regard to the prayer space at the Western Wall, which is the holiest synagogue in the halakhic and Jewish world.

(And further see p. 350). The necessary conclusion is that:

> … Granting the petitions before the Court would constitute a substantive change in the *local custom*, and the conducting of prayer services in the manner requested in the petitions would constitute a grave offense to the feelings of the overwhelming majority of worshippers in regard to the place …
>
> Clearly, it goes without saying that the Petitioners are entitled to pray in accordance with their custom in their communities and synagogues, and no one will stand in their way. The freedom of worship of the Petitioners stands. But due to the uniqueness of the Western Wall, and the great sensitivity of Judaism's holiest site, prayer at that one unique place must be conducted in accordance with the common denominator that makes it possible for every Jew to pray there – the local custom that has been observed there for generations, and that should be strictly adhered to (*ibid*., p. 350, emphasis original – M.C.).

This is even the case in regard to the serious fear of a possible breach of public order. The freedom of worship acquired by the Women of the Wall must retreat before the fierce opposition of the majority of worshippers at the site – opposition deriving from the severe affront that will be felt by those worshippers if the Women of the Wall are granted their request and permitted to pray in accordance with their custom in the Western Wall Plaza. In the words of Justice Elon (*ibid*., pp. 349-350):

> It is clear beyond all doubt that granting the petitions before us would lead to particularly harsh, bitter and sharp dispute, as well as to violence that would end in bloodshed. It is an uncontested fact that the overwhelming majority of worshippers who visit the prayer area at the Western Wall every day and every night are of the honest, good-faith opinion and belief that the changes requested in the two petitions before the Court amount to desecration of the prayer area at the Western Wall. Not only will it result in extremely violent and severe dispute, but in terms of halakha, *both men and women will be prevented* from praying at the

> Wall. At present, access to the Wall and prayer at the Wall are open and permitted to every Jewish man and women, who pour out their hearts before God as each women and man desires, and as each wishes to speak with his Maker, whether by heart or from a book. It would be unthinkable that different dates and times for prayer would be instituted at the prayer area at the Western Wall *for the prayer services* of different groups, and that the fate of this holy site would be its division into times and periods among the members of the Jewish People, their holidays and different movements, as has been the fate of the Holy Places of other religious communities … (emphasis original – M.C.).

Deputy President Elon was thus of the opinion that the petition of the Women of the Wall should be denied in its entirety, and that they should not be permitted to pray according to their custom in the Western Wall Plaza.

14. On the other side – diametrically opposed to the Deputy President – stood Justice Levin. As opposed to Deputy President Elon, Justice Levin was of the opinion that the Women of the Wall had a right to pray in the Western Wall Plaza in accordance with their custom. Moreover, after four years had passed since the events that gave rise to the petitions, it was time, in his opinion, to decide the matter and grant the petitioners' request.

15. First of all, Justice Levin held that the Protection Law is a secular law, and therefore the petition should not be decided solely on the basis of halakhic considerations. This statement by Justice Levin conspicuously contradicts the opinion of Deputy President Elon, who interpreted and effected the Protection Law in accordance with Jewish halakha, and in reliance upon numerous Jewish-law sources. In the opinion of Justice Levin, the Western Wall site is sacred to the Jewish People both as a religious site and place of prayer, and as a place bearing national significance, a symbol of the Jewish kingdom, and he was of the opinion that it was in accordance with that approach that the manner of conduct in its vicinity and the rights of Jews to act there must be interpreted. Moreover, the Western Wall is not a synagogue, and therefore it is not subject to the halakhic rules that apply to a synagogue. The test that should be applied in regard to permissible activity in the Western Wall Plaza should be based upon "the common denominator of all the groups and people who visit the Western Wall site and the Plaza in good faith, whether for prayer or for other legitimate purposes" (p. 357).

As for the concept of "local custom" in accordance with reg. 2(a) (1a) of the Protection Regulations, Justice Levin expressed his opinion that:

> … in my opinion, the term "local custom" need not be interpreted specifically in accordance with the halakha or the existing situation. It is the nature of custom to change over time, and in its framework expression should be given to a pluralistic, tolerant approach to the views and customs of others, subject to the limitations that I have noted above.

However, Justice Levin was also of the opinion that restrictions may be imposed upon certain activities at the Western Wall site (*ibid*., p. 357):

> Without exhausting the subject, it may be justifiable to restrict religious ritual or other conduct at the site when the common denominator of the public that legitimately cares about the Wall, and not merely one sector, sees the conduct as an "intolerable" violation that "desecrates" the site, or where the conduct is not carried out in good faith but simply to anger and provoke, or where circumstances justify establishing that certain concrete conduct will, by reason of its extent or timing, lead to a breach of public order in circumstances in which preventing the conduct (in those concrete circumstances) overrides the right to worship or the conduct of the relevant party, while ensuring appropriate alternatives for the conduct in order to limit the danger to public order that would result from it.

The practical result of this is (*loc. cit*.):

> … that no absolute prohibition should be placed upon conducting prayer services at the Western Wall site simply because there are groups that oppose them, and considerations of certain and proximate danger of a breach of the peace need not necessarily justify imposing such a prohibition. Rather, it is the duty of the relevant authority to ensure the appropriate conditions in order to balance all the relevant interests so that all those who seek to assemble at the Wall and its Plaza may fully realize their rights without unnecessarily violating the feelings of others.

Inasmuch as four years had passed since the events that gave rise to the petitions, it no longer seemed appropriate to decide – after such a long period – "whether or not the conduct of any of the Petitioners was in good faith at the time" (*loc. cit.*), and therefore Justice Levin decided "under these circumstances" that:

> I am satisfied that, at this point, it is sufficient to issue a decision that recognizes in principle the good-faith right of the Petitioners to pray at the Western Wall Plaza while wearing *tallitot* and while carrying Torah scrolls, subject to the provisos that I have already noted above. That is what I would decide.

Nonetheless, being aware of the difficulties that might confront the Government in putting the decision into practice, Justice Levin further decided that the execution of the decision should be postponed. In his words (p. 358):

> In light of the sensitivity of the subject, and the need to prepare for the execution of this decision, and perhaps also to enact legislation to arrange the matter, I would recommend to my colleagues that this judgment be issued subject to the interim order remaining in force for one year from today.

16. The third opinion – the second in the order published in IsrSC – was given by President Shamgar. At the outset, President Shamgar addresses the exalted status of the Western Wall – both in the religious tradition and in the national tradition of the Jewish People – stating (*ibid*., p. 353):

> The Wall – which bounds the Temple Mount on its western side – was sanctified *in the religious tradition* of the Jewish People as the remnant of our Temple. For thousands of years, it has represented *in our national tradition* what we lost with the destruction of the Temple, as well as the continuity of our national existence. In the eyes of the religious *halakha*, it is a *mikdash m'at*; from a nationalist perspective, it symbolizes generations of suffering and the aspiration for a return to Zion and the return of our diaspora, and therefore, it expresses the strength and vitality of the nation, its ancient roots and its eternality. Therefore, *inter alia*, the opening ceremony of Remembrance Day for the Fallen Soldiers of Israel is held there, and soldiers are sworn in while facing it (emphasis original – M.C.).

Further on, President Shamgar goes on to speak of tolerance and patience (*ibid*., p. 354):

> … we have emphasized on various occasions that the sons and daughters of a free society in which human dignity is a fundamental value, are asked to respect the personal-emotional feelings of the individual and his dignity as a person, while understanding that the personal-emotional priorities and the manner of expressing them differs from person to person. Thus we were of the opinion … that a free society is sparing in imposing limits upon the choices of the individual and acts with patience and tolerance, and even tries to understand the other, even when he chooses paths that the majority does not deem acceptable or desirable.

Tolerance and patience "are not unidirectional norms, but rather they are encompassing and multidirectional" (*ibid*., p. 354), and therefore:

> … tolerance must be mutual. Belligerent demonstrations that sometimes draw upon the practices of violent societies from the east and west are not appropriate to it.

Following this preface, President Shamgar informs us: "All of this leads us to the bumpy road of trying to balance between approaches and beliefs that are incompatible" (*ibid*., p. 354), and in this context he adds that it would be preferable if the resolution of disputes be reached through dialogue. In his words (*ibid*., pp. 354-355):

> … it is worth remembering that exclusive focus upon presenting questions and problems before the Court – the "wonder drug" of our generation – is not necessarily the appropriate solution or the desirable remedy for all that ails us. At times it comprises the desire for an imposed solution, grounded in a judicial order, when an attempt at reaching agreement and discussion between the various approaches seems more difficult. However, a solution achieved through agreement and understanding has the advantage of deriving from the parties, and the spirit that led to the agreement will imbue its results.

17. On the merits, one needn't dig too deeply to discover that President Shamgar was of the opinion that the petitioners had a right to pray according to their custom in the Western Wall

Plaza. Like Deputy President Elon, President Shamgar was also of the opinion that we must seek and find "a common denominator for all Jews, whomever they may be" (*ibid*., p. 355). However, unlike Deputy President Elon, in the opinion of President Shamgar (*ibid*., p. 355):

> … the common denominator means sufficing with the basic arrangements that would ensure freedom of access and freedom of worship to *everyone*, without imposing special conduct upon those who do not want it, and without violating the sensitivities of the believers. It does not mean imposing the strictest approach. Incidentally, if we were to adopt the strictest approach, then no Jew would be permitted to visit the Temple Mount (emphasis original – M.C.).

President Shamgar agrees that "in light of the unusual sensitivity of the issue at bar, it cannot be resolved at a stroke, while ignoring its deep roots", but he adds, "I am not convinced that the Respondents are not exaggerating the conflicts and differences." He then continues to express his opinion in no uncertain terms in regard to the right of the Women of the Wall. In his words (*ibid*., p. 355):

> In my opinion, practical solutions should continue to be sought, according to which anyone who wishes to approach his Creator in prayer will be able to do so in his own style and manner, as long as it will not constitute a substantial interference with the prayers of others. The legal starting point is, indeed, the prevailing situation. But we must not bar the way before the good-faith right of anyone who wishes to pray in his own manner, as is clear from the provisions of the said laws.

