October 6 Panel - Opinion Abstracts

Shakdiel v. Minister of Religious Affairs
HCJ 153/87 (May 19, 1988)

ABSTRACT

The Jewish Religious Services Law provides for the establishment of local religious councils throughout the country, charged with the duty to provide Jewish religious services and to allocate public funds in support of such religious services, as are needed in the area. By Law, the membership of such councils is to reflect the general public desire and need for the distribution of such religious services in the locality and the range of interest in such services. In determining the Council's make-up, attention must be given to the different groups represented in the Local or Municipal Council and to their respective strength, but this factor is not conclusive. The members of the religious council are appointed by the Minister of Religious Affairs, the local Chief Rabbis and the Local Council, following a procedure whereby each of the above voices his opinion of the others' candidates. Disagreements between the parties concerning proposed members of the religious council are resolved by a ministerial committee comprised of representatives of the Prime Minister, the Minister of Religious Affairs and the Minister of the Interior.

This case concerns the makeup of the religious council in Yerucham. The Petitioner is a religiously observant woman, who teaches Judaic subjects in the local school. She is a member of the Local Council, representing the National Religious Party, and was proposed by the Local Council to be a member of the Yerucham religious council. The local Rabbi opposed her inclusion on the religious council on the ground that she is a woman, that women have not hitherto served on religious councils and that her presence would impair the council's functioning.

The Petitioner was not included among the members of the religious council. Her exclusion was explained by the ministerial committee as not based upon any principled objection to a woman serving on such a council but rather as grounded in a tradition that has developed since the establishment of the State, adhered to by all the concerned parties, that women would not be proposed as members of religious councils due to the close working relationship existing between such councils and the Rabbinate. It was also feared that the Petitioner's membership on the religious council in Yerucham would obstruct its proper functioning. The Petitioner contends that her disqualification is based on irrelevant grounds. Since the religious council is an administrative body, concerned with providing and funding religious services to the local community, and does not decide questions of religious Law, there is no reason to disqualify a woman from serving on it.

The court issued an order *nisi*, directing the Respondents to show cause why the court should not direct that the Petitioner be included as a member of the Yerucham religious council. The

Respondents appeared in opposition to the order *nisi*. In a decision rendered by Justice Elon, the court ordered that the rule be made absolute, holding:

1. The ministerial committee, being a body that fulfills a public function under the Law, is subject to judicial review. As with all such public administrative bodies, it must exercise its discretion in good faith, honestly, rationally and without unlawful discrimination, and must make its decisions on the basis of relevant considerations.

2. The Jewish religious services provided by the religious council are an integral part of the municipal services furnished in the locality and must be provided to all who request them, without regard to sex, ideology, education or any other distinction. Although such services are religious in character, the religious council is responsible only for their provision and is not concerned with the resolution of any questions concerning matters of religious Law. The qualifications for membership on the council are determined by the general legal system. Candidates for membership on the council need not meet such qualifications as are required by religious Law.

3. The exclusion of the Petitioner from membership on the religious council because she is a woman is contrary to the fundamental principle of the Israeli legal system that forbids discrimination on grounds of gender. This principle finds expression in the Declaration of Independence and is one of the principles which has found its expression in the Women's Equal Rights Law, 5711-1951.

JUSTICES

Elon, Menachem	Primary Author	majority opinion
Barak, Aharon	Author	concurrence
Ben-Porat, Miriam		majority opinion

Hoffman v. Director of the Western Wall
HJC 257/89 (1994)

ABSTRACT

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:

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.

JUSTICES

Elon, Menachem Primary Author	majority opinion
Shamgar, Meir	concurrence
Levin, Shlomo	dissent

Hoffman v. Director General of the Prime Minister's Office
HCJ 3358/95 (May 22, 2000)

ABSTRACT

This petition concerns the Petitioners' request to establish arrangements that would enable them to pray in the prayer area adjacent to the Western Wall in "women's prayer groups, together with other Jewish women, while they are wearing *tallitot* [prayer shawls] and reading aloud from the Torah", as required by the judgment of the Supreme Court in HCJ 257/89 *Hoffman v. Director of the Western Wall* (hereinafter: the First Judgment). Pursuant to the First Judgment, the Government decided, in 1994, to appoint a Directors General Committee, headed by the Director General of the Prime Minister's Office, to present a proposal for a possible solution that would ensure the Petitioners' right of access and worship in the Western Wall Plaza, while limiting the affront to the feelings of other worshippers at the site. In the report presented by the Directors General Committee to the Prime Minister, the Committee found that the Petitioners could not be permitted to pray in the Western Wall Plaza itself. The Committee therefore recommended that the Women of the Wall be permitted to pray at an alternative site at the southeastern corner of the Temple Mount wall. Two additional public committees that addressed the matter adopted a similar position, and the matter was therefore returned for a decision by the Court.

