UNOFFICIAL TRANSLATION OF APRIL 6, 2003 DECISION; TRANSLATION AS OF July 18, 2003 by Rivka Haut; Susan Aranoff; Reviewed by Miriam Benson

Judge Chessin:

Why was the First Temple destroyed? Because of three factors: idolatry, adultery and murder.

> As for the Second Temple , when they were occupied with Torah and mitzvot and deeds of loving kindness, why was it destroyed? Because of sina't chinam (baseless hatred). This teaches that sinat chinam is equal to three sins :idolatry, adultery and murder.

(Yoma 9b)This was how it was in besieged Jerusalem when Titus the messenger of far away Rome assaulted her walls. The enemy surrounded her with the desire to destroy and exile the nation and kingdom. And the Israelites within Jerusalem - sons of Jerusalem and those who gathered within Jerusalem from all the borders of Israel - their hands were raised against each other.
The enemy was without and the enemy was within. This is the way of fighting; the way of hatred; as fighting and hatred destroy all good, they erode and destroy human relationships. They destroy humanity, animals, vegetation. Such is hatred, such is jealousy, such is fanaticism; and fanaticism is the worst of all.

The Western wall is a remnant of our Second Temple and upon it now are (???),,, Should we not learn from our nation's anguished history?

BACKGROUND

2. Our subject is the appeal of the decision of the Bagatz 3358/95 Anat Hoffman etc. against the office of the Prime Minister etc.
44 (2) 345. In that decision the Supreme court decided - Eliyahu Mazza and also Tova Strassberg-Cohen and Dorit Beinish-to order the government "to set the appropriate conditions within whose guidelines the otorot can exercise their right to pray according to their custom in rechavat haKotel." The otorim before us-the government of Israel and those who act in its behalf (The Government of Israel or the Government) – are of the opinion that it is inappropriate for the Court to issue an injunction as ordered, because the proper arrangements and conditions had already been set up prior to that decision. In its decision the Court rejected this claim and now the government asks us - with this appeal - to decide if indeed it has fulfilled what has been demanded of it.

3. Law of Preservation of Holy Sites, 1967-) the law that was enacted about two weeks after the Six day War - teaches us in sharp and very clear language about safe guarding holy sites from desecration and damage, about guarding the freedom of access of people of all religions to their holy places, and about the prohibition of offending their sensitivities regarding those sites.

1. Preservatioon of the Holy Sites

> The Holy Sites will be preserved from desecration and from any other damage and from anything that may impinge upon freedom of access of all religions to their holy sites or to their feelings towards those sites.

In this same language, word for word, para. 3 of the basic law tells us: Jerusalem the capital of Israel (law of Jerusalem). The law of shmirah - and, later, also the law of Jerusalem - was intended to completely change the status quo. Until the beginning of the law of shmirah - in the period of the Mandate and until after the birth of the State, when the Kotel and other sites holy to Jews were under the jurisdiction of Jordon's Hashemite Kingdom- there were restrictions, sometimes terrible and humiliating restrictions, as to the rights of the Jews to their holy sites. But now those restrictions and those obstacles have been removed.

The law of Preservation of Holy Sites was not created for Jews alone: perhaps we can say: in essence it was not created for Jews. It was created for Muslims, it was created for Christians, it was created for people of every religion that has sites holy to them in Israel. Their rights were enacted by law, even as a basic law. The status of Jews to their holy sites was enacted like the status of all other religions to sites holy to them, from total and complete equality, with no exception- each religion and its holy sites.

We live within our own nation, (we are independent) and until now we have not heard any serious complaint about the desecration of any other religion towards its holy places. The State guards the rights of these people with extra vigilance, there is no breach and no complaint. And see, it is a miracle, and perhaps not a miracle, :It is only the Jews who are not satisfied with what is and what is not done in our holy places - sometimes here, sometimes there. Our interest in the appeal is one of those differences of opinion that have been revealed amongst Jews, amongst ourselves alone.

4. This is the fourth time that we are dealing with this subject, and let us express the hope that this will be the last time. The first time was in Bagatz 257/89, 2410/90 Anat Hoffman etc. v. the administrator of the Kotel; Susan Alter etc. v. the Minister of Religion etc. p'd 48 (20 265 (THE FIRST DECISION OR FIRST LAWSUIT). THE SECOND TIME WAS BAGATZ 882/94 Susan Alter etc. v. Minister of religion etc. (not published), when the defendants from the first case demanded enactment of the appeal from the first decision (the appeal). The third time was the decision that we are currently dealing with the appeal, it is Bagatz 3358/95 Anat Hoffman etc. v. Mancal Minister of religion. Etc. P'd 44 (2) 345 (second decision or second appeal). And now we are meeting the fourth time.

In order to understand the different opinions and the arguments of the litigants, we see no recourse other than a review of the stages until now. The stages we have just mentioned were like stones in a necklace that are linked side by side to become one strand ; and before we string a new stone on it, we must learn and understand the nature of what this chain is.

Initial events and the first atirah.

5. Events began on Rosh Chodesh Tevet, 9.12.1988 , when a group of Jewish women, residents of Jerusalem, attempted tp pray together in rechavat haKotel. The custom of those women is to wrap themselves in tallit when they pray and to read aloud from a Torah scroll as is usual when reading torah. Thus the women attempted to do - facing the Western wall each month and on some holidays. On that Rosh Chodesh Tevet the female and male worshippers near the Kotel were unwilling to permit the women to pray as they wished, and from the time they began those male and female worshippers reacted violently. On Rosh Chodesh Adar Aleph, the now experienced women informed the police, ahead of time, of their intention to pray near the Kotel according to their custom, but this did not help, in the course of their prayers other female worshippers - and angry male worshippers supporting them - disrupted the women's group: cursed them, accused them of bad things, and even snatched their siddurim from their hands, threw things at them and hit them.

6. After these events the women met with Rabbi Getz z"l, the rabbi who was administering the Kotel area, and for Ta'anit Esther of that year an agreement was reached and the women agreed to pray near the Kotel without tallitot and without Torah scrolls. Rabbi Getz, on his part, took upon himself the responsibility of guarding the safety of the women and to permit them to exercise their right to pray. The agreement was not successful because Rabbi Getz was unable to keep his promise. On Ta'anit Esther the tefillah was especially stormy, and at the end of the day the police had to scatter a wild and violent crowd with tear gas grenades.

7. After the difficult events of Ta'anit Esther, on 14 Adar (March 21) 1989, the women brought their first atirah (Bagatz 257/89), and so the first stage began.

8. Those who opposed the women's prayer continued to behave strongly against them, but the women did not weaken. The women continued to arrive at the Kotel on Roshei Chodoshim and to pray next to it, but the clear opposition of the worshippers at the site - and with them the Rabbi who administers the Kotel - did not abate. In the course of time there was no lack of harsh words - orally and in writing - and even violence reared its ugly head. Justice Elon, in the first decision, discusses the events that led to the decision, on pp. 277-292.

9. At the end of 1989 the first group of women succeeded in encouraging and strengthening another group of Jewish women, residents of America (the second group). They created "The International committee for WOW. - from then on the first group together with the second group acquired the title "Neshot haKotel" - and together they attempted to come to the Kotel at regular times and to pray near it. The prayers of the second group of women was - and is - according to Orthodox halakhah, since the women of that group are from all streams of Judaism, and in order that they can all unite and be one group, the group chose the style of prayer that is the strictest from all the denominations. These women pray together privately, meaning they do not consider themselves to be a minyan and therefor they refrain from praying those prayers only permitted with a minyan, like Kaddish. They wrap themselves in tallitot and read aloud from the Torah - like the

custom of the first group - but they are careful not to constitute themselves as a minyan - like the practice of the first group -but even so they are strict about not reading Torah like a minyan, for example, regarding blessings and aliyot.

10. Before Rosh chodesh Kislev in 1989 the women of the second group tried to pray at the Kotel -together - , according to their custom, but when they reached the rechavat haKotel, wearing tallitot and with a Torah scroll, they were forbidden to enter ezrat nashim. This event led to exchanges of letters with the representatives of the Ministery of religion, and when they realized that the correspondance did not bear fruit, the women of the second group also appealed to the High court. This atirah, on June 3 1990- is the atirah Bagatz 2410/90, Susan Alter etc. v. the Minister of Religion. This diyyun was joined with the diyyun of the first group, and both cases together constitute the first stage. For the sake of completion, let us add that while the WOW contain women from different streams - as we are accustomed to see in Judaism - for our purposes they are all united in their demand to be permitted to pray near the Kotel together, wrapped in tallitot and reading aloud from a Torah, like men who wrap themselves in tallit and read from the Torah and nobody disturbs them.