18. President Shamgar is of the opinion that it would be appropriate to attempt to continue to employ means that might lead to an arrangement acceptable to all:

> I have already noted that this Court may not be the most effective medium – and certainly not the only one – that, through meeting with the various parties, can try to find practical ways for realizing the legislative purpose of the two aforementioned laws, which continues and realizes the principle declared in the Declaration of Independence.

> If the relevant parties are willing, it would be appropriate to make at least an attempt to reach a solution that would be suitable to all those who wish to visit the Western Wall.

And for this reason, he is of the opinion that a decision should not be rendered immediately (*ibid*., pp. 355-356):

> It is, therefore, my opinion that, at this stage, we should not decide the matter before us in the manner that a normal legal dispute is decided. I would recommend to the Government that it consider the appointing of a committee that would continue to examine the issue in depth in order to find a solution that will ensure freedom of access to the Wall and limit the harm to the feelings of the worshippers.
>
> Therefore, I would, at present, dismiss the petitions, subject to my above recommendation. The gates of this Court are always open, but as stated, the other available options should first be exhausted.

19. If we closely examine the opinions of the three justices, we discover that they are divided into a majority and a minority for various reasons. In order to understand this correctly, we will now take a small step backwards. We will examine the petitions of the Women of the Wall and then return to the opinions of the justices.

The primary prayer of the petitioners in HCJ 257/89 (the First Group) was directed against the Director of the Western Wall, the Ministry of Religious Affairs, and the Chief Rabbis, demanding that they show cause:

> Why do they forbid and/or prevent the Petitioners in particular, and Jewish women in general from carrying Torah scrolls and reading from them, and/or wearing *tallitot* during their prayers.

As for the Second Group – the Women of the Wall who petitioned in HCJ 2410/90 – their primary prayer was this:

> A petition for an order against the Respondents … forbidding them to prevent Petitioners nos. 1-6 from praying at the Western Wall and in the Western Wall

Plaza while wearing *tallitot* and reading the Torah, and requiring them to permit the Petitioners to bring a Torah scroll into the Western Wall Plaza, and ensure such prayer by the Petitioners without interference or harm.

These petitions were denied by a majority composed of President Shamgar and Deputy President Elon, but while the Deputy President's reasons came from the east, the President brought his reasons from the west.

20. On the merits, as noted, Deputy President Elon was of the opinion that the Women of the Wall did not have a right to pray according to their custom at the Western Wall, and he therefore decided that the petitions should be denied. President Shamgar was also of the opinion that the petitions should be denied, but unlike the Deputy President, it was his opinion that the time was not yet ripe for a judicial decision, and he therefore decided to deny them. In the opinion of President Shamgar, the Petitioners' petitions were premature, as the parties had not exhausted all of the avenues for resolving the disputes amicably – rather than by a decision of the Court – and it would not, therefore, be appropriate to decide the matter and rule upon the rights of the parties at law. The Deputy President from here and the President from there – each for his own reasons – arrived at a joint operative conclusion that the petitions should be denied and the orders nisi quashed. But the reasons for their decisions were diametrically opposed. In this regard, Justice Levin was in the minority, as his opinion was that an order absolute should be granted in a particular form.

Thus far in the matter of the operative relief.

21. The disagreements on the operative decision were unlike the disagreements on the merits in regard to the right of the Women of the Wall to pray at the Western Wall in accordance with their custom. In this regard, the division among the opinions of the justices was different than in regard to the operative decision.

The opinion of the Deputy President, Justice Elon, was, as stated, that the Women of the Wall did not have a right to pray at the Western Wall in accordance with their custom. As opposed to this, Justice Levin was of the opinion that, subject to certain provisos, the Women of the Wall had a right to pray in good faith at the Western Wall in accordance with their custom, while wearing *tallitot* and carrying a Torah scroll. In this regard, President Shamgar concurred

with Justice Levin that the Women of the Wall had a right to pray at the Western Wall in good faith and in accordance with their custom. Indeed, as we saw, President Shamgar was of the opinion that "[T]he legal starting point is, indeed, the prevailing situation. But we must not bar the way before the good-faith right of anyone who wishes to pray in his own manner, as is clear from the provisions of the said laws" (at p. 355). At the same time, while President Shamgar and Justice Levin agreed on the merits, they disagreed as to the operative relief, and for reasons that we explained above, President Shamgar was of the opinion that the order nisi should be quashed and the petitions denied.

22. The result of the First Petition was thus that according to the majority, the Women of the Wall had a right to pray in accordance with their custom at the Western Wall, while by a different majority, their petition was denied.

The Proceedings after the Judgment in the First Petition and the submission of the Second Petition

23. President Shamgar was of the opinion that the possibilities for reaching an agreed solution had not been exhausted, and in this regard he accompanied Justice Levin part of the way (see para. 15, above, in regard to the operative relief that Justice Levin thought should be granted to the petitioners). President Shamgar did not set a time for examining the possibilities for reaching an agreed solution, but he expressly stated the parameters for striking a balance. We quoted his opinion above (para. 17), and we will reiterate it here:

> In my opinion, practical solutions should continue to be sought, according to which anyone who wishes to approach his Creator in prayer will be able to do so in his own style and manner, as long as it will not constitute a substantial interference with the prayers of others. The legal starting point is, indeed, the prevailing situation. But we must not bar the way before the good-faith right of anyone who wishes to pray in his own manner, as is clear from the provisions of the said laws.

In other words, the Women of the Wall have the fundamental right to pray to God in accordance with their custom – whether in their own place or before the Western Wall – "as long as it will not constitute a substantial interference with the prayers of others."

24. In the judgment that is the subject of the Further Hearing – the judgment in the Second Petition – the Court surveyed the events following the judgment on the First Petition at length (see pp. 352 – 361 of the judgment in the Second Petition), and we will therefore be brief.

25. Two months passed after the rendering of the First Judgment, and on May 17, 1994, pursuant to the recommendation of President Shamgar, the Government of Israel decided to appoint a committee that was instructed as follows:

> … to propose a possible solution that will ensure freedom of access to the Western Wall and freedom of worship in its Plaza, while minimizing the violation of the feelings of the worshippers at the site.

The members of the Committee were the Director General of the Prime Minister's Office (Chair), and the Directors General of the Ministry of Religious Affairs, the Ministry of the Interior, and the Ministry of Police, and the Legal Advisor of the Prime Minister's Office. The Prime Minister's Advisor on the Status of Women was appointed to the committee as an observer (the Directors General Committee). The Government allotted six months for the Committee to present its recommendations.

26. When they saw that the First Judgment did not grant them the relief they had hoped for, the Women of the Wall petitioned the Supreme Court to grant a Further Hearing on the First Judgment (HCJFH 882/94 *Susan Alter et al. v. Minister of Religious Affairs et al*., unpublished). The Deputy President, Justice Aharon Barak, decided to deny the request, grounding his decision upon the Government's decision. In his decision, the Deputy President wrote:

> This petition must be denied. My opinion is grounded upon the view expressed by President Shamgar in his opinion in the judgement that is the subject of this request. In his opinion, the President noted that, at this time, he would not decide upon the petition. Instead, he recommended that the Government consider the appointment of a committee that would examine the matter in depth in order to

> arrive at a solution that would ensure freedom of access to the Wall and minimize the violation of the feelings of the worshippers.

The Deputy President quotes the Government's decision, and goes on to say:

> On the basis of this sequence of events, it would appear to me that we should wait for the Committee's recommendation (which is supposed to be given within six months of the establishing of the Committee). If those recommendations are unacceptable to the Petitioners, they may reapply to the Court (sitting as High Court of Justice). In his opinion, the President noted in this regard that "[T]he gates of this Court are always open, but as stated, the other available options should first be exhausted".

27. Let us return to the Committee. The six months allocated to the Committee by the Government passed. Then a further six months passed (pursuant to an extension decided upon by the Government, and the Committee's recommendations were still delayed in coming. Seeing this, the Women of the Wall petitioned the High Court of Justice, this time presenting a united front (HCJ 3358/95 *Anat Hoffman et al. v. Director General of the Prime Minister's Office et. al.*).

This Second Petition added nothing new to the First Petition. The request of the Women of the Wall was merely that the Government establish arrangements that would permit them to pray in the prayer area at the Western Wall "in women's prayer groups, together with other Jewish women, while they are wearing *tallitot* and reading aloud from the Torah", in accordance with the First Judgment (see the Second Judgment, IsrSC 54 (2) 345, 347). In other words, the Second Petition was, in essence, a petition to force the Government to do what the Court had ordered that it do in the First Petition.

28. Not long after the submission of the Second Petition, on July 2, 1995, the Government decided to extend the time allocated to the Committee for presenting its recommendations by an additional six months.

Ultimately, on April 2, 1996, the Committee presented its recommendations to the Government. And this is the core of the Committee's recommendation:

> In order to achieve the balance demanded of the Committee in the Government's decision between freedom of access to the Wall and limiting the violation of the feelings of the worshippers, the Committee has not found the time to be ripe for permitting prayer in the Western Wall Plaza itself that differs from the traditional prayer accepted there.

In arriving at its decision, the Committee gave significant weight to the views of the Commissioner of Police and the Police Commander of the Jerusalem District who expressed their opinion in regard to the consequences of the prayer of the Women of the Wall for public order. They were of the opinion that an arrangement for the allocation of prayer times would not prevent harm to public order. The Committee further examined four alternative prayer sites in the vicinity of the Wall: the site beneath "Robinson's Arch", the area in front of the Hulda Gates, the southeastern corner of the Temple Mount wall, and the "Little Western Wall". Of the four alternatives, the Committee was of the opinion that the southeastern corner was the most appropriate.

29. When the recommendations of the Directors General Committee were presented before it, the Government decided to appoint a ministerial committee to "examine the recommendations of the Directors General Committee and the means for effecting them, and decide the matter on behalf of the Government." That decision was made on April 21, 1996, but because elections for the fourteenth Knesset were held shortly thereafter, the ministerial committee was automatically dispersed.

