HCJ 257/89

HCJ 2410/90

1. Anat Hoffman
2. Dr. Bonna Haberman
3. Dr. Judith Green
4. Rendel Fine Robinson

v.

1. Director of the Western Wall
2. Ministry of Religious Affairs
3. Chief Rabbinate of Israel
4. Minister of Religious Affairs
5. Minister of Justice
6. Commander of the Old City Police Precinct, Israel Police, Jerusalem
7. Commander of the Jerusalem District, Israel Police
8. Israel Police
9. Sephardic Association of Torah Guardians – Shas Movement
10. Rabbi Simcha Miron
11. Agudat HaChareidim – Degel HaTorah
12. Rabbi Avraham Ravitz HCJ 257/89

1. Susan Alter
2. Professor Susan Aranoff
3. Professor Phyllis Chesler

4. Rivka Haut
5. Professor Norma Baumel Joseph
6. Professor Shulamit Magnus
7. International Committee for Women of the Wall, Inc.

v.

1. Minister for Religious Affairs
2. Director of the Western Wall
3. Commissioner of the Israel Police
5. Attorney General HCJ 2410/90

H. Kadesh, U. Ganor for the Plaintiffs in HCJ 257/89; N. Arad, Director of the High Court of Justice Department of the State Attorney's Office for Respondents 1-8 in HCJ 257/89 and the Respondents in HCJ 2410/90; Z. Terlo for Respondents 9-12 in HCJ 257/89; A. Spaer for the Petitioners in HCJ 2410/90.

The Supreme Court sitting as High Court of Justice

[January 26, 1994]

Before President M. Shamgar, Deputy President M. Elon, Justice S. Levin

Facts:

The two petitions concern the arrangements for prayer in the Western Wall Plaza in Jerusalem.

The Petitioners request to conduct prayer services in the Western Wall Plaza, while carrying Torah scrolls and wearing *tallitot* [prayer shawls]. The Petitioners in HCJ 257/89 seek to conduct "prayer groups" that read from the Torah. The Petitioners in HCJ 2410/90 represent some one-thousand women who are members of various streams of Judaism, Orthodox, Conservative, Reform and Reconstructionist. They do not ask to conduct their prayers in a "*minyan*" [prayer quorum], but they do wear *talittot* and read from a Torah scroll that they bring with them.

The arrival of the Petitioners at the Western Wall Plaza to conduct their prayer services, as stated, met with the fierce opposition of worshippers at the site. The dispute between the

worshippers and the Petitioners was accompanied by rioting, the throwing of gravel and dirt at the praying Petitioners, and the use of force and verbal violence.

In the course of hearing the petition in HCJ 257/89, regulation 2 (a) of the Regulations for the Protection of Holy Places to the Jews, 5741-1981, was amended by the addition of regulation (1a), which prohibits the conducting of any religious service at the Western Wall that is not in conformance with the local custom or that violates the feelings of the worshippers in regard to the place.

The Petitioners argue that the new regulation is void *ab initio*, or in the alternative, that it should be voided by reason of extraneous considerations or as *ultra vires* the Minister's authority. They further argue that their prayer services are not contrary to the "local custom", and that they strictly observe the rules of halakha [Jewish religious law].

According to the Respondents, the Petitioners' right of access to the Western Wall is not in dispute. What is refused to them is prayer in their own manner, that is, while arriving as a group, wearing *tallitot*, carrying Torah scrolls and reading from them. Such prayer has led to severe disturbances in the Western Wall Plaza, breach of public order, and the violation of proper decorum.

For those reasons, the regulation that is the subject of the petitions is valid, and the manner in which the Petitioners conduct their prayers at the Western Wall should be evaluated in accordance with it.

Held:

The High Court of Justice ruled as follows:

A. (1) 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. The Order-in-Council only deprives the Court of jurisdiction in matters of freedom of worship in the holy places

(2) The petitions treat of freedom of access to the Western Wall, the danger of desecration of the site, and a possible affront to the sensitivities of the worshippers. The Court holds jurisdiction over these matters.

B. (*per* M. Elon D.P.): In terms of halakha, the questions raised by the petitions concern the rules of prayer: one – is a woman permitted to wear a *tallit* and *tziztit*; two – are women permitted to carry a Torah scroll and read from it. These two subjects must be preceded by the examination of an additional question, that of the manner of conducting public prayer by women.

C. (*per* M. Elon D.P.):

(1) According to halakha, fulfillment of the obligation of public prayer requires a "minyan", i.e., ten men, and "acts of sanctification" – i.e., prayers in which God is sanctified.

(2) Women are required to pray, but they are not obligated to public prayer. Women are exempt from the performance of time-bound positive commandments, that is, commandments

that must be performed at specified times. A person who is exempt from the performance of a time-bound positive commandment cannot be counted for the required, obligatory quorum for constituting a minyan of ten.

(3) Conducting prayers that are entirely constituted and led by women, in the manner customary in a minyan of men, is contrary to halakha.

(4) Women are exempt from wearing *tzitzit* or a *tallit*, as these are time-bound positive commandments inasmuch as the obligation is limited to a defined time period. However, women are permitted to perform these *mitzvoth*.

(5) The requirement that a commandment be performed for the purpose of observing it, and not motivated by a lack of consideration for the halakhic rule due to "extraneous considerations" of principled objection to the exemption because it insults women, is a fundamental principle of the halakhic world with regard to the introduction of legislative enactments, establishing customs, and introducing changes thereto.

D. (*per* M. Elon D.P.):

(1) Custom is one of the established, creative sources of Jewish law.

(2) Custom can be general, and it can also be local, that is, restricted to a place or to specific places, where various internal factors influence its generality or restriction. It may also be subject to change by its nature, the place and the time, and in accordance with the existence of legitimate factors of the place and the time that justify such change.

(3) Not every absence of a custom grounds an "argument from silence". In certain circumstances, it is evidence of a lacuna that must be remedied when the time and need arise, assuming that there is no halakhic prohibition that prevents it.

(4) A custom that deviates from a prior custom that forbids the introduction of a new custom that is not justified by legitimate social and ideological changes in the halakhic world, may not be followed.

(5) The halakhic world is especially careful in regard to introducing new customs in the synagogue. This fact finds expression in regard to the custom of "prayer groups", which is a central issue in these petitions.

E. (*per* M. Elon D.P.):

(1) At the prayer area beside the Western Wall, which must be treated like a synagogue and even more, there was never any custom of women's prayer.

(2) Granting the Petitioners' petition would involve a clear change in the local custom of the synagogue as observed for generations upon generations.

(3) An important principle of halakha is that custom should not be changed "due to the quarrels" [that would ensue]. This principle was enunciated in regard to every custom in halakha,

and it applies *a fortiori* to synagogue customs, and all the more so in regard to the synagogue in the Western Wall Plaza.

(4) The subject of these petitions – concerning the laws and customs of prayer – is particularly sensitive in the halakhic world. The halakhic world is defined by its laws and values, and just as halakhic scholars and decisors disagree in regard to its rules, so they may disagree as to its values or in regard to the implementation of its values.

(5) It is conceivable that the substantial change in the status and role of women in this century will have an effect over time, and will lead to an appropriate resolution even of this complex, sensitive subject of prayer groups. But the prayer space beside the Western Wall is not the place for a "war" of acts and opinions over this issue.

E. (*per* M. Elon D.P.):

(1) Just as the Temple Mount and the Temple that stood upon it were symbols of the Jewish religious world and of the Jewish nation's political sovereignty, 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.

(2) (*per* M. Shamgar P.): In the eyes of the religious halakha, the Western Wall is a *mikdash m'at* [a little sanctuary]. 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.

(3) (*per* S. Levin J.): The Western Wall and its plaza have been a holy site for the Jewish People for generations, as a religious site and a site of prayer, but at the same time, it also bears national symbolic significance as a unique historical remnant of the walls of the Temple. 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 there. That 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 cannot be accepted *a priori* and as a foregone conclusion.

G. (*per* M. Elon D.P.):

(1) An examination of the history of the Holy Places shows the very sensitive nature of these places to which disputes, disagreements and strong emotions are inherent. The treatment of the Holy Places is characterized by extreme care and moderation, attempts to achieve compromise and mediation between the parties, and by refraining from unequivocal rules and definitive solutions.

(2) Such an approach is inappropriate to the nature of the Judiciary, which is used to definitively deciding disputes on the basis of clear legal rules. Therefore, in practice, the treatment of the Holy Places was entrusted to the Executive branch.

(3) The Executive branch relied upon the long established principle of maintaining the status quo. Preserving the existing situation is the only means for ensuring that peace and quiet, and public decorum -- so necessary for places imbued with holiness – be maintained.

F. (*per* M. Elon D.P.):

(1) The principle that a person's freedom of worship is not absolute but must retreat where there is a probable threat of harm to public order, is merely a different expression – one more appropriate to the Holy Places – of the principle of maintaining the status quo.

(2) In the Holy Places there is – in light of past experience – an evidentiary presumption that a deviation from the status quo may lead to a disturbance of public order. This evidentiary presumption, together with additional evidence – and perhaps even on its own – may, in appropriate cases, provide the necessary evidentiary grounds required under the near-certainty test to limit freedom of worship in the Holy Places, and to restrict it due to the need to preserve public order.

(3) In the circumstances of this case, the possible clash is not only between the freedom of worship of the Petitioners and the interest in maintaining public order. There is an additional possible clash between the freedom of worship of the Petitioners and the freedom of worship of other worshippers.

(4) In the Holy Places, there is no choice – in a case of a clash between the freedom of worship of different worshippers themselves – but to try to find the common denominator of all the worshippers, even if, as a result, the freedom of worship of one may come somewhat at the expense of the freedom of worship of another.

I. (*per* M. Shamgar P.):

(1) The petitions before the Court lead us to the bumpy road of trying to balance between approaches and beliefs that are incompatible. In this regard, it is worth remembering that exclusive focus upon presenting questions and problems before the Court is not necessarily the appropriate solution or the desirable remedy for all illnesses.

(2) The search for a common denominator for all Jews, whomever they may be, is worthy of respect. 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.

(3) 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.

J. (*per* Elon D.P.):

(1) Subsection (1a) of regulation 2(a) of the Regulations for the Protection of Holy Places to the Jews, promulgated by virtue of the Protection of the Holy Places Law, 5727-1967, expresses the principle of maintaining the status quo. The "local custom" and the status quo are one and the same.

(2) The Minister of Religion did not exceed the authority granted to him by the legislature under the Protection of the Holy Places Law. He acted within the operating framework delineated by the primary legislator in sec. 1 of the Law to protect the Holy Places – including, of course, the Western Wall – from desecration and anything likely to violate the feelings of the members of the different religions with regard to the places holy to them.

(3) There was more than enough evidence before the Minister of Religion that prayer conducted in the manner practiced by the Petitioners leads to severe, tangible harm to public order, and thereby leads to desecration of the Western Wall.

(4) The regulation is a reasonable expression of the principle of preserving the *status quo*, the principle of preserving public order in a Holy Place, and primarily – in expressing the broadest common denominator of all the worshippers at the site. The reasonableness of the subsection of the regulation derives from the policy grounding the regulation, and from the purpose that it seeks to realize.

K. (*per* S. Levin J. (dissenting)):

(1) In regard to the activity in the Western Wall Plaza, the adoption of the broadest common denominator as a standard is not helpful. The common denominator that must be taken into account is the common denominator of all the groups and people who visit the Western Wall and the plaza in good faith, whether for prayer or for other legitimate purposes.

(2) No absolute prohibition should be placed upon conducting prayer services at the Western Wall simply because there are groups that oppose them, and considerations of certain and proximate danger of a breach of the peace do not necessarily justify imposing such a prohibition.

(3) It is the duty of the relevant authorities to ensure the appropriate conditions for balancing all the relevant interests, in order that all those who seek to assemble at the Wall and its plaza may fully realize their rights without excessively violating the feelings of others.

(4) Regulation 2 (a) (1a) of the Regulations for the Protection of Holy Places to the Jews is not repugnant to the Protection of the Holy Places Law, but 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.

(5) Under these circumstances, it is possible 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, with the proviso that there conduct does not constitute an intolerable "desecration", "other violation", or a "violation of feelings" as appropriate in a democratic society.

L. (*per* M. Elon D.P.):

(1) The approach according to which conducting worship services at the Western Wall that are opposed by other groups should not be subject to a total ban is an absolutely new

approach in the case law of the Supreme Court, and it stands in utter contradiction to a long line of decisions issued by the Court.

(2) The case law has upheld a prohibition upon Jews praying on the Tempe Mount in order to preserve public order and prevent a proximate threat of disturbances and rioting, Freedom of worship thus retreated before the need to preserve public order to the point of denying any Jewish religious worship on the Temple Mount.

(3) The Temple Mount on the east of the Wall is no different from the prayer plaza on the west of the Wall, both of which are Holy Places. In view of the fact that according to the decisions of this Court, prohibiting every Jew from praying on the Temple Mount is consistent with the principle of freedom of religion, prohibiting the inclusion of a single element in the prayer service, to which the overwhelming majority of worshippers are vehemently opposed, also does not constitute an infringement of freedom of worship.

M. (*per* M. Shamgar P.): The issues raised by the petitions should not be decided in the manner that legal disputes are normally decided. We should recommend that the Government consider appointing 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 harm to the feelings of the worshippers. The petitions should be dismissed, subject to that recommendation.

Judgment

Deputy President M. Elon:

Preface

We have been called upon to address two petitions concerning the arrangements for prayer in the Western Wall Plaza in Jerusalem, Israel's capital. The facts and content of each of these petitions are substantively different, but in view of their common subject, we have decided to address them jointly.

The petitions are extremely sensitive by their very nature and substance. In terms of their substance, we are concerned with the laws and customs of prayer – subjects that are central to Jewish law and Judaism. As for the location, we are concerned with what has been Judaism's holiest site since the destruction of the Temple. The special legislation and the rich case law of this Court also inform us of the sensitivity and of the tension attendant to the issue of the Holy Places in this country. This is also evident from the facts set forth in the two petitions before us, and the arguments presented by the Petitioners' learned counsels.

We shall, therefore, address each matter in turn, in an orderly fashion.

We shall proceed as follows: After examining the issue presented by the petitions (paras. 1-3), we will specifically address the facts of each of the petitions that are of importance for our consideration and decision (paras. 4-11), as well as the arguments of the Petitioners and of the Respondents (paras. 12-17). As noted, the questions that we must decide are intertwined with matters of prayer and its rules, which derive from the world of halakha [Jewish religious law], and with which we will begin our examination (para. 18). We will then address contemporary social changes in the status and roles of women (paras. 19-20). We will enquire into the laws of prayer in a *minyan* [prayer quorum], time-bound commandments, women's "prayer groups", the wearing of a *tallit* [prayer shawl] by a woman, and the reading of the Torah by women (paras. 21-17). We will then proceed to examine the subject of custom in halakha, which is of particular importance for the subject before us – custom in general, in the synagogue in particular, and especially at the Western Wall – change of custom, the avoiding of dispute, and sectarianism (paras. 28-32). In doing so, we will address the extreme nature of the disagreements in regard to the subject before us, the law and values of the halakhic system (paras. 33-36), the rendering of true judgment (para. 37-38), and a summary of the halakhic position in regard to our subject (para. 39). From the world of halakha, we shall proceed to the arena of the Israeli legal system: the Holy places, the *Status Quo* (paras. 40-43), and the disputes surrounding them (paras. 44, 48-49); the Western Wall during the Mandate period and after its liberation in the Six Day War

(paras. 45-46), the prevention of Jewish prayer on the Temple Mount (para. 47), and a summary of the history of the Holy Places (para. 50). From that point, we shall address the principle of freedom of worship, and balancing and restricting it (paras. 51-53), the regulation regarding preserving "local custom" and not offending the sensitivities of the praying public in regard to the Western Wall (para. 54), and the reasonableness, appropriateness and necessity of the regulation (paras. 55-60). We will conclude with a summary (para. 61) and by rendering true judgment in the matter before us (para. 62), and a response to the comments of my learned colleagues (para. 63).

In HCJ 4185/90 *Temple Mount Faithful v. Attorney General*, IsrSC 47 (5) 221, the Court considered a petition concerning work being carried out on the Temple Mount, on the eastern side of the Western Wall. In the petitions at bar, we address events on the western side of the Wall. Both cases thus concern events on either side of the Wall. Inasmuch as we addressed the history of the Temple Mount and the Western Wall in detail in HCJ 4185/90, we see no need to repeat what has already been stated there. At times, this judgment refers to that judgment, and at times it does not. The reader can read both to obtain a complete picture.

HCJ 257/89

1. On 14 Adar II 5749 (March 21, 1989), the Petitioners in HCJ 257/89 submitted a petition for an order nisi, stating:

> A. Against Respondents 1-3, i.e., the Director of the Western Wall, the Minister of Religious Affairs and the Chief Rabbis of Israel: "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 prayer shawls during their prayers" [sec. 2.a of the heading of the petition].
>
> B. Against Respondents 6-8, i.e., the Commander of the Old City Police Precinct, the Commander of the Jerusalem District of the Israel Police, and the Israel Police: "Why will they not protect the Petitioners in particular, and women in general in their exercise of the right to freedom of belief, religion, worship and conscience at the Wall" [sec. 2.b of the heading of the petition].

On 20 Iyar 5749 (May 25, 1989), the requested order nisi was granted with the consent of the State's representative of the said Respondents.

In the hearing held on 20 Av 5749 (August 21, 1989), we ordered that the Shas Movement, Rabbi Simcha Miron, the Degel Hatorah Association, and Rabbi Avraham Ravitz be joined to the petition as Respondents 9-12, at their request (MHCJApp 318/89, MHCJApp 319/89).

2. On 3 Adar 5750 (Feb. 28, 1990) – following the promulgation of the Regulations for the Protection of Holy Places to the Jews (Amendment), 1989, which we shall address further on – the Petitioners submitted an amended petition comprising an additional request for an order nisi against the Minister of Religious Affairs and the Minister of Justice (Respondents 3-4):

> Why should the Court not declare the Regulations for the Protection of Holy Places to the Jews (Amendment), 1989, to be void … or in the alternative, why should it not void them [para. b. of the heading of the amended petition].

With the consent of the Respondents, an amended order nisi was issued on the basis of the amended petition.

HCJ 2410/90

3. On 10 Sivan 5750 (June 3, 1990), the Petitioners in HCJ 2410/90 submitted:

> A petition for the granting of a decree against the Respondents (the Minister of Religious Affairs, the Director of the Western Wall, the Commissioner of the Israel Police, and the Attorney General – M.E.) forbidding them from preventing Petitioners 1-6 from praying at the Western Wall and in the Western Wall Plaza while wearing *tallitot* and reading from the Torah, and requiring them to permit the Petitioners to bring a Torah scroll to the Western Wall Plaza, and to ensure that such prayer by the Petitioners be conducted without disturbance or harm [heading of the petition].

An order nisi was granted on the day that the petition was submitted.

A joint hearing of the objections to the orders nisi in both petitions – HCJ 257/89 and HCJ 2410/90 – was held on 13 Adar 5751 (Feb 2, 1991), as requested by the Petitioners in HCJ 2410/90.

The Facts

HCJ 257/89

4. The Petitioners are Jewish women, and residents of Jerusalem. Petitioner 1 is a member of the Jerusalem city council. The Petitioners come "to pray at the Wall, together with other Jewish women, at various times, as part of a group called the 'Rosh Hodesh [new month] Group'" (sec. 1.a of the amended petition). In the course of their prayer, they wear *tallitot* and read the Torah. Petitioners 1 and 2 "are Torah readers, and on occasion, serve as prayer leaders in their congregations" (sec. 3.a of the amended petition).

The Petitioners claim that when they went to pray at the Western Wall Plaza, as described, their prayers were disturbed. This began on the Rosh Hodesh beginning of the month of Tevet 5749 (Dec. 9, 1988), when there was "violent conduct … (directed at them – M.E.) by *hareidim* ["ultra-Orthodox"]" (Appendix A to the amended petition). In regard to the events of Rosh Hodesh Adar I 5749, the third Petitioner, Dr. Judith Green, states:

> On Monday morning, 1 Adar I (Feb. 6, 1989) … at 6:30 AM, a group of about 25 women began the Rosh Hodesh prayers at the Western Wall Plaza … we informed the police in advance a day earlier, on Sunday, 30 Shevat (Feb. 5, 1989), of our intention to conduct prayers, and we provided full details ….
>
> We, indeed, saw a police van opposite the Wall, in which there were some 10 police and border patrol officers. We thought that they were there to see what would happen, and to intervene if necessary. We conducted the morning service and recited *Hallel* without any significant disturbance, but when we began reading the Torah, several *hareidi* women began to interrupt and curse us. In the end, they ran to the *mehitza* [separation barrier between the sections for male and female prayer] and called for the *hareidi* men to assist them. The men broke through the

mehitza and began to beat us. They grabbed prayer books and tried to take our Torah scroll. 'Reinforcements' arrived from various yeshivas in the Jewish Quarter (apparently), and at that moment, several men who were concerned for our safety went to the police van to ask for help. The police told them that they should not intervene, and that they should let the police 'do its job'. When the *hareidim* began to throw chairs and tables at us, I asked the police to ask for help. They told me not to worry, that they were in control of the situation and had called for assistance. Several other people turned to the police, but none of them left the van. At that point, we began to worry about the safety of the Torah scroll and the safety of the men who were trying to protect us. We therefore left the place as a group, encircling the Torah scroll, while the *hareidim* continued to curse and hit us. No police or border patrol officer entered the area of this violent event, although it occurred right before their eyes.

When we left, we encountered a police officer who said that he was the area commander. He said that he was unaware of our intention to conduct Rosh Hodesh prayers on that morning. Several police officers who had been in the van were also there, and they continued to berate us for trying to tell them how to do their job [Appendix A to the amended petition].

Following the events described, the Respondents and the Petitioners conducted negotiations that proved unsuccessful. The Petitioners informed Respondent 1 that they "will come to pray at the Wall on the Fast of Esther, without *tallitot* and without a Torah scroll", and Respondent 1 assured them that he would see to "their safety and the conducting of their prayers" [sec. 9a of the petition].

And this – according to the Petitioners – is what occurred on the Fast of Esther 5749:

11. (a) On March 20, 1989 (the day of the Fast of Esther), the Petitioners gathered with their friends, in a group numbering several dozen women, to pray at the Wall without *tallitot* or Torah scrolls ...

(b) When they entered the women's section at the Wall, there was a large commotion by yeshiva students, and other men and women who were there, who insulted the Petitioners and tried to assault them. Border patrol officers who were at the scene ensured their entry into the women's section unharmed.

(c) During their prayers, unruly men tried to break through into the women's section, shouting and cursing, and throwing chairs and stones at the prayer group. Several extremist women who were present in the women's section, also contributed their insults and fists.

(d) The border police first tried to protect the prayer group and catch the offenders, but quickly, and in accordance with orders from above, they left the Wall and the Plaza, and abandoned the prayer group to the devices of the violent rioters. The Western Wall ushers were at a loss to provide help.

(e) Counsel for the Petitioners, who was present at the event, demanded that the police protect the praying women, but was referred to Respondent 6 (the Commander of the Old City Police Precinct – M.E.).

(f) At the time of the event, Respondent 6 stood on the balcony of the police post near the Wall, and observed what was occurring while doing nothing, as if to say 'let the young men play before us' [II Samuel 2:14].

(g) Counsel for the Plaintiffs, who turned to Respondent 6 and requested his quick intervention in light of the rioting, and fearing the spilling of blood at the Wall, was ordered to leave the police post.

(h) The violent rioting at the Wall, which included the throwing of a bottle that shattered in the women's section, the throwing of chairs and stones, and shouting and whistling, continued without police intervention.

(i) As a result of the throwing of a chair at the heads of the praying women, one of the women was injured. Mrs. Rachel Levin sustained a head injury, and was later treated at Hadassah Hospital …

(j) The person who threw the said chair fled from the women's section and ran into the Cardo, while Counsel for the Plaintiffs and others gave chase. Border police standing at the entrance to the Cardo, who were asked to arrest the fleeing suspect, stood aside and allowed him to flee and disappear into the depths of the Cardo. They referred the complainants to their commander, Respondent 6.

12. After about 45 minutes, the police finally intervened, dispersing tear gas canisters in the Western Wall Plaza and moving the men away. As a result of the tear gas canisters, the prayers of the Petitioners and their friends could not continue, and they were forced to leave the women's section, hurt, injured, and crying, to conclude their prayers far from the Western Wall Plaza.

13. The Director General of the Ministry of Religion was present throughout the Petitioners' prayers at the Wall on March 20, 1989, and observed what took place [secs. 11.a – 13a of the amended petition].

The day following the events of the Fast of Esther, the Petitioners submitted the petition at bar, as noted.

5. The Respondents presented a different version of the events that transpired up to the date of the submission of the petition. This is how the matters are described by Respondent 1, Rabbi Getz, the rabbi in charge of the Western Wall and the other holy sites surrounding the Temple Mount, in his letter of 22 Adar 5750 (March 19, 1990) to the Director of the High Court of Justice Department of the State Attorney's Office:

> For over twenty years, since the day I was appointed to my position as Rabbi of the Wall, the Western Wall Plaza has been a quiet, calm island in the raging sea of our lives in Israel.
>
> Every year, millions of Jews come from Israel and the Diaspora to visit the Wall to pour out their hearts beside the remnant of our Temple, and each can commune with his Maker in tranquility and safety.

All are equal before the Creator, poor and rich, scholar and unschooled, knowledgeable and ignorant, and recite their prayers according to the Sephardic, Ashkenazic, or Oriental rite, or a revised prayer book, in Hebrew, English, French, or any other language. And no one says a word when, with no comparison implied, Moslems, Catholics, Protestants, Presbyterians, and even Japanese Makuya also come, and we have been privileged to see the prophesy of redemption 'for My house shall be a house of prayer for all peoples' [Isaiah 56:7].