11. For the sake of completion let us add: according to paragraph 4 of the Law of the Preservation of Holy Sites, the Minister of Religion is permitted, after advising with representatives of those religions who are affected, or according to their advice, and with the agreement of minister of justice, to enact regulations in order to carry out the law, the Minister of Religion acted accordingly many times, and regarding the Kotel (and other places sacred to Jews) enacted regulations entitled "Regulations for the Preservation of Jewish Holy Sites, 1981 (Preservation Regulations), and now, after the first lawsuit was brought to the Court - that is the lawsuit of the first group of women and before the lawsuit of the second group - the Minister published on Dec.31, 1989, an amendment to those takanot - after consulting with the chief rabbis - he added regulation 2, subsection 1(a). And this is the language of the amendment: Prohibited activities: 2. (A) In the area of the holy sites are prohibited

.....

(1a) a religious ceremony that is not according to the custom of the place, which offends the sensibilities of the worshippers

.....

We will deal more with this amendment as we go along. But let us add now that following what was stated in this subsection (and regulation 4 of the regulations) the Rabbi who administers the Kotel tried to prohibit entrance of the WOW to ezrat nashim.

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DECISION IN THE FIRST LAWSUIT

12. The lawsuit of WOW - these are the lawsuits of Bagatz 257/89 and Bagatz 2410/90 - came before the High Court of Justice with President of the Court Meir Shamgar, Chief Justice Menachem Elon, and Judge Shlomo Levin. After some time -a long time - after

the litigants were unable to come to an agreement, the Court reached a decision. The decision was given on Jan.26, 1994, and the three judges wrote three separate opinions. All three agreed that "the plaintiffs have the right to pray according to their custom in their congregations and in their synagogues, and nobody may stop them;" that "the religious freedom of these plaintiffs exists" (in the words of Justice Elon, ibid 350) and that the prayers of WOW "have no formal halakhic violation at all "(Justice Elon p. 321). But, different opinions were revealed among the justices, on the issue of whether WOW are permitted, in practical terms, to pray according to their custom in rechavat haKotel, and to actualize their basic rights of freedom of religion.

13. Justice Elon thought - in an opinion that is worthy of being called monumental and encyclopedic -that WOW does not have the right to pray at rechavat haKotel according to their custom, and his legal decision is based on that. Firstly, the Chief Justice decided, the prayer space near the Kotel is a synagogue; not only that but it is "the holiest synagogue in the world of halakhic Judaism." (Ibid.318). In another place the Chief Justice decided that the prayer area near the Kotel "has the law (rule, din) of a synagogue and more than that."(ibid. 319) Secondly, the prayer custom of WOW, while it is not against halakhah, is not accepted. "Not accepted" he cried ("karah"): It is not accepted in an Orthodox synagogue; it is against the prayer customs of Orthodox synagogues. Conclusion: the prayer custom of WOW, according to the Chief Justice, is a custom that does not correspond to "minhag hamakom."

In connection with this, the Chief Justice mentions regulation 2(a) (1a) of the law of the Preservation of Holy Sites - according to which a religious ceremony at the Kotel "that is not according to the custom of the site, which offends the sensibilities of the worshippers" is forbidden. And he adds and decides that this rule "represents the basis of guarding the status quo: 'custom of the site' and 'status quo' are one and the same. (Ibid.344) Chief Justice Elon adds: Prayer according to the custom of the plaintiffs - prayer which is disruptive of the custom of the site - causes a serious and concrete blow to public order , and thereby brings about the desecration of the Kotel." (Ibid.345)and (329):

> ...the reality is that according to the majority of halakhic decisors, including Israel's Chief Rabbis, the response to the lawsuit of the plaintiffs, including in Bagatz 2410/00, is due to desecration of synagogue customs and sanctity. The same regarding synagogue prayer customs. And certainly this is the case regarding the Kotel prayer site, which is the most sacred . Synagogue in the world of Judaism and of halakhah.

(See p. 350). And the sought after conclusion is:

> The response to the lawsuits before us is that there is an essential change in the custom of the site, and in the prayer ceremony that the lawsuites seek there is serious and harsh offence to the feelings of the majority of worshippers there...
>
> It is understood and unnecessary to say that the plaintffs have the right to

> pray according to their custom in their kehillot and in their synagogues, and nobody will take this away from them. The religious freedom of the plaintiffs exists and remains. But for the unity of the Kotel and the many emotions towards this site that is holiest to all Jews, it is necessary to establish prayer in this unique and special place, according to the common denominator that permits the prayer of every Jew, and that is - the custom of the site that has existed for generations, and we must be careful about this (ibid.350) (and the emphasis is in the original).

So too even regarding the serious fear that public order might be disrupted. The religious freedom that WOW have acquired must be restrained because of the strong opposition of the majority of worshippers in that place, an opposition whose root is in the harsh attack (pegiyah) that those worshippers will suffer if the request of WOW will be granted and they will be permitted to pray according to their custom in the Kotel area. In Judge Elon ‘s words:

> It is clear and there is no doubt that granting the request of the plaintiffs before us will cause a serious conflict, very bitter and angry, accompanied with violence that will end with murder. A clear fact is that the majority of worshippers who regularly come to the Kotel, day after day and night after night, are among those who think and believe, with sincerity and innocence, that the changes requested in the two lawsuits before us will desecrate the prayer site near the kotel; not only will matters lead to violent and difficult conflict, but according to the halakhah, WILL DEPRIVE THEM, MEN AND WOMEN ALIKE (his emphasis), to pray themselves at the kotel. Today, access to the kotel and prayer next to it are open and permitted to every male and female Jew who pray as each woman and man want to before their Creator, orally or from a text. It cannot be imagined that in the prayer site at the kotel there will be set up different times for religious ceremonies of different groups, and the fate of this holy site will be to divide it, according to specific times, between the Jewish people according to its denominations and streams, as has happened to the holy sites of other religions.....

And Chief Justice Elon felt therefore that it is necessary to completely reject the appeal of WOW, and not to permit them to pray according to their custom at the Kotel Plaza.

14. On the other side - on the opposite pole - stands Justice Levine. Opposing Chief Justice Elon, Judge Levine holds that WOW have the right to pray in the Kotel Plaza according to their custom. Not only this, but after the passage of four years since the events that gave birth to these lawsuits, the time has come, according to him, to decide the law and to grant the plaintiffs their request.

15. First of all, states Justice Levine, the law of shmirah is a secular law, and therefore the atirah should not be decided only by considering halakhic opinions. These statements of Justice Levine stand in conspicuous contradiction to Chief Justice Elon’s opinion: The Chief Justice explains

and bases the law of shmirah according to Jewish Law (hahalakhah haIvrit) and relies upon much support from Jewish Law. In the opinion of Justice Levine, as the Kotel is holy to the Jewish people both as a religious site and a place of prayer and also as a place with nationalistic significance, a symbol of the sovereignty of Israel. We should determine behavior in this area the and rights of Jews here accordingly. Even more: the site of the Kotel is not a synagogue and in any case the halakhot based on the synagogue do not apply here. The standard to apply regarding activities permitted in the Kotel Plaze should be based on "the common denominator of all types of people who, in good faith, seek to enter the width and breadth of the Kotel area whether for prayer purposes or for other legitimate goals" (p.357).

As for the term "custom of the site" as the force behind Regulation 2 (a) 1 (a) of the Regulations of Preservation of Holy Sites, Justice Levine expressed his opinion thusly:

> As for me, the phrase "custom of the site" does not necessarily have to be understood according to the halakhah or the status quo. The nature of a custom is that it changes in response to changing times, and within its confines we must permit expressions of pluralism and tolerance of the opinions and customs of others, according to those limitations that I have previously mentioned.

At the same time, reasons Justice Levine, it is necessary to set limits on various activities in the Kotel area (ibid 357):

> Without being exhaustive in this area, it is possible that there may be legitimate reasons to limit the activity of religious ceremonies or other activities in the Kotel area. It may be that according to the common denominator of the public that is concerned, in a legitimate way with the Kotel area and not only one sector of the public-there may be activities that are "unbearable" that have elements of "desecration" of the area, or activities not based on sincerity and even for the sake of arousing the senses or creating provocation, or there may be circumstances that justify that a particular activity is likely, by its nature and scheduling, to cause disruption of the public order, in such circumstances preventing the activity (in those concrete circumstances) takes precedence over the religious freedom or action of those involved, so that it is necessary to make appropriate changes to the activity in order to lessen the danger to public safety which would arise from its taking place.