30. Another year passed until, on June 2, 1997, and after being presented with the recommendations of the Governors General Committee, the Ministerial Committee for Jerusalem decided to adopt the recommendations. This was the decision of the Ministerial Committee:

> A. To record the notice of the Prime Minister according to which the Government of Israel recognizes the right to freedom of worship and religion of every person, including the Petitioners.
>
> B. To find that in reliance upon the evaluation of the Israel Police, the prayers of the Petitioners, in accordance with their custom, cannot be permitted in the Western Wall Plaza, and that in accordance with the evaluation of the other

security services that was recently presented, a change of the status quo in regard to prayer arrangements in the alternative suggested sites may lead to a danger to public safety.

C. In accordance with the aforesaid, to maintain the existing situation unchanged for the present. To act to examine the possibility of arranging an appropriate alternative prayer site, and to request a postponement of the Court proceedings for an additional three months for the purpose of examining the situation of the proposed sites from the security standpoint.

D. The evaluation of the security agencies will be brought for further discussion by the Ministerial Committee for Jerusalem, and for a decision on the matter.

31. The Government did not relent in its attempts to find an agreed solution for the prayers of the Women of the Wall. A committee was established at that time whose assignment was to develop recommendations in regard to the matter of conversion to Judaism (the Neeman Committee), and the Government proposed that that committee address the issue of the Women of the Wall. The Women of the Wall initially rejected this proposal, but after discussion in the Court – in the course of the proceedings in the Second Petition – the matter was transferred to the examination of the Neeman Committee.

32. The members of the Neeman Committee were – in addition to the Chair, the then Minister of Finance Yaakov Neeman – Prof. Dov Frimer, Adv.; Rabbi Nahum Rabinowitz; the Head of the Ma'aleh Adumim Yeshiva; Rabbi Uri Regev, representing the Reform Movement; and Rabbi Ehud Bandel (replacing Rabbi Reuven Hammer), representing the Conservative Movement. The representatives of the parties were invited to the Committee's meetings, and the representatives of other relevant bodies also participated, among them: the Antiquities Authority, the Ministry of Religious Affairs, the Ministries of Justice and Internal Security, the Office of the Minister for Diaspora Affairs, the Israel Police, and others. The Committee held a number of meetings, and in the course of its deliberations it also visited five possible prayer sites: the area of the parking lot adjacent to the entrance to the Western Wall Plaza, beside the staircase; the "Southern Wall" area; the women's prayer section in the Western Wall Plaza; an area at the back of the Western Wall Plaza known as the "Flag Plaza"; and the "Robinson's Arch" area.

On Sept. 23, 1998, the Committee presented the report that it had prepared, examining the advantages and disadvantages of each of the proposed alternatives. At the end of its report, the Committee reached the conclusion that conducting prayer at the "Robinson's Arch" site is "the most practical solution for the needs and demands of the Women of the Wall. That is the case after weighing the advantages and disadvantages of each of the above alternatives. … [and] weighing and balancing the need to find an appropriate prayer site that would meet the needs and demands of the Women of the Wall, and the important principle requiring the avoiding of violation of the feelings of the worshippers at the Western Wall Plaza and not violating the local custom". These conclusions were adopted over the opposition of Rabbi Uri Regev.

The Second Judgment

33. The recommendation of the Neeman Committee was not acceptable to the Women of the Wall. They were of the opinion that the recommendation did not fall within President Shamgar's balance parameters, and they therefore maintained their position, demanding their right to pray in accordance with their custom in the Western Wall Plaza. That is also what they argued before the Court in the Second Petition. The Government's position was, needless to say, different and opposed. In the Government's opinion, President Shamgar had said nothing more than that a balance must be struck between the right of access to the Wall, and harm to the feelings and well-being of the public. The Government further argued that that balance had been appropriately preserved by the Neeman Committee, and that the Committee's recommendation reasonably balanced the interests pulling to either side. The Court was therefore required to decide the issue of whether the decisions of the Government and the committees that had acted on its behalf were consistent with the decision rendered in the First Judgment.

34. The judgment in the Second Petition was drafted by Justice Mazza, with the concurrence of Justices Strasberg-Cohen and Beinisch. The judgment reviewed the chain of events leading up to it, and in examining the activity of the committees in relation to the balancing parameters set down by President Shamgar, instructed us as follows (*ibid.*, 364-365):

> … the recommendation of the Directors General Committee was not only contrary to the express instructions of the First Judgment, it also deviated from the

purpose for which the Committee was appointed, as defined in the Government's decision.

The committees that followed the Directors General Committee – the Ministerial Committee for Jerusalem, as well as the Neeman Committee – pursued the same path. The common denominator of the recommendations that were presented by all of the committees that addressed the matter was expressed by the conclusion that the balance between the Petitioners' right to pray in the Western Wall Plaza, and the harm that the Petitioners' prayer will cause to others and the opposition that will be aroused can only be found in removing the Petitioners from the Western Wall Plaza and forcing them to suffice with this or that alternative prayer venue. Needless to say that these recommendations too – like the recommendation of the Directors General Committee – deviated from the balancing formula in the First Judgment.

It would not be superfluous to note that even in explaining the reasons for their conclusions, the honorable committees drifted to views that were rejected by the majority of the justices in the First Judgment. Thus, for example, in arriving at its positon, the Directors General Committee ascribed weight to the verdict of the Chief Rabbis that "there should be no change in the existing status quo, and that prayer at the Western Wall should continue to be conducted as was customary and accepted to this day". That position, sanctifying the "status quo", was supported in the First Judgment only by the Deputy President, Justice Elon, but was entirely rejected by Shamgar P. and Levin J. This comment is equally applicable to the balancing formula followed by the Neeman Committee, which also granted weight to the consideration of "not violating the local custom". Particularly perplexing was the comment of the Directors General Committee that "the paths of peace require mutual sacrifices of both sides", inasmuch as by its recommendation that the Petitioners be removed entirely from the Western Wall Plaza, the Committee expressed the opinion that only the Petitioners are required – for the sake of peace – to sacrifice everything, whereas the groups opposing the presence of the Petitioners – the fear of whose violent reaction led the Committee

> to seek a different solution from that it was asked to recommend – are neither asked nor expected to make any sacrifice.

As for the parameters of the balance decided upon (by majority) in the First Judgment, Justice Mazza adds as follows (*ibid.*, 366):

> … the First Judgment recognized the right in principle of the Petitioners to conduct prayers in accordance with their custom in the prayer plaza beside the Western Wall, and [] the committees that addressed the subject of the petition following the First Judgment did not do what they were intended to do in accordance with the instructions of that judgment …

As for the fear of the violent reactions of the opponents of the prayer of the Women of the Wall, the Court further held that a balance that abolishes the right of the Women of the Wall by reason of public safety deviates from the balance parameters established in President Shamgar's opinion (*ibid*., 365):

> We are of the opinion that in arriving at its decision in the First Judgment, the Court already took into account the possibility that recognition of the Petitioners' right to pray in accordance with their custom in the Western Wall Plaza might lead to violent reactions by groups for whom tolerance of others is foreign.

35. This, therefore, was the decision in the Second Judgment now before us in a Further Hearing: Having found that the "balances" effected by the various committees are incompatible with the instructions of the First Judgment, the Court ruled (*ibid*., 367) to issue an order absolute:

> [I]nstructing the Government to establish the appropriate arrangements and conditions under which the Petitioners will be able to realize their right to pray in accordance with their custom in the Western Wall Plaza.

This time as well, as in the first case, the Court refrained from deciding upon the details of the appropriate arrangement, but Justice Mazza found it appropriate to emphasize that "the required decision [in the matter of the arrangement] is only in regard to the concrete conditions in order to enable the Petitioners to pray in accordance with their custom in the Western Wall Plaza, such as the place and times in which they may do that, while mitigating the affront to the

feelings of other worshippers and while maintaining the necessary security arrangements" (*ibid*., at 367).

The Court further decided to delay the execution of the judgment, setting a period of six months – i.e., until the end of November 2000 – for the establishing of the necessary arrangements.

The Petition for a Further Hearing

36. The Second Judgment was issued on May 22, 2000, and two-weeks later – on June 6, 2000 – the Government and those acting on its behalf (the Director General of the Prime Minister's Office, and the Directors General of the Ministry of Religious Affairs, the Ministry of the Interior and the Ministry of Police, the Legal Advisor of the Prime Minister's Office, and the Prime Minister's Advisor on the Status of Women) petitioned for a Further Hearing in the matter of the judgment. President Barak granted the request on July 13, and thereafter, the panel appointed for the Further Hearing decided to further delay the execution of the order issued by the Court in the Second Judgment until the rendering of judgment in the Further Hearing.

37. We will now take a brief recess in order to complete the picture. While the proceedings in the Further Hearing were pending, two organizations – the "*Kolot Hakotel*" Association and the "*Am Echad*" Association – requested to join the petition as additional petitioners – public petitioners – together with the Government. These organizations were not party to the High Court proceedings up to this point, but now requested to join the proceedings in the Further Hearing after they had begun. The "*Kolot Hakotel*" Association presented itself as an association whose members are "religious and traditional women who see preserving and employing traditional prayer at the Western Wall, as the last remnant of the place of the Temple, to be a supreme value in the continuity of Jewish life and Jewish tradition". As for the "*Am Echad*" Association, it presented itself as a religious movement whose members are drawn from "a broad spectrum of 'streams' within Orthodox Judaism in Israel and the Diaspora." This organization expressed "great concern in regard to change or deviation from the accepted prayer of generation upon generation at the Western Wall, in which all of world Jewry is a partner", and therefore, it explained, it requests to further argue before the Court alongside the Government.