The Supreme Court Held:

A. (1) The First Judgment recognized the Petitioners' right to worship in the Western Wall Plaza.

(2) The mandate of the Directors General Committee was to find a solution that would allow the Petitioners to realize their right to pray in the Western Wall Plaza, while reducing the affront to the feelings of other worshippers. But in recommending the designation of an alternative prayer site to the Western Wall Plaza the Directors General Committee chose a solution that was different from the one it was requested to develop and propose.

(3) Therefore, the recommendation of the Directors General Committee was not only contrary to the express instructions of the First Judgment, it also deviated from the purpose for which the Committee was appointed, as defined in the Government's decision.

B. (1) In arriving at its decision in the First Judgment, the Court already took into account the possibility that recognition of the Petitioners' right to pray in accordance with their custom in the Western Wall Plaza might lead to violent reactions by groups for whom tolerance of others is foreign.

(2) We cannot reconcile with a situation in which fear of the violent reaction of any sector of the public will lead to the denial of the possibility of another sector to realize its given rights. It is not inconceivable that, in given circumstances, the Police may prevent a person or a group from realizing a right where there is a real basis for the fear that realizing the right will lead to a violent outbreak that may breach the public peace, and where the Police is unable to prevent such

dire consequences by reasonable means. But 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.

C. (1) Inasmuch as none of the alternatives suggested and considered at various stages of the proceedings can be viewed as even partially realizing the right to worship in the Western Wall Plaza, it is appropriate that the High Court of Justice order the Respondents to act to establish the appropriate arrangements for the realization of that right.

(2) Therefore, the Government must make concrete arrangements that will ensure the realization of the Petitioners' right to worship in the Western Wall Plaza within six months.

JUSTICES

Mazza, Eliahu	Primary Author	majority opinion
Beinisch, Dorit		majority opinion
Strasberg-Cohen, Tova		majority opinion

Director General of the Prime Minister's Office v. Hoffman
HCJFH 4128/00 (April 6, 2003)

ABSTRACT

[This abstract is not part of the Court's opinion and is provided for the reader's convenience. It has been translated from a Hebrew version prepared by Nevo Press Ltd. and is used with its kind permission.]

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

The High Court of Justice held:

Cheshin, J.

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

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

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

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

Turkel, J.

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

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

E. Mazza, T. Strasberg-Cohen, D. Beinisch JJ., dissenting

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

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

Englard, J., concurring and dissenting

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

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

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

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

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

(6) Accordingly, the expression "conducting a religious ceremony that is not in accordance with the local custom" in reg. 2(a) (1a) of the Regulations for the Protection of Holy Places to the

Jews, 5741-1981, should be interpreted in accordance with its halakhic meaning, such that prayer in the Western Wall Plaza in the manner of the Women of the Wall falls within the scope of the prohibition established under the regulation.

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

JUSTICES

Cheshin, Mishael	Primary Author	majority opinion
Barak, Aharon		majority opinion
Or, Theodor		majority opinion
Englard, Izhak	Author	concurrence
Turkel, Jacob	Author	concurrence
Levin, Shlomo	Author	dissent
Mazza, Eliahu	Author	dissent
Beinisch, Dorit	Author	dissent
Strasberg-Cohen, Tova	Author	dissent

Ragen v. Ministry of Transport
HCJ 746/07 (January 5, 2011)

ABSTRACT

This Petition concerns bus lines operated by the Second and Third Respondents, where segregation between men and women had become customary. It was argued that these arrangements violate the principle of equality, the constitutional right to dignity and to freedom of religion and conscience and that they have been put in place without lawful authorization. Against the First Respondent (hereinafter: the Respondent) it was primarily argued that it has absolved itself from its duty to supervise the operations of the Second and Third Respondents. There is currently no dispute that the reality of segregation on bus lines, being dictated and coercive, is unlawful. The First Respondent adopted a report complied by the "Committee for Examining Riding Arrangements on Public Transportation Lines which Serve the Haredi Sector" (hereinafter: the Committee.) The report denies any intended (and therefore let alone coercive) segregation, and at the same time allows certain consideration for the will of those seeking to voluntarily uphold segregation. The dispute goes directly to the manner in which the report should be implemented and to the accompanying steps that the Respondent ought to take.

