הקתדרה לזכויות אדם ע"ש אמיל זולא
كرسي حقوق الإنسان على اسم إميل زولا
The Emile Zola Chair for Human Rights

Women of the Wall: A Temporary but Meaningful Milestone*

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Another link has been added to the long chain that is the history of the Women of the Wall (WoW).[1] In all probability this latest development is a comma, not a period: the struggle will continue. Nevertheless, the ruling in the case of the State of Israel versus Bonnie Riva Ras[2] is an important milestone in the struggle to recognize the right of women to pray as a group at the Western Wall. No less importantly – the ruling is well crafted, brief, terse and substantive: an excellent example of the efficient, confident and professional use of known and tried techniques of legal analysis. This is a ruling that deserves to be studied and taught.

WOW's cause has not come before the courts since 2003. In Iyar – the Hebrew month in which the State of Israel was born – the heads of the State Attorney's Office chose to give Israel a gift in the form of a "Days Detention Appeal" entitled "The State of Israel versus Bonnie Riva Ras" and four other women: five women – one for each of the five Books of Moses; or, if you prefer – five women to celebrate the fifth of Iyar, the date on which the State of Israel was established. The state complained that these five women "wrap themselves in a *tallit* and read aloud from a Torah scroll", and requested an order banning them from the Western Wall for a period of three months. Jerusalem District Court Judge Moshe Sobel also gave Israel a gift: he decided that "the appeal is to be rejected", and ruled that the women have the right to pray "in accordance with their custom" at the Western Wall. Judge Sobel himself did not discuss gifts and made absolutely no comment regarding the profound significance of such gifts. As we shall see, he confined himself to the four corners of the law. Nevertheless, it is difficult to ignore the ramifications of his ruling. The State Attorney's Office gave a gift

* Occasionally, insights into judgments would be translated into English

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1 HCJ 3359/95 Hoffman v. Director-General of the Prime Minister's Office, 54(2) PD 345 [2000] (Isr.); HCJFH 4128/00 Director-General of the Prime Minister's Office v Hoffman, 57(3) PD 289 [2003] (Isr.).

2 Days Detention Appeal (Jer.) 23834-04-13 State of Israel v. Ras (Apr. 24, 2013), Nevo Legal Database (by subscription) (Isr.).

that besmirched Israel. Jewish women were arrested for attempting to pray as a group, with the markings that distinguish a prayer group – markings that a substantial number of (male) rabbis, well versed in the Torah, admit are permitted in accordance with religious law. The State Attorney's Office seemed almost willfully to be flaunting the manner in which the Jewish state "protects" freedom of worship of Jews at the holiest site of the Jewish people. Judge Sobel may have offended those who assumed that a little violence, combined with police arrests and threats of criminal prosecution, would put these women back in their place. Significantly, he reaffirmed the basic principles in whose name, and for whose sake, Israel was founded: the commitment to equality, dignity, and freedom of worship.

The ruling is based on three pillars:

First, simply claiming a "provocation" does not justify the charge of disturbing the peace. Judge Sobel analyzed article 13 of the Detentions Law[3] and compared it to the analogous article in the previous law – the Criminal Proceedings Law, Combined Version – in order to highlight its purpose. He supported his conclusion by reference to numerous precedents and an academic article. Adhering to this technical and stable structure (the letter of the law, the history of the law, case law, and an academic comment), he reached the conclusion that the charge of disturbing the peace requires "reasonable grounds to fear that [women's prayer] will threaten public security or the security of a given individual present in the Western Wall plaza". In the absence of such evidence, Sobel determined, the women's freedom of movement cannot be denied. In other words, without evidence "it is very difficult to see how they present a threat to security".[4] This assertion, strategically positioned at the end of the decision, closes the circle with which it began. In the first section of his ruling, Judge Sobel reviewed the finding of the magistrate's court on the same matter: "The respondents did not disturb the peace and, accordingly, there are no grounds for their arrest and for conditioning their release on bail". This initial finding (the women did not commit a provocation and did not disturb the peace) is connected to the precise legal analysis at the end

3 *Id*. § 5–6.
4 *Id*. § 9.

of the ruling. A strand of logic that law students are trained to identify passes through this series of holdings s, and decrees that the relevant offense requires reasonable grounds for concern for public security. Judge Sobel drily noted that no such reasonable grounds exist in this case.

Second, Judge Sobel revisited the underlying tenets of criminal law. In order to detain or arrest someone, or to impose bail on them[5] (with the goal of banning them from the Western Wall), a preliminary condition is required: grounds for arrest in accordance with article 13 of the Criminal Proceedings Law (Enforcement Authorities – Detentions, 5756-1996). What are these grounds in our case? The state argued that the women violated a prohibition established in a previous ruling of the High Court of Justice – namely the additional High Court of Justice hearing in the Hoffman case ("the Additional Hearing").[6] In order to determine whether there was such ground, we must understand what the Additional Hearing established – and what it did not establish. This clearly is a legal question.