38. After examining the requests of the two organizations and their written summary pleadings – which were submitted after the submission of extensive summary pleadings by the State Attorney's Office – we reached the conclusion that those requests added nothing to the detailed, broad scope of the arguments presented by the State Attorney's Office. For that reason, we decided, on Nov. 19, 2000, to deny the requests of the organizations to join the proceedings as additional petitioners in the Further Hearing.

Indeed, it is decided law that when an entity with a general public interest requests to join as a party to proceedings before the High Court of Justice, we carefully consider "if that joinder would contribute to the proper, full examination of the dispute" (HCJ 852/86 *Aloni v. Minister of Justice*, IsrSC 41 (2) 1, 32, and also see p. 31). If such is the case in regard to proceedings before the High Court of Justice, then it applies all the more so in regard proceedings in a Further Hearing. Thus, having found that the organizations did not present arguments that are not argued by the Government, we decided to deny the requests.

Following this brief recess, let us now return to the matter of the Further Hearing.

39. The State Attorney's Office, on behalf of the Government and its subsidiaries, reiterated the argument that it has presented since the outset of the proceedings in the matter of the Women of the Wall, that the Women of the Wall did not acquire a right to pray in accordance with their custom before the Wall and in the Wall Plaza, adding that it disagrees with the Court's finding in the Second Judgment that the First Judgment established the law. The State Attorney's Office finds support for this view in the statement of President Shamgar – in the First Judgment, *ibid*., 355-356 – that "at this stage, we should not decide the matter before us", and in the statement of the Deputy President, Justice Barak, who, in denying the request of the Women of the Wall for a Further Hearing on the First Judgment, held that "[i]n his opinion [in the First Judgment], the President [Shamgar] noted that, at his time, he would not decide upon the petition" (para. 26, above).

40. I find it hard to accept the argument of the State Attorney's Office that the matter of the right of the Women of the Wall was not decided in the First Petition. We quoted the statements of the justices in the First Judgment at length, and in our opinion, the Court decided upon the right of the Women of the Wall to pray in accordance with their custom at the Western Wall (see

the statements that we quoted above in paras. 15-18 and para 21). We would further recall that among his other statements in the First Judgment, the President explicitly held that "we must not bar the way before the good-faith right of anyone who wishes to pray in his own manner, as is clear from the provisions of the said laws" (*ibid*., 355). In speaking of "the said laws", the President was referring to the provisions of sec. 1 of the Protection Law and its identical parallel in sec. 3 of Basic Law: Jerusalem, Capital of Israel, according to which: "The Holy Places shall be protected from desecration and any other violation and from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places".

President Shamgar went on to speak of these two laws further on in his opinion, in stating that the parties should "try to find practical ways for realizing the legislative purpose of the two aforementioned laws, which continues and realizes the principle declared in the Declaration of Independence" (*ibid*., 355). President Shamgar addressed that "declaratory principle" at the beginning of his opinion (*ibid*., 353), holding that the fundamental provision that we addressed in the two relevant laws give "statutory expression to the statements of the Declaration of Independence, which declares that the State of Israel will ensure freedom of religion and conscience, and will protect the Holy Places of all religions" (*ibid*., 353). Can there be any doubt that President Shamgar recognized the right of the Women of the Wall to pray in accordance with their custom in the Western Wall Plaza? The question begs the answer.

President Shamgar's holding in regard to the right of the Women of the Wall to pray according to their custom at the Western Wall is clarified and explained further on, against the background of his recommendation that the Government "consider the appointing of a committee that would continue to examine the issue in depth in order to find a solution that will ensure freedom of access to the Wall and limit the harm to the feelings of the worshippers" (*ibid*., 356). A person naively reading this statement would learn that the Women of the Wall held a right to pray in their manner at the Western Wall, and that the committee that President recommended appointing was intended only to find a solution that would "ensure"[1] freedom of access – in his words – while limiting the affront to the feelings of the worshippers. The term "ensure" freedom

[1] Translator's note: The Hebrew term is "*lekayem*", which may variously be translated as to ensure, realize, maintain, affirm, implement, confirm, etc.

of access is not ambiguous. It has but one meaning, which is that the Women of the Wall have a right to pray at the Wall in accordance with their custom. That right, together with the need to limit affront to the feelings of the worshippers – both the right and the need – must coexist.

41. When the Court examined the actions of the Government and its committees against the balance parameters that the Court had established in the First Judgment, it found that the actions were one thing and the balance parameters were another, that is, the actions did not fall within the parameters. The Government's prayer, therefore, is that we turn back the clock and reverse not only the Second Judgment but the First Judgment as well. In any case, the opinion of the majority in the First Judgment is clear and requires no interpretation.

42. In the course of the proceedings before us, we tried to bring the sides closer; we tried but did not succeed. The Government reiterated the proposal of the Neeman Committee that the Women of the Wall pray in accordance with their custom at the "Robinson's Arch" site. In the words of the Government in its pleadings:

> The Respondents will argue that prayer at "Robinson's Arch" realizes both conditions established by President Shamgar, *viz.*, the ensuring of the right of access to the Wall and limiting the affront to the feelings of the worshippers. The right of access to the Wall will be preserved (as will freedom of worship), inasmuch as Robinson's Arch is, as stated, a part of the Wall, and prayer there will avoid friction and prevent affront to those who pray at the Wall in the long-customary manner.
>
> …
>
> The solution is respectable, fair and immediately executable. It would be proper for the honorable Court to issue a ruling in the matter of the prayer arrangements at the Holy Places that will allow the necessary flexibility in order to ensure freedom of access and worship, on the one hand, and the prevention of friction and violence, on the other.

As we are all aware, "Robinson's Arch" is a remnant of the western wall of the Temple Mount, just like the Western Wall. However, no one would deny that in the collective and

individual consciousness of Jews, this part of the western wall is not perceived to be of a level of sanctity and uniqueness equal to that part of the western wall referred to as The Western Wall: with a capital "T". We would further add that, over the last few years, the site adjacent to "Robinson's Arch" – a site under the auspices of the Antiquities Authority – has occasionally served as a prayer space for the Conservative Movement. The question before us was, therefore, whether the "Robinson's Arch" site would be suitable for the prayer of the Women of the Wall.

43. The justices of the First Judgment examined the Neeman Committee's proposal in regard to "Robinson's Arch", and their opinion was that the site was not suitable to serve as an appropriate alternative prayer space to the Western Wall in that it could not realize the balance parameters enunciated in the First Judgment. The Court also visited the other alternative prayer sites proposed to the Women of the Wall – among them "Robinson's Arch" – but further held in the Judgment (at p. 366) that "making such a visit was unnecessary for the purpose of rendering a decision, inasmuch as the Petitioners' right to pray in accordance with their custom at the Wall was already recognized, in practice, in the First Judgment". As for us, we should remember that we are sitting in judgment in a Further Hearing.

44. In our deep desire to try to find an appropriate, amicable solution to this prolonged dispute between the parties, we, too, decided to visit the "Robinson's Arch" site. We indeed visited the site, and received explanations from the representatives of the Antiquities Authority and other relevant bodies. After seeing the site with our own eyes and examining what needed to be examined, we arrived at the conclusion – like the justices of the Second Judgment – that prayer at the "Robinson's Arch", site in its current state, would not properly realize the right of the Women of the Wall to pray opposite the Wall. Indeed, had the Government acted to adapt the site to a regular prayer space, it might have been perceived – although not easily – as a sort of continuation of the Western Wall Plaza. However, in its present physical state, "Robinson's Arch" cannot serve as an appropriate prayer space. We are satisfied that this alternative cannot succeed, and we cannot blame the Women of the Wall for not agreeing to the proposal. We would further note that the "Robinson's Arch" site currently serves as a unique archaeological park that is under the auspices of the Antiquities Authority, and the Antiquities Authority does not agree to introduce any changes that would make the place suitable to serving as a prayer site.

45. We regret that the parties could not find a way to bridge the gap between them, even if it meant walking a narrow bridge. It was possible, and would have been proper, to find an appropriate arrangement, but we now find ourselves before a rift. It is best that prayer arrangements not be decided by the courts – neither the High Court of Justice nor any other court. However, now that the matter is brought before us, it is our right – nay, our duty – to decide in accordance with the law.

46. The Western Wall is a place that is sacred to the Jews. The Wall is also sacred to the Women of the Wall, and to those who firmly oppose the manner of prayer of the Women of the Wall. And so, on one side we have the right of the Women of the Wall to pray in their manner at the Wall, and on the other side stands the firm opposition of other religiously observant people who see the prayer of the Women of the Wall as an affront to their feelings toward a place they hold as holy. And as is well known, holiness is indivisible. This is the main problem standing in the way of finding an appropriate legal solution to the differences of opinion that have arisen between the parties.

47. I have considered and reconsidered the matter, and in the end I have reached this conclusion: the right of the Women of the Wall is a right that entitles them to pray at the Wall in their manner. That is what was held in the First Judgment. That is what was reiterated in the Second Judgment, and I can find no justification to uproot that decision. However, like every right, the right of the Women of the Wall to pray beside the Wall in their manner is not unlimited. It is a right that – like every other legal right – requires that we evaluate it and weigh it against other rights that are also worthy of protection. Indeed, we must do what we can to minimize the affront that other religiously observant people sense due to the manner of prayer of the Women of the Wall, and by doing so, also prevent serious events arising from the confrontation of the opposing parties. As President Shamgar stated in the Second [sic] Judgment (*ibid.*, 355):

> In my opinion, practical solutions should continue to be sought, according to which anyone who wishes to approach his Creator in prayer will be able to do so in his own style and manner, as long as it will not constitute a substantial interference with the prayers of others. The legal starting point is, indeed, the

prevailing situation. But we must not bar the way before the good-faith right of anyone who wishes to pray in his own manner …

In order to try to comprise both these and those, I believe that, for the time being, it would be appropriate that the Women of the Wall pray in their manner at the Western Wall in the "Robinson's Arch" site, with the proviso that the site be properly prepared in a manner appropriate for people to enter and spend time there. As we said – and saw with our own eyes – the present physical state of the site does not make it possible to conduct prayer there in an appropriate manner, and the worshipper can also not touch the Wall as do worshippers at the Western Wall. The required conclusion is that the "Robinson's Arch" site cannot be deemed an appropriate alternative site for prayer in its present state. But if the site will be properly and appropriately adapted, it will be possible to view it as an alternative to the Western Wall for prayer. And so, if the Government will prepared the "Robinson's Arch" site – appropriately and as required – within twelve months from today, then the Women of the Wall will be able to pray in their manner at that site. In saying that the Government must prepare the site "appropriately and as required", I mean, *inter alia*, the making of appropriate safety arrangements and easy, secure access to the prayer site and the Wall itself.