The High Court of Justice (in an opinion authored by Justice Rubinstein and joined by Justices Joubran and Danziger) held that:

The primary conclusions of the Committee were that the existing segregation policy is prohibited. However, the Committee was satisfied that the demand for public transportation where segregation between men and women is possible reflects the sincere desire of parts of the Haredi population. Currently, the agreed point of departure is that operating the bus lines in the "Mehadrin" manner is prohibited. This is the revised position of the Respondent, and thus as a regulatory body it must instruct the operators of public transportation. In other words, those operating public transportation (as any other person) is not permitted to tell, ask or order women where they must sit on the bust simply because they are women, or what they must wear, and that may sit anywhere the please. This is also the rule for men. The Committee's instruction will from now on be the controlling legal arrangement.

Coercing segregation arrangements against women's will and often with verbal violence and beyond is a severe violation of equality and dignity that cannot be permitted, including on the criminal law level. The recommendations of the Committee go to ensuring the rights of all users of public transportation on one hand, and granting the possibility – to those who desire it – to observe their religious and cultural views on the other. In this context, the Committee's recommendations are acceptable to the Respondents and it cannot be said that this is a policy that is not reasonable or that requires intervention, subject to comments and additions as detailed below.

The operators of public transportation will be required to post a sign to any bus line that was previously a "Mehadrin" line that would instruct as following: "Any passenger may sit at any place they choose (except for the seats marked for people with disabilities). Harassing a passenger in this matter may constitute a criminal offense." The Respondent may, as needs be,

order posting of signs on additional lines as well. To the extent that it is decided in the future to permit loading passengers through any bus door, signs shall be posted there, too. The Second Respondent (the Third Respondents stopped providing its services) shall advertise the cancelation of the segregation arrangements as the right of each passenger to sit wherever they please; appropriate training shall be provided to drivers. The publication and the posting of signage shall be done within 30 days from the day the decision is handed down. As to the issue of women boarding through the "back door," there will be a test period of one year while operating stronger supervision and monitoring. At the end of this period the Respondent will be permitted to again consider this issue.

Radio Kol BeRamah v. Kolech – Religious Women's Forum
CLA 6897/14, June 29, 2015

ABSTRACT

The Supreme Court affirmed the decision of the District Court to permit the Kolech Organization to bring a class action against the radio station "Kol BeRamah Ltd.", claiming that the declared policy adopted by the radio station in the years 2009-2011 whereby women would not be heard on its broadcasts constitutes prohibited discrimination for the purposes of the Prohibition Against Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law. The Court ruled, inter alia, on the cumulative conditions that had to be met in order for an "organization" to be permitted to bring a class action instead of a plaintiff with a personal cause of action.

The District Court granted the application for approval to bring a class action submitted by the Kolech – Religious Women's Forum Organization (hereinafter: Kolech) against the radio station "Kol BeRamah Ltd." (hereinafter: the radio station), holding that the declared policy adopted by the radio station in the years 2009-2011, whereby women could not be heard on the station's broadcasts, constituted prohibited discrimination under the Prohibition Against Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: Prohibition Against Discrimination Law). (It will be noted that the change in the management of the radio station as of the year 2011 was the result of a regulatory and monitoring process instituted by the Second Authority.) Hence this Application for Leave to Appeal, which was heard as an appeal, at the center of which lies the following questions: Does the policy of the radio station according to which women are not heard on its broadcasts constitute cause for bringing a class action? And on what conditions is an "organization" authorized to bring such an action?