The river of Israel's sorrows laps calmly beside the ancient stones, and our brothers and sisters depart with a sense of relief and ease.

This until that bitter day of 2 Kislev 5749 (Dec. 1, 1988), when, late at night, sitting in my office at the Wall, I received an anonymous notice from a person warning me that feminist women would be coming to the Wall, and they would overturn the *mehitza* that separates the men and the women. I could hardly believe my ears, and I thought that he was putting me on.

Nevertheless, early the next morning I informed the police commander of this, and I demanded an increased police presence, while expressing my reservations as to the credibility of the notice.

But when, at about 7:00 AM, I saw an army of Israeli and foreign journalists and photographers, I called the Director General of the Ministry for Religious Affairs, Mr. Z. Orlev, who arrived immediately, and I put all of the ushers and all the other staff of the Wall at the ready beside the *mehitza*.

Indeed, half an hour later, some fifty or sixty women arrived at the site, some wrapped in a *tallit* or wearing a *kippah*, and one of them holding a Torah scroll in her arms, and that immediately ignited the emotions of the men and women at prayer.

I did not prevent them from entering the Western Wall Plaza, and I even calmed the enraged spirits, explaining to all interested that from a halakhic legal perspective, there is no prohibition, but it is contrary to custom, and not accepted

among Jews, and that calmed the anger of the protesters. I naively thought that this was a one-time phenomenon that would pass. (Incidentally, I firmly deny that I knew, or that it was reported to me, that women, or a woman, would come to the Western Wall wrapped in a *tallit*, and I did also did not attest to that effect!).

I was also surprised that in declarations made to the various press outlets, the Petitioners emphasized that this would now be a permanent, systematic policy. I therefore asked the honorable Chief Rabbis of Israel for their halakhic opinions, and on 17 Shevat 5749, they ruled to forbid, and this after the phenomenon recurred on Rosh Hodesh of Tevet (Dec. 9, 1988), and this time was met by the angry vocal reactions of the worshippers.

The matter of the arrival of the women wrapped in *tallitot* and carrying a Torah scroll evolved into a serious breach of public order, and turned the Western Wall Plaza into a shameful battle ground, ending in disrespect and discord.

The Petitioners, for their part, only stoke the flames with daily announcements to the press, which have drawn angry responses for and against.

Nothing transpired on the Rosh Hodesh of Shevat, as it fell on the holy Sabbath.

On the Rosh Hodesh of Adar I (Feb. 6, 1989), the terrible spectacle recurred. The said group of women arrived, accompanied by a crowd of reporters and photographers, and this time there was an escalation because their announcements to the press "mustered" a crowd of opponents, and the women, on their part, added an element of singing, which is expressly contrary to halakha.

I am unaware of any physical injury whatsoever. But it is shocking that the aforementioned expressly claimed to have received my permission to conduct their prayers. Several meetings were held between the Chief Rabbinate of Israel and our office administrators in order to limit the damage and embarrassment. I personally turned to several public personalities and requested that they use their influence with the complainants, and especially Plaintiff 1, to refrain from causing a desecration and dragging the public to sacrilege.

> On 11 Adar II, a joint meeting was held in the Director General's office, at which the Petitioners were present. They demanded that we protect them when they come on the Fast of Esther, and we unequivocally declared that they are disturbing public order, and we, for our part, will strictly enforce it …
>
> We therefore prepared for that day, 23 Adar II 5749 (the day of the Fast of Esther – M.E.) (March 20, 1989), and in coordination with the police and its commanders, I reinforced the ranks of female ushers, emphasizing that the police would intervene only if the ushers lost control of the area.
>
> Once again there were announcements to the press, a timely assembly of photographers and reporters, and the women confronted a wall of people who attempted to block their access to the Wall, while the ushers protected them and allowed their access. But the shouts and the attempts at physical harm forced me to request the intervention of the police, who dispersed the disturbances with two tear gas canisters.
>
> And my face is covered in embarrassment and shame by this – for what? What harm would come to them if they were to pray as they wish in their own homes or their own places of prayer that requires all this commotion? [Appendix R/B of the Respondents' response of April 8, 1990].

6. During the period between the submission of the petition, 14 Adar II 5749 (March 21, 1989), and the first hearing of the petition, 20 Iyar 5749 (May 25, 1989), the commotion in the Western Wall Plaza subsided. And this is how the events are described in the above letter of Rabbi Getz:

> Prior to 28 Nisan 5749 (April 6, 1989), in coordination with the office administration, I assembled a staff of women who could control the women worshippers who were attempting to oppose their arrival. I also removed the chairs from the men's section and from the women's section. And, indeed, when they arrived at the Plaza, I was given a 'legal affidavit' by their attorney that they are coming without a Torah scroll and without *tallitot*, and that they would not

> approach the women's section. And, indeed, other than a single shout, there were no reactions by anyone.
>
> That was also the case on Rosh Hodesh Iyar (May 6, 1989). I explained to the women present that this was not the time for disturbances, and that they should bear in mind that only yesterday the blood of two Jews was spilled in the center of Jerusalem, and that they must behave with restraint.
>
> Nevertheless, when they began singing in the course of their prayers, that had been silent until that point, there were shouts of disapproval by male and female worshippers, and they quickly left the area" [Appendix R/B of the Respondents' response of April 8].

And this is what we can learn about the events up to the first hearing in the matter of this petition from the letter of 2 Iyar 5749 (May 7, 1989) of Mr. Zevulun Orlev, then Director General of the Ministry of Religion, to the Director of the High Court of Justice Department:

> I respectfully present you with a report of the course of events in regard to the prayers of a group of feminist women who have recently been praying at the Western Wall each Rosh Hodesh.
>
> I have personally been following this matter over the months of Shevat, Adar I, Adar II, Nisan, and Iyar. I have also met personally met with Rabbi Getz, the rabbi responsible for the Western Wall, and with representatives of the group concerned.
>
> The matter was first brought to my attention by the media, which reported that the group would pray at the Wall while wrapped in *tallitot* and reading form the Torah.
>
> The first Rosh Hodesh prayers were preceded by announcements in the media. By analyzing their content, I have no doubt that the source of the reports was the women themselves.

The announcements led to opposing responses in the *hareidi* press, which heated up the atmosphere, and created expectations of a struggle.

Even when the women arrived at the Wall without *tallitot* and Torah scrolls, there were fierce reactions by the *hareidim*, inasmuch as they believed the reports in the media, and expected that the women would do what was reported.

This was exacerbated by the conspicuous presence of politicians walking at the head of the group, and the presence of many television crews, photographers and reporters accompanying the group of women, which entered the Plaza as a united group, in organized rows and columns as if in a clear protest march.

Our office invested substantial effort to make it clear to the women, on the one hand, that they would not be permitted to enter if they prayed with *tallitot* and read from the Torah, and to the *hareidim*, on the other hand, that if the women promise not to deviate from the local custom, they will not break their promise.

And, indeed, on Rosh Hodesh Nisan, the effort produced results, and other than the loud protests of a small number of men and women against the women, there was no significant disturbance. Those protests were the result of the organized, demonstrative entrance, and the accompaniment of the media, who were not invited by us or by the other side …

Prior to Rosh Hodesh Iyar, there were no reports of the matter in the media. The group of women arrived without the conspicuous presence of politicians, and presumably, without the accompaniment of television crews, photographers and reporters. I am glad to report that the group entered undisturbed (they did not enter in formation, but as a normal group), prayed for about half an hour, and quietly left the Plaza. In the course of prayer, after the group began to pray with organized singing aloud – contrary to the decision of the rabbi in charge of the Wall – two *hareidi* women shouted that the singing bothered them, and were silenced by the Wall ushers.

This progression of events proves and leads to the following conclusions:

A. When the event assumes the character of a demonstration by the women, it is also met by reactions from the other side, and vice versa.
B. When the event is conducted within the framework of the directives of the rabbi of the Wall, there are no harsh responses or disturbances, and vice versa.

From the my discussions with the commander of the Old City police, Chief Superintendent Yair Must, who accompanies me at every event, I know that he agrees with the event analysis and its conclusions [Appendix R/1 to the response submitted by the Respondents in MHCJApp 312/89 on Aug. 15, 1989].

7. As noted, an order nisi was issued on the day of the hearing, with the State's consent. The Court also recorded the State's notice that "the competent authorities in the area of the Western Wall Plaza will see to … ensuring the well-being and safety of the Petitioners, and that their prayer services at the Western Wall Plaza will not be disturbed," with the proviso that the Petitioners will continue to conduct their services at the Wall "in accordance with the prevailing prayer customs at that place, that is – that they will pray in the women's section, without *tallitot* and Torah scrolls" [sec. 2 and 3 of the State's notice of May 24, 1989].

Unfortunately, this interim agreement did not bring about an end to the confrontations at the Western Wall.

8. On 6 Av 5749 (Aug. 7, 1989), the Petitioners requested "to issue an interim order instructing the Respondents to take all the necessary steps to ensure the uninterrupted conduct of the prayer service of the Petitioners' and their friends without physical or verbal violence" (MHCJApp 312/89). In this request, the Petitioners described the events that they claim occurred after the interim arrangement described above. The events of Rosh Hodesh Sivan 5749 (June 4, 1989) are described as follows in the letter of the Petitioners' attorney of June 5, 1989, to the Attorney General and the Director of the High Court of Justice Department:

A. On Rosh Hodesh Sivan, June 4, 1989, the Petitioners, together with their friends, tried to pray in the women's section of the Wall. They arrived at the Wall without *tallitot* and without a Torah scroll, and prayed in the women's section. The following events occurred at the place:

1. A group of women made noise and deafening shouts and insults that interfered with the prayers.
2. A group of men, on the other side of the *mehitza*, shouted and interfered with the prayers.
3. A few women tried to push the worshippers out of the area while they were trying to pray.
4. The prayer book of Mrs. Anat Hoffman was grabbed, folded and spat upon, and the prayer book of another women was grabbed and thrown to the ground.
5. Another women was hit by a stone that was thrown at her.

    b. Cognizant of the State's notice, submitted in writing to the Supreme Court sitting a High Court of Justice as an assurance of the State in file 257/89, the women approached the ushers and the police.

    c. Both of the above stood by, indifferent, and refrained from "ensuring the well-being and safety of the Petitioners, and that their prayer services at the Western Wall Plaza will not be disturbed" (quote from the State's said notice).

    d. If that were not enough, the women were shocked when Mr. Shmuel Markovich, the police officer in charge, approached them and demanded, in Rabbi Getz's name, that the women only pray silently, and if not, then the police would take action against them.

    e. As was their custom, the women departed for the "Hurva" synagogue, where the following events occurred:

        1. The site was "occupied" by a group of *hareidi* men.
        2. When the women tried to pray at a lower place, the men poured water on them, and the *hareidim* tried to force their way in among the praying women. In doing so, they injured Miriam Keltz and Helen Louis, who fell, were hurt, and required medical attention.
        3. The police made no serious effort to allow the women to pray.
        4. The women who submitted complaints were sent from pillar to post between the Kishle [the Old City police precinct], the Russian Compound, the Ministry of Tourism, etc. And complaints were

accepted from the two women who were injured only after they were subjected to a thorough runaround.

Another description of the events on Rosh Hodesh Sivan is given by the Petitioners in their letter of 26 Sivan 5749 (June 29, 1989) to the Minister of Religion:

1. …Despite the State's promise, on Rosh Hodesh Sivan (June 4, 1989) we found that the violence against us continued, and that your office did not succeed in protecting our well-being in an effective manner, as promised in court.

   On Rosh Hodesh Sivan, the ushers did not succeed in protecting us, and Rabbi Getz, who was present at the scene, did not call the Israel Police for help. The Wall ushers claimed that they were unwilling to touch a woman even if she was riotous, and hitting and cursing other worshippers. In order to resolve this problem, is was suggested that female ushers would be sent for, and we were grateful for this initiative on your part.

2. … Since December 1988, on Rosh Hodesh, holidays and Shabbat eves, we follow the same customary practice, arriving at the Western Wall Plaza unobtrusively, singly or in pairs. We gather into a group in the women's section, without a Torah or *tallitot*, and pray together.

   On Rosh Hodesh Sivan, we did not deviate from our customary practice, despite what is stated in the written report presented to you by Rabbi Getz (Appendix D of the Petitioners' request in MHCJApp 312/89).

   On Rosh Hodesh Tammuz 5749 (Aug. 2, 1989), the violence increased, as attested by Petitioner 1, Mrs. Anat Hoffman, and Petitioner 2, Dr. Bonna Haberman, in their affidavit of Aug. 6, 1989:

3. …

(c) For our prayers on 1 Tammuz and 1 Av, the Ministry of Religion provided a force of female ushers who were intended to protect us from our violent attackers, and permit us to pray undisturbed. But instead of that, the ushers joined those who were trying to silence our prayers. When we tried to continue our prayers as usual, and even though we were without *tallitot* and without a Torah scroll, we and our friends were forcefully *dragged out of the women's section before we could finish our prayers*, while women who call themselves "*hareidi*" exploited the opportunity to pelt us with pebbles and throw mud and dirt at us.

4. Not only were we forcefully dragged and expelled from the women's section in a humiliating and degrading manner for all to see, but the Director of the Western Wall, Rabbi Getz, stated to our attorney Advocate Herzl Kadesh – as he reported us – *that in the future, we will be entirely barred from entering the women's section.* A similar report appeared in the media as a statement made on behalf of the Ministry of Religion.

5. Although those of us who pray at the Wall every Friday (in a group of 10-25 worshippers) have encountered verbal violence, to date the prayers have not been frustrated as occurred on the occasions of the Rosh Hodesh prayers.

…

6. (a) The authorities pretend to explain their conduct by an artificial distinction that they make between "prayer" and "singing", and by defining our prayer as singing. In that manner, they seek to evade their responsibility and obligation under the law and in accordance with their commitment to the High Court of Justice.

(b) We pray only from prayer books, and in accordance with the standard Ashkenazic rite. We pray in a group, with a prayer leader. The service includes, among other things, *pesukei d'zimra* [preliminary blessings and psalms], which include the "Song of the Sea", as well as prayers like "*tzur*

yisrael" and "*aleinu*". On Rosh Hodesh, the service also includes *hallel*. These prayers are recited aloud [affidavit of the Petitioners submitted in support of their request in MHCJApp 32/89].

The Petitioners also appended pictures to the said affidavit, which depict the events of Rosh Hodesh Av. The pictures show a group of women sitting on the Western Wall Plaza while female ushers try to lift one of the women; the women of this group lying of the Western Wall Plaza and female ushers trying to lift one of them; a women being removed from the Plaza by a female usher; a "*hareidi*" woman using her bag to fight with one of the women sitting on the Western Wall Plaza.

9. The Respondents explained what occurred on Rosh Hodesh Sivan, Tammuz and Av as the result of the Petitioners breaching the interim agreement reached in the hearing of 20 Iyar 5749 (May 25, 1989):

> 7. (a) …
>
> (b) When the petition for an interim order was heard by the honorable Court, the parties agreed that until the end of the legal proceedings, the Petitioners would conduct themselves in accordance with the local custom. And because the petition focused upon a specific issue, the notice to the Court emphasized the reference to that issue, i.e., prayer by women while reading the Torah and wearing *tallitot*.
>
> (c) It would appear that the Petitioners inferred from this that they had been granted permission to breach the local custom in regard to everything not included in their petition, and from that point onward, when they came to pray on Rosh Hodesh, they began to sing.
>
> In doing so, the Petitioners knowingly deviated from the local custom, while claiming to act in accordance with the customs of their congregations [the State's response of Aug. 15, 1989 in MHCJApp 312/89].

The Respondents also provided a different description of the events of *Rosh Hodesh* Sivan, Tammuz and Av. Rabbi Getz addresses what occurred on Rosh Hodesh Sivan 5759 (June 4, 1989), in his aforementioned letter to the Director of the High Court of Justice Department:

> Rosh Hodesh Sivan 5749 (June 4, 1989) saw a recurrence of the matter of provocative singing and the opposition of the worshippers, and somehow I got the situation under control [Appendix R/B of the Respondents' response of April 8, 1990).

The events of Rosh Hodesh Tammuz 5749 (July 4, 1989) are described by Rabbi Getz in his letter to the Director General of the Ministry of Religion of 1 Tammuz 1989 (July 4, 1989), which was the day of the event:

> This morning, the first day of Rosh Hodesh Tammuz, a group of the Reform women, headed by Mrs. A. Hoffman, arrived. It was a relatively smaller group than we expected, and comprised some 40-50 women.
>
> Before that, I gave the male and female ushers that we mustered for the emergency situation specific instructions … I also fully coordinated with the police commander Mr. Y. Must, and I also pressed upon the male and female worshippers not to intervene in any way, and to leave the matter exclusively to me. When the said group of women arrived on the scene at about 7:00 AM, each was given a copy of my request, in Hebrew on one side, and in English on the reverse, in which the worshippers were asked not to deviate from "the tradition of generations of our people in any way' [Appendix R/2(a) of MHCJApp 312/89 – M.E.].
>
> They approached the wall undisturbed, and began to pray. But now and again they began to sing, and the ushers politely asked them to be quiet, and here and there, a few women voiced their objection. But when they began singing very loudly, and were unwilling to stop, I instructed the ushers to remove them – without especial force – from the Plaza. When the said worshippers saw that, they calmed down, finished their prayers

> quietly, and went up the steps to the Jewish Quarter to read the Torah, etc. I should point out that Mrs. A. Hoffman constantly ran from one woman to another, apparently trying to incite them, but without great success.
>
> In summary – and the police force commander agrees – there was no need to resort to force, and it would appear that this will be the proper approach until the legal issue is decided. And so, thank God, we have managed to maintain order without causing any physical or emotional injury [Appendix R/2 to the Respondents' response submitted in MHCJApp 312/89 on Aug. 15. 1989].

It would also be appropriate to quote the instructions that Rabbi Getz gave to the ushers in preparation for Rosh Hodesh Tammuz:

> It is your task today:
>
> A. To prevent any disturbance of any woman who comes to pray at the Wall, and to protect her.
> B. To prevent any breach of public order by anyone.
> C. In accordance with section 4(c) of the Western Wall Regulations (5741), also to physically remove from the Western Wall Plaza any person when you receive such instruction from the undersigned [Rabbi Getz – M.E.] [Appendix R/2 (b) of the Respondents' response submitted in MHCJApp 312/89 on Aug. 15, 1989].

The serious events that transpired on Rosh Hodesh Av 5749 (Aug. 2, 1989) are described by Rabbi Getz in his letter to the Director of the Ministry of Religion of 1 Av 5749 (Aug. 2, 1989), which was the day of the events:

> This morning, a group of the Reform women arrived that was larger than usual, comprising some 70-80 women. They were preceded by

representatives of Israeli and foreign television, as well as photographers and reporters.

Upon their arrival, they were asked by the ushers to maintain order and respect the local custom. Our male ushers stood beside the *mehitza*, on the men's side, in order to prevent any outburst by the worshippers.

The Reform women began their prayer quietly, and did not create any disturbance. But when they broke out in song, there was a general cry for silence, and I sent a few of the female worshippers in the women's section to speak to them and politely ask them to preserve the holiness of the place.

For a moment, the singing ceased, but then they resumed it loudly. After they were warned to stop, the ushers began to remove them. Then, at a prearranged signal, they all sat down at once on the floor, and amplified their singing in a very provocative manner.

I was then forced to order their physical removal, one at a time, while the ushers blocked the entrance to prevent their return to the site. The picture made me very very uncomfortable, but they left me no choice. I would like to praise the readiness of the police, under the command of Inspector Markovich, although I saw no need to activate them (Must was on vacation).

In summary, I see an escalation in the phenomenon, and I would recommend that we now consider not permitting their entry to the area, so as not to see a recurrence of today's difficult scene [Appendix R/3 of the Respondents' response submitted in MHCJApp 312/89 on Aug. 15, 1989].

And this is what was stated in Rabbi Getz's letter to the Director of the High Court of Justice Department:

> … On Rosh Hodesh Av (Aug. 2, 1989), we reached the nadir of disrespect for the holiness of the Western Wall. As befits destruction,[1] I foresaw what might happen, mustered a reinforced staff of ushers, coordinated with the police, and also sent a written note, in Hebrew and in English, in which I greeted the arriving women with a cordial blessing and a request that they not breach the public order. I actually begged them that they act with reserve, and not bring about any provocations.
>
> Indeed, at first they began to pray quietly, but suddenly they began singing loudly, and despite my repeated requests, they completely ignored them and sang even louder.
>
> Of course, on the other hand, the expected reaction followed, and in fear of severe developments and violence, I instructed the ushers to remove them. Then, by a prearranged signal, they all sat down at once on the floor, arm in arm, singing loudly.
>
> Despite the stinging pain that I feel to this very day, I instructed that they be dragged out right in front of the many cameras that, as usual, had been invited in advance [Appendix R/B of the response of April 8, 1990].

A similar picture of the events of Rosh Hodesh Av is presented in Mr. Zevulun Orlev to the Director of the High Court of Justice Department of 2 Av 5749 (Aug. 3, 1989). As stated in the letter:

> … the women breach the rules for prayer and conduct of the place by intentional, organized and flagrant singing.
>
> On Rosh Hodesh Av (Aug. 2, 1989), they went even further, coming in a large, organized group, accompanied by politicians and the media (newspaper, radio and television) that were invited by them.

[1] Translator's note: The reference is to the fact that the Temples were destroyed in the month of Av.

> We see that as a flagrant breach of the decision of the High Court of Justice, which ruled that the prayers be conducted in accordance with the usual customs of the place, and I therefore request that legal steps be taken for breach of the High Court's decision and contempt of court.
>
> In addition, I respectfully inform you that, in light of the recurring breaches of the local custom by the group, we are considering not permitting them to enter the Plaza as an organized group, but only as individuals [Appendix R/4 of the response submitted in MHCJApp 312/89 on Aug. 15, 1989].

10. At the end of the hearing held on 20 Av 5749 (Aug. 21, 1989) in regard to the Petitioners' request for an interim order, as described above, and in light of the described events, this Court ruled as follows:

> In regard to the interim order, the existing situation should continue without any change either way. Any change in the manner of conducting prayer can result, if at all, only following a legal ruling by this Court, following a hearing of the petition on the merits. Therefore, the Petitioners shall be permitted to pray at the site in accordance with the local custom, as dictated by the Rabbi of the Wall. This means, *inter alia*, that their prayers will be conducted without *talittot* or Torah scrolls. As for singing aloud at the site, this, too, must be conducted – as long as the matter is not addressed on the merits by this Court – in accordance with the said local custom. The Petitioners' prayers, in accordance with the local custom, must be permitted by the Respondents, who must ensure appropriate security arrangements for properly carrying it out [decision in MHCJApp 312/89].

Following that decision, peace returned to the women's section, and the Petitioners' prayers – in accordance with the local custom – preceded peacefully. Rabbi Getz refers to this in

the aforementioned letter of 22 Adar 5750 (March, 12, 1990) to the Director of the High Court of Justice Department:

> The lowering of tensions began on 19 Av 5749 (Aug. 20, 1989) (should be: 20 Av 5749 (Aug. 21, 1989) – M.E.), with the issuance of the order by the honorable Supreme Court that they must observe the instructions of the Rabbi of the Wall, and not change the local custom.
>
> With the exception of a certain attempt at disturbing the peace on Rosh Hodesh Elul 5749 (Sept. 1, 1989), there has been absolute calm, and large or small groups of women arrive every Rosh Hodesh, without prior notice to the press, pray quietly at the Wall like all daughters of Israel, and depart, and they are made welcome [Appendix R/B of the response of April 8, 1990].

This is also what can be understood from the letter of 38 Kislev 5750 (Nov. 29, 1989) from Mr. Zvi Hoffman, Director of the Holy Places Department in the Ministry of Religion, to Mr. Zevulun Orlev:

> This morning, Rosh Hodesh Kislev, a group of the Reform women, numbering about 100 women, arrived at 7:20 AM. The group was relatively larger than usual. Representatives of the media, as well as photographers and reporters, preceded them. Upon their arrival, they were asked by Rabbi Getz's secretary, Mr. Z. Hecht (as Rabbi Getz was absent due to illness), to maintain order and respect the local customs.
>
> They approached the Wall undisturbed, and began praying without any singing and without raising their voices. They finished their prayers after about 20 minutes, and went up the steps to the Jewish Quarter for the reading of the Torah, etc.

> In conclusion, there was no need to make recourse to the police contingent or the ushers that we had requested. This only goes to show that their prayers can be conducted in accordance with the local custom without any problems [Appendix R/C of the response of April 8, 1990].

HCJ 2410/90

11. The facts of this petition – although they raise the same issue – are entirely different from the facts of the petition in HCJ 257/89. Petitioners 1-6 are Jewish women who are residents of the United States. The Petitioners founded Petitioner 7 – the International Committee for Women of the Wall – and they claim to "represent a group of at least 1000 Jewish women who are members of the primary Jewish movements, including the Orthodox, Conservative, Reform, and Reconstructionist" (para. 1 of the petition).

As for the manner of prayer of the Petitioners and the group that they represent:

> 13. As for the character of the prayer of this group, because the women are members of different movements, although primarily Orthodox, they decided to adopt the rule of following their common denominator, that is, prayer that is acceptable to all the movements.
>
> 14. In light of that decision, this group prays in accordance with Orthodox halakha, and it alone, inasmuch as this does not offend the religious views of any of its members, and therefore they conduct their prayer services in accordance with the accepted halakha of the Orthodox religious Jewish world.
>
> 15. In light of that, in their joint prayer as a group, the Petitioners are careful:
>
> (a) Not to refer to themselves or consider themselves a *minyan* for any and all purposes.

(b) Not to recite those prayers that are permitted only in the context of a *minyan*, such that they do not recite the *kaddish*, they do not say the "*barechu* …", there is no repetition of the *shemoneh esreh*, etc.

(c) They do not hold a Torah reading service, and do not bless or "go up" to read from the Torah.