48. But if the place is not made suitable – within twelve months – as appropriate and required, and having found no arrangement acceptable to both parties, it is the duty of the Government to make arrangements in accordance with the instructions set out by President Shamgar in the First Judgment and the instructions of the Court in the Second Judgment. In other words: the Government will be required to make appropriate arrangements and provide appropriate conditions within which the Women of the Wall will be able to realize their right to pray in their manner in the Western Wall Plaza. The Western Wall Plaza is a large space, and with a little good will, the Government will be able to allocate "four cubits" for them to pray in their manner. The Women of the Wall do not ask for much. They are willing to make do with little: for example, prayer for one hour, once a month on Rosh Hodesh (except for Rosh Hodesh of the month of Tishrei), and altogether eleven hours a year (see: the First Judgment, p. 355 at letter C). The Government can arrange this small thing. I would further recall what the Court wrote in the Second Judgment – and recommend that we adopt this statement – that what the Government is asked to decide in regard to appropriate arrangements and conditions is

exclusively in regard to the concrete conditions in which the Respondents will be able to pray according to their custom in the Western Wall Plaza – such as the place and times in which they can pray in their manner – while mitigating the affront, as far as possible, to the feelings of other worshippers, and while providing the necessary security arrangements.

A government is created to govern, which is why it is called a government. And it is the legal duty of the Government to find an appropriate way to enable the Women of the Wall to conduct their prayer in good faith and in their manner in the Western Wall Plaza.

Epilogue

49. The Second Temple was destroyed and went up in flames in the year 70 CE. Little remains but broken fragments. From that time, and for one-thousand-nine-hundred years, those fragments were the captives of foreigners. Jews were callers, permitted to visit their own holy places. On the 28th of Iyar 5727, June 7, 1967, the Western Wall – a remnant of the outer wall if the Temple – was liberated from the foreign hands that held it. The Wall did not free itself from its captivity. It was the paratroops, paratroopers of the Israel Defense Forces, who freed it from its foreign yoke. Since that liberation, we are at home in this remnant of the Temple. Some of those paratroopers who freed the Wall were religiously observant and some were not. And even the observant ones among them were not all of one stripe. But all of them were agents of the Jewish People – all of the Jewish People. When that war was over – actually, immediately following the liberation of the Wall – the paratroopers fulfilled their duty, and gave the People of Israel that precious trust that they held and that they had redeemed in blood. The Wall was handed over to the Jewish People in its entirety, and not just to a part of it. And all of the Jewish People – and not just part of it – acquired rights in the Wall. "And just as the Temple Mount, and the Temple that stood upon it, was a symbol of the Jewish religious world and of the Jewish nation's political sovereignty over Israel, so the Western Wall, the remnant of our destroyed temple, was the holiest place for the Jewish People, and symbolized its desire and aspiration for the return of national sovereignty." Thus wrote Deputy President Elon in the First Judgment *(ibid.*, 333). Indeed, so it is. The Western Wall is for all the Jewish People, and not just for a part of it.

Conclusion

50. In conclusion, I recommend to my colleagues that we decide as stated in paragraphs 47-48 above.

I will conclude with the prayerful wishes of the psalmist (Psalms 122:6-7):

> Pray for the peace of Jerusalem, may they prosper who love you.
>
> Peace be within your walls, and security within your towers.

President A. Barak:

I concur in the opinion of my colleague Justice M. Cheshin.

Deputy President (Emeritus) S. Levin:

I would deny the petition without reservation, as the time has come to render a final judgment in accordance with the law. I see no reason to order, except in the framework of a compromise, that the Robinson's Arch site, currently a special and unique archaeological park, be converted into a prayer site over the objections of the Antiquities Authority.

Justice T. Orr:

I concur in the opinion of my colleague Justice M. Cheshin.

Justice E. Mazza:

Like my colleague the Deputy President, I too am of the opinion that the petition should be denied without any reservations. The right of the Women of the Wall to pray in accordance

with their custom in the Western Wall Plaza was decided by a majority in the judgment on the First Petition (HCJ 257/89 *Hoffman v. Director of the Western Wall*, IsrSC 48 (1) 265), and unanimously affirmed in the judgment that is the subject of this Further Hearing (HCJ 3358/95 *Hoffman v. Director General of the Prime Minister's Office*, IsrSC 54 (2) 345). Even my colleague Justice Cheshin, with whose opinion in regard to the right of the Women of the Wall, the majority of justices in this Further Hearing concur, does not doubt the justice of the said judgment. Nevertheless, he recommends that we intervene in the relief that was granted to the Women of the Wall in the judgment that is the subject of this Further Hearing, such that they will be able to realize their right to pray in accordance with their custom in the Western Wall Plaza only if the Petitioners fail to prepare – and as long as they do not prepare – the "Robinson's Arch" site for them as an alternative prayer site. In referring to that site, which currently serves as an archaeological park worthy of the name, my colleague indeed admits that "in the collective and individual consciousness of Jews, this part of the western wall is not perceived to be of a level of sanctity and uniqueness equal to that part of the western wall referred to as The Western Wall". Nevertheless, my colleague recommends seeing this site (as long as it is prepared to serve as a prayer site) as an alternative with which the Women of the Wall must make do, and at least for the present, relinquish the realization of their recognized right to pray in accordance with their custom in the Western Wall Plaza. My colleague Justice Cheshin proposes adding this proviso to the judgment, in order, in his words, to "do what we can to minimize the affront that other religiously observant people sense due to the manner of prayer of the Women of the Wall, and by doing so, also prevent serious events arising from the confrontation of the opposing parties".

I cannot agree with this proposal that, with all due respect, essentially eviscerates the recognized right of the Women of the Wall. As we already noted in the judgment that is the subject of this Further Hearing, "the Court already took into account the possibility that recognition of the Petitioners' right to pray in accordance with their custom in the Western Wall Plaza might lead to violent reactions by groups for whom tolerance of others is foreign". Moreover, in arriving at our decision in the judgment that is the subject of the Further Hearing, we were careful to point out that the Government must establish the arrangements and conditions, such as the place and times in which the Women of the Wall can conduct their prayer

in the Western Wall Plaza, "while mitigating the affront to the feelings of other worshippers and while maintaining the necessary security arrangements". It is important to explain that the arrangements that the Government was obliged to establish were intended to allow the Women of the Wall to realize their right to pray in the Western Wall *Plaza*, as opposed to *beside* the Wall. As is generally known, the Western Wall Plaza covers a large area. Most of the worshippers are concentrated in the part of the area that is adjacent to the Wall and clearly separated from the more remote parts of the Plaza. In requiring that the Government establish arrangements that would allow the Women of the Wall to realize their right to pray – some eleven hours a year, in all – in a suitable place in the Western Wall Plaza, we gave appropriate expression to consideration of the feelings of the other worshippers. This equation reflects a proper balance between the need to allow the Women of the Wall to pray in accordance with their custom and the need to mitigate, as far as possible, the resulting affront that may be caused to the feelings of other religiously observant people. Intervening in the substance of the relief granted to the Women of the Wall in the judgment that is the subject of the Further Hearing would upset that balance.

It is, therefore, my opinion that the petition should be denied, and that a timeframe should be set for the Government to make the necessary arrangements as ordered in the judgment that is the subject of the Further Hearing.

Justice T. Strasberg-Cohen:

My opinion was and remains that the Women of the Wall should be permitted to realize their right to pray in accordance with their custom in the Western Wall Plaza, and that the Government must make that possible by establishing appropriate arrangements, as decided in our judgment in HCJ 3358/95.

Therefore, I concur with the position of my colleagues Deputy President S. Levin and Justice E. Mazza, according to which the petition should be denied. Nevertheless, I would welcome any compromise that might be achieved by the parties concerned that would be acceptable to all.

Justice J. Turkel:

1. Like my colleague Justice M. Cheshin, I too am of the opinion that the choice of the "Robinson's Arch" site as a prayer space for the Respondents (who have come to be known as "The Women of the Wall" – J.T.) is the fitting, appropriate and balanced solution to the dispute that was brought before us. However, this solution should not be adopted "conditionally", as recommended by my colleague, but rather as a permanent solution. My approach also differs from his. If it were up to me, I would quash the order issued by this Court (E. Mazza, T. Strasberg-Cohen, D. Beinisch JJ.) in HCJ 3358/95 *Anat Hoffman et al. v. Director General of the Prime Minister's Office et al.*, IsrSC 54 (2) 345 (hereinafter: the Second Judgment) ordering the Government "to establish the appropriate arrangements and conditions under which the Petitioners [the Respondents in the petition before the Court – J.T.] will be able to realize their right to pray in accordance with their custom in the Western Wall Plaza". One way or another, the "Robinson's Arch" solution, recommended by the Neeman Committee, has been adopted. And it would appear that the petition before us is grounded in law – "in law" in its plain meaning – for reasons of law and not principally for reasons of the law of prayer.

Non-intervention in Administrative Discretion

2. I will begin with first principles. The discretion granted to an administrative authority is the power to choose among possible solutions. The rule is that the Court will not substitute its discretion for the discretion of the administrative authority required to decide a matter. Thus it has been held:

> One thing is beyond all doubt, and it is that the Court will not attempt to substitute its discretion for the discretion of the competent authority, and will not impose its opinion on those upon whose wisdom, reasoning, knowledge and practical experience the legislature intended to rely; in short – on their discretion that is based upon knowing the true situation in all its aspects and conditions …. (CA

311/57 *A.G. v. M. Dizengoff and Co. Ltd.*, IsrSC 13 (2) 1026, 1039, *per* Z. Berenson J.).