The conclusion is (ibid):

> We should not totally prohibit prayer ceremonies in the Kotel area only because there are groups opposed to them, and concerns about certain and imminent danger of disruption of the peace does not force us to justify prohibiting them as stated : but it is imperative for the appropriate authorities to weigh all the interests directly related, so that all who seek to enter the length and breadth of the Kotel and its plaza may actualize their rights without greatly offending the feelings of others.

Since four years have passed since the events which led to this lawsuit, it is inappropriate to determine - after such a long time - "if the exercise of the right of any of the otorot was done

with sincerity or not"(ibid) and therefore Justice Levine decided that "in these circumstances" :

> I am satisfied that at this stage it is sufficient to give a fundamental decision which recognizes the sincere right of the plaintiffs to pray at the Kotel Plaza while donning tallit and holding a Torah scroll, all in deference to the limitations that I have previously stated. This is my decision.

At the same time, as he was witness to the difficulties that the Government might face when actualizing the decision, Justice Levine added and decided that it is necessary to delay implementing the decision, and, in his language (ibid 358):

> Faced with the sensitivity of the issue and the need to prepare for implementation of the decision and perhaps to legislate a schedule, I advise my colleagues that this decision will be given with deference to the interim injunction which should remain in effect until a year from today.

16. The third decision - second that was published in P.D. (acronym for Piskei Din, the official published volumes of Israeli Supreme Court decisions, m.b.) was given by President Shamgar. In the beginning of his remarks he deals with the lofty status of the Kotel - in religious tradition and in the national tradition of the Jewish people - and these are his words (ibid 353):

> The Kotel - which encircles Har HaBayit on its Western side -was sanctified in the RELIGIOUS TRADITION of the nation of Israel, as a remnant of our temple. In our NATIONAL TRADITION it symbolizes, for thousands of years, that which we lost with the destruction of the Temple. And, more than this, the continuation of our Nation. It is a mikdash me'at (minor Temple) from the halakhic perspective; from the national perspective its symbolizes the sadness of generations and the desire to return to Zion and the restoration of our independence. Therefore, it is an expression of the power and existence of the nation, of its deep roots and its eternity. Therefore, among other events, on Memorial Day when we remember the fallen soldiers, and when soldiers are sworn in, they stand opposite the Kotel. (The emphasis is in the original – M.H.)

In the continuation of his words Pres. Shamgar speaks about tolerance and patience (ibid 354):

> ...we have repeatedly emphasized that the sons and daughters of a free society, which has dignity of humanity as a basic rule, are called upon to honor the personal feelings and sensitivities of the individual and the honor of mankind and with the understanding that personal feelings and emphasis and methods of expression differ from person to person. For example.... we have stated that a free society limits setting restrictions on the serious choices of the individual and behaves with patience and tolerance and even attempts to understand the other, even regarding matters that do not seem to be acceptable or desirable in the eyes of the majority.

Tolerance and patience "are not narrow one-way goals; they are rather broad and many sided (ibid 354):

> Tolerance must be mutual...powerful attacks which are sometimes derived from the

behavior of violent groups, from the east or west, are not conducive to it.

After these introductory remarks, Pres. Shamgar informs us that "all this brings us to the difficult way full of obstacles, of weighing the different sides, beliefs and opinions that are not mutually compatible (ibid 354), and in this regard he adds that it would have been suitable if the resolution of these differences of opinion would be found with dialogue, and according to the language there, (ibid 354-355):

> It is good to remember that the exclusive focus on resolution of difficult issues and problems before the court, the "miracle cure" of our generation, is not necessarily an appropriate solution and desired cure for all our ills. Hidden within it is the desire that a forced resolution will be imposed, relying on judicial enforcement, as the effort to reach an understanding and a dialogue between representatives of the different views seems to be too difficult. Know that a resolution of accord and understanding is most desirable, and the spirit that would bring about such an accord would hover over its outcome

17. As for the essence of the matter, we need not delve too deeply to reveal that Pres. Shamgar's opinion is that the plaintiffs have acquired the right to pray according to their custom in the Kotel Plaza. According to the view of Chief Justice Elon, Pres. Shamgar also thinks that we should seek to find the "common denominator of all Jews wherever they may be"(ibid 355); but, unlike Chief Justice Elon, Pres. Shamgar's opinion is this (ibid 355):

> The common denominator means, according to me, acceptance of arrangements that guarantee freedom of access and freedom of prayer for all, without imposing any particular kind of behavior on one who doesn't want it and without offending the sensibilities of the believers. Incidentally, if we adopt the most stringent (machmir) path, it would be prohibited for any Jew to go up to the Temple Mount.

Pres, Shamgar agrees that "in light of the extraordinary emotions of this matter before us we can resolve it with a wave of the hand, while denying its deep roots"; but, he adds, "I am not convinced that there is no exaggeration on the part of the respondents regarding presentation of the opposing sides." In continuation of these words Pres. Shamgar expresses his opinion in very clear language (that cannot be understood any other way)about the rights of WOW. In his words (ibid 355):

> As for me, we must additionally seek other practical ways, according to which every person who seeks to turn to his (sic) Creator in prayer should be permitted to do so in their own way, as long as there is no actual offense (disruption?) to the prayers of others. The legal starting point is indeed the current situation. But we should not close the door on guaranteeing the right of anyone who sincerely seeks to pray according to his way, and this clearly rises out of the establishment of these laws.

18. Pres. Shamgar feels it is appropriate to try and continue efforts to reach an arrangement acceptable to all:

> I have already noted that this court is not the best - and certainly not the only - venue that can try, together with the different venues, to find practical ways to implement the legislative goals of the two relevant laws, that are the continuation and implementation of the basic proclamation in the Declaration of Independence.
>
> If there is a sincere desire on the part of the proponents , it is appropriate that regarding the Kotel there should at least be an effort made to arrive at an arrangement that suits all who yearn to go up to the Kotel.

And for this reason it is his opinion that we should not give judgment immediately.

> Therefore it is my opinion that we should not decide this issue, at this stage, in a way that one decides an average legal dispute. I am advising the government to consider appointing a committee that will continue to examine the issue in depth in order to arrive at a solution that will ensure freedom of access to the Kotel and will limit offense to the emotions of the worshipers.
>
> Therefore I would delay the lawsuits at this stage, according to my above advice. The doors of the court are always open, but, as stated, we should first attempt to exhaust other open paths.

19. We will soon examine the opinions that the three judges wrote for the first stage and we know that they differ in major and minor aspects for different reasons. To understand the real issues let us now move backwards a bit: we will examine the lawsuit of WOW and then we will return to the judges' opinions.

The plaintiffs' main claim of Bagatz 257/89 (the first group) was directed against the administrator of the Kotel, the Religion Ministry and the Israeli Chief Rabbis, and these were directed to give a reason :

> why they forbid the plaintiffs in particular and all Jewish women in general and/or prevent them from carrying Torah scrolls at the Kotel and reading from them and/or donning tallitot during their prayers.

As for the second group - those WOW who brought suit in Bagatz 2410/90 - whose main claim was this:

> A claim to grant an order against the defendants ... forbidding them to deny the plaintiffs numbers 1-6 to pray near the Kotel and at the Kotel Plaza while wrapping themselves in tallitot and reading from a sefer Torah and which obligates them to permit the plaintiffs to bring a Torah to the Kotel Plaza and to ensure such prayer by the plaintiffs without violence and without disturbance.
>
> These lawsuits were denied by the majority opinion of Pres. Shamgar and chief Justice

Elon, but as the reasons of the chief justice came from the east, the Pres. brought his reasons from the west (they arrived at the same conclusion using vastly differing reasoning, m.b.)

20. Chief Justice Elon felt - regarding the essence of the lawsuit, as we have seen - that WOW do not have the right to pray at the Kotel according to their custom, and he therefore decided to deny the lawsuits. Pres. Shamgar also decided to deny the lawsuits, but, unlike the chief justice, his opinion was that it was premature to decide in the court and therefore decided to reject them. The lawsuits of the plaintiffs are premature, so thought Pres. Shamgar: all paths towards possible resolutions of the differences of opinion in peaceful ways have not yet been exhausted - and not decided by the court - and therefore it is not right to decide and to limit the rights of the sides according to law. The chief justice on one hand, and the president on the other - each from their own reasons - jointly reached an operative decision to reject the lawsuits and to void the interim injunction that had been issued, but the reasons for their decisions were totally different. Judge Levine was, in this matter, in the minority opinion, his opinion was that it was time to issue a permanent injunction of a specific nature.

Until here - regarding the operative stage

21. Unlike the differences of opinion in the operative decision were the differences of opinion on the essence of the issue: On the issue of the right of WOW to pray at the Kotel according to their custom. On this issue the judges' opinions diverged in a different way than they did regarding the operative remedy.