16. In practice, the Petitioners conduct individual prayer, with all its characteristics and restrictions, together, with the addition of two elements that are halakhically permitted:

(a) They wear a *tallit* during their prayers;

(b) They read from a Torah scroll that they bring with them [Petitioners' summary of pleadings of Feb. 27, 1991].

As for the background of the petition, it states as follows:

4. In their efforts to forge a strong, deep tie with Jerusalem, the Women of the Wall brought a Torah to Jerusalem towards the end of 1989, and left it in Jerusalem, *inter alia*, so that so that they would be able to read from it in the course of their prayers during their recurring visits.
5. The Women of the Wall requested to pray at the Wall, as aforesaid, on Rosh Hodesh Kislev (Nov. 29, 1989), while wearing *tallitot* and reading from the Torah that they brought, as stated above.
6. When the Women of the Wall were informed that Respondent no. 2 (Rabbi Getz, the Director of the Western Wall – M.E.) might try to prevent their praying as aforesaid, as he did in regard to a group of Israeli women whose petition is pending before this honorable Court in file 257/89, Petitioners 1-6 postponed the intended date of prayer to Thursday, Nov. 30, 1989, and on Nov. 26, 1989, they wrote to Respondent no. 2 and to the representative of Respondent no. 3 (the Commissioner of the Israel Police – M.E.) in the Old City, while sending a copy of their request to Respondents

no. 1 (the Minister of Religion – M.E.) and no. 4 (the Attorney General – M.E.) … so that the Respondents could take the necessary steps in order to prevent a disturbance of their intended prayers, as aforesaid. The letters were delivered to their recipients no later than Nov. 28, 1989.

…

12. At the intended time for their prayers, as aforesaid, the Women of the Wall arrived at the Western Wall Plaza, carrying *tallitot* and the Torah scroll, but the representative of Respondent no. 1 prevented their entry to the Western Wall Plaza, claiming that since they were women, they are not permitted to wear *tallitot* or read from the Torah, in accordance with a decision of Respondent 2 … Petitioners 1-6 were informed that their entry into the Western Wall Plaza and their prayers there would be prevented by force [paras. 4-6, and 12 of the petition in HCJ 2410/90].

In addition, the Petitioners emphasize that:

> Upon the preventing of their entry to the Western Wall Plaza, as aforesaid, the group of Petitioners and those that accompanied them dispersed that day, Nov. 30, 1989, peacefully and quietly, making no attempt to cross the security barrier outside the Western Wall Plaza on the Dung Gate side, and in no case, neither in the past nor following the submission of the petition, did the Petitioners request to conduct prayers at the Wall in accordance with their custom, due to the position of the Respondents, as aforesaid.
>
> … and their prayers did not cause any breach of public order, inasmuch as they were never conducted at the Wall, beside it, or in the Plaza facing it [paras. 17, 20 of the Petitioners' summary pleadings of Feb. 27, 1991].

Pleadings

Petitioners' Pleadings

12. The Protection of Holy Places Law, 5727-1967, states as follows:

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.

Offences

2. (a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years.

   (b) Whosoever does 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 shall be liable to imprisonment for a term of five years.

Saving of Laws

3. This Law shall add to, and not derogate from, any other law.

Implementation and regulations

4. The Minister of Religious Affairs is charged with the implementation of this Law, and he may, after consultation with, or upon the proposal of, representatives of the religions concerned and with the consent of the Minister of Justice, make regulations as to any matter relating to such implementation.

When the original petition in HCJ 257/89 was submitted, the Regulations for Protection of Holy Places to the Jews, 5741-1981, promulgated under sec. 4 of the Protection of Holy Places Law, stated, *inter alia*:

Definitions

1. In these Regulations:

Holy Places – The Western Wall and its Plaza, including any structure and any aboveground or underground passage the entrance of which is from the Plaza; …

The Director – The person appointed by the Minister of Religion, on the proposal of the Chief Rabbis of Israel, to be the Director in Chief, or the Director of a specific Holy Place.

Conduct

2. (a) In the area of the Holy Places, and subject to what is set out in sub-regulation (b), the following is prohibited:

(1) Desecration of the Sabbath and Jewish holidays;

(2) Improper dress;

(3) Placing kiosks or stands;

(4) Providing religious services of any kind without the permission of the Director;

(5) Distributing publications without the permission of the Director;

(6) Making speeches, announcements aloud, carrying placards or signs, without the permission of the Director and in accordance with his conditions;

(7) Panhandling or accepting contributions, with the exception of placing charity boxes in places designated by the Director for purposes that he has established;

(8) Slaughtering;

(9) Eating, drinking or holding a celebration outside of places designated for that purpose by the Director;

(10) Smoking;

(11) Sleeping outside of places designated for that purpose by the Director;

(12) Entrance of animals.

(b) …

Restrictions upon Photography in the Western Wall Plaza

3. …

Powers of the Director

4. (a) The Director may, with the consent of the Chief Rabbis of Israel or the Minister of Religion, give instructions to ensure the efficient enforcement of the prohibitions set forth in Regulation 2.

(b) Any person present in the area of the Holy Places must obey the lawful instructions of the Director.

(c) The Director may remove from a Holy Place any person who interferes with the carrying out of his function or who transgresses any of the provisions of Regulations 2 or 3.

Punishment

5. Anyone who transgresses any of the provisions of Regulations 2 or 3 is liable to imprisonment for a term of six months or a fine in the amount of 500 shekels.

Inasmuch as that was the wording of the Regulations at the time of the submission of the original petition in HCJ 257/89, the Petitioners' primary claim in that petition was that:

> The Protection Regulations do not prohibit women's prayer in the women' section, and do not prohibit women from reading the Torah or wearing *tallitot* [para. 3.b of the original petition].

They further argued that the Director of the Western Wall and the Chief Rabbis are not authorized "to impose prohibitions or promulgate decrees that are not expressly stated in the Protection Regulations, and if they did so, they exceeded their authority" [paras. 4.5b-5.b of the original petition]. The Petitioners therefore argued that they should not be prevented from

praying at the Western Wall while reading the Torah or wearing *tallitot*, and that the Israel Police must ensure their right to do so.

13. On 4 Tevet 5750 (Jan. 1, 1990) – prior to the State's submission of its affidavit in response to the petition – the State informed the Court of the promulgation of the Regulations for the Protection of Holy Places to the Jews (Amendment), 1989, which amended Regulation 2, above, as follows:

> *Amendment*
>
> 1. In Regulation 2(a) of the Regulations for Protection of Holy Places to the Jews, 5741-1981, following section (1), shall come: (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.

As noted, in light of the amendment of the Regulations, the Petitioners in HCJ 257/89 submitted an amended petition.

14. In their amended petition, the Petitioners argued extensively against the validity of the said amendment to reg. 2 of the Regulations for Protection of Holy Places to the Jews. The Petitioners argued that the new amendments are void ab initio, or in the alternative, should be voided, inasmuch as they suffer from various flaws: extreme unreasonableness, unlawful discrimination, extraneous considerations, improper purpose, deviation from authority, and infringement of the principles of justice (para. 14 of the amended petition; para. F of the summary pleadings of the Petitioners in HCJ 257/89).

They further argued that their praying while wrapped in *tallitot* and reading the Torah does not fall within the ambit of the prohibition established under the new regulations. The reasoning grounding this claim is that prayer in the manner described is not contrary to the "local custom" [para. 6 B (a) of the amended petition; para. 7 of the Petitioners' summary pleadings].

15. The Petitioners in HCJ 2410/90 essentially repeated the arguments in HCJ 257/89, while noting the factual differences between the two petitions.

In their petition, the Petitioners especially emphasized their strict observance of halakha. They further emphasized the fact that they – as opposed to the Petitioners in HCJ 257/89 – had not caused a disturbance of the peace [paras. 18-20 of the Petitioners' summary pleadings in HCJ 2410/90].

The State's Pleadings

16. In its response, the State emphasized that the Petitioners' right of access to the Western Wall and their right to pray there are not disputed. What it forbidden to the Petitioners is praying in their own manner, that is, arriving as a group, wrapped in *tallitot*, carrying a Torah and reading from it. The reason for this prohibition is that when the Petitioners conducted such prayer, it caused serious disorder in the Western Wall Plaza, disturbance of the peace, and a breach of appropriate decorum [para. 3 of the State's summary pleadings of Feb. 24, 1991].

By virtue of the authority vested in him under the Protection of Holy Places Law, the Minister of Religious Affairs promulgated the Regulations for Protection of Holy Places to the Jews, after conferring with the Chief Rabbis of Israel, and with the consent of the Minister of Justice, as required under sec. 4 of the Law. Those Regulations established arrangements intended to realize the purpose of the Law, namely: the avoiding desecration or other harm to the holy places, and avoiding any other offense to the sensitivities of the praying public in regard to the place. These arrangements ensure that public order and appropriate decorum will be preserved in the holy place.

As part of the said arrangements, reg.2 establishes a list of prohibited actions in the area of the holy places. Among the prohibited acts is a prohibition upon "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" – reg. 2 (a) (1a) [paras. 6-7 of the State's summary pleadings of Feb. 24, 1991].

In order to carry out the obligation to preserve public order and decorum in the Holy Places, there is a principle of strict preservation of the status quo in the Holy Places. In the Declaration of Independence, the State of Israel affirmed that it would ensure freedom of religion, and that it would "safeguard the Holy Places of all religions". That promise was kept, in

practice, by strict preservation of public order and decorum in all the Holy Places, and by the preservation of the "*status quo*" in those places. That policy of the Government of Israel is also expressed in the Protection of Holy Places Law, and in sec. 3 of Basic Law: Jerusalem, Capital of Israel [paras. 1-15 of the State's summary pleadings of Feb. 24, 1991)].

It is therefore contended that the regulation that is the subject of the petitions is valid, and that the manner in which the Petitioners conducted their prayers at the Wall should be examined in its light. The State further argues that for the purpose of the application of the regulation's provisions to the Petitioners, the question that must be asked is whether prayer in the manner performed by the Petitioners has ever been the local custom at the Western Wall. The answer to that question is no, and prayer in the manner performed by the Petitioners at the Western Wall constitutes an offense to the sensitivities of the praying public in regard to the place [paras. 19-22 of the State's summary pleadings of Feb. 24, 1991].

The State referred to the opinions provided by the Chief Rabbis in the matter before us, in which they expressed their extreme opposition to the conducting of prayer services in the manner of the Petitioners. According to the State, these opinions were given by virtue of the authority granted to Chief Rabbis as stated in sec. 4 of the Protection of Holy Places Law, which requires consultation with the representatives of the relevant religions. Thus, sec. 4 of the said Law states that the Minister of Religion may promulgate regulations suggested by the representatives of the relevant religions [para. 23 of the State's summary pleadings of Feb. 24, 1991].

The Parties' Pleadings in regard to the Court's Jurisdiction

17. Initially, the State did not raise any objection to the jurisdiction of this Court over the subject of the petition at bar. Respondents 9-12 in HCJ 257/89 – the Shas Movement, Rabbi Miron, the Degel HaTorah Association, and Rabbi Ravitz – claimed that "the subject matter of the petition … is not within the jurisdiction of the honorable Court due to the provisions of sec. 2 of the Palestine Order in Council (Holy Places), 1924" [para. 7(a) of the affidavit of Rabbi Miron of Aug. 17, 1989, and the affidavit of Rabbi Ravitz of Aug. 18, 1989].

The State explained its reasons for not raising the issue of the jurisdiction of this Court in the summary pleadings submitted on 10 Adar 5751 (Feb. 24, 1991). The petitions address the

arrangements established in the Regulations for Protection of Holy Places, by virtue of which the Petitioners were prevented from conducting their prayers at the Wall in their manner. The Petitioners in HCJ 257/89 responded at length and in detail to the claim of lack of jurisdiction of the Court [Chapter B of the Plaintiff's summary pleadings of Feb. 24, 1991]. We do not see any need to address this at length for the purpose of the matter before us.

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, Mot 15/69 *National Circles Association v. Minister of Police*, IsrSC 24(2) 141 (hereinafter: the *National Circles* case), 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.

The Subject before the Court in Halakha

18. The questions that we must decide concerns prayer and its rules, which are matters deriving from the world of halakha. I would not presume to rule on any of the matters before us from the perspective of halakha. I am no halakhic decisor, nor a halakhic decisor's son[2]. I probe the words of scholars and decisors, and contemplate the wisdom and thoughts of sages and philosophers, and express my thoughts on the matter. This enquiry is appropriate, inasmuch as the parties presented lengthy arguments on this matter from the halakhic perspective, in

[2] Translator's note: Elon, D.P., who was an ordained rabbi and a professor of Jewish law, is adapting the verse, "I am no prophet, nor a prophet's son; but I am a herdsman, and a dresser of sycamore trees" (Amos 7:14), an expression of modesty frequently employed in rabbinic literature, see, e.g., TB Berakhot 34b, TB Eiruvin 63a, TB Yevamot 121b, Leviticus Rabbah (Margulies), Vayikra 6, Aharei Mot 20.

particular, by submitting the opinions of Prof. Pinhas Schiffman (in HCJ 257/89), Prof. Shmuel Shilo (in HCJ 2410/90), and Prof. Eliav Shochetman, who first submitted an opinion in HCJ 257/89, and later submitted an opinion in HCJ 2410/90. Out of respect for them,[3] I will also say a few words on the subject. This examination is necessary in order to understand the subject before the Court, which relates to intrinsically halakhic questions that are grounded in the world of halakha and its values. It is only proper, therefore, that we briefly address them as they are expressed in halakha, before delving into the legal aspects of the issues raised by the petitions.

Social Changes in the Status and Role of Women

19. The subject at issue –prayer by women, their obligation and exemption, and additional, related subjects – have long been a subject of halakhic and scholarly literature. The discussion of these issues has intensified in this generation, against the background of social changes in the status of women that I will discuss below, and many books and articles have been written on the subject, some of which I will cite.

The problem of the status of women in halakha in the face of changes in women's social involvement, status and education, and the roles that women fulfil in daily life – including religiously observant women – is a central subject in the investigations of contemporary halakhic decisors and philosophers. We, too, have addressed this question at length in the decisions of this Court (see: ST 1/81 *Nagar v. Nagar*, IsrSC 38 (1) 365 (hereinafter: the *Nagar* case); HCJ 153/87 *Shakdiel v. Minister of Religious Affairs*, IsrSC 42 (2) 221 [http://versa.cardozo.yu.edu/opinions/shakdiel-v-minister-religious-affairs] (hereinafter: the *Shakdiel* case)), in regard to the study of Torah by women in the context of our decisions concerning the equal obligation of a father and a mother to educate and raise their child (the *Nagar* case; and see the *Shakdiel* case, at p. 265), and in regard to the right to vote for and be elected to public office (the *Shakdiel* case). Following a detailed examination of those two issues, we concluded (*ibid.*, at p. 268):

[3] Translator's note: Both Prof. Shilo and Prof. Shochetman were students of Elon, D.P. at The Hebrew University.

With respect to the Torah study by a woman, there is an express rule in the Talmud, generally upheld in the halakhic codes, that a woman is not only *exempt* from studying the Torah but even *forbidden* to do so, this rule being derived from the Biblical verse "and you shall teach them to your sons", and not your daughters. But the profound socio-ideological changes experienced in latter generations, has radically altered also the outlook on the issue of women studying *Torah,* and it has been determined that not only is there no longer any prohibition, but women are even obligated to study Torah; and not only do they study it for themselves, but they even teach it to the sons of others. And if this is the outcome of the controversy concerning women studying the Torah, then the issue of the election of women to public office should have the like outcome, *a fortiori,* since most rabbinical scholars are of the opinion that the matter is not expressly prohibited in the Talmudic halakha, and some of the codifiers and *Rishonim* differed from Maimonides' opinion that only a man may be appointed to all public office. And if so radical a departure as abrogation of the grave prohibition against women studying the Torah could result from social and ideological changes, why not a much less radical departure that permits a woman to serve on a religious council? Should we not see Rabbi Malka's assessment of the contemporary situation that obligates women to study Torah, i.e., that "in current times, when women play a large part in all walks of life, penetrate the depths of the secular sciences and fill the benches of the universities, run offices and own businesses, and have a hand and a voice *in the leadership of the state and in political affairs*", as constituting decisive reason to permit modern women to take part in developing and maintaining religious services in their place of residence, by serving on the council charged with implementation of the task? At a time when women actively take part in diverse educational, cultural, social and political pursuits, is not a woman's preclusion from serving on a *religious council*, in particular, a harsh insult to her dignity and standing, precisely as a *religious woman*? She may discharge a public function in all areas of social, cultural and political life, but not in a public body that caters to her religious way of life? Is the

> native-born to be on the earth and the foreign-born in the highest heavens? (TB Bava Kama, 42a).

And we went on to say (*ibid*., at p. 269):

> It need scarcely be said that in the world of the halakha we do not discuss purely legal-halakhic questions, in the sense of *juridical* rights and duties. Rather the ideological and normative values of Jewish religious life are inherent in and inseparable from the subject of the discourse. For we are taught "do not read *ways of behaviour* [*halikhot*], but *legal rules* [*halakhot*] (*cf*. TB *Megilla* 28b) and by way of paraphrase we could equally well say, "do not read *legal rules* [*halakhot*] but *ways of behavior* [*halikhot*], since legal rules and ways of behavior come inextricably linked. We have seen clearly reflected - throughout the scholarly passages here cited - in addition to the legal exposition of our subject, also lengthy and detailed discussion of the conceptual implications of Jewish family life; the roles of the father and the mother, of the woman and the man, domestic harmony, the concept of modesty, and so on. All this because examination of these concepts is essential to the juridical-halakhic ruling on our subject. However, these important concepts must be addressed *according to both their original significance and their contemporary setting*, as we have learned from the passages quoted. Take, for example, this last concept [of modesty - Ed.] and its deep significance in Jewish life, for all persons, as stated by the prophet Micah: "You have been told, man, what is good and what the Lord requires of you - only to do justice, and to love mercy, and to walk modestly with your God. (Micah 6:8; and see TB *Makkot* 24a).

In this connection, we quoted (*ibid*.) Rabbi A. Lichtenstein, the head of the Har Etzion Yeshiva in Alon Shevut in Gush Etzion (in his article published in *The Woman and Her Education* (Emunah, 5740) 158):

The question is, to what extent do we want to perpetuate the original position we find in the halakha or to modify it by legitimate halakhic means, having regard to historical developments. This is a question of outlook affecting not only our present problem but also many others, such as the sabbatical year, the transactions permit [allowing interest-bearing loans – trans.], and so on. When we circumvent the halakha, by halakhic means of course, should we say that the halakha wanted one thing then and now wants another? Or does the halakha still require the same today, except that we cannot meet its standard? To discuss this problem we must consider not only the specific question on the agenda but also the normative ramifications of the problem. When we seek to circumvent the halakha today, by legitimate means, we must ask whether or not it is for attaining a meaningful purpose, religiously and normatively speaking. There is a difference between using a circumvention in order to feed a number of poor women, as in the example of Rabbi Tarfon given in the Jerusalem Talmud *(*TB *Yevamot,* 4:12), or so that someone can gain a few extra pounds.

As for the problem of changing or reforming the status of women, if it is feasible to build a sounder and more perfect society, one that is mindful of the values of the Torah and the halakha, then it must be contended that what once was, was suited to those times, but today there is reason to relate to contemporary reality detached from the past. It is impossible to bring back the past – that is not realistic. It is not possible to revive the simplistic naiveté of women that was then. Hence it is needed to replace the *Ze'ena Ure'ena,*[4] with a tractate of the Mishna, such as *Hullin,* to teach women more and lend their lives a content closer to that of men, so that women can derive benefit from the existing reality. But to have neither the one nor the other, that certainly is inconceivable. If there is to be neither innocent belief as in past times, nor serious study of the Torah, women will fall between two stools, and that clearly will not be good.

[4] A sixteenth-century Yiddish exegetical/homiletical presentation of the weekly Torah and Haftarah readings, and the Five Scrolls.

We, therefore, further stated (the *Shakdiel* case, pp. 269-270):

> Such is the way of the halakha from ancient times. On this score we wrote elsewhere (M. Elon, *Jewish Law – History, Sources, Principles*, 3rd ed., (Magnes, 1978), p. xv – M.E.): "... The history of the Jewish nation is reflected in the history of Jewish law, its institutions and subject matter. For the development of Jewish law was intertwined with the problems that arose in reality, the law and reality reciprocally influencing each other. The halakhic scholars and the community leaders faced a twofold task: on the one hand, a continuing concern to create and develop the Jewish law, and on the other hand, a great responsibility to preserve the spirit, purpose and continuity of the ideas that were central to each legal institution. The performance of this twofold task - to find and determine legal solutions that were founded in the past and also served the many needs of the current generation – is clearly evident to anyone who studies the history of Jewish law in its different periods..." (and see, *ibid*., at p 45 – M.E.).
>
> To the above end, the system of Jewish law has drawn upon its own legal sources – those very sources recognized by the halakha as means to create and develop the rules of the system (*ibid*., at pp. xv and 45 – M.E.).

Indeed, that is the way and the world of halakha, and every problem or issue that confronts it as the result of a changing societal and social reality requires in-depth examination and consideration of the halakhic rules, principles and values in order to arrive at an appropriate, correct solution by means of the creative sources of halakha – both in terms of the resolution of the problem and in terms of the spiritual world and values of the halakhic system. The more fundamental and comprehensive the issue, the greater the need for in-depth, responsible examination. And so it is, to no small extent, in regard to the issues presented by the petitions at bar, which we will now address.

20. In terms of halakha, the questions raised by the petitions concern the rules of prayer: one – is a woman permitted to wear a *tallit* and *tziztit*; two – are women permitted to carry a Torah

scroll and read from it. These two subjects must be preceded by the examination of an additional question, that of the manner for conducting public prayer by women. The latter question is particularly emphasized by the Petitioners in HCJ 2410/90, who take care that their prayer groups are "in accordance with the accepted halakha of the Orthodox religious Jewish world", "not to refer to themselves or consider themselves a *minyan* for any and all purposes", "not to recite those prayers that are permitted only in the context of a *minyan*", etc. (see para. 11, above).

As we noted at the outset, many instructive things have been said and decided in regard to these and other related issues in the Talmudic literature, commentaries, and responsa literature, and in the writings of scholars. These issues have been increasingly discussed of late, due to the changes in the social reality and the status and role of women in that reality, which we referred to at beginning our examination of the subject before us in the world of halakha. This is not the place for a lengthy examination of these matters, and we do not pretend – nor do we see a need – to conduct an exhaustive examination of them. We will only briefly address some of the fundamental matters regarding the issues before us.

It is worth noting the interesting phenomenon that a significant part of the halakhic literature on these issues is to be found in books and articles published in English (see: Rabbi Avraham Weiss, *Women at Prayer: A Halakhic Analysis of Women's Prayer Groups*; Rabbi Moshe Meiselman, *Jewish Women in Jewish Law*; Rabbi Prof. Eliezer Berkovits, *Jewish Women in Time and Torah*; Rabbi J. David Bleich, "Survey of Recent Halakhic Periodical Literature," 14 (2) *Tradition* 113 (1973); Rabbi Saul Berman, "The Status of Women in Halakhic Judaism," 14 (2) *Tradition* 5 (1973) ; Rabbi Aryeh Frimer, "Women and Minyan," 23 (4) *Tradition* 54 (1988); etc., to which we will make reference below).

This phenomenon, which is uncommon in regard to the overwhelming majority of other halakhic subjects, derives from the fact that interest – from its inception and to this day – in the application of these issues has largely been among the various Jewish congregations in the United States. This, too, will be of importance in deciding the petitions before us from a legal perspective.

Prayer in a "Minyan"

21. Women are required to pray, but they are not obligated to public prayer (TB Berakhot 20a-b; Maimonides, *Mishneh Torah*, Laws concerning Prayer 1 (b); *Shulhan Arukh*, OH 106, 1-2, *Magen Avraham*, ss. b, *ad loc*.; *Responsa Shaagat Aryeh* 14. There is a difference of opinion as to whether women are obligated to pray three times a day – *arvit*, *shaharit*, and *minha* – or only for some of them. In the opinion of one of the accepted contemporary decisors, Israel Meir of Radun, in his book *Mishna Berura*, women are required to pray *shaharit* and *minha* (see: *Mishna Berura* on *Shulhan Arukh* OH 106 b). We will address the reason why women are exempt from public prayer below, in our discussion of time-bound positive commandments.

According to halakha, fulfillment of the obligation of public prayer requires a "*minyan*", i.e., ten men, and "acts of sanctification" – i.e., prayers in which God is sanctified, such as *kaddish*, *barekhu*, *kedusha*, and the repetition of the *amida* – are only performed in a minyan (TB Megilla 23b). Women are not counted for constituting a *minyan* of ten, as we shall explain below. A *minyan* of ten men is also required for additional things, such as the priestly blessing, a "*zimun*" of ten for the grace after meals, but there is disagreement among halakhic decisors as to the reason for this (see: Maimonides, *Mishne Torah*, Laws concerning Prayer 8, d-f; *Shulhan Arukh*, OH 55 a; and see in detail, *Encyclopedia Talmudit*, vol. 6, *s.v*. "*Davar SheBikedusha*", pp. 714*ff*.).

Women are not counted for the constitution of the required *minyan*, except for certain matters and for specific reasons, in the opinions of various halakhic decisors among the *Rishonim* and *Aharonim*.[5] By way of example, in regard to the reading of the Megilla and the recitation of the blessing "*harav et rivenu*" that follows the reading, see: Nachmanides, *Milhamot HaShem*, on Rif [Isaac ben Jacob Alfasi], *Megilla* 5:a; Meiri, *Berakhot* 47b; Ran [Rabbi Nissim ben Reuven Gerondi] on Rif, *Megilla* 19:b *s.v*. "*Hakol Kesherin*", and *Megilla* 23a, *s.v*. "*Hakol Olin Lamina Shi'va*"; in regard to the *public* sanctification of God, see: Rabbi Reuven Margulies, *Margoliot HaYam*, *Sanhedrin* II, 6 and 27 and sources cited there; on the *HaGomel* blessing, see: *Mishneh Berurah* OH 29:3 and sources cited there; and see *Encyclopedia Talmudit*, v. 4, *s.v*. "*Berakhot hahoda'ah*", pp. 318-319, etc.; and this is not the place to elaborate (see Rabbi A.