It was further stated in this regard, *inter alia*:

> A discretion is given to an administrative organ …in order that, in fulfilling its many-sided functions which circumstances may vary and change periodically and which cannot be precisely determined in advance, it may have freedom of action. In other words, discretion means freedom of choice from among different possible solutions, or an option granted to the administrative authority, and because that authority is empowered to choose and select the solution appropriate to its mind, the court will not interfere for the reason alone that it would itself have picked upon a different solution. Such interference is tantamount to a negation of the discretion of the administrative organ and its transfer to the court (FH 16/61 *Registrar of Companies v. Kardosh*, IsrSC 16 1209, 1215, [English translation: IsrSJ 4 33, 35]; HCJ 92/56— *Richard Weiss v. Chairman and Members of the Law Council* (1956) IsrSC 10 1592; HCJ 636/86 *Nahalat Jabotinsky Workers' Moshav v. Minister of Agriculture* [1987] IsrSC 41(2) 701, 708 *per* E. Winograd J.).

This rule is based upon the separation of powers, "in accordance with which the authority to decide in matters of execution and administration remains – except in exceptional cases – in the hands of the Executive, whereas the Judiciary restricts itself to judicial review of the constitutionality of the authority's decision" (R. Har-Zahav, *Israeli Administrative Law* (1966) p. 436 (Hebrew). However, a number of causes for intervention in administrative discretion have been developed in the case law, *inter alia*, the duty to act within the law, the duty to refrain from discrimination and act equally, the duty to exercise discretion reasonably, the duty to act fairly and not arbitrarily, the duty not to act on the basis of extraneous considerations or for extraneous purposes. Thus, it has been stated:

> It appears to me that in this regard, the normative framework that applies to the exercise of administrative discretion applies to this matter as well. The accepted

rules in regard to reasonableness, fairness, good faith, an absence of arbitrariness, discrimination and other such criteria that apply to administrative discretion apply to this matter as well (HCJ 297//82 *Berger et al. v. Minister of the Interior*, IsrSC 37 (3) 29, 34, *per* Barak J.).

Did the Government act within the framework of its discretion in deciding to designate the "Robinson's Arch" for the prayer of the Respondents? Do any of the causes that justify intervention in administrative discretion apply here? And therefore, should we order the Government to establish arrangements and conditions as stated in the order in the Second Judgment?

The Exercise of Discretion

3. Before attempting to answer these questions, we will first consider some of the history of the affair. In HCJ 257/89, 2410/90 *Anat Hoffman et al. v. Director of the Western Wall et al*.; *Susan Alter et al. v. Minister of Religious Affairs et al*., IsrSC 48 (2) 265 (hereinafter: the First Judgment) – in which this Court (M. Shamgar P., M. Elon D.P. and S. Levin J.) first addressed the subject at bar – the Court "decided by majority to dismiss the petitions, subject to the recommendation in the opinion of presiding judge" to "consider the appointing of a committee that would continue to examine the issue in depth in order to find a solution that will ensure freedom of access to the Wall and limit the harm to the feelings of the worshippers".

Pursuant to the First Judgment, and in accordance with the recommendation of President Shamgar, the Government decided, on May 17, 1994, to appoint a Directors General Committee that was requested "to propose a possible solution that will ensure freedom of access to the Western Wall and freedom of worship in its Plaza, while minimizing the violation of the feelings of the worshippers at the site" (hereinafter: the Directors General Committee). The Directors General Committee recommended that the petitioners be offered an appropriate alternative site in which they might realize their desire to pray in accordance with their custom, in two sites in the boundaries of the archaeological park – the "Hulda Steps", and the southwestern corner of the Western Wall that is referred to as "Robinson's Arch". The recommendations of the Directors General Committee were presented to the Government on April 2, 1996. On April 21, 1996, the

Government appointed a ministerial committee to "examine the recommendations of the Directors General Committee and the means for effecting them, and decide the matter on behalf of the Government" (hereinafter: the Ministerial Committee). On June 2, 1997, the Ministerial Committee decided to adopt the recommendations of the Directors General Committee. At that time, a committee was established to make recommendations in the matter of religious conversion. The Government asked the committee to make recommendations in regard to the prayer of the Women of the Wall, who are the Respondents in the petition at bar. On Sept. 23, 1998, the Neeman Committee presented a report in which it reached the conclusion that prayer at the "Robinson's Arch" site, which "meets the Wall and is adjacent to it …" is "the most practical alternative for the needs and demands of the Women of the Wall". The committee emphasized that it reached this conclusion after "weighing and balancing the need to find a suitable prayer space that will answer the needs and demands of the Women of the Wall and the important principle of refraining from causing affront to the worshipping public in the Western Wall Plaza and not violating local custom". The conclusion was adopted by the Government, as we learn from the Petitioners' notice which states that "the recommendations of the Neeman Committee represent a reasonable balance between the petitioners' wish to pray according to their custom at the Western Wall and the other relevant considerations" (para. 13 of the respondents' supplemental pleading in that case, who are the Petitioners at bar, for the hearing in which the Second Judgment was given).

The Neeman Committee's conclusion was examined in the Second Judgment, and it is also at the heart of these proceedings. As stated, the Neeman Committee reached its conclusion after it examined and considered other possible prayer sites, after "weighing and balancing" the various considerations, and after finding that "the most practical alternative" was at the "Robinson's Arch" site. Thus, the committee chose one solution from among the possible solutions presented to it, which included the women's prayer section in the Western Wall Plaza. Even if I were of the opinion that a different solution could have been chosen, there are no grounds for saying that the Neeman Committee – and then the Government – could not make the choice that it made, or that any of the causes that would justify intervention in that conclusion were present. Therefore, inasmuch as the Government concluded that it would be appropriate to choose the alternative recommended by the Neeman Committee, this Court must not substitute

its discretion for that of the Government, whether by rejecting its decision or by revisiting the matter in a Further Hearing, as was done in regard to the Second Judgment.

The Conclusion of the Neeman Committee –Additional Reasons for Adoption

4. According to my colleague Justice M. Cheshin: "As we are all aware, 'Robinson's Arch' is a remnant of the western wall of the Temple Mount, just like the Western Wall. However, no one would deny that in the collective and individual consciousness of Jews, this part of the western wall is not perceived to be of a level of sanctity and uniqueness equal to that part of the western wall referred to as The Western Wall with a capital 'T'." I cannot agree with that statement, and not merely because my impression is different, but primarily because no halakhic or historic sources were presented from which one might conclude that the holiness of any particular part of the Western Wall – the wall that, in my view, is the entire western wall of the Temple Mount – is more holy than any other part.

I also find it hard to agree with his conclusion that: "had the Government acted to adapt the site to a regular prayer space, it might have been perceived – although not easily – as a sort of continuation of the Western Wall Plaza". I am of the opinion that the sanctity of a place does not derive from constructing and adapting it, but rather it is inherent to its very nature. I would note in this regard that the Masorti [Conservative] Movement uses the "Robinson's Arch" site as a prayer venue, and regards it as the "Masorti Wall" (see the Masorti Movement's advertisement in the *Kol Ha'ir* newspaper of June 16, 2000, submitted as Appendix B of the Petitioners' written summation).

5. It is worth noting that under the Neeman Committee's recommendation, the Respondents – who claim to follow "Orthodox custom" – retain the right of access to the women's prayer section of the Western Wall Plaza, including the right to pray there in accordance with the local custom. The only restriction upon the Respondents' worship there would be in regard to their practice of praying "in a group, wrapped in *tallitot*, carrying a Torah scroll and reading from it". However, they would be able to follow that practice in the "Robinson's Arch" site, which is the continuation of the Western Wall. The respondents would, therefore, be permitted to carry out all of their prayer customs – some in the Western Wall Plaza before the Western Wall, and some

at the "Robinson's Arch" site. For this reason as well, the solution chosen by the Neeman Committee and adopted by the Government was appropriate, proper and balanced.

This conclusion does not contradict the view expressed by President Shamgar in the First Judgment, in which he stated: "I would recommend to the Government that it consider the appointing of a committee that would continue to examine the issue in depth in order to find a solution that will ensure freedom of access to the Wall and limit the harm to the feelings of the worshippers" (*ibid*., at p. 3556). I doubt that President Shamgar's intention in that statement was to hold that the Respondents, the Women of the Wall, have the right to pray at the Western Wall – in its specifically limited sense that does not include the "Robinson's Arch" site – and specifically according to their custom. It would seem to me that the intention can be inferred from the fact that, contrary to the position of Justice S. Levin in the First Judgment – who wished to issue a judgment that recognized the right of the Women of the Wall "to pray at the Western Wall Plaza while wearing *tallitot* and while carrying Torah scrolls" – President Shamgar adopted the language "freedom of access to the Wall" and no more. The Neeman Committee's conclusion thus ensures both the freedom of access and the freedom of worship of the Respondents, as recommended by President Shamgar, but limits part of their prayer practices to "part" of the Western Wall, which is the "Robinson's Arch" site. There is no reason to intervene in that.

Judgment of Peace

6. In concluding, I would say a few words about the paths of peace. In tractate *Derekh Eretz Zuta, Perek HaShalom* we read: "As we learned there, Rabbi Shimon ben Gamliel says: The world exists on three things – on justice, on truth and on peace. Rabbi Mina says: And these three are one. Where justice is done, truth is done and peace is made. And these three were stated in one verse, as it says (Zachariah 8:16) 'Give judgment in your gates for truth, justice, and peace'. Wherever there is justice, there is peace…". The judgment rendered by the Government in adopting the alternative that it chose is judgment and is peace.