The opinion of the chief justice, Justice Elon, was, as we said, that WOW do not have the right to pray at the kotel according to their custom. On the other side, the opinion of Justice Levine was subject to certain limitations, WOW have the right to pray in good faith near the kotel according to their custom, while they are wearing tallit and holding a Torah scroll. Regarding this matter, Justice Shamgar agreed with the opinion of Justice Levine, which is that the right of WOW permits them to pray in good faith at the Kotel according to their custom. Pres. Shamgar opined, as we have seen, that:

> "The legal starting point is the status quo; but we should not close the door before actualizing the good faith rights of anyone who sincerely seeks to offer their prayers according to their custom, and such clearly arises from the established laws (p.355) "

At the same time, even though Pres. Shamgar's opinion was like Justice Levine's regarding the heart of the matter, the two disagreed regarding the operative remedy: and for the reasons that we have stated above Pres. Shamgar thought to annul the interim injunction and to deny the lawsuit.

22. The conclusion of the first lawsuit is therefore that, according to the majority, WOW acquired the right to pray according to their custom at the Kotel. At the same time, and according to (a different) majority their lawsuit was rejected.

EVENTS WHICH OCCURRED AFTER THE DECISION IN THE FIRST LAWSUIT:

SUBMISSION OF THE SECOND LAWSUIT

23. Pres. Shamgar felt that all possibilities for a reaching an agreed-upon compromise had not been exhausted, and with this understanding Justice Levine went with pres. Shamgar a little bit of the way (please see piskah 15 above, regarding the operative remedy that according to Justice Levine's view there was room to provide for the plaintiffs). Pres Shamgar did not allot time to clarify the possibilities of obtaining a compromise, but he clearly established the parameters of the balance in his opinion. We discussed the matter above (para 17) and we will review them:

> As for me, we need to additionally seek after practical ways, according to which every person who seeks to turn to his (sic, r.h.) Creator with prayer may be permitted to do so in his own style and manner, as long as there will be no actual offense to the prayers of others. The legal starting point is therefore the current situation. But we should not close the door before the right of actualization of any who in good faith wish to offer his prayer according to his custom, and this clearly arises from the establishment of the aforementioned laws.

In other words: WOW have the basic right to offer their prayers before the Creator of the world according to their custom - in their own space and at the Western Wall- as long as "there will thereby be no actual offence to the prayers of others."

24. In the decision that is the subject of this appeal - this is the decision in the second lawsuit - the court reviewed in detail the chain of events that occurred after the decision in the first lawsuit (see pp.352-361 in the decision in the second lawsuit), and therefore we will be brief where we could be lengthy.

25. A few months passed after the first decision, and the government of Israel decided, - on May 17 1994 -following the suggestion of Pres. Shamgar - to appoint a committee that is asked to

> ...present a possible resolution that will preserve the freedom of access to the Western Wall and freedom to pray in its plaza, while lessening the offense to the worshippers at the place.

Among the members of the committee were the Director-General of the prime Minister's Office (Chairperson), Directors-General of the Ministry of Religion, of the Ministry of the Interior and of the Ministry of Police, and the legal advisor to the office of the Prime Minister. Also, the Prime Minister's advisor on the Status of Women (Directors' General Commission) . The government further gave the Commission a deadline of six months to present its recommendations.

26. When WOW saw that the first decision did not give them what they wanted (lit. did not put in their hands), they turned to the High Court with a request for an appeal of the first decision (DANGATZ 882/94 Susan Alter etc. v. Minister of Religion etc., not published). The Deputy Chief Justice, Aharon Barak, decided to reject the request , and as the basis of his decision he relied on the government's decision. And this is what the Deputy Chief justice wrote in his decision:

> I decide to reject the request. As the basis for my view are the words of Pres. Shamgar in the decision which is the subject of this request. In his decision the pres. indicated that at this stage, he is not deciding the lawsuit. Instead, he advises the government to consider appointing a commission that will continue to research the subject in depth, in order to arrive at a resolution that will uphold WOW's freedom of access to the Kotel and will minimize the offense to the feelings of the worshippers (hamitpalilim).

The Deputy Chief Justice cites the government's decision, and in the continues thus:

> Because of this chain of events, it appears that we should wait for the commission's proposals (which are supposed to be given in six months from the time of its formation). If these proposals will not be accepted by the appeallants, they have permission to return to this court (sitting as the High Court of Justice). In his decision, the Pres. cites, in this matter, that "the gates of the court are always open , but, as we said, it is appropriate to first try other open paths."

27. Let us return to the commission. Six months passed since the government appointed the commission. After these another six months passed (after an extension that the government decided upon), and the commission's proposals were late in coming. When WOW saw this, they appealed to Bagatz, this time with joined forces (bagatz 3358/95 Anat Hoffman etc. v. mifcal Office of the Prime Minister etc.)

This lawsuit added nothing to the first lawsuit. WOW's request this time was only that the government set up arrangements that will enable them to pray at the prayer plaza near the Kotel "in prayer groups of women, together with other Jewish women, while donning tallitot and reading aloud from the Torah" ; all this according to the first decision. See the second decision, p'd 54 (2) 345, 347. In other words, the second lawsuit was in essence a lawsuit to force on the government what the court directed in the first lawsuit.

28. In a short time after bringing the first lawsuit, on July 2 1995, the government decided to add six additional months to the time alloted to the commission to present its advice.

In the end, on April 2, 1996, the commission placed its proposals on the government's table. And this was the essence of the Commission's proposal:

> In order to arrive at the balance (compromise) requested of the commission by government decision, between freedom of access to the kotel and between limiting the offence to the feelings of the worshippers (mitpallilim) , the commission did not find that the time is ripe to enable prayer at the Kotel Plaza itself, that differs from the traditional prayer that is accepted there.

In deciding what it decided, the commission gave a lot of weight to the words of the Police Commissioner and the Police Chief of the district of Jerusalem, who expressed their views about the effect of WOW's prayers on public safety. The stand of both of them was that the arrangement according to which the times of prayer at the Kotel would be set would not

eliminate the danger to public order. The commission additionally examined four alternative locations in the Kotel area (b'svivat haKotel): the area below "Robinson's Arch"; the area in front of the Huldah Gates; the south-east corner of the Temple Mount wall; the region of the "Kotel hakatan." From all these alternatives, the commission felt that the south-east corner is the best alternative.

29. When the proposals of the Directors' General Commission were put on the table, the government decided to appoint a committee of ministers (sarim) "that will examine the proposals of the Directors' General Commission and how to implement them and will decide on this matter on behalf of the government." This decision was accepted on April 21, 1996, but since a short time after this elections were held for the 14th Knesset, the ministerial committee scattered on its own.

30. Another year passed, until June 2, 1997, and since the proposals of the Directors' General Commission remained on the table, the ministerial committee for Jerusalem affairs decided to adopts the proposals, and this was the decision of the ministerial committee:

> a. To record the acknowledgment of the Prime Minister that the State of Israel recognizes every person's freedom of religion and worship, including the plaintiffs.
>
> b. To maintain that in reliance on the evaluation of the Israeli police it is not possible to allow the prayer of the plaintffs , according to their custom, in the Kotel Plaza, and according to the evaluation of security sources that were recently presented, a change in the status quo regarding prayer arrangements, in the proposed alternative sites, may present danger to public safety.
>
> c. According to the above, to leave the existing situation alone at this stage. To try as much as possible to examine the possibility of arranging an appropriate alternative prayer site and to seek an additional three month postponement in the courts to examine the security situation in the proposed sites.
>
> d. The evaluation of security sources will be brought for additional discussion before the ministerial committee for Jerusalem affairs and for a decision in this matter.

31. The government did not cease from its efforts to try and find a compromise solution for WOW's prayers. In those days a committee was formed whose task was to formulate proposals in the area of conversions (Ne'eman commission), and the government suggested that this committee also examine the issue of WOW. At first, WOW rejected this suggestion, but after discussion in the court - as part of the hearing in the second lawsuit - the issue was transferred for clarification to the Ne'eman commission.