[5] Translator's note: The term "*Rishonim*" refers to scholars who were active following the Geonic period and the period prior to the writing of the *Shulhan Arukh*, approximately from the middle of the 11th century to the middle of the fifteenth century. "*Aharonim*" refers to scholars active following that period.

Frimer's detailed article "Women and Minyan," 23 (4) *Tradition* 54 (1988), pp.54*ff*. and Rabbi Weiss' book, *Women at Prayer: A Halakhic Analysis of Women's Prayer Groups*, pp. 13-56).

Time-Bound Positive Commandments

22. In regard to the questions raised by the issue before the Court and the reasons behind them, we should address the halakhic principle that women are exempt from the performance of time-bound positive commandments, that is, commandments that must be performed at specified times (day not night, at specific times of day, on specific days or holidays, etc.: Mishna Kiddushin 1:7; TB Kiddushin 32a; Maimonides, Laws concerning Idolatry, 12:3, Laws concerning *Tzitzit*, 3:9; *Shulhan Arukh* OH 17:2. Before examining the reason for this halakhic rule, we should note that there are no few exceptions to this rule, and that women are obligated to perform a significant number of time-bound positive commandments, such as, reciting (and hearing) *kiddush* on the Sabbath, eating matzah on the first night of Passover, and others (TB Berakhot 20a-b; Kiddushin 34a; Sukkah 28a, etc.; and see Saul Berman, "The Status of Women in Halakhic Judaism," 14 (2) *Tradition* 5, 1-13 (1973).

Various reasons have been adduced for this exemption (see, e.g., Ellenson, *Bein HaIsha LeYotzra*, vol. I, 2nd ed. (Jerusalem, 1982), pp. 30 *ff.* (Hebrew) [English translation: Ellinson, *Women & the Creator/Serving the Creator*, v. I, 2nd ed. (Jerusalem, 1986)]; Rabbi Berman, above). The prevailing view is that the exemption is intended to make it easier for a woman to fulfill her role, rather than due to her lesser status relative to men. In the Jewish world, a woman's central role is to maintain the home and family – "The king's daughter is all glorious within" (Psalms 45:14). Therefore, the Sages ruled that a woman *is exempt* from performing acts that must be performed at *specific times* in order not to make it more difficult to fulfil her primary role. This reason appears in halakhic literature as early as the *Rishonim* (see, for example, *Abudarham HaShalem*, Daily Prayers, chap.3, Benedictions for *Mitzvot* (Hebrew).

We would note what was said by Rabbi Moshe Feinstein, one of the greatest contemporary decisors, in regard to our subject (*Responsa Iggerot Moshe*, OH Part IV, 49):

> For women, in general, are not wealthy, and they are responsible for raising the children, which is the more important task before God and the Torah … women

> are, by nature, better suited to raising the children, and for this reason, they were relieved of having to study Torah and of the time-bound positive commandments. Therefore, even if the social reality were to change for all women, as it was for wealthy women of all times, and even if it would be possible to entrust the raising [of children] to some other men and women, as in our country – the rules of the Torah, and even of the rabbis, does not change.

Rabbi Feinstein goes on to state:

> We should be aware that this is not because women are of a lower state of holiness than men, as in regard to holiness, they are equal to men in regard to the applicability of the obligation to observe the commandments. For the commandments relate only to the holiness of Israel, and every verse of the Torah that speaks of the holiness of people was also directed to women, whether in regard to the giving of the Torah: "then you shall be my treasured possession … and a holy nation" was said to the House of Jacob, which refers to the women, and "speak to the children of Israel" refers to the men … and we find that every place that the Torah speaks of the matter of the holiness of Israel, it also speaks to the women. Therefore, women recite blessings in the form "who has sanctified us by His commandments", just like men, *even for commandments that the Torah does not require of them*. And it is merely a matter of leniency, because God wished to make it easier for women as explained above, and not, God forbid, to denigrate. And as far as the relations between a man and his wife, there is no distinction between a man's obligation to honor his wife, and a women's obligation to her husband. And many women were prophets, and all the laws of prophecy apply to them as to men. And they were praised more than men in many regards, both in the Bible and by the Sages. And there is no denigration of their honor in any regard in that they were exempted from Torah study and from time-bound commandments, and there is no reason to complain about that. And it brings honor to the Torah to explain this again and again.

We also find an enlightening explanation in the writings of Rabbi Isaac Arama, author of the *Akedat Yitzhak* and one of the great scholars and Torah commentators, who lived in the 15th century, in the generation of the expulsion from Spain (*Akedat Yitzhak*, Genesis, chap. 9):

> By her two names – "*isha*" [Woman] and "*chava*" [Eve] – we learn that a woman has two purposes: One is shown by the name "*Isha* [Woman], for from *ish* [Man] was she taken", and like him she can understand and learn matters of the intellect and piety, like the matriarchs, and the righteous women and prophetesses, as we learn from the plain meaning of *eshet hayil* [a woman of valor] (Proverbs 31).
> The second is the matter of childbirth … and the rearing of children, as is shown by the name "*chava* [Eve], because she was the mother of all the living".
>
> A woman who cannot give birth is prevented from fulfilling her minor purpose [the second above], and for good or for ill, she remains like a man who does not bear children, of whom it is said [of a barren man and a barren woman]: "I will give them, in My House and within My walls, a monument and a name better than sons or daughters" (Isaiah 56:5), for the main progeny of the righteous is good deeds [Rashi's commentary to Genesis 6:9, *s.v.* "*eleh toldot noah*"]. That is why Jacob was angry with Rachel when she said: "Give me children, or I shall die" (Genesis 30:2), to reproach her and teach her this important matter, which is that she would not be dead as a result of this mutual purpose, by having been denied offspring, just as it would be for him if he would not bear children.

The *primary* purpose of a woman, as for her husband, is to "understand and learn matters of the intellect and piety, like the Matriarchs, and the righteous women and prophetesses". The *minor, secondary* purpose is that of childbirth and rearing children. This hierarchy is interesting and instructive, and deviates from what was accepted among philosophers of that period [15th cent.] (also see Rabbi Weiss' aforementioned book, at p. 115).

A particularly instructive and unique example was provided by Rabbi Samson Raphael Hirsch, the founder of the *Torah im Derech Eretz* philosophical school, (in his commentary to the Torah, Leviticus 23:43):

> Clearly, the reason for the exemption of women from time-bound commandments does not derive from their lesser importance, so to speak, or because the Torah did not find them appropriate, as it were, for observing those commandments.
>
> It would appear to us that the reason for not obligating them to those commandments is that the Torah does not think that women are in need those commandments and their observance. The Torah assumes that our women have an extraordinary love and holy enthusiasm for their role in serving the Creator, which are greater than those of men. Men, who face trials in their professional lives that threaten their devotion to Torah, need regular encouragement and cautionary reminders in the form of the time-bound commandments. That is not so for women, whose lifestyle comprises fewer of such trials and dangers.

23. The "exemption" from the obligation to observe time-bound commandments – such as public prayer, blowing the shofar (on Rosh Hashana), shaking the lulav (on Succot) – does not, therefore, deprive a women of *permission* to observe the commandments, if she so desires, and in the opinion of many decisors, when a women performs a time-bound commandment, she is also permitted to recite the appropriate benediction that is said by men: "… who has sanctified us by His commandments *and commanded us*" (Tosafot on TB Kiddushin 31a, *s.v.* "*delo makpidna*"; Nachmanides, *Novellae*, TB Kiddushin 31a, *s.v.* "*man d'amar li*"; Ritba [Rabbi Yom Tov ben Avraham Asevilli], *Novellae*, TB Kiddushin 31a, *s.v.* "*delo makpidna*"; Ra'avya [Rabbi Eliezer ben Yoel HaLevi of Bonn], Part II, chap. 597). Indeed, as noted above, a women who attends public worship cannot be counted for the requisite quorum of ten. A reasonable, logical reason was, *inter alia*, given for this, which is that a person *who is exempt* from the performance of an obligation cannot be counted for the requisite, obligatory quorum for *constituting a minyan* of ten. For the very same reason, for example, a man who is exempt from the performance of commandments – e.g., when a man is required to mourn a relative who has died, that man is deemed an "*onen*" until the deceased is buried. In that period, he is exempt from the fulfilment of commandments, due to his sorrow and his involvement in making funeral arrangements. According to many halakhic decisors, because an *onen* is exempt from the obligation of prayer, he cannot be counted toward the quorum required for a *minyan*

(*Shayarei Knesset Gedolah*, OH 55, *Glosses of the Beit Yosef* [Rabbi Joseph Karo] 4; *Responsa Perah Mateh Aharon* [Aharon ben Hayyim Avraham HaKohen Perahyah] Part I, 19; Rabbi Yaakov ben Yosef Reischer, Responsa *Shevut Yaakov*, Part II, 25). Therefore, women are counted as part of the quorum for a *minyan* for matters for which they are obligated for whatever reason (e.g., for the reading of the Megillah, the public sanctification of God's name, etc. (see what we stated above, and see Weiss, *ibid*., at pp. 44-54)).

Women's "Prayer Groups"

24. Before the modern period, women did not generally go the synagogue for public prayer. In the modern period, women began attending synagogue services on the Sabbath and holidays. The prayers and the reading of the Torah were all conducted by men, who were in the men's section of the synagogue, while the women sat in a separate women's section, and fulfilled only a passive role, that is, they recited all of the prayers that were led and recited in the men's section.

The Petitioners in HCJ 257/89 ask to conduct prayers that are entirely constituted and led by women, as is customary in a minyan of men, i.e., including the recitation of *kaddish*, "*barekhu*", and so forth. This is clearly in contradiction of the halakha. As opposed to them, the Petitioners in HCJ 2401/90 also wish to conduct prayer entirely constituted and led by women, but not as it is conducted in a minyan of men – i.e., with the recitation of *kaddish*, "*barekhu*", and so forth – but rather without reciting those elements, so as not to contravene the halakha. These petitioners call their prayer ceremony "prayer groups" or "*tefillah* groups", in order to distinguish between the status of the prayer group and that of a minyan of men. However, in regard to two matters with which their petition is concerned, the practice of their "prayer groups" is the same as the practice in a minyan of men – that is, they wear *tallitot* and *tzitzit*, and they read from the Torah, albeit without reciting the blessings and being "called up" to the Torah as is customary in a *minyan* of men.

25. As noted, the women who are members of the "prayer groups" do not adopt the approach of the Petitioners in HCJ 257/89, inasmuch as it is incompatible with the halakhic rules. According to them, the approach of the "prayer groups", as described above, is consistent

with the halakhic rules. Some Orthodox rabbis support these "prayer groups". But other Orthodox rabbis, who are also aware of the social role and education of contemporary, halakhically observant women, and who are supportive of such observance, nevertheless object to the approach of the "prayer groups", and deem them harmful to the halakhic world. At present, the number of such "prayer groups" is not large. They were originally founded in the United States, and there are very few in Israel.

These two approaches of Orthodox Jewry, although they hold much in common, also have sharp disagreements, as expressed in abundant writings, some of which we shall mention, while addressing a few of their details. Those disagreements are particularly pointed, and at present, the overwhelming majority of Orthodox Jewry absolutely rejects the "prayer groups", and sees them as a serious deviation from halakha. We will address the nature and substance of these disagreements below. But before doing so, we will briefly make several observations on the subject of wearing a *tallit* and *tzitzit*, and reading the Torah by women.

Wearing a Tallit by Women

26. Women are exempt from wearing *tzitzit* or a *tallit*, as this is one of the time-bound positive commandments inasmuch as the obligation is limited to a defined time period (day and not night). But as we noted, women are exempt from time-bound positive commandments, but they are not forbidden to perform them, and this applies to the mitzvah of *tzitzit*, as well. Maimonides even notes this principle in the context of the *mitzvah* of *tzitzit*, as follows (Maimonides, Laws concerning *Tzitzit*, 3:9):

> The Torah exempts women … from *tzitzit*; women who wish to wrap themselves in *tzitzit*, do so without a blessing. Similarly, in regard to all other positive commandments from which women are exempt, if they wish to perform them without a blessing, we do not prevent them.

This is also the view of Ravad [Rabbi Abraham ben David of Posquières] (*Glosses of Ravad* on Maimonides, Laws concerning *Tzitzit* 3:9), who adds that women are also permitted to recite the appropriate benediction upon the performance of commandments (see further, *Commentary of Ravad on Sifra, Leviticus* chap. 2).

This brings us to differences of opinion in regard to the halakha as it concerns the question of whether women who voluntarily perform time-bound positive commandments may recite the benediction associated with the performance of those commandments. We earlier noted the view of some halakhic scholars, first and foremost Rabbeinu Tam [Rabbi Jacob ben Meir], one of the greatest Tosafists, that women are permitted to recite "who has sanctified us by His commandments … *and commanded us*", and this is also the view of Ravad in regard to women who wear a *tallit*, who holds that they may recite the appropriate benediction. As opposed to that, the opinion of Maimonides was, as noted, that they may wear *tzitzit* but not recite the benediction, which is a different view that is held by many leading halakhic scholars, particularly Sephardic scholars (and see our discussion below).

Thus, Rabbi Moshe Feinstein, writes in his aforementioned responsum (*Responsa Iggerot Moshe*, OH Part IV, 49) that just as women are permitted to perform time-bound positive commandments, and to recite the benediction, so it is in regard to the commandment of *tzitzit*: "it is possible for a woman who wishes to do so, to wear a garment that is distinct from men's clothing, but that has four corners, and to tie *tzitzit* thereto and observe this commandment." But Rabbi Feinstein adds a proviso that runs consistently through his work, stating:

> However, clearly that is only if her soul yearns to perform commandments even though she is not commanded to perform them. However, since it is not with this intention, but rather due to her protest against God and His Torah, this is not the performance of a commandment at all, but the opposite, a forbidden act, for it is heresy as she performs it thinking it possible for the laws of the Torah to be changed, and it is a grave matter.

This requirement of intentionality, that a commandment be performed *for the purpose of observing it* and not motivated by a lack of consideration of the halakhic rule due to "foreign considerations" of principled objection to the exemption because it insults women, is a fundamental principle of the halakhic world in regard to the introduction of legislative enactments, establishing customs, and introducing changes thereto. The parties submitted a letter from Rabbi Tendler, the grandson of Rabbi Moshe Feinstein, which explicates the approach of his grandfather in regard to the great fear that the motives of the prayer groups derive from such extraneous considerations, and that the permission to wear a *tallit* is applicable only when it is

clear that "their intention is for the sake of heaven, without any questioning of the Torah of Israel or the customs of Israel" (responsum (letter) of Rabbi Tendler).

This reason represents one of the *values* of the halakhic world, and is an important element of the decision-making policy of halakha in general, and in regard to sensitive and special subjects such as the one before us, in particular. We shall further consider this aspect below.

At the time of the *Rishonim* and the *Aharonim* there were women who wore *tallitot* and recited the benediction with the approval of the rabbinic sages (Maharam [Rabbi Meir ben Baruch] of Rothenberg, *Teshuvot, Pesaqim u-Minhagim*, I.Z. Kahana, ed. (Jerusalem, 1957) 24 p. 141; *Responsa Tzemah Tzedek* (of the third Lubavitcher Rebbe), OH 3, which presents a detailed examination of the subject; Rabbi M. Toledano, *Ner HaMa'arav*, p. 155; and see S. Ashkenazi, *HaIsha B'Aspeklariyat HaYahadut* (1953) vol. I, p. 137). However, it has not been customary for women of more recent generations to wear *tallitot*, as opposed to other time-bound commandments such as the blowing of the shofar, waving the lulav, and sitting in the sukkah, which they customarily perform. The reason for this derives from the custom first recorded by Maharil [Rabbi Yaakov ben Moshe Moelin] (*New Responsa of Maharil* (Jerusalem, 1977) OH 7, pp. 13-14 (Hebrew)) that women refrain from it. This custom was cited by the Rema [Rabbi Moses Isserles] (*Glosses on the Shulhan Arukh* OH 17:2 (Hebrew)) as follows:

> And in any case, if they wish to wear it and say the benediction, they may do so as with the other time-bound positive commandments … but it has the appearance of haughtiness. Therefore, they should not wear *tzitzit*, as it is not an obligation pertaining to the person.[6]

From the writings of some of the more recent halakhic decisors, it appear that the contemporary custom is that women do not wear *tzitzit* (Rabbi Yaakov Chaim Sofer, *Kaf HaHayyim*, OH 17:8; Rabbi Yechiel Michel Epstein, *Arukh HaShulhan*, OH 17:b-c, and see the explanation of the author of the *Arukh HaShulhan*, *loc. cit*., of the Rema's explanation "it has the appearance of haughtiness", and his conclusion: "and therefore we do not permit them to

[6] Translator's note: That is, the commandment pertains to the article rather than the person, i.e., in principle, it does not require that a person wear *tzitzit*, but rather that *tzitzit* be affixed to any four-cornered article of clothing that a person wears.

perform this commandment, and that is the custom from which we should not deviate"; and see Rabbi S. Yisraeli, "The Performance of Commandments by Women," published in *HaIsha veHinukha* (Emunah, 1980) (Hebrew), p. 29; and see Meiselman, *above*, at pp. 44-45, 152-154. To complete the picture, we should add the statement in the *Targum Yonatan ben Uziel*, Deuteronomy 22:5: "A woman must not put on a man's apparel" etc., but this explanation was not accepted by most decisors (see the responsum of Rabbi Moshe Feinstein, which we quoted above, and his careful wording: "a garment that is distinct from men's clothing"). We should also note that the explanation of "the appearance of haughtiness" has not always led to a generally accepted prohibition in other contexts in which it is found. Thus, for example, some important halakhic decisors and kabbalists, like Rabbi Isaac Luria, the Ari, ruled that *tzitzit* should not be worn on the outside of one's clothing because it has the appearance of haughtiness, and other important halakhic decisors ruled that one should not wear *tefillin* arranged in the manner specified by Rabbeinu Tam[7] because it has the appearance of haughtiness, yet in both cases, and particularly in regard to the former – not to wear *tzitzit* on the outside of one's clothing – a significant part of the contemporary religiously observant community does not follow the ruling (and see on the above in detail, Chief Rabbi Ovadiah Yosef, *Responsa Yehaveh Da'at*, II, 1 (Hebrew)).

Reading the Torah by Women

27. In the opinion of the majority of halakhic decisors, women *are exempt* from the obligation of reading the Torah, because it is deemed to be a time-bound positive commandment (Tosafot, TB Rosh Hashanah 33a, *s.v.* "*ha rabi yehuda ha rabi yosei*"'; and see the detailed discussion of most of the issues under discussion in this case in Ran on Rif, TB Megilla 23a, *s.v.* "*hakol olin leminyan shiv'a*"; Rabbi Shalom Mordechai Schwadron, *Responsa Maharsham*, I, 158; *Arukh HaShulhan*, OH 282:11).

In order to examine this aspect of the matter before us, it would be appropriate to briefly examine the explanation given by the author of the *Arukh HaShulhan* (*above*). In beginning his

[7] Translator's note: This refers to wearing *tefillin* in which the parchments are arranged in the order specified by Rabbeinu Tam in addition to wearing *tefillin* in which the parchments are arranged according to Rashi.

explanation, he states that there is a halakhic source from which we may infer that women are indeed required to hear the reading of the Torah:

> And note that in tractate Soferim (18:4) we find that women are required to hear the reading of the Torah like men, etc., and it is required to translate each portion and prophetic reading following the Sabbath Torah reading for the people, the women and children; end quote.

However, he rejects this proof, as follows:

> And it would appear to me that this is not an absolute obligation, but is like that of children, inasmuch as she is exempt from Torah study. Moreover, nothing is more time-bound than this. And as for a woman being counted in the quorum of seven (i.e., for the reading of the Torah, the reference is to TB Megilla 23a), the Tosafot already wrote in Rosh Hashanah (33a at the end of *s.v.* "*ha*") that this is just as they recite the benedictions for all time-bound commandments… And this is not to be compared to the commandment of *Hakhel*, where the Torah commands (Deut. 31:12) "Gather [*Hakhel*] the people – men, women, children …" which is a special commandment that once in seven years the king himself reads words of admonition from the book of Deuteronomy.

The reference is to what is stated in Deuteronomy 31:10-13, and it is appropriate that we quote the entire text, inasmuch as what is stated there serves as one of the sources cited in regard to the subject that we are addressing. And this is what is stated in those verses:

> And Moses instructed them as follows: Every seventh year, the year set for remission, at the Feast of Booths, when all Israeli comes to appear before the Lord your God in the place which He will choose, you shall read this Teaching aloud in the presence of all Israel. Gather the people – men, women, children, and the strangers in your communities – that they may hear and so learn to revere the Lord your God and to observe faithfully every word of this Teaching. Their children, too, who have not had the experience, shall hear and learn to revere the

> Lord your God as long as they live in the land which you are about to cross the Jordan to occupy.

The author of the *Arukh HaShulhan* therefore concludes that this does not prove that women are obligated in regard to the reading of the Torah, and he thus ends his remarks in stating:

> But to state that women are obligated in regard to the reading of the Torah *every Sabbath* is certainly strange, and everyday conduct is proof, and for the most part, they cannot hear it. Rather, tractate Soferim states, as a matter of moral principle, that when they would translate, it was appropriate to translate before them and before the children in order to instill in their hearts the fear and the love of God.

And see *Mishna Berura* OH 282:12.

As opposed to this view, it would seem to appear from the opinion of the Rabbi Abraham Abele Gombiner (*Magen Avraham* commentary (OH 282:6) on *Shulhan Arukh*, OH 282:3) that one might deduce from the sources cited by the *Arukh HaShulhan* that women are obligated for the reading of the Torah. After citing TB Megillah 23a that "all are qualified to be among the seven" ["*hakol olin leminyan shiv'a*"] (see above) and the various explanations that have been given for that, he continues to say:

> It would appear from this that a woman is obligated to hear the reading of the Torah. And although it (reading the Torah) was enacted for the sake of Torah study, and women are exempt from Torah study, in any case it she is commanded to hear, as in regard to the commandment of *Hakhel* regarding which women and children are obligated. See section 146. However, it would seem that even though they are not obligated, they are qualified to be among the seven, and so wrote the Tosafot at the end of (tractate) Rosh Hashanah. But in tractate Soferim, chapter 18, it is written that women are obligated to hear the reading of the Torah like men, and it required that we translate for them so that they understand. End of quote.

But the Magen Avraham concludes his remarks as follows:

> And here it is customary for the women to leave.

This is not the appropriate place to address this issue at length for the purpose of our examination. For that very reason, we have not found it necessary to address the statement in tractate Megillah (*above*), and in Maimonides, Laws of Prayer, 12:17, and in the *Shulhan Arukh*, OH 282, in regard to "respect for the congregation" [*k'vod ha-tzibbur*] (in regard to the meaning of that expression, see the detailed discussion in Weiss, pp. 67-83; and see Meiselman, pp. 140-146).

The obligation to read the Torah is defined as a time-bound positive commandment because it is specific to fixed times. Women are, therefore, not counted for the purpose of forming a minyan of ten for the reading of the Torah, just as they do not constitute a minyan for prayer. But they are permitted to read the Torah, where we are concerned with a "prayer group" composed solely of women, and the nature of that reading. The question that arises is in regard to reciting the "*barechu*" benediction, which was established by the Sages, and which is deemed to be among the "acts of sanctification" (see above). Many discussions resulted in various suggestions in regard to one benediction recited before the reading of the Torah, which is also recited before the morning prayers, and it is, therefore, permissible to recite it. As noted, the Petitioners in HCJ 2410/90, who seek to hold a prayer group while observing the halakhic rules, stated in their petition: "They read from a Torah scroll that they bring with them," – "They do not hold a Torah reading service, and do not bless or "go up" to read from the Torah" (para. 11, above). Therefore, I see no need to elaborate further. We would note what was stated in the said letter of Rabbi Tendler, which we addressed earlier, who, after emphasizing the theoretical position in regard to the possibility of conducting "prayer groups" of women whose intention is for the sake of heaven, stated:

> *And they may read from the Torah*, but must be careful not to do so in a manner that might be misinterpreted *as public reading*. For example, they may not publically recite the benediction or rely upon the benediction they made earlier, and if they have not yet recited it, they should do so silently.

And see the conclusion of the said letter: "And there is no absolute prohibition for a menstruating woman to look upon or touch a Torah scroll, and even though it is proper to be stringent, in any case it has become prevalent to be lenient in this regard" (and see: Maimonides, Laws concerning the Torah Scroll, 10:8; *Shulhan Arukh*, YD 282:9; and see the Rema's gloss on *Shulhan Arukh* OH 88:1; Weiss' discussion in his aforementioned book, at pp. 85-98).

As for reading in this manner *in a synagogue*, we will address that below.

Custom in the World of Halakha

28. Having arrived at this point, it would be appropriate to say something about the power of custom in the halakhic system, which plays a special role in the subject of the case before us.

A. The subject of custom as one of the established, creative sources of Jewish law is discussed at length in in my book (*Jewish Law – History, Sources, Principles*, above, pp. 713*ff*.). Custom can testify to the existence of longstanding law, which has found its way into halakha by means of midrash, enactment, etc., and can itself serve as a creative source of law under certain circumstances and subject to certain conditions: the difference between the power of custom in regard to prohibitions and other fields of halakha; proof of the existence of the custom, and the assessment of the custom by halakhic experts – is it the result of a mistake, is it a bad custom, is it an imposition upon the public, etc. (see: *ibid*.). This is not the place to discuss this very broad subject at length. We would only note this: just as custom can be general, it can also be local, that is, restricted to a place or to specific places, where various internal factors influence its generality or restriction. It may also be subject to change by its nature, the place and the time, in accordance with the existence of legitimate factors of the place and time that justify such change (see: *ibid*.; M. Elon, ed., *Digest of the Responsa Literature of Spain and North Africa*, v. I, (Institute of Jewish Law, 1986) *s.v.* "*Minhag*", pp. 230-233; and also see Prof. D. Sperber's comprehensive *Minhagei Yisrael: Origins and* History, v. I (Mossad Harav Kook, 1988) pp. 60-61 and fn. 18, v. II (1991).