Conclusion

7. If my opinion were adopted, we would grant the petition, quash the order issued by the Court in the Second Judgment, and declare that in adopting the conclusion of the Neeman Committee in regard to choosing the "Robinson's Arch" site as a prayer venue for the Respondents, the Government fulfilled its obligation. However, since my colleague Justice Cheshin – in his own way, which is the way of compromise – reached the conclusion that "it would be appropriate that the Women of the Wall pray in their manner at the Western Wall in the "Robinson's Arch" site", I concur with what is stated in the concluding part of para. 47 of his opinion.

Justice D. Beinisch:

I concur in the opinion of my colleagues Deputy President S. Levin, Justice E. Mazza and Justice T. Strasberg-Cohen, who are of the opinion that the petition should be denied. I have not changed my opinion that it is the right of the Women of the Wall to pray in accordance with their custom at the Western Wall, and that the Government must establish the arrangements and conditions that would limit, as far as possible, the affront to the feelings of the other worshippers, in terms of a suitable place, times, and security arrangements.

Justice I. Englard:

I utterly disagree with my colleagues in the majority. My disagreement is not focused upon individual points, but is rather a disagreement with their entire approach, beginning with the alleged holding in the judgment in the first proceeding, HCJ 257/89, 2410/90 *Hoffman et al. v. Director of the Western Wall et al.*, IsrSC 48 (2) 265 (hereinafter: the First Case), and ending with the merits of the approach adopted by this Court in the second proceeding, HCJ 3358/95 *Hoffman v. Director General of the Prime Minister's Office*, IsrSC 54 (2) 245 (hereinafter: the Second Case).

I will begin with my different understanding of the holding in the First Case. My colleague Justice E. Mazza tried to infer a majority holding – which would constitute a binding instruction – from the three different opinions given in the First Case, recognizing the fundamental right of the petitioners to pray in their manner in the Western Wall Plaza. The trouble is that such an attempt, focused upon the opinion of President Shamgar, is highly problematic in that, from a legal standpoint, the only result of the judgment was the denial of the petitioners' petition, subject to a recommendation that the Government consider the appointment of a committee. Thus, all the rest of President Shamgar's opinion, whatever it may mean, was nothing but obiter dicta that have no obligatory legal force whatsoever. Indeed, at the end of his opinion, President Shamgar expressly holds that "at this stage, we should not decide the matter before us in the manner that a normal legal dispute is decided", and he adds that "[t]he gates of this Court are always open, but as stated, the other available options should first be exhausted". Against the background of these statements, I cannot agree with this Court's assumption in the Second Case that the committees that addressed the issue "drifted to views that were rejected by the majority of the justices in the First Judgment". Moreover, President Shamgar held that practical solutions should be sought "according to which anyone who wishes to approach his Creator in prayer will be able to do so in his own style and manner, *as long as it will not constitute a substantial interference with the prayers of others*" (*ibid.*, at p. 335 between marginal letters e-f; emphasis added – I.E.). Therefore, even according to the "majority", no fault can be found with the committees that examined and found that prayer in the manner and style of the petitioners significantly violates the prayers of others, and therefore proposed what they proposed. It should be noted that preserving the local custom does not constitute a fundamental impediment barring the petitioners from approaching and praying beside the Wall. The prohibition concerns only the outward manner of worship, to which I will return in the course of this opinion. For the moment, I will suffice with the comment that there is unanimous agreement on the condition that the realization of the right to worship must be made in good faith (*per* Shamgar in the First Case, at p. 355 [marginal letters e-f]; *per* Levin, *ibid.*, at p. 357 [c]; *per* Mazza in the Second case, at p. 363 [d]). Yet, there are those who see the petitioners' manner of prayer as constituting a "provocation" or a "war" to achieve ideological goals, and the Western Wall is not the appropriate place to wage it [Elon, pp. 329 & 350]. This question, too, was examined by the Court in the First Case. From all the above we can, in my opinion, conclude that

there is no legal basis for this Court's assumption that the committees that addressed the matter of the petition, following the First Case, did not do what they were asked to do in accordance with the instructions in that judgment. There was no such instruction, and therefore, for this reason alone, the petition in the Further Hearing should be granted.

2. It is, however, clear that the said formal reason is not sufficient to conclude the debate surrounding this petition. In the final analysis, what stands behind the formal reliance upon the judgment in the First Case is a substantive perspective that guided my colleagues in the Second Case – a point of view that, in principle, adopted the opinion of my colleague Justice S. Levin in the First Case, while utterly rejecting the point of view of Deputy President M. Elon. It would, therefore, be appropriate to address that substantive perspective as expressed in the Second Case. I will state at the outset that this approach is very problematic in my view due to its shaky legal grounds. There are many questions for which I did not find adequate answers in the opinions of my colleagues Justices S. Levin in the First Case, E. Mazza in the Second Case, and M. Cheshin in this petition. I will briefly touch upon the main issues among them.

3. The first fundamental issue concerns the general jurisdiction of this Court to consider the issue of freedom of worship in the Holy Places. This issue was mentioned and quickly decided in the First Case by Deputy President Elon (*ibid*., at pp. 297-298). It should be noted that the claim of lack of jurisdiction was raised not by the State but rather by one of the other Respondents. This is what the Court states there, *per* Deputy President Elon:

> The Palestine Order in Council (Holy Places), 1924, does not deprive the Court of jurisdiction to adjudicate in regard to the preservation of public order and the prevention of criminal offences, as established in the Law and the Regulations for Protection of Holy Places to the Jews. In HCJ 222/68 *National Circles Association v. Minister of Police* (IsrSC 24(2) 141), the majority held that while the Order-in-Council does deprive the Court of jurisdiction in matters of freedom of *worship* in the Holy Places, it does not deprive it of jurisdiction in regard to freedom of access to the Holy Places, the duty to ensure *the prevention of desecration* of the Holy Places, or the duty to *protect the sensitivities* of the members of the various religions towards their Holy Places, which are the matters addressed by the Regulations in the matter at bar. This petition treats of the

> freedom of access of the Petitioners to the Western Wall, the danger of desecration of the site, and a possible affront to the sensitivities of the worshippers, and this Court holds jurisdiction over the matter of the petition.

It should be noted that Justice S. Levin expressed his agreement with this opinion in regard to the Court's jurisdiction to address the matter of the petition *(ibid*., at p. 356 [b]).

4. However, that conclusion as to the jurisdiction of the Court, taken against the background of the provisions of the Order-in-Council and the majority opinion in HCJ 222/68, Mot 15/69 *National Circles Association v. Minister of Police*, IsrSC 24(2) 141 (hereinafter: the *National Circles* case), does not stand up under examination. The matter before us directly concerns freedom of worship and not freedom of access or criminal offenses in regard to the Holy Places. As noted, the petitioners are not being prevented from approaching and praying beside the Wall. The sole restriction is upon the outward manner of their worship. In my opinion, such a dispute falls within the scope of the provisions of the Order-in-Council, even under the provisos set out by President Agranat in the *National Circles* case. It should be noted that the majority opinion in the *National Circles* case is viewed with approval by this Court, as can be seen even in HCJ 4185/90 *Temple Mount Faithful v. Attorney General et al*., IsrSC 47 (5) 221, 282:

> Indeed, it has also been held by this Court that the authority to address the realization of the right to worship is granted to the Executive and not the Judiciary, as that is what is established by art. 2 of the Palestine Order-in-Council (Holy Places), 1924, as construed in the *National Circles* case, above.

While it is true that the parties to the said proceeding did not raise this claim, nevertheless, since we are concerned with subject-matter jurisdiction, the Court does not derive its authority from them, but must raise the issue of an absence of subject-matter jurisdiction *nostra sponte*, inasmuch as it relates to the very source of its judicial standing and thus to the validity of its judgment. As is well known, the consent of the parties cannot remedy a lack of subject-matter jurisdiction. Perhaps we should revisit the majority opinion in the *National Circles* case, but as long as that holding has not been reversed, the authority to address matters of worship in the Holy Places, including the Western Wall Plaza, is granted exclusively to the Executive. By way of demonstration, would anyone imagine that this Court might intervene in

the arrangements for worship of the various Christian communities in the Holy Sepulchre in Jerusalem, while changing the existing status quo?! Would it not be self-evident that such an inter-community dispute would be non-justiciable under the Order-in-Council?!

5. For the sake of continuing the examination, I will assume that it is possible to overcome the problem of lack of jurisdiction, as this Court believed in the two cases mentioned. In other words, I will proceed upon the assumption that the case before us can be situated in the provisions of the Protection of the Holy Places Law and Basic Law: Jerusalem, Capital of Israel. In the First Case, my colleague Justice S. Levin expressed his view in regard to the significance of the Protection of the Holy Places Law and the regulations thereunder. It would appear that that view was adopted in its entirety in the Second Case. I will first quote the statement of my colleague Justice S. Levin in regard to the Protection of the Holy Places Law (*ibid*., at pp. 356-357):

> A. In my opinion, the subject of the petition should not be decided on the basis of halakhic considerations. After all, it is clear that the Protection of the Holy Places Law (hereinafter: the Law) is a secular law. It takes account of considerations of the relevant religious communities, including the considerations of the Chief Rabbis (see sec. 4), but not only those considerations, and the terms it employs should be interpreted in accordance with the common denominator acceptable to the Israeli population in its entirety. Therefore, the terms "desecrate", "other violation", and "anything likely to violate … their feelings (of the members of the religious communities – S.L.) towards those places" in sec. 1 of the Law should be given an interpretation that, on the one hand, expresses the right to freedom of worship and religion, as accepted in a democratic society and as "tolerated in it", and on the other hand, the protection of the interests of public safety and "intolerable" violation of the feelings of others as acceptable in that society.
>
> B. Unquestionably, the Western Wall (and its Plaza) has been a holy site for the Jewish People for generations, as a religious site and a prayer site, but at the same time, it also bears national symbolic significance as a unique historical remnant of the walls of the Temple, a symbol of the Jewish kingdom that the

masses of Israel yearned for throughout the generations. In these circumstances, the fact that the Wall serves as a site for prayer is not necessarily decisive in establishing the scope of activity permitted at the site. In this sense, I am unwilling to accept *a priori* and as a foregone conclusion that for the purposes of the Law, the Western Wall should be viewed as a "synagogue" in every way, and that the activity conducted there is subject to the rules of halakha that apply to a synagogue and none other.