32. These were the members of the Ne'eman Commission: the Chair, Yaacov Ne'eman ,who was Finance Minister at that time; Ariel Weiss, Esq.; Prof. Dov Frimer, Esq.; Rabbi Nachum Rabinowitz, Rosh Yeshiva Ma'aleh Adumim; Rabbi Uri Regev, representative of the Reform Movement; Rabbi Ehud Bendel (substitute for Rabbi Reuven Hammer), representative of the Conservative Movement. Invited to the commissions sessions were representatives of the different sides and also representatives of other bodies who were affected by this participated,

among them: the Antiquities Authority, the Ministry of Religion, the Ministry of Justice, the Ministry of Internal Security, and the Ministry for Diaspora Affairs, the Israeli police, and others. The commission held a number of sessions and during the course of its deliberations even toured five possible prayer sites: the parking lot near the entrance to the Kotel plaza, near the steps; the Southern Wall area; the women's section at the Kotel; the area above the Kotel plaza called "the Flags' Plaza"(degalim); and "Robinson's Arch."

On September 23, 1998, the commission presented a written account (din vecheshbon) and discussed the advantages and drawbacks of each suggested alternative . At the end of its report the commission arrived at the conclusion that prayer at "Robinson's Arch" is the "most practical alternative for the demands and requirements of WOW. This after examination of the advantages and drawbacks of each of the alternatives...and from weighing and balancing the need to find an appropriate prayer site for WOW and to answer their demands, and between the important principle according to which it is necessary to avoid offense to the feelings of the worshipping public (clal hamitpallilim) at the Kotel Plaza and in order not to violate the custom of the site." These conclusions were accepted contrary to the dissenting opinion of Rabbi Uri Regev.

THE SECOND DECISION

33. The Ne'eman's commission's recommendation was not acceptable to WOW. They thought that this recommendation did not come within the guidelines of an attempt at compromise (lit. balancing) of Pres. Shamgar., and therefore they stuck with their opinion and insisted on their rights to pray according to their custom at the Kotel Plaza. They even argued this before the court in the course of their second lawsuit. The government's stand, it is unnecessary to state, was different and opposing. According to the government, Pres. Shamgar merely said that it is necessary to strike a balance between freedom of access to the Kotel and between offending the sensibilities of the public and the safety of the public. This balance, the government added and argued, appropriately remains in the Ne'eman commission, and the commission's recommendation serves as a reasonable balance between the opposing and polarizing factors. The court, therefore, was asked to determine if the government's decision and the commissions that functioned on its behalf are in accordance with the conclusion of the first decision.

34. Justice Mazza wrote the second decision and justices Strassberg-Cohen and Beinish agreed with him. The decision reviewed the chain of events that occurred until then. And in examining the work of the commissions against the weighing (compromising) that Pres. Shamgar declared, he (Justice Mazza, m.b.) declares (ibid 364-365):

> ...The recommendation of the Directors' General Commission, not only opposes the stated premises of the first decision, but also departs from the reason for appointing the commission as it was defined by government decision.
>
> Also the committees that trod in the footsteps of the Directors' General Commission - the ministerial committee for Jerusalem affairs and also the Ne'eman commission - followed

in its footsteps. The common denominator of the recommendations that were advanced by all the committees that dealt with this issue was expressed by the conclusion that the balance between the right of the plaintiffs to pray at the Kotel Plaza and the offense that the plaintiffs' prayers will cause to others and the opposition that it will arouse, can only be accomplished by distancing the plaintiffs from the Kotel Plaza and requiring them to be satisfied with an alternative prayer site, one or another. And it is unnecessary to say that these recommendations also - like the recommendation of the Directors' General Commission - departed from the type of balancing (compromise) in the first decision.

It is not redundant to point out, that also in the rationale of their conclusion the honorable committees skated over the perceptions that were rejected by the majority of judges in the first decision. For example, in the formulation of the position of the Directors' General Commission, consideration was given to the chief rabbis declaration that "we should not change the existing status quo and we should continue to pray at the Kotel in the way that has been customary until today." This stand, which sanctifies the "status quo", was supported in the first decision only by Justice Elon, but was pretty much rejected by Pres. Shamgar and by Justice S. Levine. This note is also applicable to the formulation of the balance which the Ne'eman commission took for itself as a principle, and gave weight also to the concept "not to violate the custom of the site." Particularly astonishing is the remark of the Directors' General Commission "that for the sake of peace the sides must make equal concessions." For it is in their recommendations to totally distance the plaintiffs from the Kotel Plaza that the commission revealed its real opinion, that only the plaintiffs must, for the sake of peace, totally relinquish [their rights] while those groups in opposition to the plaintiffs' presence, the fear of whose violent reactions caused the commission to dig deep for a solution different from what it had been asked to find, are asked for nothing and are not expected to relinquish anything.

Regarding the parameters of the compromise that was declared (according to majority opinion) in the first decision, Justice Mazza adds these words (ibid 366):

The first decision recognized, in practice, the basic rights of the plaintiffs to pray according to their custom in the prayer area near the Kotel, and the committees that dealt with the matter following the first decision did not do what was asked of them, according to the terms of the decision...

As far as worrying about the violent responses of those opposed to WOW's prayers, the court additionally determined that a balance that nullifies the rights of WOW because of preservation of public safety, this type of balance strays from what was decided by pres. Shamgar's decision (ibid 365):

We believe that the possibility of recognizing the rights of the plaintiffs to pray in their custom at the Kotel Plaza may cause violent reactions from groups whose tolerance towards of others is limited to themselves, was already taken into account by the court in the first decision .

35. This therefore was the conclusion of the second stage which stands before us for a diyun

nosaf: when it found that the "balances" (compromises) that the various committees prepared do not fit the requirements of the first decision, the court decided (ibid 367) to make a final order -

> that directs the government to prepare the arrangements and the appropriate conditions to enable the plaintiffs to implement their rights to pray according to their custom at the Kotel Plaza.

Even at this stage, as in the first stage, the court refrained from establishing the details of the appropriate arrangements, but in the continuation of his words Justice Mazza found it necessary to emphasize that "the necessary determination (regarding the arrangement) is regarding only concrete conditions that will enable the plaintiffs to pray according to their custom at the Kotel Plaza, like the place and the times that they may do so, while limiting the offense to the sensibilities of other worshipers and while establishing adequate security arrangements (ibid p.367).

The court additionally decided to set a time for the implementation of the decision, limiting it to six months - which was until the end of November 2000- to establish the necessary arrangements.

THE LAWSUIT FOR A DIYUN NOSAF

36. The second decision was handed down on May 22 ,2000, and around two weeks later - on June 6, 2000 - the government and those who function on its behalf (the Director-General of the Prime Minister's office, the Directors' General of the religion Ministry, the office of the Interior and the police, the legal advisor to the Prime Minister and the Prime Minister's advisor on the status of women) appealed for a diyun nosaf on the decision. Pres. Barak accepted their request on July 13, and later the judges' panel that was appointed for the diyun nosaf , decided to delay the enactment of the court's order in the second decision until a decision in the diyun nosaf.

37. Let us take a bit of time to expand on this matter. While the events of the diyun nosaf are pending, two corporations - the "Voices of the Kotel" (kolot haKotel) and the "One Nation" (am echad) - submitted requests to be joined to the diyun as additional plaintiffs – plaintiffs on behalf of the public -on the government's side. These corporations were not involved in the bagatz but now requested to join the diyun nosaf after it began. The corporation " Kolot ha Kotel" presented itself as a corporation made up of " religious and traditional women who see value in maintaining traditional prayer at the Kotel, as the last remnant of the site of the Temple, a lofty value to continuation of Jewish life and Jewish tradition." As for the corporation of "Am Echad," this one presented itself as a religious movement whose members come "from a wide range of 'streams' within the Orthodox Judaism of Israel and the Diaspora." This corporation expressed " great anxiety about change or variation from the accepted prayer of generations at the site of the Kotel that is shared by all the Jews in the world." And from here, so they explained, to continue to argue before the court on the side of the government.

38. After they reviewed the requests of the two corporations and their written briefs - briefs that were submitted after the expansive briefs of the Attorney General – we decided that there is

nothing that those pleaders can add to the detailed and wide reaching claim of the Attorney General. Because of this, on Nov.19, 2000, we decided to reject the request of the corporations to join as additional plaintiffs to the diyun nosaf.

Indeed, regarding the request of a party on behalf of the general public to join one side of a review of matters before Bagatz, it is our rule that we judge strictly "if there is anything in the joining in that would contribute to the appropriate and complete clarification of the legal dispute: Bagatz 852/86 Aloni v. Justice Minister p'd 41(2) 32; and see also ibid on p.31). If this applies to proceedings before Bagatz, how much more so does it they apply to a diyun nosaf. And so, when we found that there is nothing that the corporations can enlighten us about complaints that were not heard from the government's side, we decided to reject the request.

After this brief pause, let us return to our topic of the diyun nosaf.