The Supreme Court (per Justice Y. Danziger, Justices E. Hayut and D. Barak-Erez concurring) dismissed the appeal, except for comments on the question of quantification of the damage and subject to the determination that in adjudicating the case, the District Court will not discuss the violations that occurred in the period after the beginning of the process of regulation, for the following reasons:

After a short discussion of the general phenomenon of exclusion of women from the public domain, and after the Supreme Court expressed its feeling of disgust and revulsion at the existence of this phenomenon in those cases in which it amounts to prohibited discrimination, and after setting the parameters of the discussion as a class action on grounds of discrimination, the Court proceeded to examine the central questions of the discussion, at the end of which the Court arrived at the conclusion that no cause was found to intervene in the majority of the determinations of the District Court; its final conclusion was that the said action is suitable for adjudication as a class action, both in its substance and in the manner in which it was submitted. In particular, no cause was found for intervening in the two central determinations according to which Kolech is an organization that is eligible to bring a class action by virtue of section 4(a)(3) of the Class Actions Law, and there is *prima facie* cause for bringing a class action lawsuit under

the provisions of sec. 3(a) of the Class Action Law and item 7 of the Second Appendix to that Law.

In relation to sec. 4(a)(3) of the Law which states that an "organization" (within the meaning of the definitions section of the Law) may bring a class action, provided that the action engages in an area that is included in one of its public purposes, and provided that it is difficult to submit the application in the name of a plaintiff who has a personal cause of action, according to Justice Danziger narrow and cautious interpretation should normally be adopted in removing the procedural barriers that were placed by virtue of the above sec. 4(a)(3) before organizations that wish to submit an application for approval of a class action, out of concern that lack of caution in this context is liable to increase the extent of the phenomenon of bringing baseless actions even for cases in which, apparently, it is not difficult to bring the action in the names of plaintiffs with personal causes of action.

An organization seeking to bring a class action lawsuit in place of a plaintiff with a personal cause of action must meet the three following cumulative conditions: first, the organization must prove that it complies with the conditions of sec. 2 of the Class Action Law, which include proving that it is an active, proven organization, that operates in an actual and regular manner, and has been doing so for at least a year, and that the purpose of its activity is clearly a public purpose; secondly, the organization must prove that the lawsuit is within the area of one of its public purposes; thirdly, the organization must prove that a difficulty exists in submitting the application in the name of a person with a personal cause of action, the term "difficult" being examined in accordance with the case and its circumstances, and having regard to several indications that were mentioned (including lack of financial means amongst potential plaintiffs; areas or situations in which the direct victims are not aware of the fact of the harm done to them due to gaps in knowledge or an inability to comprehend the harm; cultural barriers which make it difficult to find a plaintiff with a personal cause of action: all these are relevant to situations characterized by the existence of a cultural gap that deters plaintiffs with a personal cause of action from turning to the courts) which does not constitute a closed list. As a rule, proving this condition will require that evidence be presented showing that the organization acted with "due diligence" to locate a plaintiff with a personal cause of action, in both the quantitative and the qualitative sense; but this is subject to the possibility of there being exceptional situations in which the court will be satisfied that there is an inherent difficulty, or that there are special known and convincing data that stems from the circumstances of the case, which suffice in themselves to show that there is a difficulty in finding a plaintiff with a personal cause of action.

As the District Court determined, Kolech – which has set itself the goal of promoting the status of women in the religious community and in Israeli society – complies with the above conditions, and it is therefore a "qualified organization" for the purpose of bringing a class action. The main reason supporting the conclusion that it was difficult to find a plaintiff with a personal cause of action in the present case is that there is a reluctance on the part of ultra-Orthodox women to place themselves at the forefront of the struggle to increase gender equality in the ultra-Orthodox community, for fear of harm to their position in the community. In this regard, the cultural aspect carries great weight, for it is sufficient to support the concern that had not Kolech submitted the application for approval of the class action, it would not have been

submitted at all. To this the Court added that even had it been possible to locate a plaintiff with a personal cause of action who could have submitted the application herself, it would not have been right in the circumstances to order that the action be denied or dismissed in limine, but at most, to order that the organization be replaced by that plaintiff.