What does the Additional Hearing have to do with the five women "suspects" who are the subject of the application for removal (the subject of the hearing in our case)? If one scrutinizes the theory of precedents and the theory of *res judicata*, one find that the answer is simple: nothing. There is no connection between the two. The five women in our case were not a party to the additional High Court of Justice hearing in the Hoffman case, and accordingly "the content of the ruling cannot be considered a legal instruction directed at and violated by the respondents".[7] A ruling of the High Court of Justice cannot enact criminal offenses whose violation establishes grounds for arrest. Moreover, even if the five women had been a party to the Additional Hearing, what precise holding in that opinion binds them? In order for this hearing to create grounds for arrest, Sobel finds, it would have to establish "an order prohibiting the Women of the Wall from praying in the Western Wall plaza". If such an order existed, it might then be possible to determine that the five "suspects" violated this

5 *Id*. § 5.
6 HCJFH, *Director-General of the Prime Minister's Office v Hoffman*, 57(3) PD 289 (2003).
7 Ras, *supra* note 3, § 7.

order. But the Additional Hearing did not contain any such order. Sobel sends a laser beam into the heart of the ruling – its operative result. What is the precise nature of the remedy formulated in the Additional Hearing? Judge Sobel quotes and interprets: The Court established that "At the very least, for the present, it would be appropriate that the Women of the Wall pray in their manner alongside the Western Wall, at the Robinson's Arch site".[8] Judge Sobel applies a meticulous interpretation here that emphasizes the "operative outcome". The Additional Hearing states that it would be appropriate that the Women of the Wall act in this manner; it does not order them to do so: "The ruling in the Hoffman Additional Hearing did not impose a prohibition on prayer on the Women of the Wall – and, at the very least, not a prohibition whose violation warrants criminal sanction".[9] The guiding principle behind this meticulous interpretation is one of the pillars of criminal law: A criminal offense must not be worded in vague language, and if it is clouded in vagueness the judge must dispel this cloud through careful reading that avoids attributing criminal actions to individuals. This is a primary tenet, but there is more. The order was not addressed to the Women of the Wall, but to the government. Moreover, its tone was conditional rather than decisive. This is the formula Judge Sobel finds in the operative part of the Additional Hearing, and he quotes it verbatim to prevent any misunderstanding. If the government meets the conditions and prepares Robinson's Arch for prayer, then the Women of the Wall should pray there. This positive formula implies its negative twin: if the government fails to meet these conditions, and does not prepare Robinson's Arch properly, then this entire operative outcome collapses like a house of cards. Nothing has been done and nothing has been ordered. Note the careful and specific manner in which Judge Sobel summarizes his conclusion: "Bearing in mind that the outcome of the Hoffman Additional Hearing is worded in conditional language , and in the absence of any judicial determination as of the time of the committing of the offenses attributed to the respondents confirming that the government has met the conditions established in [the Additional Hearing], the said ruling cannot be considered tantamount to an

8 *Id*.
9 *Id*.

absolute decree imposing a peremptory and unequivocal instruction whose violation might entail criminal liability".[10]

This quote embodies a challenge to the State Attorney's Office. The state attorneys who seek to continue to impose the threat of arrest on the Women of the Wall are required to secure a judicial determination confirming that the government has met the conditions. All those involved in this matter know that the government has not met the conditions. It may well be that the government hoped that by ignoring the issue, it would eventually die away. Yet the Women of the Wall continue to seek to pray to their Creator, and to do so as a group, equipped with opinions by scholars of Jewish Law confirming the propriety of their actions.

Third, did the Women of the Wall commit an act that is prohibited in the bylaws concerning the Holy Places? Regulation 2(A)(1A) prohibits "the holding of a religious ceremony otherwise than in accordance with the custom of the site that injures the feelings of the worshipping public toward the site".[11] The regulation is worded in an objective manner and does not refer to women in general, or to the Women of the Wall in particular. If a religious ceremony is held "otherwise than in accordance with the custom of the site" and also "injures the feelings of the worshipping public toward the site", then such ceremony might amount to a violation of the regulation. Judge Sobel interprets the wording of the regulation. What is the meaning of the "custom of the site?" In order to answer this substantive question we must ask a procedural question: Who decides what constitutes the custom of the site? According to the constitutional principle of the separation of powers, which is upheld by Israeli law, the judiciary is in charge of saying what the law is. How has the High Court of Justice, the highest judicial authority in the land, ruled when it faced this question? Judge Sobel collects the rulings on this matter, all of which relate to the Women of the Wall, all called *Hoffman*. The task here is not straightforward since these rulings do not reveal an explicit *ratio decidendi*. Judge Sobel examines the opinions in all three opinions and tallies the score. In the first Hoffman ruling, he says, both Chief Justice Shamgar and Justice Levin

10 *Id*.
11 *Id*. § 8.

ruled in favor of the right of the Women of the Wall to pray as a group in the Western Wall plaza. So far we have two justices. A panel of three justices held explicitly that the women have a right to pray as a group at the Wall Plaza. That makes five justices. What about the Hoffman Additional Hearing (the third Hoffman opinion)? Judge Sobel quotes the majority justices: "In our opinion, the Court [in the first Hoffman petition] ruled in favor of the right of the Women of the Wall to pray in accordance with their custom in front of the Western Wall". This statement came to approve that holding, not to detract from it. In short, the meaning of the custom of the place is not to be determined in accordance with orthodox Jewish law but rather in accordance with Israeli law.