39. The Attorney General, in the name of the government and its arms, returned and argued before us - in the same way it argued from the inception of WOW's lawsuit - that WOW did not acquire the right to pray according to their custom before the Kotel and at the Kotel Plaza, and added that he disagrees with the court's determination in the second decision that the first decision set a rule. The Attorney General found support for their view in the words of Pres. Shamgar - in the first decision, 355-356 - that "we cannot decide this matter before us at this stage," and in the words of the Deputy Chief Justice Judge Barak, who, when rejecting the request of WOW for a diyun nosaf on the first decision, declared that " in his decision [in the first stage] pres. [Shamgar] noted that at this stage, he is not deciding the lawsuit." See ibid, para 26.

40. It is difficult for me to accept the Attorney General's claim that the first lawsuit did not decide the matter of Wow's rights. We brought lengthy excerpts from the judges in the first decision. And we think that the court decided regarding the rights of WOW to pray according to their custom in the presence of the Kotel. See what we brought above, in paragraphs 15-18 and paragraph 21. Let us remember, we should not forget, that among his other statements in the first decision, Pres. Shamgar explicitly declared that "we should not close the door in the face of implementation of the good faith rights of anyone who wishes to spread out his prayers as he wishes, and this clearly emerges from these statutes quote above" (Ibid 355) In his words regarding "the principles in these statutes", Pres. Shamgar was referring to paragraph 1 of the law of Preservation (of Holy Sites, m.b.) and to the corresponding, identicla rule - in paragraph 3 of the Basic Law: Jerusalem, Capital of Israel, according to which "the holy places will be guarded from desecration and any other offense and from any thing that will potentially violate freedom of access of people of all religions to their holy sites or to their feelings towards those sites."

Pres. Shamgar continued and discussed these two rules in the continuation of his opinion, when he said that we should "try, through contact with the various factors, to find practical ways of implementing the goal of these two statutes, which is the continuation and the implementation of the declaration of principle in the Declaration of Independence (ibid 355).

Regarding that "declaration of principle" Pres. Shamgar discussed it at the beginning of his opinion (ibid 353), when he determined that the chief lesson that we learned in these two relevant statutes, give "expression, in the law of freedom, to the principles of the Declaration of Independence, which declares that the State of Israel will guarantee freedom of religion and conscience and will guard the holy sites of all religions. " (ibid 353). Is there any residue of doubt in anyone's heart that Pres. Shamgar recognized the rights of WOW to pray according to their custom at the Kotel Plaza? The question is a question that contains its answer.

Pres. Shamgar's determination about the rights of WOW to pray according to their custom before the Kotel, is clarified and explained also in the continuation of his words and in the background and proposal to the government to "consider the appointment of a committee that will continue to examine the topic in depth in order to arrive at a solution that will preserve the freedom of access to the Kotel and minimize the offense to the feelings of the worshipers." (Ibid 356). The one who reads these words sincerely will learn and will know that WOW acquired the right to pray according to their custom before the Kotel, and that the committee whose appointment pres. Shamgar suggested was created only to find a solution that would "preserve" freedom of access - in the words of the president - and at the same time minimize any offense to the feelings of the worshippers. The expression "preserve" freedom of access does not lend itself to two explanations; it has only one explanation, which is, that WOW's right to pray before the Kotel is available to them, according to their custom. It was decreed that this right, and with it the need to minimize any offense to the feelings of the worshippers - the right and the need - must co-exist.

41. At the second stage, when the Court came to examine the activities of the government and the committees regarding delineating the compromise that was decreed by the court at the first stage, it found the activities on one side and the delineating of a compromise on the other, in other words: the activities did not come under the area of setting up a compromise. Now the government's claim before us is, therefore, that we should turn the clock back and overturn not only the second decision but the first decision also. In any event, the words of the majority in the first decision are clear and do not require explanation.

42. In the course of our deliberations we tried to bring the litigants' positions closer together; we tried but did not succeed. The government again raised the Ne'eman commission's suggestion before us according to which WOW would pray according to their custom at Robinson's Arch. In the government's language in its written brief:

> The defendants will argue that prayer at "Robinson's Arch" fulfills both of the conditions that Pres. Shamgar set, namely, preservation of freedom of access to the Kotel and minimizing the offense to the feelings of the worshipers. Freedom of access to the Kotel will be preserved (also freedom of worship) because Robinson's Arch is, as we said, part of Kotel, and prayer there will rule out friction and will prevent offense to the feelings of those worshipers at the Kotel according to past practice.
>
> The solution is therefore honorable, reasonable and able to be immediately implemented. It is appropriate that the rule that will emerge from the honorable court in the matter of prayer arrangements at holy sites should make possible the flexibility necessary to

maintain freedom of access and worship on the one hand, and eliminate fights and violence on the other.

The area "Robinson's Arch", we all know, is a remnant of the Temple Mount's Western Wall. It is the same as the Kotel. Yet nobody will deny that in the collective and individual consciousness of the Jewish people, this part of the western wall does not have the same level of holiness and uniqueness that the section of the western wall known as the Kotel has; THE Kotel - double emphasis on the word "the". We will also add that in the last few years sometimes the area near "Robinson's Arch" - the section under the jurisdiction of the Antiquities Department - served as a prayer site for the Conservative Movement. The question before us therefore was this, is "Robinson's Arch" appropriate for WOW's prayers?

43. The judges of the second decision examined the suggestion of the Ne'eman Commisssion on the matter of "Robinson's Arch", and their view was that this area is not suitable as an appropriate alternative prayer space instead of the Kotel Plaza because it does not fulfill the compromise concept that the first decision decreed. The court did visit the alternative prayer spaces that were suggested to WOW - including "Robinson's Arch" - but declared in the decision (p.366) that "conducting this tour departed from the requirements of the decision, for the rights of the plaintiffs to pray according to their custom near the Kotel have actually already been recognized, in the first decision." As for us, let us remember that we are sitting to judge the diyun nosaf.

44. From our strong desire to attempt to find an appropriate solution, and a peaceful one, to the continuing dispute between the litigants, we decided that we too will visit "Robinson's Arch." And so, we visited the place and we merited hearing explanations from the mouths of people from the Antiquities department and from the representatives of other interested parties. After we were impressed with what our eyes saw and we examined what needed examining, we arrived at the conclusion - as did the judges of the second decision - that prayer at "Robinson's Arch"as it is today does not constitute an appropriate implementation of WOW's right to pray near the Kotel. But, if the government would act to change the space into an organized prayer site, then it could be seen - although, not easily - as a kind of continuation of the Kotel Plaza. But "Robinson's Arch" in its physical state today is not meant to serve as an appropriate prayer space. We were convinced that this alternative will not succeed, and we would not be able to complain that WOW does not agree to accept the proposal. Let us also mention that "Robinson's Arch" serves today as a unique and special archeological park, under the jurisdiction of the Antiquities Department; the Antiquities Department does not agree that any changes should be made in this site to turn it into a prayer space.

45. It saddens us that the litigants could not find a way to bridge over the gap between them and could not walk on the narrow bridge. It would have been possible and it would have been appropriate to find a suitable arrangement. And now we stand before a rupture. It would have been more suitable, to the prayer arrangements [for the litigants to find a solution] because no court should decide this - not the High Court of Justice and not any other court. But, when the matter came before us, it is our right - even more:our obligation - to decide according to the law.

46. The Kotel is a holy place for Jews. It is also holy to WOW and also to those who strongly

oppose the manner of WOW's prayers. And, on the other side, stands WOW's right to pray according to their custom next to the Kotel. And, on the other side, is the strong opposition of other mitzvah observers, those who feelings towards this holy place are deeply violated by the manner of WOW's prayers. And, holiness, as is known, is not given to division. This then is the major difficulty for our road to finding a legal solution that is appropriate to the opposing views of the litigants.

47. I weighed the matter, I turned it around again and again, and in the end I arrived at this conclusion; the right of WOW is a right that permits them to pray next to the kotel according to their manner. This was decided in the first decision, and I did not find it just to uproot this rule from its place. However, the right of the plaintiffs to pray next to the Kotel according to their manner, like all legal rights, is not an unlimited right. It is a right that demands - like any other legal right - that we measure and weigh against other rights which are also worthy of safeguarding. Therfore, we msut do what is in our power to minimize the offense that other mitzvah observers feel regarding WOW's prayers, and in this way to also deter serious incidents between the warring camps. And in the words of Pres. Shamgar in the second decision (ibid. 355):

> I think we must continue to seek other practical ways, according to which every person who wished to turn to his Creator in prayer should be permitted to do so in his style and manner, so long as in so doing there is no actual offense to the prayers of others. The legal starting point is therefore the current situation. But we should not close the door in the face of the implementation of the sincere rights of anyone who wishes to pray according to their custom...