As for the cause of action, the Court decided that the Prohibition Against Discrimination Law applies in the circumstances of the case. As the District Court determined, the prohibition against discrimination in the provision of a "public service" refers not only to access to the broadcasts of the radio station, but to all the services that the station provides to listeners, including the possibility of listeners participating in programs. Blocking this possibility for women because they are women – provided such blocking is proved – is certainly liable to amount to discrimination to which the Prohibition Against Discrimination Law applies. Following on from this, the Court dismissed the argument of the radio station that gender distinction is necessitated by the torani-traditional nature of the radio station and is due to the halakhic position of the rabbinical committee, and therefore there is no discrimination; and alternatively that the exceptions specified in the Prohibition Against Discrimination Law apply, so that it is not possible to sue the station for its policy. The Supreme Court held that the policy adopted by the radio station does indeed constitute discrimination under sec. 3(a) of the Law, and that there is no room to apply the exceptions prescribed in secs. 3(d)(1) and 3(d)(3) of the Law, according to which it will not be considered discrimination where "the action is necessitated by the nature of the substance of the product" and that it is possible to maintain "separate frameworks for men or women, as long as this separation is justified" In this context, the Court determined that in order for either of the two above exceptions to apply, it must be proven that the religious norm is indeed binding, or at least justifies adopting the differential attitude to women. In the present case it cannot be said that religious practice mandates or justifies application of the exceptions in the Prohibition Against Discrimination Law, particularly when the halakhic opinion upon which the station relies – that of the late Rabbi Ovadia Yosef – stated specifically that the prohibition on allowing women's voices to be heard is not in the category of a halakhic prohibition, but rather, in the category of embellishing a precept. Moreover, the facts in the present case show that the cultural and the religious character of the radio station was preserved even after the said practice of excluding women from the broadcasts of the station was stopped in the framework of the regulatory process, and what is more, the scope of the activity of the station actually keeps growing. Moreover, the exception specified in sec. 3(d)(3) of the Law does not apparently apply in our case, *inter alia* o for the reason that it refers to the existence of "separate frameworks" for men and women, i.e., an arrangement of separation; in our case there was no arrangement of separation but an arrangement that apparently prevented women, and only women, from participating in the broadcasts of the radio station.

Further, no cause was found for changing the determinations of the District Court with respect to extending the immunity as provided in sec. 6 of the Civil Wrongs Ordinance.

With respect to harm and calculating the compensation, even though the Court accepted some of the arguments raised by the radio station regarding the harm, it was of the opinion that this element was proved by Kolech at the required *prima facie* level for this stage of the proceedings, and therefore there is no reason to depart from the final conclusion of the District Court to the effect that it had been proven to the required extent, that the members of the class

incurred harm due to the policy of the station. At the same time, the Court decided to intervene in certain determinations of the District Court in this context, such as the determination regarding the possibility of awarding damages in the suit "without proof of harm". The Court decided that it was not possible to award damages without proof of harm in the circumstances of the case, notwithstanding the possibility of doing so under the Prohibition Against Discrimination Law in matters other than a class action. A second comment referred to the matter of the relief that was sought – NIS 104,000,000: it was noted that the case raised questions concerning the appropriate method of calculation of the compensation in the circumstances of the case.

No grounds were found for intervening in the determination of the District Court whereby a common question existed in respect of all the members of the class, i.e., **"**whether the station acted with prohibited discrimination against the members of the class in that it prevented women from being heard on air from the time it began operating and until today, 6.11.2011…"; according to the Court, the spotlight on the issue of the common question was to be turned on the tortious conduct of the radio station during the period of the declared policy. This question is one that stands at the center of the action; the District Court will not address questions that relate to the period of time after the commencement of the regulatory process, in the course of which the two concrete violations occurred. The Supreme Court also found no room to intervene in the determination that there is a "reasonable possibility" that the above question will be decided in favor of members of the class.

Neither was reason found to intervene in the determination of the District Court that a class action is the suitable means of conducting the said dispute, insofar as the period prior to the beginning of the regulatory process is concerned. As opposed to this, the Court held that with respect to the period of the particular instances of violation, a class action lawsuit is not necessarily the most efficient way of conducting the particular dispute, and it is preferable if it is adjudicated in the framework of personal actions brought by the women who were allegedly harmed, to the extent that they wish to do so.

Furthermore, the conditions laid down in secs. 8(a)(3) and 8(a)(4) were met: there is reasonable basis to assume that the interests of all members of the class will be represented and conducted in an appropriate manner and in good faith.

Consequently, it was ruled that the decision of the District Court will stand, except for any changes necessitated by what has been said above.

Justices E. Hayut and D. Barak-Erez concurred with the above and added comments, *inter alia* regarding procedural questions related to class actions being brought by means of an organization and on the substantive issue of the exclusion of women, including reference to an additional aspect relating to the "placement" of the present case on the private-public continuum.