B. Rabbi Zvi [Hershel] Schachter states in regard to our subject ("*Tz'i lakh b'ikvei ha-tzon*," 17 *Beit Yitzhak* 118, 127 (1988):

> We have never heard nor seen such a custom of arranging the reading of the Torah and the reading of the Megillah for women alone, and we are obligated to follow the tradition of our fathers and our fathers' fathers in the manner of observing the commandments.

Therefore:

> Since it was never customary for women to observe the commandment of prayer and reading the Torah, etc. in such a manner, we must not change our ancestral custom and create of our own imagination new types of conduct … and not only must we continue to follow the customs of our fathers, but it is also prohibited to change their customs. And although it is true that "we have not seen is not evidence", in any case the Shakh [*Siftei Kohen* commentary of Rabbi Shabbatai ben Meir HaKohen] on [*Shulhan Arukh*] YD 1:1 explained "… that, in any case, such conduct established the custom … and in any event such conduct is prohibited as being a change in custom" (*ibid*., pp. 128-129).

This position is not unambiguous. Not every absence of a custom grounds an "argument from silence". In certain circumstances, it is evidence of a lacuna that must be remedied when the time and need arises, assuming that there is no halakhic prohibition that prevents it.

C. An interesting example of this can be found in two responsa of Rabbi Yehiel Weinberg, one of the most important contemporary halakhic decisors and in his Responsa *Seridei Esh* III:93 and 96 [New Edition: II:39 and 62]. In support of his view, Rabbi Schachter cites one of those two responsa – number 96 (above, at p. 128), but a comparison of the two responsa yields a different conclusion. We will briefly examine the matter.

In responsum 96, Rabbi Yehiel Weinberg considers the question whether it is permissible to employ a general anesthetic in the course of performing a circumcision of a child or an adult – such as a convert or a person not circumcised as child – in order to relieve him of the pain associated with circumcision. He answers in the negative, particularly in the case of an adult. In the other responsum – number 93 – Rabbi Yehiel Weinberg was asked about the permissibility of celebrating a bat mitzvah for a girl who has attained the age of obligation to the commandments, when she is 12 years old, just as it has always been the custom to celebrate the

bar mitzvah of a boy who has reached the age of obligation, upon reaching the age of 13. In this matter, his answer is positive, and approves the celebration of a bat mitzvah for a girl. What the two responsa share in common is the introduction of a new practice in regard to circumcision and in regard to celebrating a bat mitzvah. In a long and detailed responsum, Rabbi Yehiel Weinberg explains his negative answer in the case of the use of an anesthetic in the course of a circumcision in that this possibility has long been available, even in Talmudic times, but the halakhic sages expressed their opposition to its use, for halakhic reasons detailed in the responsum, and in such matters the principle "a custom of Israel is Law" applies, and we may not deviate therefrom. As opposed to this, he gives a positive answer in regard to the celebrating of a bat mitzvah. His reasons for this response are instructive. Indeed, there was no such custom of celebrating a bat mitzvah in past generations, and therefore:

> There are those who argue against permitting the celebrating of a bat mitzvah, as it is contrary to the custom of prior generations that did not observe this custom (*ibid*., sec. 1).

But he rejects this argument. And why?

> But in truth, this is no argument, because in prior generations there was no need to see to the education of girls, as every Jew was filled with Torah and the fear of heaven, and even the atmosphere of every Jewish city was brimming with Jewish spirit … but times have radically changed … (*ibid*.).

And also this:

> And it is heartbreaking that in regard to general education, the study of secular literature, natural sciences and humanities, girls are educated in the same manner as boys, but religious studies, the study of Bible, the ethical literature of the Sages, and the study of the practical commandments that women are obliged to observe, are entirely neglected. To our good fortune, the Jewish leaders of the previous generation were aware of this problem, and they established institutions for Torah education and the strengthening of religion for Jewish girls. The establishment of a large, comprehensive network of Beth Jacob schools is the most wonderful expression of our generation. And common sense and the

> demands of pedagogic principles almost require that we also celebrate a girl's attainment of obligation to commandments.
>
> And this distinction that we make between boys and girls in regard to the celebration of attaining maturity deeply offends the humanity of a maturing girl who, in other areas, has achieved emancipation, as it were.

And as for the fear of "extraneous considerations" in introducing a new custom of celebrating a bat mitzvah, i.e., the fear of imitating the practices of gentiles, and so forth, he states:

> And those among our brethren who have introduced this innovation of celebrating a bat mitzvah say that they do so in order to instill in the heart of a girl who has reached the age of obligation a sense of love for Judaism and its commandments, and to awaken her sense of pride in being a daughter of a great, holy nation. And we are not concerned that the gentiles celebrate confirmation for both boys and girls, for they do what they do and we do what we do. They pray and bow in their churches, and we bend our knees, bow and offer thanks to the King of kings, the Holy One, blessed be he (*ibid*. p. 296, col. 1 [New Edition: p. 458, sec. 26]).

D. In conclusion, a custom that deviates from a prior custom that forbids the custom to be introduced – as in the case of anesthesia for a circumcision – and which is not justified by legitimate social and ideological changes in the halakhic world may not be followed, inasmuch as that is the power of a custom for which there is no material, halakhic justification for change. As opposed to this, the introduction of a new custom – such as the celebration of a bat mitzvah – that is not contrary to law and which was not observed in the past due to different social and ideological circumstances that have entirely changed (and see what we wrote above – para, 19 – in the *Nagar* case and the *Shakdiel* case in regard to the difference in the social role and education of contemporary women), is appropriate on the merits in order to prevent in our generation what Rabbi Yehiel Weinberg described as "this distinction that we make between boys and girls in regard to the celebration of attaining maturity (which) deeply offends the humanity of a maturing girl".

Rabbi Weinberg's student Prof. Eliezer Berkovits addressed this material distinction in regard to custom in light of the above two responsa of Rabbi Weinberg in his book *Jewish Women in Time And Torah* (1990) pp. 79-81. He arrived at the conclusion (at p. 81) that women's "prayer groups" may be permissible, subject to the restrictions observed by them, as we explained above.

E. The celebration of a bat mitzvah for a girl who has reached the age of twelve was also addressed by Rabbi Moshe Feinstein (*Responsa Iggerot Moshe*, OH I, 104). In his responsum, he expresses doubt as to the propriety of introducing the custom of celebrating a bat mitzvah, and he does not deem such a celebration to be "a mitzvah or a *se'udat mitzvah* [a religiously required celebratory meal], but merely a celebration like a birthday party". Rabbi Moshe Feinstein absolutely prohibits celebrating a bat mitzvah in a synagogue, permitting it only in the home. He adds, as we have seen elsewhere in his earlier responsum, the consideration that such a celebration may comprise an improper extraneous consideration of emulating the practices of groups that do not accept the primary obligation to the observance of halakha. In his aforementioned responsum, Rabbi Yehiel Weinberg agreed with this proviso stated by Rabbi Moshe Feinstein that a bat mitzvah not be held in the synagogue, "but only in a private home or a social hall adjacent to the synagogue" (above, at p. 297, col. 1), for the reason of the improper extraneous consideration of emulation.

Incidentally, in his responsum, Rabbi Yehiel Weinberg addresses the question of why the fact that a custom derives from negatively characterized imitation deems it as deriving from an "extraneous consideration" that taints the custom, and why a bat mitzvah celebration should not properly be held in a synagogue. The reason is that this custom imitates a practice of the Reform Movement, which sought, and achieved among its members, the abrogation halakhic rules that were fundamental to Judaism, *inter alia*, "they eliminated all reference to the return to Zion and the restoration of the Temple worship to Jerusalem" (*ibid*., 93, p. 298; and see: our discussion of the position of the Reform Movement, then and now, that does not recognize the halakhic system as an obligatory, normative system even in regard to the most fundamental matters of the Jewish world, in HCJ 47/82 *Foundation of the Israel Movement for Progressive Judaism v. Minister of Religion*, IsrSC 43 (2) 661, 705-709; and see *Responsa Seridei Esh*, III:93; an instructive responsum by Professor Rabbi David Zvi Hoffmann, one of the most important halakhic decisors

of the previous generation, in *Responsa Melamed Le-ho'il*, OH 16, concerning the prohibiting of the playing of an organ in the synagogue due to this consideration of imitation). This proviso, with which Rabbi Yehiel concurred, is also founded upon the special care required in changing synagogue practices, as we shall discuss below.

F. From the above responsum of Rabbi Moshe Feinstein, we see that he was not comfortable with the idea of introducing bat mitzvah celebrations, as explained above. In this regard, it is interesting to note the responsum of the Sephardic Chief Rabbi, Rabbi Ovadiah Yosef, who took an unequivocally favorable view of celebrating and encouraging this custom, and he even recommends it:

> … It certainly would appear that it is a mitzvah to have festive meal and celebration for a bat mitzvah, in accordance with what the Maharshal (Rabbi Solomon Luria, one of the great halakhists of sixteenth-century Poland) wrote in his book *Yam shel Shlomo* (Bava Kama, 7:37), that there is no greater *se'udat mitzvah* than that of a bar mitzvah… And so it is, as well, in regard to a girl who becomes obligated to the commandments that a woman must observe, and it therefore a mitzvah for her that she performs, it is good to make it a day of celebration and also a mitzvah to do so… (*Responsa Yabi'a Omer*, part II, OH 29, para. 4).

Chief Rabbi Ovadiah Yosef also addresses this matter in another place (Responsa *Yeheveh Da'at*, part II, 29), where he adds (at p. 111):

> And in fact, preventing bat mitzvah celebrations lends support to the sinners to criticize the scholars for oppressing the daughters of Israel and discriminating between boys and girls.

He also cites and relies upon Rabbi Yehiel Weinberg's view (in Responsum 93) that it is not an emulation of the gentiles, and that not holding bat mitzvah celebrations constitutes a form of discrimination that severely injures a girls humanity.

Further on, Rabbi Ovadiah Yosef relies upon other response of contemporary Sephardic halakhists, among them Rabbi Ovadiah Hedaya (*Responsa Yaskil Avdi*, part V, OH 28) who is

also of the opinion, as is also the case for the illustrious Rabbi Yosef Ben Ish Hai (*Responsa Yabi'a Omer*, above; and *Yeheveh Da'at*, above).

Rabbi Ovadiah Yosef refers to the opinion of Rabbi Moshe Feinstein, who cast doubt on the propriety of celebrating bat mitzvahs, as we noted above, and takes exception to his view:

> …And I saw that the illustrious Rabbi Moshe Feinstein, in *Responsa Iggerot Moshe,* part I, OH 104, wrote … And with all due respect for his knowledge, what he says is not clear, inasmuch as she enters into the commandments and is like an adult who is obligated and observes all the commandments that a woman is required to observe, certainly it is a *mitzvah* … (*Responsa Yabi'a Omer,* above; and see response *Yeheveh Da'at*, above, pp 110-111 in which he disagrees with other things that Rabbi Moshe Feinstein wrote in this regard in justification of his position, and see there).

Thus, Chief Rabbi Ovadiah Yosef concludes his responsum (*Yeheveh Da'at*, above):

> The custom of making a festive party and a meal of thanksgiving and rejoicing for a bat mitzvah on the day she attains thirteen years and one day is a good and proper custom. And it is appropriate to say words of Torah, and sing songs in praise of God. However, the rules of modesty must be carefully observed in accordance with our holy Torah … and our blessed God will not withhold His blessings from those who attend in good faith.

It should be noted that Rabbi Yosef does not refer to Rabbi Yehiel Weinberg's statement that a bat mitzvah celebration not be held in a synagogue. In this regard, we should take note of what we said in regard to the opinion of the late Sephardic Chief Rabbi, Rabbi Ben-Zion Meir Hai Uziel, in regard to his opinion that women should be granted the right to vote, like men, for various public institutions. Thus we wrote in the *Shakdiel* case, at p. 257:

> The approach of Rabbi Uziel is instructive in his bringing "indirect" evidence of the spirit of the halakha that points to the desirable policy. According to halakha, a person who brings a sacrifice lays his hand on the animal's head. In this regard. [*Midrash*] *Sifra*, Leviticus, chap. 2 states: "And he shall lay his hand upon the head of the burnt offering (Leviticus 1:4) – the sons of Israel lay their hands and

the daughters of Israel do not lay their hands". In other words, the law in regard to the laying of hands upon an animal sacrifice does not apply to a woman.

But the Midrash goes on to state:

> Rabbi Yosei said, Abba Elazar told me, we had a calf for a peace-offering, and we took it out to the Women's Court (of the Temple), and the women laid their hands upon it, not because laying of hands applies to women, but for their gratification."
>
> If that is how we are to act in regard to something that is forbidden – laying hands by women – then, continues Rabbi Uziel, *a fortiori* we should act in that manner in regard to the granting women the right to vote, as no law forbids it "and preventing them from participating (in elections) would be an insult and a misrepresentation".

This assembled material, and the judicial policy that it indicates, are also appropriate to the matter before us.

G. This is the way of custom as a creative source of halakha. Custom is rooted in the accepted principles of halakha, its rules and values. Today, when Jewish women study and teach, and know the law and the ways of halakha, it is proper that when a woman attains the age of obligation to the commandments, that occasion be celebrated as it is for boys. But sometimes there are considerations, which are also legitimate, that influence the acceptance of a custom by halakhic sages subject to various provisos, due to a fear of imitation and extraneous influences – each according to his approach to deciding halakha and the extent of the existence of a fear of imitation in this or some other place. In the world of halakhic values, this fear must also be given significance, after careful, appropriate examination. We shall address this below.

Changing Synagogue Custom

29. The halakhic world is especially careful in regard to introducing new customs in the synagogue. This fact is expressed in regard to the custom of "prayer groups", which is a central issue in this case. Such "prayer groups" are generally conducted outside of synagogues, in special places designated for them. Thus, Rabbi Avraham Weiss, in his abovementioned book, at

p. 18, writes: "Even in communities where women's groups have been approved by the rabbinic leadership, the synagogue has, with few exceptions, been declared off limits to them. In virtually all cases, they are held in homes or rented hotel facilities." Indeed, Rabbi Weiss goes on to point out that the synagogue is the most appropriate and preferable place for conducting prayer, and his words are worthy of consideration. But as far as our investigation into the nature of custom and the manner of observing it goes, we find that, in practice, the overwhelming majority of "prayer groups" are not held in synagogues themselves, which attests to the especially problematic nature of changing custom as it relates to synagogue practice (and see the *Encyclopedia Talmudit*, vol. 3, *s.v. Beit Haknesset*, pp. 192*ff*. (Hebrew); in regard to the use of a synagogue, its sanctity and respect, see *loc. cit*.; and see Rabbi Zvi Schachter, above, p. 130; and see: Rabbi Abraham Isaac HaKohen Kook, *Responsa Orah Mishpat* 38).

The Synagogue in the Western Wall Plaza

30. What we have said thus far is of special interest in regard to the subject of this case – conducting the Petitioners' prayers in the Western Wall Plaza. The prayer space at the Western Wall is the holiest synagogue in the halakhic and Jewish world. It is the place of which the Midrash (*Exodus Rabba* 2:2, and elsewhere) states:

> The Divine Presence never departs from the Western Wall.

Indeed, the Western Wall is not a part of the Temple itself, but a wall surrounding the Temple Mount upon which the Temple stood. But in Jewish tradition, the Wall is generally viewed as a "remnant of our Temple". The prayers recited in the synagogue replace the Temple service following its destruction, and synagogues are referred to as "*mikdash m'at*" [a little sanctuary]: "Yet have I been to them as a little sanctuary (Ezekiel 11:16). Rabbi Isaac said: This refers to the synagogues and houses of learning in Babylonia" (TB Megilla 29a; and see HCJ 4185/90 *Temple Mount Faithful v. Attorney General*, IsrSC 47 (5) 221, 230).

Throughout the generations, Jews have considered prayer beside the site of the Temple to be especially propitious, and especially beside the Western Wall – the only remnant that remains of the Temple (see HCJ 4185/90, *ibid*., at pp. 245-246). Due to the fact that the plaza before the Western Wall has always served as a permanent place for Jewish prayer, the halakhic scholars

held that this plaza is subject to the law of a synagogue. Thus, in the last century, Rabbi Hillel Moshe Gelbstein wrote in his book *Mishkenot Le-Abir Yaakov*:

> It is a mitzvah to respect and extol that place as much as possible, at least as much as a synagogue, and more so … because it stands before the holy and awesome place … we must try with all our might to make … an attractive, elegant and beautiful floor ... and of course protect it from desecration as far as possible …and *a fortiori* in comparison to a synagogue … for the outer wall of a synagogue is holy like the synagogue itself.

Moreover, the site of the Western Wall is subject to the commandment of "guarding the Temple" [against desecration], for although it is not possible to fulfill that in our day at the actual site of the Temple, it can be observed adjacent to the Temple Mount, that is, beside the Western Wall (Rabbi Gelbstein's remarks are quoted in Zvi Kaplan, "The Western Wall in Halakha," 5728 *Shana Beshana* 174-175 (Hebrew)).

And this is what Chief Rabbi Ovadiah Yosef ruled on the subject:

> 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)).

The Prohibition upon changing Custom "On account of the Disputes"

31. At the prayer area beside the Western Wall, which must be treated like a synagogue and even more so, there was never any customary women's prayer, neither in the form requested by the Petitioners in HCJ 257/89, nor in the form of "prayer groups", as described in HCJ 2410/90. Granting the Petitioners' petitions would involve a clear change in the local custom in the synagogue, as observed for generations upon generations. An important principle of halakha is that custom should not be changed "on account of the disputes [that would ensue]" (TB Pesahim

50a-b). This principle was enunciated in regard to every custom in halakha, and it applies *a fortiori* to synagogue customs, and all the more so in regard to the synagogue in the Western Wall Plaza. This is the unequivocal opinion of the Chief Rabbis of Israel, which we noted above.

In his letter, Rabbi Avraham Shapira wrote:

> Moreover, in addition to the halakhic prohibition, as noted above, there is also a principle of prohibiting the annulling of customs, which was never done, whether in regard to *tzitzit* or in regard to a women's prayer in a minyan. Such a thing is unheard of and unacceptable in Judaism, and for this reason alone, it is unlawful, as a custom of Israel is Law.
>
> All of this is true even if they do so in their own homes. *But when they come to change the halakha and custom in public, in a holy place like the Western Wall, a matter that raises dispute, contention and altercations, there is also a prohibition of increasing disputes in Israel, and the desecration of a holy place* (response of Rabbi Avraham Shapira (letter)).

That is also the conclusion to be drawn from the letter of the Sephardic Chief Rabbi, Rabbi Mordechai Eliyahu, in his aforementioned opinion:

> We are commanded and warned not to change any custom, and particularly customs of synagogue prayer … and it is therefore prohibited to make any change in the traditional manner of prayer of many generations at the Western Wall, which is a remnant of our Temple and our glory, besides having the additional holiness of being the place of the prayers of all Israel (response of Rabbi Mordechai Eliyahu (letter)).

As we shall see, the opinions of the Chief Rabbis of Israel are of legal importance in the Israeli legal system in regard to the issue addressed by the petitions before the Court.

32. Much has been written and said on the extreme severity of causing disputes, particularly in synagogues. We will suffice in quoting the words of the Hafetz Hayim [Israel Meir HaCohen Kagan] (*Mishna Berura*, OH 151:2):

> And all the more so must one be careful in the synagogue and study hall to refrain from offenses of forbidden speech such as defamation, rumor mongering, disputes and altercations, because not only are these very serious offenses, but the offense is even greater in a holy place because it shows contempt for the Divine Presence, as a person who sins alone is not like a person who sins in the King's palace, in the presence of the King.
>
> And even worse, such a person also causes the public to commit those serious offenses, as "strife is like a ruptured water pipe" (TB Sanhedrin 7a), in the beginning the sin seeps into a few people, and ultimately the channels unite into strife between one and another until the entire synagogue is ablaze like a bonfire, and to our great discredit, this sometimes leads to disgrace, insult and public shaming, and to blows and informing, and increasing the desecration of God's name.

An important principle of halakha, particularly in the field of customs, was established on the basis of the biblical statement "*lo titgodedu*" [literally: "you shall not cut yourselves"] (Deut. 14.1), which the Sages interpreted as a severe prohibition of sectarianism[8] and dispute (see: M. Elon, *Jewish Law – History, Sources, Principles*, p. 759; [Rabbi Yehuda Greenwald], *Responsa Zikhron Yehuda*, 37; [Isaac ben Sheshet Perfet], *Responsa Rivash*, 512; [Simon ben Tzemah Duran], *Tashbatz*, II 204, III 176; [Ben-Zion Meir Hai Uziel], *Mishpetei Uziel*, III, HM 228). The Sages were particularly strict in regard to changes in synagogue customs, in light of the injunction "*lo titgodedu*" (see: Prof. Y.D. Gilat, "*Lo Titgodedu*," 18-19 *Bar Ilan University Yearbook* 88*ff*. (1981)).

The Severity of the Disagreements on the Issue in the World of Halakha

33. We became aware of the severity of the disagreement concerning the issue before us from the detailed description of the facts, as presented in the petitions and from all the event that occurred in the affair: the prayer space beside the Western Wall became a "battlefield" of

[8] The Sages gave a homiletic interpretation of the words *lo titgodedu* as meaning "*lo ta'asu agudot agudot*", thus understanding the verse as "you should not cut yourselves into factions".

extreme violence, hitting, tear gas, physically lying on the floor of the prayer area before the Wall, and incessant incitement, and all in front of the various media. But this is not the only way that the dispute was expressed. As we stated, this subject – concerning the laws and customs of prayer – is particularly sensitive in the halakhic world. The halakhic world is defined by its laws and values, and just as halakhic scholars and decisors disagree in regard to its rules, so they may disagree as to its values, or to be more precise, in regard to the implementation of its values. We briefly addressed this earlier in regard to the issue before us. It would be appropriate to take a further, special look into this matter, which, at its core, concerns a dispute between two opposing approaches to halakhic values, with each approach sharing a common devotion to halakha. This can be seen in reading the aforementioned article of Rabbi Zvi Schachter, who serves as a *rosh yeshiva* at Yeshiva University in New York ("*Tz'i lakh b'ikvei ha-tzon*," 17 *Beit Yitzhak* 118, 134 (1988)), and the aforementioned book of Rabbi Avraham Weiss, which we cited earlier. We will consider several examples.

A. As noted, the Petitioners in HCJ 2410/90 conduct women's "prayer groups" that are not considered "prayer in a *minyan*". They do not include the reciting of the "*barekhu*", "*kedusha*", or a repetition of the *amida*, and they are not halakhically flawed from a formal perspective. Yet, in Rabbi Schachter's opinion, women's prayer groups should not be conducted because, in his words: "If they were to pray in a regular *minyan* in a synagogue, they would observe the obligation to prayer in its fullest form (that is, with the recitation of "*barekhu*", kaddish, etc.), and by making a "*minyan*" of their own, they detract from their prayer" (*ibid*., p. 118).

It is hard to understand this argument. As earlier noted, women are indeed halakhically obligated to private prayer, but they are not obligated to public worship, and therefore, they are not counted for the purpose of constituting a "*minyan*" in its halakhic sense. What, then, is detracted when a woman does not pray in the women's section [of the synagogue] in the presence of a *minyan* of men, but rather prays with a group of women, and thus does not hear the "*barekhu*",etc., which she is not obligated to hear? (Weiss, *ibid*., pp. 55-56). Moreover, "prayer groups" of women (that do not perform "acts of sanctification") are common in Orthodox schools and colleges for women, and it was never the practice to bring a "*minyan*" of men to those prayer services in order to enable the saying of "*barekhu*", etc. The same flaw in Rabbi

Schachter's argument is present in regard to the reading of the Torah by women without reciting the "*barekhu*" benediction, and in regard to other matters, as well.

B. Rabbi Schachter views women's prayer groups as a "falsification of the Torah" (*ibid*., p. 119).Why? Because "their intention is to demonstrate that women are as important as men". Rabbi Schachter relies upon a statement of the Maharshal, Rabbi Solomon Luria, one of the great halakhists of sixteenth-century Poland, which was made in an entirely different context (*Yam shel Shlomo,* Bava Kama, 4:9). The Maharshal absolutely and emphatically forbids teaching Torah to a non-Jew, due to the attendant spiritual and other dangers, and he disagrees with those "in Spain, Italy and the Moslem lands who study God's Torah with the gentiles for their pleasure and salaries", referring to the Jews of Spain and the East who studied and discoursed with non-Jews. But I searched the writings of the Maharshal and did not find the term "falsification of the Torah"! In any case, it is hard to understand what connection there might be between what the Maharshal wrote and the subject of women's prayer groups, and what might be halakhically wrong with women viewing themselves to be as important as men, and conducting public worship in which "acts of sanctification" are not performed!