In order to attempt to include these as well as those, I think that for a little while it is appropriate for WOW to pray according to their custom at the section of the Kotel in the area of "Robinson's Arch" as long as the area will be made proper ("kosher") and appropriate for people to enter and stay there. As we have stated - and have seen with our own eyes - the physical condition of the area today does not allow for proper prayer, and the worshiper cannot even touch the kotel as people do who pray near the Kotel. The necessary conclusion is that we cannot see "Robinson's Arch" in its present condition as an area that is appropriate for prayer. But if the area will be fixed up in the proper and required way it will be possible to see it as an alternative to the Kotel Plaza for prayer. And therefore if the government will prepare "Robinson's Arch" - in the appropriate and required way - within 12 months from today, then WOW will be able to pray according to their custom in that place. When I say that it is the government's responsibility to prepare the place " in the appropriate and required way" I mean, among other matters, to establish appropriate security measures and to prepare easy and safe access to the prayer area and to the kotel itself.

48. And if the area will not be prepared - within 12 months - in the appropriate and required way, and if an arrangement acceptable to the two litigants will not be found, it will be the government's obligation to set up an arrangement following the guidelines of Pres. Shamgar in the first decision and the guidelines of the court in the second decision. In other words: it is the government's responsibility to set up appropriate arrangements and conditions according to which WOW may implement their right to prayer according to their custom at the Kotel Plaza.

The Kotel Plaza is a broad area, and with a little bit of good will the government will be able to mete out to WOW a small area for their prayer according to their custom. WOW do not demand much. They are ready to be satisfied with a little; for example ; prayer for one hour, once a month, on Rosh Chodesh (except for Rosh Chodesh Tishrei) all together 11 hours a year (see the second decision 355c). The government can make arrangement for this little bit. I will add and repeat words from the court in the second decision - and I will advocate that we adopt these words -that the government's establishing appropriate arrangements and conditions only pertains to concrete conditions that will enable the petitioners to pray at the Kotel Plaza according to their custom - like the place and times that they can pray according to their custom - with minimal offense , as much as is possible, to the feelings of other worshippers and with the necessary security requirements.

A government is created in order to govern that is why it is called government, and it is its legal obligation to find an appropriate way to enable WOW to actualize their prayer in good faith , according to their custom, at the Kotel Plaza.

EPILOGUE

49. The Second Temple was destroyed and went up in flames in 70 CE. Only fragments remained, only a few. Since then, for over 1900 years, those fragments were held hostage by foreigners. The Jews were able to be in their holy places as short term visitors, as people who needed permission. On the 28th of Iyar, 1967, June 7, the Kotel was liberated - the remnant of the outer wall of the Temple - from the foreigners who held it. Not by itself was the Kotel liberated from those who held it hostage. There were the paratroopers, paratroopers of the Israeli army who liberated it from the oppression of foreigners. Since the liberation we are at home in this remnant of the holy Temple. These paratroopers who liberated the Kotel, some were shomrei mitzvot and some were not shomrei mitzvot. And even the shomrei mitzvot among them did not come from the same place. But they were all messengers of the people of Israel. Of all of the people of Israel. When that war ended - and actually immediately after the Kotel was liberated from those who held it prisoner - the paratroopers fulfilled their responsibility and handed over to the people of Israel the precious deposit that they held which was bought with blood. The Kotel was given to all of the people of Israel, not only to one part of it. And all of the people of Israel - not only one part of it - acquired a share of the Kotel. "Just as the Temple Mount, and the Temple that rested upon it, symbolized the singular religious world and the national independence of the people of Israel, so too did the Kotel symbolize the remnant of our Temple that was destroyed, the holiest place to the people of Israel and its yearning for the return of its national state independence." So wrote chief justice Elon in the first decision (ibid 333) . And so it is. The Kotel belongs to all of the people of Israel, not only to one part of it.

CONCLUSION

50. Conclusion: I will suggest to my colleagues that we decide according to paragraphs 47 and 48 above.
And with the prayer of hope of the Psalmist we will conclude our words (Psalm 122:6-7)

> Seek the peace of Jerusalem, they shall prosper that love thee
> Peace be within thy walls and prosperity within thy palaces

Signed: Judge Chessin

President A. Barak:

I agree with the decision of my colleague Judge M. Chessin.

The Deputy Chief Justice S. Levine:

I would reject the appeal with no limitation, as the time to give a final decision has arrived . I see no room to direct, not according to compromise, to prepare Robinson's Arch, which today serves as an archeological garden special and unique of all its kind, as a prayer space against the opinion of the Antiquities Department..

Judge T. Ohr:

I agree with the decision of my colleague Judge M. Chessin.

Judge A. Mazza

Like my honorable colleague, the Deputy Chief Justice, I too think that the appeal should be rejected without any additional conditions. The right of WOW to pray according to their custom at the Kotel Plaza has been acknowledged , according to the decision of the majority of judges, in the decision given in their first lawsuit (bagatz 257/89 Hoffman v the administrator of the Kotel p'd 48 (1) 265), and was again acknowledged - this time with a unanimous decision - in the lawsuit which is the subject of this appeal (Bagatz 3358/95 Hoffman v Director General of the Office of the Prime Minister, p"d 54 (2) 345.). Even my colleague Justice Chessin, whose opinion regarding the rights of WOW is accepted by most of the judges in this appeal, does not doubt the justice of said decision. Despite this he suggests intervening in the nature of the remedy which was granted WOW in the decision which is the subject of this appeal, in such a way that they will be able to actualize their right to pray according to their custom at the Kotel Plaza only if the plaintiffs will not prepare - and as long as they do not prepare - the area of "Robinson's Arch" as an alternative prayer site. However, when discussing this area, which serves today as an archeological garden worthy of its name, my colleague admits, that "in the collective and individual conciousness of the Jewish people this section of the western wall does not have the same level of holiness and uniqueness as the section of the western wall that is called the Kotel." Despite this, my colleague suggests considering this area (as long as it will really be prepared to serve as a prayer area) as an alternative that WOW must be satisfied with and at least at this time forgo implementing their recognized right to pray according to their custom at the Kotel Plaza. This condition Judge Chessin suggests adding to the decision, according to his words, because "we must do all in our power to minimize the offense that other Mitzva observers feel about the manner of WOW's prayers, and thereby to also prevent serious occurrences in the conflict between the opposing camps".

As for this suggestion, which, with all due respect, contains within it the eradication of the substance of the recognized rights of WOW, I cannot agree. As we have already pointed out in the decision subject of this appeal, "The possibility that the rights (of WOW) to pray according to their custom at the Kotel Plaza may provoke violent reactions on the part of groups whose tolerance towards others is restricted to themselves, has already been taken into account when the court gave its decision in the first lawsuit." Even more: even when arriving at the decision subject of this appeal , we were careful to point out that it is the government's obligation to determine arrangements and conditions, such as the location and the times when WOW can actualize their right to pray at the Kotel Plaza. 'While lessening the offense to the sensibilities of other worshipers and with setting up the necessary security arrangements. " It is important to emphasize that the arrangements that the government is obligated to establish were set up to enable WOW to implement their right to pray at THE KOTEL PLAZA , as distinguished from NEAR THE KOTEL.
As is known, the Kotel Plaza is spread out over a wide area. The part of the area that is joined to the Western Wall and clearly separated from the more distant sections of the plaza is where most worshipers gather. It is the government's obligation to set up arrangements that will enable WOW to implement their right to pray - about 11 hours a year in all - in the location that will be found to be appropriate for this in the Kotel Plaza, while giving appropriate and serious consideration to the sensibilities of all the other worshipers. This language reflects the right balance between the need to enable WOW to pray according to their custom and between the need to limit as much as is possible the offense that will be caused to the feelings of other mitzvah observers. Intervention in the substance of the remedy granted to WOW in the decision subject of this appeal will violate the proper balance.

My opinion is, therefore, to reject the appeal and to impose a deadline within which the government will set up arrangements which they have been directed to do under the decision subject of this appeal.

Judge Mazza

Justice T. Strassburg - Cohen

My opinion was and still is that we should enable WOW to actualize their right to prayer according to their custom at the Kotel Plaza and the government must enable this implementation by setting up appropriate conditions, as was decided in our decision of bagatz 3358/95. Therefore, I join the stand of my colleague, vice president S. Levine and A. Mazza, according to which the appeal should be rejected. With this, I would greet favorably any compromise between the interested parties, that is accepted by all.