Judge Sobel supports his view by reference to the comments of Justice (ret.) Englard, who concurred with the majority opinion in the Additional Hearing (though he opposed the right of the Women of the Wall to pray as a group). Justice Englard confirmed that the pluralistic, secular, and nationally-oriented interpretation of the "custom of the place" – which recognizes the right of the Women of the Wall to pray as a group – is indeed "the interpretative approach that has been accepted by this Court". Thus we see that three justices who discussed, in the Additional Hearing, the question of what was determined in the first Hoffman petition, all agreed that it established that the custom of the place recognizes the right of women to pray as a group. Together, that makes eight justices (Shamgar, Levin, Matza, Beinisch, Strasberg-Cohen, Heshin, Barak and Orr). The conclusion that emerges from this careful counting is that the phrase "custom of the place" is to be interpreted in accordance with a pluralistic, secular, and nationally-oriented approach. A pluralistic approach recognizes all the Jewish denomination: Orthodox, Modern Orthodox, Conservative, Reform, etc. Every Jewish denomination is entitled and permitted to pray as a group, and there is no obligation to adhere to one specific approach, be this Orthodox or other. A secular approach returns to basic principles and respects the message of Israel's Declaration of Independence: Israel will respect equality between the sexes and freedom of worship. A nationally-oriented approach sees the Jewish state as the state of all Jews, in which the custom of one Jewess is not superior to that of another. Note that Judge Sobel did not claim that this is the only possible interpretation that may be applied to the term "custom of the place". His assertion is much

narrower: this is the required interpretation when the state suspects that a man or woman is a criminal offender. And this is so because the subject matter is the criminal law. Moreover, the case involved a site holy to the entire Jewish people, wherever they may be – not of one group that has assumed a monopoly over the manner of worship of Jewish men and women. For these reasons the interpretation must be pluralistic, secular, and nationally-oriented.

The strength of this ruling lies in its lean profile – all muscle and no fat – and in the polished yet dry character of its legal analysis. In order to appreciate fully this achievement, we may take a moment to consider what Judge Sobel, or another judge faced with this case, might have done.

One option would have been to have listened to a faint, yet seductive, voice that may have whispered in his ear, "Why bother, just leave it alone;" "what will you gain out of this?" Why take on powerful rabbis who might later label you a Jew-hater? And if they do label you, how many people would come to your rescue? Just issue a restraining order without saying too much, and that's the end of it.

Or he could have written a learned opinion full of enchanting rhetoric reviewing the history of the Western Wall, its importance to Jews through the ages, the wars for its liberation and the blood spilled, the ink spilled in the Declaration of Independence committing the state to gender equality, the importance of the rule of law and of judicial impartiality, or the obligation of the police to protect people even if their actions irritate others – particularly when they demand rights they have not previously enjoyed. He might have quoted from the Talmud, the Mishna, and the works of the Sages. Perhaps a mention of Bruria would have been appropriate. He could have offered a learned dissertation, balancing the right of the Women of the Wall with the rights of the orthodox worshippers. And then at the end of this learned, uplifting, and protracted exposition he could end with an apologetic, mournful, and dejected passage: The time has not yet come. Here is my restraining order. I don't like this, but there is no alternative. The Orthodox sector has put its foot down, and it is powerful. As for you women: we have already emphasized that justice is on your side, so go away. Please, just go away.

Or, he may have cried out: Tthis is not the way! Women come to pray and are chased as criminals? Just what are they asking for – two hours at most, once a month, early in the morning. Just 0.14 percent of the total number of hours in the calendar year. He might have gone on to quote a considerable number of respected and well-known rabbis who have supported women's right to pray as a group, even if not in a *minyan* (an official quorum). Rabbi Professor Daniel Sperber and Rabbi Mendel Shapiro are just two examples.[12] He might then have ended with a simple decision: A group prayer once a month? By all means. That's the end of it.

Judge Sobel could have taken any of these paths, but he did not. Instead, he offered a ruling that is a model of legal technique. Anyone who seeks to understand how legal formalism can also be used to advance the rights of men and women, and anyone who wants to understand the practical meaning of "without fear or prejudice", should take time to read the ruling in *The State of Israel versus Bonnie Riva Ras*. Even if this effort proves unsuccessful at present, this opinion will enjoy a distinguished place in the pantheon of those court rulings that display the best face of the State of Israel.

12 WOMEN AND MEN IN COMMUNAL PRAYER: HALACHIC PERSPECTIVES (Chaim Trechtman ed., 2010).