C. The above leads to two primary results. One in regard to the right to freedom of worship at the Western Wall site, and the other in regard to the right to conduct other activities of an appropriate nature at the site. As for these two types of matters, we should establish permission in principle for conduct, as long as that conduct does not constitute "desecration", an "other violation", or a "violation of feelings" of the nature that I have already mentioned above. In this regard, in my opinion, the adoption of the broadest common denominator as a standard – in the manner presented by my honorable colleague -- is of no help. Consider, for example, even if there are those who believe that a particular manner of prayer is absolutely forbidden by a severe halakhic prohibition, or that activities of a national character at the Wall are objectionable in their eyes, that alone should not justify prohibiting such activity. In my view, the common denominator that must be taken into account in the matter before us – and I agree that it is possible to employ this test – is the common denominator of all the groups and people who visit the Western Wall site and the plaza in good faith, whether for prayer or for other legitimate purposes. If we do not say this, then we hand an exclusive monopoly to a particular point of view, in preference to any other, in regard to freedom of expression, and as a result, the right to freedom of worship and freedom of expression will be found lacking.

As noted, this view was adopted by the Court in the Second Case. See and note well, *ibid*., at p. 352 [e].

6. Before addressing the said basic point of view of this Court in the matter of the meaning and construction of the Protection of the Holy Places Law in regard to the Holy Places, it would

be proper to note, as well, reg. 2(a) (1a) of the Regulations for the Protection of Holy Places to the Jews, 5741-1981, that was added as a result of the dispute that is the subject of this petition. It states as follows:

> *Prohibited Conduct*
>
> In the area of the Holy Places … the following is prohibited: Conducting a religious ceremony that is not in accordance with the local custom, that offends the sensitivities of the praying public in regard to the place.

In the First Case, this Court agreed that this regulation does not deviate from the scope of the law (see *ibid.*, at p. 357 [e], *per* S. Levin J.). However, in regard to the interpretation of this regulation, Justice Levin was of the opinion that:

> [B]ut in my opinion, the term "local custom" need not be interpreted specifically in accordance with the halakha or the existing situation. It is the nature of custom to change over time, and in its framework expression should be given to a pluralistic, tolerant approach to the views and customs of others, subject to the limitations that I have noted above.

7. In my opinion, the interpretive approach adopted by this Court is *incorrect*. The idea that due to the secular character of the Protection of the Holy Places Law and the regulations thereunder, the terms appearing therein must also be interpreted in accordance with secular standards does not stand up under examination. This we must admit: all the laws of the Knesset are, by their very nature, secular norms, inasmuch as the Knesset is not a religious institution. Therefore, nothing can be learned from the nature of the Knesset's laws in regard to the manner for interpreting terms that appear therein. There is no principled reason that a secular law not refer to a religious system. And this, in fact, is actually done, for one example among many, in the framework of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953. No one would dispute that the term "Jewish religious law" in sec. 2 refers to the Jewish halakhic system. The fact that the Rabbinical Courts Jurisdiction Law is a secular law says nothing about the legislative intent to refer to the religious legal system.

8. From the above it would appear that the secular character of the Protection of the Holy Places Law says nothing in regard to the interpretation of the terms therein or in the regulations thereunder. Everything rests upon the legislative intent in using those terms. On the contrary, the presumption is that terms borrowed from a religious system should be interpreted in accordance with that system. Moreover, the idea of holiness – in the present context in regard to particular places – is a categorically religious term that has no material meaning in the secular world, and see the classical text R. Otto, *Das Heilige* (Breslau, 1917); *id*., *The Idea of the Holy*, trans. J.W. Harvey (Oxford, 1923, 2nd ed. 1950). Thus, I cannot accept the general approach of this Court, which, in the context of the Protection of the Holy Places Law, attributed secular significance to the Western Wall. Of course, I do not dispute the national significance that holy places may have, but that was not the intention of the law, which expressly addressed the holy dimension of those places.

9. The result is that terms borrowed from the religious world, such as "desecrate", should first and foremost be interpreted in accordance with their religious significance. This is conspicuous in reg. 2 (a) (1) of the Protection Regulations that prohibits "Desecration of the Sabbath and Jewish holidays". Is there any doubt that the intention is to refer to the Jewish halakha that defines what constitutes "desecration of the Sabbath and Jewish holidays"?!

10. I utterly disagree with the idea expressed by my colleague Justice S. Levin in the First Case that he is "unwilling to accept *a priori* and as a foregone conclusion that for the purposes of the Law, the Western Wall should be viewed as a "synagogue" in every way, and that the activity conducted there is subject to the rules of halakha that apply to a synagogue and none other" (*ibid*., at p. 356 [e]). In speaking of the Western Wall and its Plaza as a holy place, the Protection of the Holy Places Law and the regulations thereunder must have intended the Western Wall as a synagogue, for that is the status that – in accordance with the halakhic conception – imbues that place with its holiness. This is made clear in the opinion of Deputy President M. Elon, who addressed this matter at length in the First Case, and arrived at the conclusion that the law applicable to the Western Wall Plaza is the law of the synagogue. See *ibid*., at pp. 318-319, where, *inter alia*, Sephardic Chief Rabbi Ovadia Yosef is cited:

> This place must certainly be no less than a synagogue, which is a *beit mikdash m'at* [a little Temple]. So it is in regard to the laws of a synagogue … certainly all

> that is true there, is true for the Western Wall … it should be treated with no less strictness than a synagogue and a *mikdash m'at* ("The Western Wall and its Surroundings in Halakha," in *The Western Wall* (Jerusalem, 1976) p. 139 (Hebrew)).

11. Against this background, we may conclude that the Court's understanding of the expression "conducting a religious ceremony that is not in accordance with the local custom" is also mistaken. "Local custom" is patently halakhic term, as is clear from the opinion of Deputy President M. Elon in the First Case. The purpose of "local custom" is to express the existence of the distinctive, traditional manners of prayer of a given place of worship. Therefore, there is no basis for the view of this Court that "in its framework expression should be given to a pluralistic, tolerant approach to the views and customs of others". In my opinion, this construction is absolutely contrary to the intention of the author of the regulations and to the language of the regulation, and no legal basis can therefore be found for it.

12. The result is that, assuming the said regulation was issued in accordance with the law – an assumption on which both I and this Court agree – then the decision to grant an order absolute in the petition at bar cannot stand. But that is not all. In accordance with the halakhic decisions cited in the opinion of Deputy President Elon, which were issued by Chief Rabbis Rabbi Avraham Shapira and Rabbi Mordechai Eliyahu, granting the petition would constitute a desecration of the customs and sanctity of a synagogue (First Case, at pp 328-329, and pp. 319-320). In this regard, Deputy President Elon wrote (*ibid*., at p. 350):

> The present reality is that the overwhelming majority of halakhic decisors, including the Chief Rabbis of Israel, see the granting of the Petitioners' petitions as constituting a desecration of the customs and sanctity of the synagogue. Such is the case in regard to the prayer customs of the synagogue, and all the more so in regard to the prayer space at the Western Wall, which is the holiest synagogue in the halakhic and Jewish world.

I cannot but wonder where this Court finds the authority to disagree with those halakhic decisions, according to which granting the petition would constitute a violation of the provisions

of sec. 1 of the Protection of the Holy Places Law, which protects the Western Wall from desecration.

13. Lastly, even if I were to ignore all of the legal problems that I have enumerated in my opinion, there would still be support for the opinion that, in view of the halakhic situation, granting the petition allowing the petitioners to act in their style and manner would constitute a substantial intrusion upon the prayers of others (Shamgar P., the First Case, at p. 355 [e]), or an excessive violation of the feelings of others (Levin J., *ibid*., at p. 357 [e]), and thus a violation even under the accepted tests of this Court.

14. Parenthetically, I would make an observation in regard to the alternative site proposed to the petitioners at "Robinson's Arch". The Court's visit to the site showed that, in principle, the site is appropriate for prayer beside the Wall. However, the representatives of the Antiquities Authority opposed making any change to the site, no matter how small. Their opposition was in regard to a stone that had fallen from the ancient wall and that, in the opinion of the representatives of the Antiquities Authority, must not be moved or hidden. I was not convinced that there is any real reason not to adapt the site such that access to the wall itself would be possible, with minimal injury to the fallen stone. I regret that my impression was that for some, the "sanctity" of archaeology exceeds the sanctity of the synagogue.

In light of the above, if my opinion were accepted, the petition for a Further Hearing would be granted and this Court's judgment in HCJ 3358/95 would be reversed.

However, inasmuch as my opinion remains a minority view, I concur, at least, with the first part of the opinion of my colleague Justice M. Cheshin, by which, if the Government will prepare the "Robinson's Arch" site – as appropriate and necessary – within twelve months from today, then the Women of the Wall will be permitted to pray there in their manner.

Decided in accordance with the majority of Barak P. and Orr, Cheshin, Turkel and Englard JJ., and against the dissenting opinions of Levin D.P. and Mazza, Strasberg-Cohen, and Beinisch JJ., as stated at the conclusion of paragraph 47 of the opinion of Cheshin J. in regard to

the preparing of the "Robinson's Arch" site as a prayer space for the Women of the Wall. However, if the "Robinson's Arch" site is not prepared to serve as a prayer space for the Women of the Wall within twelve months of the day of the rendering of this judgment, then we decide by a majority of Barak P., Levin D.P., and Orr, Mazza, Cheshin, Strasberg-Cohen and Beinisch JJ., and against the dissent of Turkel and Englard JJ., as stated in paragraph 48 of the opinion of Cheshin J., that is, that the Government is obliged to make appropriate arrangements and conditions within which the Women of the Wall will be able to realize their right to pray in accordance with their custom at the Western Wall.

Under the circumstances, we make no order for costs.

This 4th day of Nissan 5763 (April 6, 2003).