C. In the opinion of Rabbi Schachter, the public prayer of such Orthodox women smacks of "*hukkot akum*" [non-Jewish practices] (*ibid*., 131). Why? "Because it is clear that such practices did not emerge from a vacuum, but rather are a result of the general trend of women's liberation, whose subject and purpose in this regard is licentiousness, and to make them equal to men in every way possible" (*ibid*.). And not merely non-Jewish practices in general, but "non-Jewish practices in the performance of *mitzvoth*" (*ibid*.), and he cites Nachmanides on the verse (Deut. 12:30): "Beware of being lured into their ways". With all due respect to the honorable author, it is hard to fathom the intention of this statement. Why would one suspect that the participants in public prayer restricted to women and led by women might be guilty of such grave intentions and tendencies, when the very manner in which they are conducted proves strict observance of the halakhic rules prohibiting such acts of sanctification as the repetition of the *amida*, and so forth? Does that alone not prove that the purpose of the organizers of such public prayer by women – carefully observing the halakhic framework and its rules – serves a spiritual purpose that derives from knowledge and awareness of the commandments and halakha, the views and approaches of rabbinic scholars and thinkers, and from many years of study in *Torah*-

im-Derekh-Eretz educational institutions, and that as a result of that education they seek to express themselves, within the confines of halakha, by means of the "prayer groups" that are the subject of these proceedings? Indeed, this is how Rabbi Yehiel Weinberg, author of the *Seridei Esh*, views the intentions and proper desires of those parents and girls who wish to celebrate a bat mitzvah, and the same is explicitly stated by Chief Rabbi Ovadiah Yosef, as we quoted above.

D. In his pointed opposition to women's "prayer groups", even when they are not viewed as a constituting a *minyan*, Rabbi Zvi Schachter relies upon the decisions of two of the generation's foremost halakhic decisors, the late Rabbi Moshe Feinstein and the late Rabbi Joseph B. Soloveitchik:

> It is well known that two of the greatest scholars of this generation, to whom we all defer, our teacher Rabbi Joseph B. Soloveitchik, and our teacher Rabbi Moshe Feinstein, are very much opposed to all the above conduct, as well as to special *hakafot* for women, and special "*minyans*" for prayer, and for reading the Torah and the Megillah. And see the Tosafot on Bava Batra (51b) *s.v*. "*beram*", *per* Rabbeinu Tam, that if all the leading authorities of the generation disagree with him, then his opinion is without value" (*ibid*., p. 126).

Rabbi Weiss correctly comments that this statement is not precise. As for the opinion of the late Rabbi Soloveitchik, we do not have a written record, and what is attributed to him is based upon the statements of students who sought his advice. From them we learn that he was not opposed to the very existence of prayer groups, but rather to particular aspects of their practice, such as reciting the Torah blessings before and after the reading of the Torah (Rabbi Weiss, *ibid*., pp. 107-108). And as for the opinion of the late Rabbi Moshe Feinstein, it can be found in a detailed responsum (*Iggerot Moshe*, OH, part 4, 49), which we discussed above. That responsum does not present a rejection of women's prayer groups in principle, provided that they are conducted for the sake of heaven, except as regards certain changes relating to particular practices of such groups regarding the reading of the Torah (see: Rabbi Weiss, *ibid*., pp. 108-110); and see in the footnotes, *ad. loc*., what Rabbi Mordechai Tendler wrote on behalf of his grandfather, Rabbi Moshe Feinstein, which we addressed above; and see, *ibid*., pp. 111-112, fn. 39).

34. We should note that Rabbi Zvi Schachter's pointed objection to women's prayer groups is particular to this specific subject, and it does not derive from a general approach that rejects the reality of halakhic development and change over the course of generations and eras, in accordance with the recognized, special methods for change provided by the halakha itself. Rabbi Schachter emphasizes this in several places in his article, and it is appropriate that we take note of them (*ibid*., pp. 122-124):

> It is clear that the halakha is not frozen. The large number of situational changes requires that halakha change. The questions of the year 5748 are completely different from those of 5738, and in any case, in many instances, different answers are needed.
>
> Moreover, just as there is progress in the scientific world, so there is progress in the halakhic world. See *Genesis Rabba* on *VaYera* (49:2) that there is no day when God does not innovate a new halakha in the Heavenly court. And see *Yalkut Shimoni* on the book of Judges (*Remez* 49) explaining the verse "When new gods were chosen, then war was at the gates …" [Judges 5:8], concerning the wars of Torah, that the Holy One loves innovation in Torah. And in the words of Rabbi Chaim of Volozhin (in his book *Nefesh HaChaim*, 4:46), the awesome, wondrous effects of man's true Toraitic innovations upon Heaven are immeasurable.

Further on, he cites the responsum of the Netziv [Rabbi Naftali Zvi Yehuda Berlin] of Volozhin (*Meishiv Davar*, I, 46), and goes on to say (*ibid.*, p. 123):

> And see in that responsum, that this is the case, and this is the reason in regard to an innovation in the performance of a *mitzvah*, which even if not done for the sake of Heaven, still constitutes the performance of a *mitzvah*. But in the case of the innovation of a new practice, if it is not done for the sake of Heaven, that innovation cannot be called a *mitzvah* at all. And that is the meaning of the Mishna in Avot (2:2) that "all who labor with the community labor with them for the sake of Heaven", because labors undertaken not for the sake of Heaven are not *mitzvoth* at all. For labor that does not involve any specific *mitzvah* (like laying *tefillin* or blowing the shofar, and so forth) that defines the labor as the

performance of a *mitzvah*, must be labor that is for the sake of Heaven in order for that labor to be deemed a *mitzvah*.

Notwithstanding this generally positive approach, the aforesaid does not apply, according to Rabbi Schachter, to the matter before us.

> And the reason that they prefer to make a "*minyan*" (i.e. "prayer groups" – M.E.) for themselves is not by reason of the halakhic principle that "it is more meritorious through himself than through an agent" [TB Kiddushin 41a], but rather because "a man prefers a *kab* of his own to nine of his neighbor's" [TB Bava Metzia 38a], and in their "*minyan*" the women feel that it is "their thing". Surely we should not willfully destroy the additional halakhic essentials that we mentioned above (letter A) for such a feeling. On the contrary, we must sensitize these educated, intelligent women to sensitize and repair their spiritual resources to the point that they are consonant with the priorities of halakha (*ibid.*, 121).

Therefore (*ibid*., p. 122):

> We must also explain to those women, who with God's help this generation has become more righteous,[9] and who are more educated both in Torah and wisdom than previous generations … that all our women are deemed important, and it was never our practice to deny the rights of women. And so there is no need or purpose for us in the objectives of the women's liberation movement, inasmuch as the halakha instituted several obligations upon a husband in regard to his wife, like the seven obligations of a woman toward her husband, among them to love his wife as himself, and to respect her more than himself … and we find several places in the Bible and the Talmud where women are lauded more than men, and it is the halakha that a woman is deemed an adult at the age of 12, while a man at 13, because God granted women greater understanding than men, and so it is in other, similar matters. And in any case, truth be told, our women should not feel that they have only now been liberated from their servitude, and adopt the psychological attitude of a slave who has become a king, but rather they should

[9] Trans. Note: On this expression, often employed as a question as to whether a later generation has become more righteous than its predecessors, see: TB Yevamot 39b; Hullin 93a

> themselves see and understand that it has always been thus among us, for the promise that God made to women is greater than that of men, and that there has not really been any fundamental or systematic change in our view of the importance of women, but merely changes in details, inasmuch as the entire world has changed in recent years, but not changes is the principles.

35. I have said what I have, and commented as I have, because that is the way of Torah and the "war" of Torah. And I have treated Rabbi Schachter's remarks at length in order to point out the especially problematic nature of the matter before us.

As stated in the remarks we have just quoted, Rabbi Schachter's opinion is that the halakhic world, by its nature, does not stagnate, and that it is open to innovation and to enactments in accordance with the needs of time and place. But it also comprises matters and principles regarding which halakhic creativity must be exercised with great caution. In his opinion, the subject of this case is among them. He is aware of the changes that have occurred over the last generations in regard to the social status of women, in their knowledge of halakha, and in their education, but none of these – in his view – justify the change represented by women's prayer groups, which are influenced by "extraneous" and extra-halakhic considerations, and all that is associated therewith, in regard to the central place of prayer and the synagogue in Jewish tradition (and also see: *ibid*., at the end of p. 125, and pp. 127*ff* in regard to "the purpose of the *mitzvah* in the acts of *mitzvoth*", and pp. 130-131 in regard to the particularly stringent approach to "synagogue customs).

36. We have thus come to the end of our discussion of the issue, and this is not the place to elaborate further. A detailed, comprehensive discussion of this fundamental issue can be found in many additional sources in halakhic literature, as well as in articles and research in addition to those we have cited, and I refer the interested reader to them.

As we hinted at earlier, a significant part of the disagreements and approaches in this great, complex and sensitive matter concerns not merely the determination of the law in the halakhic system, but also the evaluation of the values of the halakhic world – which also constitute part of the law in the broad sense – and the application of those values to the present case; the *lege lata* and *lege ferenda*, and the appropriate judicial-halakhic policy – in light of the past and in view of desires for the future. These are accepted, legitimate considerations in the

halakhic world in general, and they are of particular importance in regard to a sensitive subject such as the one before us. Indeed, each side has expressed its views both on the world of halakha and on the realities of the contemporary world in regard to the status of women – including women who are halakhically observant and equally heedful of the minor *mitzvoth* and the major ones – in terms of their social roles and status, their knowledge of the Torah and its commandments, the ways of the world and their education. But the parties disagree in their evaluations, and therefore in their conclusions.

Needless to say, an in-depth study of the halakhic sources, with both knowledge and understanding, as practiced from generation to generation, is a necessary prior condition to any proper halakhic examination of any halakhic matter, and of the matter before us. To this we must add an evaluation of the values of the halakhic world and the manner of their application in every generation, in accordance with its problems and needs.

This is a double condition. Each of the two approaches in this matter, which we have considered above, claims to meet the requirements of this double condition.

In this regard, it would be appropriate to add a few remarks concerning the element of imitation, which serves as a factor of recognized influence upon judicial policy in deciding the law and recognizing customs in the halakhic world. As we saw, this factor is mentioned often by decisors and scholars in regard to our subject. The intention here is to imitation of a negative character of things practiced outside the world of halakha and Judaism, whether directly – i.e., imitation of "non-Jewish practices" – or indirectly – i.e., imitation of the Reform Movement, which is influenced to an extreme degree by things that are contrary to the basic principles of Judaism and halakha, such as elementary kosher laws, marriage and divorce, conversion, and at one time, even the annulment of the religio-national bond to the land of Israel, and so forth, which present an absolute contradiction of the entirety of the world of halakha. Thus we saw that Rabbi Yehiel Weinberg did not view Christian "confirmation", which applies to boys and girls, as a factor that influences the propriety of the custom of celebrating a bat mitzvah in the Jewish world, stating, "they do what they do and we do what we do". So it is in regard to the very celebration of a bat mitzvah. But as for the question of celebrating a bat mitzvah in the synagogue or not, he takes account of the fact that Reform Jewry celebrates bat mitzvahs in the synagogue , and in order to prevent influence by the Reform Movement – which does not

recognize the obligatory nature of halakha – upon the halakhic world, he is of the opinion that it would be improper to hold a bat mitzvah celebration in the synagogue itself – as was the Reform practice at that time, under the influence of elements foreign to Judaism – but rather in a hall adjacent to the synagogue.

Granting weight to the factor of negative imitation as an extraneous consideration in the halakhic world is a factor that we also find, in principle, in the general legal system in the field of public administrative law, where it is referred to as an "extraneous consideration", and it is from there that I have "borrowed" the term. In other words, a court may void an administrative decision by reason of it having been made for motives and considerations that were foreign to the subject of the decision. So it is in the halakhic world, in which a new law or custom will also be examined in light of the nature of the considerations that led to the creation of the law or custom, and whether those considerations were irrelevant or, at times, contradictory to the spirit of the halakha and its values, and thus extraneous considerations that may lead to the abolition of the new law or custom.

Extraneous considerations are weighed in halakha much as they are in the general law. In certain cases, the conclusion will be that there was no extraneous consideration of "unwanted" influence from another cultural or conceptual world. In other cases, there may be an influence that is not deemed to exercise a negative impact of an extent justifying the abrogation of the new law or custom. In other cases, the conclusion may be that the extraneous consideration is so negative that annulling the new law or custom is appropriate and correct.

The choice among the various possibilities is a value judgment that concerns judicial policy in the halakhic world, much as it is in the case of a judicial ruling in the general legal system in regard to the presence or absence of an extraneous consideration in an administrative decision.

37. Rabbi Schachter concludes his detailed article as follows:

> And the true God gave us a Torah of truth, a Torah in which the truth is written, our eyes look only to the truth, and blessed be He who keeps his true promise, for the Torah of truth will not be forsworn by the true people.

As for the truth in the world of halakha, there is a great saying of the Gaon of Vilna explaining the statement of the Sages that a judge must "judge true judgment that is according to the truth" (TB Shabbat 10a, and elsewhere). Many halakhic scholars ask: What is "true judgment that is according to the truth"? Is there "truth" that is not "according to the truth"? And what is the nature of this truth that is according to the truth?

The Gaon provided this answer:

> Judges must be experts in worldly matters so that they do not rule erroneously, for if they are not expert in such matters, then even if they are expert in the Torah law, the result will not be according to the truth. In other words, even though he will give true judgment, it will not be according to the truth … and therefore the judge must be an expert in both … that is, wise in matters of Torah and astute with regard to worldly affairs (Commentary of the Gaon of Vilna (*Mikra'ot Gedolot*, Pardes) to Proverbs 6:4).

Torah law that is integrated with the nature of the world is "according to the truth"; Torah law alone, without astuteness with regard to worldly affairs is "true", but not "according to the truth". According to Rabbi Zvi Schachter, the matter before us must be decided in accordance with Torah law, true law, but the "nature of the world" – which in the matter before us is the social and educational reality of contemporary women – is absent, due to the nature of the subject, its centrality, and the "extraneous considerations" that may be involved, for the purpose of integration in a decision that would be "according to the truth". So the question remains—is that approach according to the truth?

38. Rabbi Avraham Weiss, in his aforementioned comprehensive book, considers the matter before us, and *inter alia*, is critical of Rabbi Zvi Schachter's approach for some of the same reasons we raised above. He concludes his examination of women's prayer groups, *inter alia*, with the following words (pp. 123-124):

> Within halakhic guidelines, women may participate in women's prayer groups, as long as these groups fall into the halakhic category of tefillah and not minyan … Participants in such groups are not rebelling against Torah Judaism. Quite the contrary. They are seeking to instill greater religious meaning in their lives. Their

> purpose is not to diminish the Torah, but to enhance their Jewish commitment and halakhic observance … Their quest to reach nobly to attain this lofty objective should be applauded.

These earnest thoughts are worthy of consideration against the background of the special sensitivity of the halakhic world in regard to changes in synagogue customs, as we discussed above (and see Rabbi Weiss, *ibid*., p. 118*ff*.) Having noted the explanation of the Gaon of Vilna in regard to the concept of the "thorough truth" that a judge must strive to realize, we will mention an additional explanation of this concept, which is appropriate to what we have just quoted and stated (see the *Mishnah Rishonah* commentary to Mishna Pe'ah, 8:9, *s.v*. "*vechen dayan shedan emet la'amito*"):

> Because it is possible for a judge to recuse himself from judging in the belief that even if he would believe that he is judging truly, there is still the fear that if the case were brought before a greater judge, it would be found that he was in error, the result would be that no person would be willing to judge, for fear of error. Therefore it says: "according to the truth", because he has only his own truth, as opposed to his knowing that it is false. But if it appears to him that he is judging truly, then he should fear no more, because even if he errs, he is not culpable, because he was scrupulous in accordance with what he believed.
>
> And so we find in the Gemara at the end of the first chapter (6b) of Sanhedrin: "And lest the judge should say, 'Why have all this trouble and responsibility?' It is therefore said: 'He is with you in giving judgment'. The judge is to be concerned only with what he actually sees with his own eyes." And Rashi explains: "According to what he sees with his own eyes – he will render true justice."

And this too is part of judging "true judgment that is according to the truth".

Summary of the Halakha in regard to the Issue at Bar

39. As we have seen, the subject of these petitions is very sensitive in the Jewish world in general, and in the halakhic world in particular. The petition of the Petitioners in HCJ 257/89 is contrary to the world of halakha and generations of halakhic decisions. But even in the halakhic world, there is sharp disagreement. One view, reflected by the petition in HCJ 2410/90, is expressed in the comprehensive discussion of women's prayer groups in Rabbi Weiss' book. Even there we find uncertainty as to the manner for realizing this approach, whether in the framework of the synagogue or whether elsewhere, outside of the synagogue, due to the generally greater sensitivity in regard to change in synagogue customs as opposed to other changes in customs. The second approach is that expressed by Rabbi Zvi Schachter in his detailed article. Although it recognizes the possibility of change in customs and laws by the accepted means of the halakhic world, it strongly opposes the approach of petitioners in HCJ 2410/9, even in regard to conducting "prayer groups" outside of the synagogue. The strongest opposition to this approach is expressed in the opinions of the two Chief Rabbis of Israel. We referred to part of Rabbi Avraham Shapira's opinion above (para. 31). Rabbi Shapira concludes his opinion saying:

> In brief: in terms of law, all of the above things, including wearing *tzitzit* by women, and conducting a minyan by women for acts of sanctification, are contrary to the halakha and contrary to custom, and are unacceptable in Israel, and what we have here is simply a satanic act intended to increase dispute and raise accusations against Israel. And the matters are so simple, that they require no elaboration.

We also referred to part of the opinion of the Sephardic Chief Rabbi, Rabbi Mordechai Eliyahu (para. 31, above), who concludes in stating:

> No nation has ever desecrated its own holy place, even concerning such customary actions as removing shoes, and so forth. Will Jews come to annul the customs of those of us who seek to preserve the customs of our holy ancestors? We will not permit it. This would be an insult to generations of righteous women, an insult to all the women who come daily to pray, and an insult to the Torah of Israel.

These pointed, strong disagreements should be understood against the background of the special issue before us. We are concerned with a subject that holds a central place in the world of halakha and the Jewish religion. As earlier noted, Jewish tradition sees the synagogue as a "little sanctuary", a reminder and continuation of the Temple that stood on the Temple Mount. The synagogue is and was a center and gathering point for the religious experience and the world of halakha. That is the reason for the substantial difference between the issue before us and the halakhic world's acceptance of change in regard to the status of women in areas like education, the study of Torah, the right to vote for and be elected to public office, and other subjects. It is conceivable that the substantial change in the status and role of women in this century, in which religiously observant participate, will have an effect over time, and will lead to an appropriate resolution even of this complex, sensitive subject of prayer groups, as noted above. *But the prayer space beside the Western Wall is not the place for a "war" of acts and opinions over this issue*. 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 – would constitute 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.

The Holy Places and the Principle of Preserving the Status Quo

40. Having reached this point, we will now return to an examination of the issue in light of Israeli law and case-law.

Nothing matches the Holy Places as a source for disputes, altercations and bloody flare-ups. The intensity of emotion in regard to these places, deriving from deep in the human heart, is so great that it can ignite conflagrations. It therefore requires that the Executive and the Judiciary approach disputes relating to the Holy Places with extreme caution. This is well known, and we need not elaborate.

A comprehensive survey of the disputes over the Holy Places in the Land of Israel can be found in S. Berkowitz, *The Legal Status of the Holy Places in Jerusalem* (Diss., Hebrew University, 1978 (Hebrew)), and the interested reader can review the details there.

41. The history of the Holy Places in the Land of Israel goes back some three-thousand years, with the building of the First Temple on Mount Moriah by King Solomon. And even a thousand years earlier, since the Binding of Isaac by Abraham in the "Land of Moriah", Mount Moriah was holy in the eyes of the People of Israel (see in detail, our comments in HCJ 4185/90, pp. 228-240).

The disputes over the Holy Places originated after the destruction of the Temple, beginning in the seventh century, between Christians and Moslems, and from the thirteenth century to the First World War the disputes were characterized by struggles among the various Christian churches. In 1757, these disputes resulted in what is referred to as the Ottoman Status Quo. The history of this arrangement can be found in the opinion of the late Agranat, P. in the *National Circles* case (above, p. 196).

The British Mandate

42. With the conclusion of the First World War and the granting of the Mandate for Palestine to Great Britain, the subject of the Holy Places was addressed in articles 13 and 14 of the Mandate.

The late President Agranat wrote the following in regard to these articles of the Mandate, in the *National Circles* case, p. 192:

> Article 13 defines the responsibility of the Mandatory Power for the Holy Places and the other religious places (buildings or sites) in Palestine. That responsibility included the duty, in regard to such places, to preserve the "existing rights", securing freedom of access and the free exercise of worship. It was further established that the fulfillment of those duties will be subject to its responsibility to ensure "the requirements of public order and decorum".
>
> My first comment relates to the meaning of the term "existing rights". I should note that it is not my intention to address the construction of that term or definitively establish its meaning. My primary purpose is to point out that during the Mandatory period, *the responsibility to preserve "existing rights" was*

> *generally understood to refer to the duty to preserve the status quo ante bellum, that is, those rights in regard to the Holy Places that actually prevailed prior to the outbreak of the First World War* (see: J. Stoyanovski, *The Mandate for Palestine* (London: Longmans, Green, 1928) p. 293) [emphasis added – M.E.].

Article 14 of the Mandate provided for the appointment of a special commission in connection with the Holy Places, the composition of which was supposed to be established by the Mandatory, subject to the approval of the Council of the League of Nations. Such a council was never established, and the British government therefore promulgated the Palestine Order-in-Council (Holy Places) (see: the *National Circles* case, p. 198).

The Palestine Order-in-Council (Holy Places)

43. The Order-in-Council comprised two operative sections. The first, art. 2, was intended to exclude the hearing or determining of any matter in connection with the Holy Places from the jurisdiction of the courts:

> Notwithstanding anything to the contrary in the Palestine Order-in-Council, 1922, or any Ordinance or Law in Palestine, no cause or matter in connection with the Holy Places or religious buildings or sites or the rights or claims relating to the different religious communities in Palestine shall be heard or determined by any Court in Palestine.

The second provision – art. 3 – was a complimentary provision that granted the High Commissioner the authority to decide the preliminary question "whether any cause or matter comes within the terms of the preceding Article". The High Commissioner's decision upon the question "shall be final and binding on all parties". According to art. 3, the authority of the High Commissioner was intended to be temporary, "pending the constitution of a Commission charged with jurisdiction over the matters set out in the said Article". As noted, the said commission was never established.

The late President Agranat addressed the reasons for the promulgation of the Order-in-Council in the *National Circles* case:

> As we saw, the said article (article 14 of the Mandate – M.E.) requires the conclusion that the authority to decide upon rights and claims relating to the Holy Places was not granted to the Mandatory, but was intended for a commission that was to be appointed with the approval of the Council of the League of Nations. Thus, the Mandatory did not think itself – and could not think itself – as having jurisdiction to determine such rights and claims, even by means of the courts that it established in Palestine. It therefore established, by means of the Order-in-Council, 1924, that such matters are non-justiciable. Therefore, it also granted the High Commissioner the limited and "minimal" authority mentioned in art. 3 of the Order-in-Council – an authority that has nothing to do with the substantive determination of disputes in relation to the Holy Places (*ibid*., at p. 202).

President Agranat went on to say (at p. 203):

> If one were to ask how, under such circumstances, the Mandatory thought to fulfill … the responsibility placed upon it in regard to the Holy Places under art. 13 of the Mandate – the necessary answer is twofold. First, inasmuch as the article established that the responsibility to preserve the "existing rights" and secure free access and the free exercise of worship was subject to the obligation to ensure the requirements of public order and decorum in those places, therefore the Mandatory conducted itself (or purported to conduct itself) in accordance with the principle that the latter duty precedes the others, and that it is required to fulfill it without addressing the merits of the rights and claims, which were a dispute between the competing religious sects. But concurrently, it was required to act, to the extent possible, to preserve – and this is the second principle, which will be further discussed – the situation that it apprehended to be the *"status quo"* [emphasis added – M.E.].

44. In 1929, L.G.A. Cust, the former District Officer of Jerusalem, prepared a secret report for the Mandatory government: The Status Quo in the Holy Places (hereinafter: the Cust Report). The report was intended to aid the officers of the Government of Palestine in in deciding upon the interpretation and application of the Status Quo in the Holy Places (see the Report's Introductory Note, written by H.C. Luke, the Chief Secretary to the Government of Palestine).

The Report did, indeed, serve as a basis for the application of the Ottoman Status Quo during the Mandate period (see: Berkowitz, above, at p. 34).

The report addresses in great detail the various rights granted to the Christian communities in the Holy Places – the Church of the Holy Sepulchre in Jerusalem, the Sanctuary of the Ascension on the Mount of Olives, the Tomb of the Virgin at Gethsemane, and the Church of the Nativity in Bethlehem. As an example of the great detail in regard to the Holy Places – detail that was a practical necessity due to the many disputes – we will present the Report's summary of the situation in the Church of the Holy Sepulchre. Rights are claimed in this church by the Orthodox, the Latins, the Armenians, the Copts, the Ethiopians, and the Jacobites:

> In the various component parts of the Church the position at the present moment can be summarized as follows:—
>
> (1) The Entrance Doorway and the Facade, the Stone of Unction, the Parvis of the Rotunda, the great Dome and the Edicule are common property. The three rites consent to the partition of the costs of any work of repair between them in equal proportion. The Entrance Courtyard is in common use, but the Orthodox alone have the right to clean it.
>
> (2) The Dome of the Katholikon is claimed by the Orthodox as being under their exclusive jurisdiction. The other Communities do not recognize this, maintaining that it is part of the general fabric of the Church, and demand a share in any costs of repair. The Orthodox, however, refuse to share payment with any other Community. The same conditions apply *mutatis mutandis* to the Helena Chapel, claimed by the Armenians, and the Chapel of the Invention of the Cross claimed by the Latins.
>
> (3) The ownership of the Seven Arches of the Virgin is in dispute between the Latins and the Orthodox, of the Chapel of St. Nicodemus between the Armenians and the Syrian Jacobites, and of the Deir al Sultan between the Copts and Abyssinians. In these cases neither party will agree to the other doing any work of repair or to divide the costs.

(4) The Chapel of the Apparition, the Calvary Chapels, and the Commemorative shrines are in the sole possession of one or other of the rites, but the others enjoy certain rights of office therein. Any projected innovation or work of repair is to be notified to the other rites.

(5) The Katholikon, the Galleries and the Chapels in the Courtyard (other than the Orthodox Chapels on the West) are in the exclusive jurisdiction of one or other of the rites, but subject to the main principles of the Status Quo as being within the ensemble of the Holy Sepulchre.

(Cust Report, pp. 14-15. The Cust Report also included reference to the Jewish Holy Places – the Western Wall and Rachel's Tomb (Cust Report, pp. 43-48)).

The Western Wall

45. In HCJ 4185/90, we discussed the regard of the Jewish people to the Western Wall at length, and we will present a summary of that discussion:

> …The Temple Mount is the holiest place, the first in its level of holiness, for the Jewish people for some three-thousand years, ever since Solomon built the First temple on Mount Moriah (II Chronicles 3:1), and Mount Moriah itself was holy for the People of Israel even a thousand years earlier, since the Binding of Isaac by Abraham – Patriarch of the Jewish People – in the "Land of Moriah" (Genesis 22:2). The Temple Mount is Mount Moriah, "and Isaac our forefather was sacrificed in the Temple" (Maimonides, Laws concerning the Chosen House, 2:1-2; 8:1). This primary holiness of the Temple Mount remains to this very day, even following the destruction of the First and Second Temples: "There is no sanctuary for all generations except in Jerusalem and on Mount Moriah … as it says (Psalms 132:14): This is My resting place forever" (Maimonides, *ibid*., 1:3). And the western wall of the Temple Mount (the Western Wall), which stands to this very day, is the holiest site in Jewish tradition (at p. 244).

When the Land was conquered by foreigners, each conqueror had a special interest, of varying extent, in the Temple Mount (see in detail, HCJ 4184/90, at pp. 240-243). Even in those situations, Jews maintained their connection with the Temple Mount and conducted prayers there throughout all the years of exile (see *ibid*., at pp. 245-256). 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 (see HCJ 4185/90, at pp. 228-229, 232, 233-234, 237-239, 270-271).

In modern times, the disputes around the Western Wall have increased, along with attempts to deny Jewish historical rights to the site:

> At that time (the middle of the nineteenth century) there were many attempts by the Jews to improve their standing at the site most holy to them. In the 1850's, Hakham Abdallah of Bombay [Rabbi Ovadia (Abdallah) Somekh] tried to buy the Wall, but failed. [Moses] Montefiore unsuccessfully tried to obtain a permit to better the lot of the worshippers by placing benches (or large stones) for sitting, and erecting a rain canopy above the area, but the Jews were permitted only to pave the area. There are testimonies that a table for reading the Torah, as well as a canopy, were occasionally installed, but these arrangements were temporary and were regularly rescinded at the demand of the Waqf, which feared that the Jews would obtain rights over the area. In 1887, Baron Rothschild came up with a plan to purchase the Mughrabi Quarter, remove its dismal stones and – with the consent of the Jerusalem rabbis – turn it into a Jewish trust … but the plan was abandoned for reasons that have remained largely unknown to this day … On the eve of the First World War, the Anglo-Palestine Bank attempted to purchase the Western Wall area for the Jews, but the negotiations were interrupted by the outbreak of war. In the meantime, Jews began to write on the Wall, hammer in nails, place notes in it, and erect prayer furnishings and benches, a *mehitza* to separate between men and women, a glass-enclosed case for candles, a table for reading the Torah, etc. This led the head of the Waqf to lodge a complaint, in

1912, with the Turkish authorities, and they ordered the removal of all the above furnishings – that had, in the meantime, become almost a tradition – in order to prevent Jewish "possession" of the Western Wall.

…

After the Balfour Declaration and the Mandate, Jews were granted recognized national status in Palestine, and they began to emphasize the importance of the Western Wall as a national symbol, in addition to its traditional religious significance. As opposed to this, the Mufti employed … the claim that the Jews were trying to take over the Wall in order to incite his flock against "the Zionists". Thus, without any religious or historical basis, he declared the Wall to be a holy Moslem site. The Western Wall, to which Moslems had never before ascribed any importance – and which, at times, they even did not refrain from soiling in order to anger the Jews – was now called "Al Buraq", in honor of Muhammad's horse, which the Prophet allegedly tethered to the Wall during his legendary visit to Jerusalem. Interreligious friction concerning the Western Wall continued throughout the 1920's. In order to aggravate the Jews, the Mufti, who looked down at the Wall from his office in the adjacent "Mahqama", ordered the making of an opening at the southern end of the Wall, at the Mughrabi Gate, such as to turn the prayer plaza from a dead-end into a thoroughfare for pedestrians and animals, in order to emphasize Moslem ownership of the Wall, several layers of stone were added (on the north), and a wall was built on the northern side, such that those who passed through its gate disturbed the worshippers. On the other side of that wall, adjacent to the Temple Mount, long and loud Moslem ceremonies were intentionally conducted. All of this in addition to the complaints which served to intensify the interreligious tensions. The Moslems complained, in particular, about the erection of prayer furnishings in the plaza by the Jews, and their complaints led to the forcible removal – by the British police – of the separation between men and women on Yom Kippur (in 1928). In August 1929, an incited Moslem mob stormed through the opening that the Mufti had opened on the southern end of the plaza, attacked the worshippers and destroyed religious

> objects. Several days later, the mayhem spread, and the murderous "1929 Arab riots" began …
>
> In response to these events, the British established a commission of enquiry. The report of the commission included an express comment in regard to the Mufti's use of the Al-Buraq legend to incite against the Jews. In addition, the report recommended the establishment of an international commission to resolve the "Wailing Wall controversy". Such a commission was appointed by the League of Nations. Its members were Swiss, Swedish and Dutch, and it conducted the "Wall trial" in Jerusalem in the summer of 1930. Its report (of December 1930) established that the Moslems had absolute ownership of the Wall, but the Jews had an uncontestable right to access it for prayer. However, it also established that the Jews did not have a right to place benches in the plaza, nor to blow the shofar. The Arabs rejected the report's conclusions, while the Jews accepted them. However, the prohibition upon blowing the shofar was not acceptable to the Jewish public, which viewed it as a harsh insult. Every year, young nationalist Jews continued to blow the shofar at the Wall at the end of Yom Kippur, which always led to the intervention of the British police and to arrests (*HaEncyclopedia HaIvrit*, vol. XX (1971), *s.v.* "*HaKotel HaMa'aravi*", pp. 1122-1124).

As for the conclusions of the commission:

> They were given the force of law in The Palestine (Western or Wailing Wall) Order-in-Council, 1931. It is generally agreed that this Order-in-Council breathed its last breath with the establishment of the State of Israel (the *National Circles* case, p. 208). (On the Western Wall, also see: M. Ben Dov, M. Naor, & Z. Aner, *The Western Wall*, 13th ed. (1989) (Hebrew).

The Liberation of the Western Wall in the Six Day War

46. With the Jordanian occupation, in 1948, access to the Western Wall was denied to the Jewish residents of the State of Israel. During this period – as far as the Israeli legislature was concerned – there was no need for any specific law treating of the Holy Places, inasmuch as they

were in foreign hands. This situation changed with the liberation of the Western Wall in the Six Day War. We addressed this in HCJ 4185/90, above, pp. 246-247:

> In the Six Day War, when the Kingdom of Jordan initiated a military attack against the State of Israel and the Jewish part of Jerusalem, the Temple Mount and the Western Wall were liberated from the Jordanian occupation. In addition to the religio-cultural connection between the Temple Mount and the Jewish People, which was never severed, Israeli political sovereignty over the Temple Mount was restored, as it was for a long period in the history of the Jewish nation, from the building of the First Temple by King Solomon, some three-thousand years ago. The historical circle was closed. At the time of the liberation of the Temple Mount by the Israel Defense Forces, while the battles were still raging, the commanders of the IDF ordered that the Holy Places of other religions not be harmed, and to scrupulously maintain respect for them (see: George Rivlin, *Har HaBayit BeYadeinu* (Ma'archot) 322-323; *Amanat Yerushalayim*, *ibid*., part IV, and the bibliography there). That is how Israel's fighters felt and ordered, as the prophet Micah prophesied: "For all the peoples walk each in the name of its god, but we walk in the name of the Lord our God for ever and ever" (Micah, 4:5)…
>
> …
>
> A few days after the liberation of the Temple Mount, the Israeli government decided, for political and security considerations, to order the paratroop company on the Temple Mount to leave the area. A Border Police observation post was erected, and the area was kept under constant surveillance (Schiller, p. 40). The government also decided to allow Moslems to continue to maintain their presence and worship on the Temple Mount. For these very reasons and additional reasons … and in order to prevent friction with the Moslems, the government decided not to permit public worship by Jews on the Temple Mount.

This reality led the Knesset to adopt the Protection of the Holy Places Law, on 19 Sivan 5727 (June 27, 1967), which we quoted above (para. 12). The provisions of that law were reiterated in sec. 3 of Basic Law: Jerusalem, Capital of Israel, which states as follows:

Protection of Holy Places:

> 3. 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 towards those places.

The National Circles Affair

47. After the liberation of the Temple Mount, Jews sought to pray there, but the police prevented them. When this occurred in 1968, the National Circles Association petitioned the High Court of Justice to order the Israel Police to "provide appropriate security … in order to prevent the disturbance of Jewish prayer on the Temple Mount", and "to refrain from disturbing Jewish prayer on the Temple Mount". The petition was assigned to an expanded bench of six judges. The petition was dismissed by a unanimous Court, but the justices' opinions differed as to the reasons for the dismissal. All of the justices, as well as the State's attorneys, agreed that the right of Jews to pray on the Temple Mount, *per se*, was uncontested. In the words of the late President Agranat:

> It would be superfluous to point out … that the right of Jews to pray on the Temple Mount is their natural right, rooted deep in the long history of the Jewish People (*National Circles*, p. 221).

Nevertheless, the petition was dismissed. The late Silberg D.P. was of the opinion that the petition should be dismissed because the Protection of the Holy Places Law could not be applied without the promulgation of regulations that would provide practical guidelines for exercising the right to pray on the Temple Mount, given that the site is the holy place of worship for two peoples, Jews and Moslems. Inasmuch as the petitioners had not asked that the Minister promulgate such regulations, the petition should be denied (*ibid.*, pp. 153-156). However, he emphasized that, in his opinion, the Court held jurisdiction to consider the petition, even though it concerned a Holy Place, because The Palestine Order-in-Council (Holy Places), which restricted the Court's jurisdiction, ceased to hold force and was nullified upon the termination of the Mandate (*ibid*., pp. 156-158).

Witkon J. was also of the opinion that The Palestine Order-in-Council (Holy Places) was nullified upon the establishment of the State of Israel, or at least upon the enactment of the Protection of the Holy Places Law (*ibid*., pp. 161-162), but that the right of the petitioners to request the aid of the police for the purpose of conducting prayers on the Temple Mount was limited by the "common-sense test" (*ibid*., p. 168). As far as the petition was concerned, "the situation is sensitive and dangerous due to the interreligious situation, and the site is ripe for trouble" (*ibid*.). Therefore, there were no grounds for the intervention of the Court in the discretion exercised by the police in deciding not to extend assistance to the petitioners (*ibid*., pp. 166-168).

Berenson J. was of the opinion that The Palestine Order-in-Council (Holy Places) continued to be in force, and therefore, inasmuch as the petition concerned a Holy Place, the Court lacked jurisdiction to hear or determine the issue. The Government was authorized to address the issue, in accordance with sec. 29 of Basic Law: The Government, which establishes: "The Government is competent to do in the name of the State, subject to any law, any act the doing of which is not enjoined by law upon another authority." (*ibid*., pp. 170-178). That was, essentially, the view of the late Kister J., as well (*ibid*., pp. 182-189).

As opposed to them, the late Agranat P. was of the opinion that the Protection of the Holy Places Law impliedly repealed the Palestine Order-in-Council (Holy Places) *pro tanto*. The Protection of the Holy Places Law established substantive rights in regard to the prevention of the desecration of a Holy Place, freedom of access to the Holy Place, and in regard to injury to the feelings of the various religious groups towards their Holy Places (see sec. 1 of the Law). But the Law did not say so much as a word in regard to the right of worship at the Holy Places. In the view of Agranat P., the Protection of the Holy Places Law thus repealed the Order-in-Council in regard to anything repugnant to that Law, but the Order-in-Council remained in force in regard to the right of worship, which was not addressed by the Law. Therefore, the Court held jurisdiction to address the prevention of desecration of a Holy Place, but it did not hold jurisdiction to hear claims in regard to freedom of worship in the Holy Places. The treatment of that matter was granted to the Executive branch (*National Circles*, pp. 218-228).

Inasmuch as two of the justices – the late Silberg D.P. and the late Witkon J. – were of the opinion that the Order-in-Council was null and void, and two of the justices – Berenson and

Kister JJ. – were of the opinion that the Order-in-Council remained in force, the result was that the opinion of Agranat P. – that the Order-in-Council was repealed in part, but remained in force in regard to rights of worship in the Holy Places – prevailed. This is not the place to elaborate further.

The Orthodox Coptic Patriarch of Jerusalem v. Minister of. Police Case

48. A good example of the extreme sensitivity of the Holy Places can be found in the *Coptic Patriarch* case. In HCJ 109/70 *Orthodox Coptic Patriarch of Jerusalem v. Minister of. Police*, IsrSC 25(1) 225 (hereinafter: the first *Coptic Patriarch* case), this Court addressed a dispute between the Coptic religious community and the Ethiopian religious community. The subject of the dispute was two chapels, "The Chapel of the Four Living Creatures" and the "Chapel of Saint Michael" (adjacent to the Church of the Holy Sepulchre, whose "division" among the various Christian communities we addressed above (para. 44) in the Cust Report), and the passage through which they are entered. In practice, control of the passage and the chapels is maintained by affixing locks on the doors to at the ends of the passage and holding the keys used for opening and closing them. Until the event that led to the petition, the passage and the chapels were controlled by the Copts, but the Ethiopians claimed an exclusive right to possession and worship. During the Easter celebrations of 1970, while the Copts were standing in prayer in the Church of the Holy Sepulchre, the Ethiopians changed the locks affixed to the doors at the two ends of the passage. Pursuant to that, the Coptic Patriarch submitted a petition to this Court, asking that the Court order the restoration of the preexisting status (the first *Coptic Patriarch* case, pp. 229-234).

In the Court's judgment (*per* Agranat P., Landau, Berenson, Witkon and Kister JJ. concurring), Agranat P. emphasized that the Court would not address the conflicting claims of the parties concerning the disputed rights of ownership and possession, inasmuch as the Court lacked jurisdiction, as was held the *National Circles* case (the first *Coptic Patriarch* case, pp. 234-235). However, Agranat P. was of the opinion that the petitioner's prayer for relief was well founded in principle, based upon the prohibition of self-help. Therefore, on 19 Adar 5731 (March 16, 1971, he ordered that the order nisi issued against the Minister of Police be made absolute, but that "… the implementation of the order be postponed until April 6, 1971, in order

to allow the Government, if it find appropriate, to exercise its authority – which it always has – to address the substantive dispute at issue in any manner that it may deem fit. Clearly, in a case as this, the Government may, at any time, issue an order to the parties for the purpose of temporarily regulating the possession, which will be in force until a final decision or arrangement as to the dispute" (*ibid*., p. 252).

49. That did not bring the matter to a close. The further developments following the first *Coptic Patriarch* case are set out in HCJ 188/77 *Orthodox Coptic Patriarch of Jerusalem v. Government of the State of Israel*, IsrSC 33 (1) 225 (hereinafter: the second *Coptic Patriarchate* case). The Government issued an interim order not to change the possession of the two Chapels, that is, to leave the possession in the hands of the Ethiopian community, while allowing the Coptic community a right of access. The Government appointed a ministerial committee to decide the dispute between the two churches. The ministerial committee held many meetings, heard detailed arguments, and tried – to no avail – to bring the parties to a compromise. Four years passed, the Government changed, and a new Prime Minister was elected in 1977. Then Prime Minister, the late Mr. Menachem Begin, decided to hand the entire matter to the Ministerial Committee for Jerusalem. That committee established a sub-committee of its members to address the Coptic-Ethiopian dispute after the petition was submitted in the second *Coptic Patriarchate* case, in which the Court was asked to implement the order absolute issued in the first *Coptic Patriarch* case. The sub-committee held many meetings, and it too heard the arguments of the parties. The Court made an additional attempt to bring the parties to an agreement, but all to no avail. In the end, when the Court was forced to render judgment, the opinions of the justices were divided.

In his dissenting opinion, Landau D.P. (Witkon J., concurring in principle) took the view that the petition should be granted, and the Government should be ordered to decide the Coptic Patriarchate's claim within a reasonable period (*ibid*., at pp. 241, 248-249). The majority of the Court – Asher, Bechor, and S. Levin JJ. – was of the opinion that the petition should be denied because "the time dimension for deciding is a matter regarding which there is almost nothing in common between the approach of the Court and the Government's approach to it" (*ibid*., p. 246).

This is what occurred in one example of a dispute and disagreement in regard to one of the Holy Places. It is an important warning in regard to the issue before us. And with this we conclude our examination of the history of the Holy Places.

50. An examination of the history of the Holy Places shows the very sensitive nature of these places to which disputes, disagreements and strong emotions are inherent. The treatment of the Holy Places is characterized by extreme care and moderation, attempts to achieve compromise and mediation between the parties, and by refraining from unequivocal rules and definitive solutions. Such an approach is inappropriate to the nature of the Judiciary, which is used to deciding disputes definitively on the basis of clear legal rules. Therefore, in practice, the treatment of the Holy Places was entrusted to the Executive branch. It relied upon the long-established principle of maintaining the status quo. Preserving the existing situation is the only means that ensures that peace and quiet, and public decorum – so necessary for places imbued with holiness – will be maintained.

Freedom of Worship and the Near-Certainty Test

51. The principle of preserving the status quo can be presented in terms of legal rules that we employ in similar matters. Such is the rule by which a person's freedom of worship is not absolute, but must retreat where there is a probable threat of harm to public order. This legal rule would seem to be nothing other than the status quo principle in different clothing, more appropriate to the Holy Places.

Freedom of worship and religion is a fundamental right of our legal system. This was held in HCJ 262/62 *Peretz v. Kfar Shemaryahu Local Council*, IsrSC 16 2101; IsrSJ 4 191, and it is undisputed:

> Religion and ritual are not merely matters of legal ruling to be gathered from the books but essentially matters of emotion, faith and reverence, and even of taste and sensitivity, which are not to be measured by any objective scale equal for all (at p. 2105 *per* Cohn J. [IsrSJ 4 194]).

> …the Council in its decision (not to rent a public hall to members of the Progressive Judaism movement for the festival of Sukkot – M.E.) displayed a bias to one religious denomination and denied the right to exist of another, and in a somewhat arrogant tone decided that the form of service hitherto followed in the village is capable of providing for the religious requirements of the local inhabitants. I would have thought that it is a matter for each individual to search his own soul and decide which form of religious service and which form of prayer would give him inner satisfaction and elevation of spirit. If unity in public life and avoidance of division is what the Council strives for, compulsion will not serve to achieve such aims, and not at the expense of freedom of conscience and religion (*ibid*., p. 2113 *per* Witkon J. [IsrSJ 4 204]).
>
> And in the words of Sussman P:
>
> …but neither is it up to them (the Council – M.E.) to decide that the local inhabitants should pray in one form and not in another … But the Declaration of Independence guarantees freedom of religion and worship to every citizen of the State, and even if the Declaration itself does not grant the citizen a right enforceable by judicial process, the way of life of the citizens of the State is determined by it and its fundamental nature obliges every authority in the State to be guided by it (*ibid*., at p. 2116 [IsrSJ 4 207]).

More recently, Shamgar P. wrote in his decision in HCJ 650/85 *Movement for Progressive Judaism v. Minister for Religious Affairs* IsrSC 42 (3) 377, 381:

> Freedom of religion and worship is one of the fundamental freedoms recognized by our legal system, and constitutes a part of it. The expressions of this freedom are, of course, primarily found in the freedoms of religious expression and action, but that is not sufficient. That freedom also requires, *inter alia*, that all believers be treated equally, and that governmental authorities refrain from any act or omission in regard to the believers of all movements, as well as their organizations and institutions, that smacks of discrimination.

> Therefore, every general act performed in the course of carrying out the functions of a governmental authority requires an open, fair approach that is not conditional upon identification with the views of any movement, but that expresses the equality to which all movements are entitled.

52. Freedom of worship is not an absolute freedom, and it retreats before other rights and interests:

> Freedom of conscience, belief, religion and worship, to the extent that it proceeds from potential to practice, is not an absolute freedom … My right to pray does not permit me to trespass upon another's borders or create a nuisance. Freedom of conscience, belief, religion and worship is a relative freedom. It must be balanced against other rights and interests deserving of protection, such as private and public property rights and freedom of movement. One of the interests that must be considered is that of public order and safety (HCJ 292/83 *Temple Mount Faithful Association v. Jerusalem District Police Commander*, IsrSC 38 (2) 449, 455, *per* Barak P.).

As for the "balancing formula" between freedom of worship and public order and safety, this Court has held that it is to be found in the "near-certainty test":

> … Freedom of conscience, belief, religion and worship is limited and restricted in so far as required and necessary for the protection of public safety and public order. Of course, before any action is taken that may violate or limit this freedom by reason of harm to public safety, the police ought to adopt all reasonable means at its disposal in order to prevent the violation of public safety without violating the right to belief, religion and worship. Therefore, if the fear is of violence against the worshippers by a hostile crowd, the police must act against that violence and not against the worshippers. But if, due to its limitations, reasonable action by the police is insufficient to effectively prevent the violation of public safety, there is no alternative but to limit the freedom of conscience and religion as may be required for the protection of public safety.

> … The power of the police is not unlimited. It is tasked with many responsibilities. Protecting freedom of conscience, belief, religion and worship is one of the duties of the police, but not its only one. It must also protect other freedoms, including the freedom of conscience and religion of others. In such circumstances, there may be a situation in which, despite the actions of the police, the fear of harm to public safety may remain. Does the existence of that fear, which is not certain, justify the denial or limitation of freedom of conscience, belief, religion and worship?
>
> A fear alone … is not sufficient, but absolute certainty is also not required. Israeli law takes a middle ground of near-certainty … It would therefore appear to me that it would be appropriate that the "near-certainty test" serve for establishing the "balancing equation" between freedom of conscience, belief, religion and worship, on the one hand, and public safety on the other (*ibid*., pp. 455-456).

The finding that there is near-certainty that the exercise of freedom of worship will harm public safety must have an evidentiary basis. Such evidence may be found in prior experience:

> The requirement is of "substantial" evidence … the assessment must be based upon known facts, including past experience. Conjectures, speculations and apprehensions are not enough (HCJ 153/83 *Levi v. Southern District Police Commander*, IsrSC 38 (2) 393, 411 [English translation: http://elyon1.court.gov.il/files_eng/83/530/001/Z01/83001530.z01.pdf].

In the Holy Places there is – in light of past experience that we have reviewed at length – an evidentiary presumption that a deviation from the status quo may lead to a disturbance of public order. This evidentiary presumption, together with additional evidence – and perhaps even on its own – may, in appropriate cases, provide the necessary evidentiary grounds required under the near-certainty test to limit the freedom of worship in the Holy Places, and to delimit it due to the need to preserve public order. In the Holy Places, the principle of maintaining the status quo is often nothing more than a concrete expression of the near-certainty test.

Freedom of Worship and the Need for finding the Common Denominator of the Worshippers

53. In the matter of the petitions at bar, the possible clash is not only between the freedom of worship of the Petitioners and the interest in maintaining public order. There is an additional possible clash between the freedom of worship of the Petitioners and the freedom of worship of other worshippers. The legal principle that must apply to the latter – when it arises in the Holy Places – is one that seeks to find the broadest common denominator of all the worshippers. In the Holy Places, there is no choice – in a case of a clash between the freedom of worship of different worshippers themselves – but to try to find the common denominator of all the worshippers, even if, as a result, the freedom of worship of one may come somewhat at the expense of the freedom of worship of another. The special respect attendant to the Holy Places, and their character, require that worship at the Holy Places be conducted quietly and with decorum, without disputes, and in a manner that allows each person to serve his Maker without infringing the worship of his neighbor. There is no way to accomplish this other than by finding the common denominator of all the worshippers.

It was to this test of *finding the broad common denominator* that the late Kister J, referred in HCJ *Ben Dov v. Minister of Religion* IsrSC 22 (1) 440, which concerned a clash – in a particular Holy Place – between the members of one religious denomination and another:

> … in the area under the jurisdiction of the State of Israel, there are places that are holy to the members of more than one religion, and the legislature wished to treat all religions equally, and protect the place that are holy to each and every religion. On the one hand, the legislature established the requirement of protection in order not to infringe the freedom of access of the members of the various denominations to their holy places, while on the other hand, it established a requirement of protection against desecration and any other harm, as well as to prevent offense to the feelings of the members of the religious communities in regard to those places. Each religion has its various rules and customs in regard to respect, conduct and even the conditions and restrictions upon entering their holy places, and it is not easy to fulfil them all while ensuring the freedom of access of the members of one religion, on the one hand, and respecting and not offending the feelings of some other religion, on the other hand (*ibid*., p. 448).

Kister J. addressed this at greater length in the *National Circ*les case, at pp. 180-181:

> The freedom of access to pray does not grant a person the right to act in a manner that injures others or the existing arrangements in the place, and the police may prevent such injury. For example: A person who visits a Catholic church, whether or not he is Catholic, and acts in a manner that offends or angers, such as being dressed in a manner that is not appropriate for church, or covering his head when the accepted practice is to uncover one's head, or who stands while others bow, and certainly talking during a service, or demonstrating derision, cannot complain if the police remove him from the place, and criminal charges may also be appropriate. This is not limited to a church, but applies to any other place that is holy to Christians, as well as to a procession or other ceremony. By the same token, a Christian may not enter a place reserved for priests, nor may a Moslem man enter a women's mosque.

And further on, at pp. 181-182:

> It is only natural that when a particular site is deemed holy by the members of different faiths, problems and even disputes may arise in regard to the extent that the members of all those faiths may use the site for their ceremonies. Moreover, it may be that the conducting of a ceremony or the placing of religious symbols by the members of one religious denomination may offend the members of another denomination who may deem it as sacrilege (an extreme example in Jewish history was the erecting of a statue or altar of a pagan god in the Temple by Antiochus Epiphanes). In such a case, it may not be possible for the members of different religions to hold their ceremonies at that holy site, but only that the members of the religion whose ceremonies so offend pray as individuals, without any ceremony and without offending the others, and it is also possible that none of the religious groups will be able to conduct regular ceremonies if what one religion views as worship, another sees as sacrilege. Even if the differences are not so great, it would be hard to order the police to permit the members of each and every religion to conduct prayers or worship in the same place, as each saw fit, inasmuch as the matter might result in clashes and riots.

In some Holy Places, a common denominator may be found among all the worshippers by maintaining the status quo. In such cases, maintaining the status quo is the appropriate path.

"*Local Custom" and the Principle of maintaining the Status Quo*

54. Having arrived at this point, we will now employ these principles to examine the regulation promulgated by the Minister, the validity of which is disputed by the parties.

As earlier stated, subsection (1a) of regulation 2(a) of the Regulations for the Protection of Holy Places to the Jews states as follows:

> *Prohibited Conduct*
>
> 2. (a)In the area of the Holy Places, and subject to what is set out in sub-regulation (b), 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* [emphasis added – M.E.].

This regulation expresses the principle of maintaining the status quo – "local custom" and the status quo are one and the same. In promulgating this regulation, the Minister of Religion did not exceed the authority granted to him by the legislature in the existing Protection of the Holy Places Law, as Shamgar P. explained in HCJ 337/81 *Mitrani v. Minister of Transportation*, IsrSC 37 (3) 337, 357-358:

> The criterion for the validity of secondary legislation is always to be found in the words of the primary legislator. It sets out the boundaries for the actions of the secondary legislator by granting positive authority to carry out secondary acts in defined areas, and in the absence of such a conferral of authority by the primary legislator, the secondary legislator has nothing. The secondary legislator draws its power only from the conferral of authority in the parent law, which defines its permissible operating framework.

In the matter before us, the secondary legislator acted within the operating framework delineated by the primary legislator. The Protection of the Holy Places Law establishes that the Holy Places – including, of course, the Western Wall – will be protected from desecration and any other violation and from anything likely to violate the feelings of the members of the different religions with regard to the places sacred to them (sec. 1 of the Law). The purpose of the regulation is to realize this law – to prevent the desecration of the Western Wall and violation of the feelings of the worshippers there in regard to the Wall.

55. There was more than enough evidence before the Minister of Religion that prayer conducted in the manner of the Petitioners – prayer that, as we explained, violates "local custom" – leads to severe, tangible harm to public order, and thereby leads to desecration of the Western Wall. That evidence was presented in great detail at the beginning of our opinion, in the description of the factual background of the petitions (see paras. 4-11).

The described events create a sufficient evidentiary basis to ground the need for promulgating subsection (1a) of the Regulations in order to prevent desecration of the Western Wall. "… the phrase 'protected from desecration' means 'protection of respect …'" (HCJ 223/67 *Ben Dov v. Minister of Religion*, at p. 447, *per* Sussman D.P.). The events that occurred in the Western Wall Plaza when the Petitioners began to pray in accordance with their custom – that is, while wearing *tallitot*, reading from the Torah, and singing aloud in prayer – demonstrate the severe violation of the respect due to the Wall, and of the desecration. Women sitting and women lying on the Western Wall Plaza, women removed from the Plaza, worshippers throwing mud and dirt, chairs, tables and rocks at one another, and worst of all, the use of tear gas canisters – all intolerable sights at this Holy Place. And all of this took place in the sight of the media who "happened" to be there. The events that occurred when the Petitioners in HCJ 257/89 attempted to realize their right to pray in the prayer area of the Western Wall Plaza inform us of what may be expected if the Petitioners in HCJ 2410/90 try to pray in that place. It should be noted to the credit of the Petitioners in HCJ 2410/90 that when they were told that their praying at the Wall while wearing *tallitot* and reading from the Torah would violate local custom and the feelings of the other worshippers, they refrained from conducting their prayers (see para. 11, above), as opposed to the Petitioners in HCJ 257/89 whose conduct precipitated severe, bitter disturbances,

while they laid themselves out on the Western Wall Plaza, and so forth, with no thought for the desecration of the Holy Place.

56. The Petitioners argue that "if the police fear the violence of a hostile crowd against the women worshippers, then it must act against that violence and not against the women worshippers" (sec. 13 (a) of the amended petition in HCJ 257/89). It has already been held in this regard that:

> … if, due to its limitations, *reasonable* action by the police is insufficient to effectively prevent the violation of public safety, there is no alternative but to limit the freedom of conscience and religion as may be required for the protection of public safety (HCJ 292/83, above, p. 455, *per* Barak J.) [emphasis added – M.E.].

In the Holy Places, the reasonableness of police action is not evaluated exclusively on the basis of "the means at its [the police] disposal" (*ibid.*, p. 456), but also with regard for the special character of the Holy Place. The sight of dozens of baton-wielding police standing in the city center is not comparable to the sight of dozens of police in a Holy Place. The very presence of those police in a Holy Place can lead to a desecration of the site. Therefore, when ensuring someone's freedom of worship may require that the police take such action as dispersing tear gas canisters, we must conclude that such action should not be required of the police in a Holy Place.

57. Despite the said evidentiary grounds before the Minister of Religion, the Minister did not promulgate the regulation addressed by these petitions immediately following the described events, but first attempted to bring the parties to a peaceful compromise. The Minister was right to adopt that approach, inasmuch as the paths of peace, which are always appropriate, are particularly appropriate in regard to the Holy Places.

The Minister of Religion was forced to promulgate the regulation to prevent desecration of the Western Wall only when it became clear that the dispute could not be resolved peacefully. An additional virtue of the regulation is that the "local custom" to which it refers is intended not only to prevent desecration of the Wall, but also expresses *the broadest common denominator of all the worshippers at the site*. As we explained in addressing the halakhic position, prayer in the manner conducted by the Petitioners comprises ceremonial elements that are not acceptable to

the overwhelming majority of Jewish communities. The broadest common denominator of all the female worshippers in the Western Wall Plaza is in accordance with the form of worship that has been acceptable in the Western Wall Plaza for generations by the male and female worshippers who visit the site every day, every year, in all seasons, and even by the Petitioners. The common denominator for women praying at the Western Wall is to be found in the manner of prayer that is customary in the overwhelming majority of Jewish communities, which does not include women wearing *tallitot* and reading the Torah.

58. In light of all the above, we conclude that the regulation promulgated by the Minister of Religion is valid. Promulgating the regulation was within the Minister's authority, it was not intended to discriminate among worshippers, but was entirely compelled by the need to preserve the sanctity of the Western Wall. The regulation is a reasonable expression of the principle of preserving the status quo, the principle of preserving public order in a Holy Place, and primarily – in expressing the broadest common denominator of all the worshippers at the site. In this regard, in another context, Shamgar P. wrote in HCJ 156/75 *Daka v. Minister of Transportation*, IsrSC 30 (2) 94, 103-105:

> Not every decision that the Court sees as comprising some measure of unreasonableness is sufficient to invalidate a regulation. For the purpose of the matter before us, the unreasonableness must be extreme and not mere trivial unreasonableness.
>
> …
>
> … Here, too, we apply the important principle that the Court will not supplant its own discretion for the discretion of the authority that promulgated the regulation, and the fact that the Court might have established other, more flexible rules had the matter been given to its discretion and authority, does not itself justify invalidating a regulation …
>
> ….
>
> The Court will generally exercise great self-restraint in evaluating the validity of secondary legislation.

And as Olshan P. explained in HCJ 57, 58/53 *Tabak Haus v. Haifa Municipality*, IsrSC 7 701, 707, the basic tendency of the Court is to validate secondary legislation, to the extent possible, and not to invalidate it.

Further on in the *Daka* case (above), Shamgar P. added (at p. 106):

> The reasonableness of a regulation cannot be deduced merely from its application in a single concrete case, without also addressing and weighing its general, legitimate purpose. Here, too, reasonableness is not an absolute concept but a relative one. Therefore, a situation may arise in which the weight to be granted to an injury to an individual that derives from the regulation may be reduced when considered in light of the policy that the regulation expresses, which is firmly grounded in the authorizing primary legislation.

In the case before us, the reasonableness of the subsection of the regulation derives from the policy grounding the regulation, and from the purpose that it seeks to realize – a policy grounded in the Protection of the Holy Places Law – which is the protection of the Holy Place against desecration.

Consultation with the Chief Rabbis

59. As stated, the Petitioners complained of the Minister of Religion's consultation with the Chief Rabbis prior to promulgating the regulation. This claim is lacks any merit. Section 4 of the Protection of the Holy Places Law expressly states:

> The Minister of Religious Affairs is charged with the implementation of this Law, and he may, *after consultation with, or upon the proposal of, representatives of the religions concerned* and with the consent of the Minister of Justice, make regulations as to any matter relating to such implementation [emphasis added – M.E.].

In the matter before us, the relevant representatives of the religions concerned are the Chief Rabbis:

> Until now, no regulations have been promulgated in regard to the right of prayer on the Temple Mount for the relevant religious communities …
>
> … and when the matter shall reach the Minister of Religion, he will be required to enquire as to the position of the heads of the Moslem religious community and *the position of the Chief Rabbinate* (the *National Circles* case, at p. 189) [emphasis added – M.E.].

The Chief Rabbinate is the "highest halakhic authority in the State" (HCJ 47/82 *Foundation of the Israel Movement for Progressive Judaism*, above, p. 682). That is all the more so after the enactment of the Chief Rabbinate of Israel Law, 5740-1980, the adoption of which:

> Reinforced the status of the Chief Rabbinate as an official religious authority of the entire Jewish public, in accordance with the functions granted to the Council in sec. 2 of the Law (HCJ 47/82, at p. 693).

The Minister of Religion was therefore required to consult with the Chief Rabbis before promulgating the said regulation.

"Local Custom" for Worship at the Western Wall

60. The Petitioners raised various claims in regard to the differences in the liturgy between the Ashkenazic and Sephardic communities, and so forth, but these claims lack any merit and have nothing in common with the subject of the petitions regarding a prayer service conducted by women wearing *tallitot*, reading the Torah, and so forth. Another strange claim raised by the Petitioners is:

> Both the International Commission (for the Wailing Wall, 1930 – M.E.), and even the Shaw Commission Report on the Palestine Disturbances of August 1929 … make it clear that at that time there was no *mehitza* at the Wall, or any other furnishings other than a portable Torah ark that could be brought to the Wall on specified days (para. 64 of the summary pleadings, above).

In this regard, the Petitioners in HCJ 2410/90 appended photographs from various periods, prior to 1948, from which it appears, as they state it, that: "There was not even a custom

of separating Jewish male and female worshippers at the Wall" (para. 65 and appendices P/19-P/23 of the summary pleadings, above).

It were better that these claims had not been raised at all. As we stated above:

> Interreligious friction concerning the Western Wall continued throughout the 1920's … The Moslems complained, in particular, about the erection of prayer furnishings in the plaza by the Jews, and their complaints led to the *forcible removal – by the British police – of the separation between men and women* on Yom Kippur (in 1928). In August 1929, an incited Moslem mob stormed through the opening that the Mufti had opened on the southern end of the plaza, attacked the worshippers and destroyed religious objects. Several days later, the mayhem spread, and the murderous "1929 Arab riots" began (*HaEncyclopedia HaIvrit*, vol. XX, pp. 1123-1124) [emphasis added – M.E.].

How can one infer the lack of a "local custom" in regard to the separation of women and men from a situation that was forced upon the Jews by the decree of a foreign ruler? I am at a loss.

The question before the Court is, therefore, whether it accords with the "local custom" at the Wall for women to pray while wrapped in *tallitot* or reading the Torah, and whether women pray there in the framework of a "*minyan*" and while raising their voices in song. The answer to this question is clear. It can be found in the affidavit of Rabbi Getz, according to which:

> Women's prayer in the manner requested by the Petitioners has never taken place in the Western Wall Plaza, not during all the years that I have served as Rabbi of the Wall since 1986 (para. 3 of the affidavit of Rabbi Getz of Feb. 7, 1991).

The Petitioners claimed that there was an event in which people prayed "in an identical or similar way" in a ceremony at the Wall (para. 18 (b) of the petition in HCJ 2410/90. Needless to say, that is insufficient to testify to the "local custom", as Rabbi Getz testified:

> If ever there was such an event in the Western Wall Plaza, as claimed in the petition, it was an exception that is neither evidence or instructive as to the rule (para. 3 of the affidavit of Rabbi Getz of Feb. 7, 1991).

Conclusion

61. 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 it 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 is 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, as we have learned and seen in what we stated above (paras. 44, 48, 49). As stated above (para. 39), the substantive change in the status of women and their place in the current century, to which religiously observant women are full partners, may be *eventually* show its effects even in this complex, sensitive area of women's prayer groups, as stated above. *But the prayer area at the Western Wall is not the place for a "war" of deeds and opinions in this regard*. At present, the reality is that the overwhelming majority of halakhic decisors and the Chief Rabbis of Israel are of the opinion that granting the petitions, even that in HCJ 2410/90, would constitute a desecration of the prayer area at the Western Wall, which is the one and only place in all the Jewish world, divided in opinions and customs, where free access is guaranteed to every Jew, man and women, regardless of who they are. The Western Wall is a spiritual and real, special and unique asset that unites all the Jewish People, and we are obligated to protect it against every challenge. That objective can be achieved by *finding the common denominator* of all the Jewish People, whoever they may be, who come to pour out their hearts before their Creator in the prayer area at the Western Wall. That objective will be achieved only if we strictly observe what is set out in regulation 2 (a) (1a) that was

promulgated by the Minister of Religion, in consultation with the Chief Rabbis, and with the approval of the Minister of Justice, which 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". In light of all the above, this regulation, promulgated by the Minister of Religion under the authority granted him by the legislature, is reasonable and even necessary, and is not tainted by any extraneous consideration that might invalidate it. 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. An important principle of this Court is that we do not intervene in secondary legislation except when it suffers from extreme unreasonableness or is tainted by extraneous considerations. That is not the case here. The purpose of the regulation is *to find the common denominator* in order to facilitate the prayers of every Jew, whomever he may be, in the place that is holiest to the Jewish People, while preventing severe, violent dispute in this one unique place that unites the Jewish People. That is a good objective. It is reasonable and desirable in accordance with the facts and circumstances that we presented above.

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 Jewry'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.

62. Along the way, we addressed the concept of "true judgement that is according to the truth", which the Sages deemed a proper and desirable objective for which a judge should strive in rendering judgment (paras. 37 and 38; and see my book, *Jewish Law – History, Sources, Principles* above, pp. 226-232, 1075, and elsewhere). We addressed two interpretations of this concept, and it would seem fitting to conclude this discussion with an additional interpretation that was given to the task of a judge in making "true judgment that is according to the truth". This interpretation is that of Rabbi Joshua Falk Katz, one of the greatest and earliest

commentators of the *Tur* and the *Shulhan Arukh*, in seventeenth-century Poland, who wrote (*Drisha*, *Tur*, HM 1(b)):

> Their intention in saying "true judgement that is according to the truth" means to say that one judges in accordance with *the place and time* of the matter so that it be according to the truth, with the exception of not always actually judging in accordance with actual Torah law. Because sometimes the judge must rule beyond the letter of the law in accordance with the time and the matter, and when he does not do so, even though he renders true judgment, it is not according to the truth. As the Sages said*: Jerusalem was only destroyed because they based their decisions only upon Torah law and they did not go beyond the letter of the law*. And concerning that it is said: You must not deviate from verdict that they announce to you either to the right or to the left, on which the Sages said: Even if they say to you that right is left, etc., and all the more so if they say the right is right, etc.

When treating of a *subject* as sensitive and central to the world of halakha, *in the place* that is holiest in the Jewish world and Israel in the generations following the destruction of the Temple, it is only right and fitting that we act beyond the letter of the law, *in accordance with the common denominator of all Jews, whomever they may be*, so that all can go to the Western Wall at any time or hour to pour out their hearts before their Maker, for the peace and unity of Jerusalem their capitol. In that, we will have rendered true judgment that is according to the truth.

I therefore recommend to my colleagues that the petitions be dismissed.

In order to bring the parties to the observance of the law and what is beyond the letter of the law, I recommend that we do not impose costs.

63. I have read the opinion of Justice S. Levin, and I see no need to add to my clearly detailed opinion. I will, however, address my colleague's conclusion, that:

> A total ban upon conducting worship services at the site of the Wall should not be imposed merely because there are groups that oppose them, and considerations of certain and proximate danger of disturbance of the peace need not necessarily

> justify imposing such a ban. Rather, it is the duty of the relevant authorities to see to the appropriate conditions in order to strike a balance among all the relevant interests, in order that all who seek to congregate at the Wall and its plaza can fully exercise their rights without overly offending the sensitivities of others.

Accordingly, he is of the opinion that the petitions should be granted.

This is an absolutely new approach in the case law of this Court, and it stands in utter contradiction to a long line of decisions since the *National Circles* case. This decision concerns the holiest place in the Jewish world *on the eastern side of the Wall*, that is, the Temple Mount, upon which the First and Second Temples stood, and which housed the Holy of Holies (see in detail: HCJ 4185/90, pp. 228-247), and the holiness of the Western Wall derives from its being "the last remnant of our Temple". In all of those decisions, without exception, it was held, on the one hand, that the right of members of the Jewish People to pray on the Temple Mount is undisputable and eternal, it exists from time immemorial and will continue for all the future, and other such superlatives. However, on the other hand, in order to preserve public order and prevent a proximate threat of disturbances and rioting, Jews were prevented from praying on the Temple Mount. Freedom of worship thus retreated before the need to preserve public order to the point of denying any Jewish religious worship on the Temple Mount. The extent of this approach can be seen in a decision issued by this Court some eight months ago, on April 4, 1993, in which we addressed, *inter alia*, the petition of a Jew who wished to enter upon the Temple Mount "while wearing *tefillin* and a *tallit* or carrying holy ashes …" (HCJ 67/93 *"Kach" Movement v. Minister of Religious Affairs*, IsrSC 47 (2) 1, 3). The petition was denied. The reasons for the decision (*per* Goldberg J., Barak and Mazza JJ. concurring) stated, *inter alia* (at pp. 5-6):

> It would not be superfluous to point out that the position of the State Attorney's Office in the aforesaid HCJ 99/76 was … that: 'The Petitioner's right of access to the Temple Mount is a fundamental right, established by law, and is not and never was disputed. We may even assume that no one will bother to enquire if, in the course of visiting this exalted place, he chooses to speak quietly with his Maker. But if what he desires is a demonstrative display of prayer … the matter is different.

> This would appear to be consistent with the claim of the Petitioners. If their right of access to the Temple Mount is a fundamental right that is not infringed even if, while realizing it, the visitor silently speaks with his Maker, then why should silent prayer be prevented simply because the Petitioner has a prayer book or other holy text in his possession, or is wearing *tefillin* or a *tallit*? However, in the opinion of the police, there is a real fear that such an act would be interpreted as a provocation, and would lead to a disturbance of public order that might even result in bloodshed …
>
> The question is, do we have the ability to decide that the fear raised by the police is groundless, and that its considerations are unfounded to the point that we will intervene? I believe that the answer is self-evident in view of the exceptional sensitivity of the place, which is unparalleled in any other place in the country. Therefore, even if we understand the desire of a visitor who innocently wishes to pray privately while carrying religious paraphernalia, we cannot, at this time, deem the positon of the police to be flawed in terms of its reasonableness.

And here one may ask: How is it possible that a single, solitary Jew cannot ascend to the Temple Mount (and we are concerned with those parts of the Temple Mount to which entrance is permissible in the opinion of many great halakhic scholars – see in detail HCJ 4185/90, at pp. 259-268) while wearing a *tallit* or holding a prayer book in his hand, when such an absolute prohibition of freedom of worship is justified by this Court by reason of the existence of a threat to public order and rioting, while as opposed to this, prohibiting prayer by women wearing *tallitot* and reading the Torah, which involves only a certain concession in the religious ceremony, and other than that they are free to pray as they wish at the Wall, and while there is no doubt that this has always been the local custom, and where there is a nearly certain danger of riots, disputes and tear gas canisters – as occurred in the past – nevertheless, such a change should be permitted in order to prevent an infringement of freedom of worship! How is the Temple Mount on the *east* of the Wall different from the prayer plaza on the *west* of the Wall, both of which are Holy Places? *According to the decisions of this Court*, any Jew, even one individual, is prohibited from praying on the Temple Mount, and that is consistent with the principle of *freedom of worship*, but prohibiting the inclusion of a single element in the prayer

service, one that was never customary at the Wall and to which the overwhelming majority of worshippers there are extremely opposed, such a prohibition constitutes an *infringement* of freedom of worship? Therefore, it is fitting and proper that, in order to prevent discrimination, a commission be appointed, as my colleague the President proposes, and that when the Court is called upon to address this subject again, it will consider the subject of freedom of worship in its entirety, on both sides of the Western Wall. As I stated above, the petitions should be dismissed.

President M. Shamgar:

1. These petitions focus, in theory and practice, upon the interpretation and meaning of sec. 3 of Basic Law: Jerusalem, Capital of Israel, and the Protection of the Holy Places Law and its regulations.

These statutes express the State's concern in preventing the desecration and any other violation of the Holy Places. At the same time, the said provisions establish that the Holy Places will be protected against anything that might violate the freedom of access of the members of the various religious communities to their Holy Places or their feelings in regard to those places.

This provides 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.

2. 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.

The importance of preserving it – its exalted, esteemed status and the unifying, fortifying power it radiates to all parts of the nation in Israel and in the Diaspora – increased and was reinforced due to the temporary restrictions imposed, in practice, by the governments of Israel upon the freedom of access of Jews to the Temple Mount.

In light of the status of the Western Wall in the public mind, one can understand the concern and diligence in regard to the following two objectives: maintaining freedom of access to the Wall, and upholding the obligation to preserve respect for the place and all its visitors. Expression was already given to these different objectives in the law enacted in 1967: In speaking of desecration – against which the Holy Place must be protected – the legislature was referring to harmful acts that by their nature or consequences violate the holiness of the site. At the same time, it established that freedom of access must be ensured to anyone who regards the place as sacred, and infringement of that free access must be prevented. The law further instructs that violation of the feelings of the members of the religious community that regard the place as sacred be prevented (and see sec. 2 (b) of the above law[10]). Understandably, these primary objectives are not necessarily compatible in all possible circumstances, and when a conflict arises, an appropriate path must be found to balance these objectives in order to ensure that the fundamental purpose is not infringed.

It is therefore sad when a Holy Place become a scene of verbal or physical dispute, and when people conduct themselves there in a manner that does not show respect for the place and its visitors. We should be mindful that it is difficult to preserve the honor of a Holy Place if we do not also respect the honor of those who visit it.

Therefore, 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 in CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum*, IsrSC 46(2) 464, 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.

[10] Trans. note: The Protection of the Holy Places Law, 5727-1967.

However, we must bear in mind that tolerance and patience are not unidirectional norms, but rather they are peripheral and multidirectional. An enlightened society also respects the beliefs and opinions of those who fiercely hold them and identify with them in a manner that is not necessarily the manner of the average person. Understanding others is more important than self-understanding. With all due regard for the aphorism "know thyself", borrowed from another cultural tradition, it cannot replace adopting the principle of tolerance as expressed in the great rule: "what is hateful to you, do not do to your fellow". Tolerance is not a slogan for acquiring rights, but a standard for granting rights to others. Ultimately, 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.

All of this leads us to the bumpy road of trying to balance between approaches and beliefs that are incompatible. In this regard, 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.

3. The halakhic and historical analysis in the opinion of my colleague Deputy President (Emeritus) Elon is impressive and tremendously informative.

My honorable colleague's call to find a common denominator for all Jews, whomever they may be, is also worthy of respect. But in my view, 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.

I also concur with my colleague's conclusion that, in light of the unusual sensitivity of the issue at bar, it cannot be resolved at a stroke, while ignoring its deep roots. On the other hand, I am not convinced that the Respondents are not exaggerating the conflicts and differences.

Thus, for example, anger was expressed in regard to the Petitioners' singing, despite the fact that they were singing prayers. Besides, is there any prohibition upon singing at the Wall? After all, people often sing and dance there, and it is unthinkable to prevent the singing of visitors, Israelis or foreigners, soldiers or citizens that is conducted with decorum. Therefore, it is possible, and I emphasize the term "possible", that the objectors' opposition to the identity of the singers has led to an opposition to singing itself, which is inappropriate.

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.

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.

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.

Justice S. Levin:

I concur in the opinion of my colleague the Deputy President with regard to the jurisdiction of this Court to address the subject of the petition, but I do not see eye-to-eye with him with regard to most of his reasoning or with the operative result for the petitions. I will briefly explain my view of the subject:

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.

D. What I have said up to now does not mean that limitations cannot be placed upon certain types of conduct at the Western Wall site. 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.

E. The result of all the above is 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.

F. I concur with my honorable colleague President Shamgar that regulation 2 (a) (1a) of the Regulations for the Protection of Holy Places to the Jews is not repugnant to the Law, but 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.

Four years have passed since the events that led to the filing of the petitions before us, and that period is long enough for the Petitioners and the Respondents to reexamine their concrete positions in accordance with the guidelines set out above. In light of the long period that has passed since the above events, it is no longer appropriate to decide at present whether or not the conduct of any of the Petitioners was in good faith at the time.

Under these circumstances, 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. 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.

Like the Deputy President, I too would not make an order for costs.

Decided by majority to dismiss the petitions, subject to the recommendation in the opinion of presiding judge.

Given this 14th day of Shevat 5754 (Jan. 26, 1994).