Judge Strassburg-Cohen

Judge Y. Tirkel

1. Like my respected colleague M. Chessin, I too think that the choice of "Robinson's Arch" as a prayer space for the respondents [who attained the title "neshot haKotel" – Y.T.) is the right solution, the appropriate and balanced [solution] to the conflict brought before us; but, in my opinion, we should not advance this solution "on condition," as my colleague suggested, but as a permanent solution. My way is not his way. If my opinion would be accepted I would nullify the injunction that this court gave (the honorable Justice A. Mazza, the honorable T. Stassburg - Cohen and the honorable Justice D. Beinish) in bagatz 3358/95 Anat Hoffman et al vs. the Director General of the Office of the Prime Minister et al, P.D.54 (2) 345 (from now on, known as "the second decision") which instructed the government to "arrange the appropriate arrangements and conditions within which the plaintiffs (the defendents in the present appeal) to actualize their right to pray according to their custom at the Kotel Plaza". Certainly, the solution of "Robinson's Arch" remains, that the committee and the Neeman commission suggested. As it seems, the appeal before us, is justified – in "the law" in its simple and literal form - for reasons of law and not only for reasons of the laws of prayer.

NON-INTERVENTION IN ADMINISTRATIVE DECISIONS

2. I will begin with the initial concepts. The disrection granted to the administrative branch is the power to choose between different possible solutions. The rule is that the court should not insert its discretion in lieu of the discretion of the administrative department upon whom has fallen the obligation to decide this matter. So it is stated:

> "One thing is beyond any doubt , and that is - that the court will not attempt to put its discretion in place of the discretion of the authorized department and should not force its opinion on those who the lawmaker intended to rely on their wisdom and reasoning, and on their knowledge and experience of the reality; in short - upon their discretion which are based upon knowledge of the true situation in all its aspects and conditions —" (words of Justice Berenson in Civil Appeal 311/57, Jerusalem vs. Dizingoff , P.D. 13 (2), 1026, 1039)

It is also said , among other things:

> "Discretion is granted to the administrative department...so that it can fulfill its many sided role which changes from time to time, and which are not given to an exact determination from the outset, therefore it has a high degree of freedom. This freedom enables the department to take into account the condition of every matter when it appears before it, and to find the appropriate solution. In other words: decision making means freedom of choice between different possible solutions, or the choice given to the administrative department, and since it has authority to choose and select the appropriate solution according to its understanding, the court should not interfere in the matter only because it would have chosen a different solution. This kind of intervention is tantamount to negating the discretion of the administrative department and transferring it to the court...." (Words of Justice Zussman in D.N. 16/61, Registrar of Corporations vs. Mansour Toufik Kardush, P.D. 16, 1209, 1215. See also words of Justice Landau Bagatz, Richard Weiss vs. Chair and Members, Legal Council, P.D. 10, 1592,

> 1595, and words of Justice Vinograd, Bagatz 636/86, Moshav Nahlat Jabotinsky et al vs. Minister of Agriculture, PD. 41 (2), 701, 708)

At the base of this rule stands the a principle of separation of powers, "according to which the authority of deciding matters concerning carrying out and administering remains - except for extreme situations - in the hands of the executive branch, and the judicial branch restricts itself to judicial review of the constitutionality of the executive's decision" (see Har Zahav, Israeli Administrative Law , tshn"z, p. 436). Despite this, there were some occasions when the court had to intervene in the discretion of the administrative branch: among them : the obligation to work within the rule of law: the obligation to refrain from discrimination and to adhere to equality; the obligation to exercise discretion reasonably; the obligation to act appropriately and not arbitrarily; the obligation not to act on the basis of improper considerations or for improper purposes. It is stated:

> "It seems to me, that in this matter, the normative framework concerning any administrative discretion, applies also to this matter. The accepted rules are reasonableness, fairness, good faith, absence of arbitrariness and discrimination and the like which apply to the use of all administrative discretion, and which apply also here." (Words of Justice [as he was then called] A. Barak in bagatz 297/82 Berger et al vs. the Minister of the Interior, P.D. 37 (3), 29, 34)

Did the government, in its decision to set aside Robinson's Arch for the defendants, act within the discretion granted to it? Does one of the conditions that justify intervention in the decision apply here? And - is it necessary to instruct the government to make arrangements and conditions according to the order given in the second decision?

EXERCISING DISCRETION

3. As we come to answer these questions we will first give our opinion on some of the evolutions of this matter. In Bagatz 257/89, 2410/90 Anat Hoffman et al v the Administrator of the Kotel et al; Susan Alter et al v. the Minister of Religion, et al; P.D. 48 (2) 265; ("the first decision") - upon which this court was asked (the honorable Judge M. Shamgar, Justice M. Elon, Justice S. Levine) for the first time in the matter before us - "it was the majority opinion to reject the lawsuits, in contingent on the suggestion in the decision of the head of the court - to consider appointing a committee that will continue to examine the issue in depth in order to arrive at a solution that will preserve freedom of access to the kotel and will limit offending the sensitivities of the worshippers."

Following the first decision and according to the suggestion of Pres. Shamgar, the government decided , on 5/17/94, to appoint a Directors' General commission that was asked to "suggest a possible solution that would preserve the freedom of access to the Western wall and freedom of praying in the Plaza, while limiting the offence to the sensitivities of those who pray in that place." (to be known as "The Directors' General Commission") The Directors' General Commission suggested offering the plaintiffs an appropriate alternate site, where they can

actualize their goal and pray according to their custom, and this in two places within the archeological gardens - 'the steps of the Huldah gate'and the south western corner of the western wall, called Robinson's Arch. The proposals of the Directors' General Commission were placed on the governments table on 4/2/96. On the day of 4/21/96 the government appointed a ministerial committee that would "examine the proposals of the Directors' General Commission and how to implement them and to decide in this matter on behalf of the government" (called "the ministerial committee "). On the day of 6/2/97, the ministerial committee decided to adopt the proposals of the Directors' General committee. In those days a commission was formed to deal with the problem of conversion (Ne'eman Commission) and it was also asked by the government to deal with the matter of WOW, the defendants before us now.

On the day of 9/23/98, the Ne'eman Commission offered its report whereby they arrived at the conclusion that prayer at Robinson's Arch, which is "kissing and adjoining the Kotel..." is "the most practical alternative to the needs and requests of WOW." The commission emphasized that it arrived at its conclusion after "weighing and balancing the need to find an appropriate prayer site that will fulfill the needs and demands of WOW, and between the important principle according to which it is necessary to avoid offense to the feelings of the general worshippers at the Kotel Plaza and in order not to violate the custom of the site". The conclusion was adopted by the government , as appears in the statement of the appellants according to whom "the conclusions of the Ne'eman commission represent a reasonable balance between the request of the plaintiffs to pray according to their custom at the kotel and between the other relevant considerations." (para. 13 of the defendants' brief, that is the appellants in this instance, prior to the hearing in the second lawsuit).

The Neeman Commission's (NC) decisions was evaluated in the second verdict of the court and is also at the heart of the current deliberations. Of course, the NC reached its decision after investigating and considering other possible prayer sites, after "weighing and balancing" of other factors, and after finding that the most practical solution was the Robinson's Arch (RA) location. The Commission chose, therefore, one solution from among the possible solutions that had been put before it, and which also included the location of the Ezrat Nashim in the Western Wall Plaza. Even if I thought that it was possible to choose a different solution, there is no foundation to say that the NC – and following its lead the government – did not have the authority to choose the solution it chose or that there arise any grounds justifying intervention in the NC's decision. Since the government, therefore, felt it was correct to choose the solution recommended by the NC, the Court dare not substitute its discretion in the place of the NC (or government), neither in invalidating that decision nor by reviewing that decision in the current appeal which is before us as was done in the second verdict.

The NC Decision – Additional reasons for Adopting It

4. According to my colleague Heshin: "The RA site, we all know, is a remnant of the western wall (Homah) of the Temple Mount, just like the Western "Kotel." And no one would deny that in the collective and individual mind of the Jewish people, that section (RA) of the ww (Homah) does not have the same level of holiness as the section called THE Western Kotel, with a double "THE" (heh hay'dee'ah)." I do not accept this view, and not only because my impression is different, but more basically because no Halachic or historic sources were put before us from which one can conclude that the holiness of one section of the Western Kotel

– the Kotel which is in my eyes the entire western wall (Homah) of the Temple Mount – is superior to the holiness of any other section.

Therefore, I find it difficult to agree with his decision that: "If the government were to act to transform the site to an organized prayer site, it might be possible to view it -- though not easily – as somehow, in some way, a continuation of the Kotel Plaza." I am of the opinion that the holiness of a place does not arise from its renovation or preparation of the place, rather it intrinsic to its very self. It should be noted that the RA location serves as a prayer site for the Masorti/Conservative Movement which views it as "The Masorti/Conservative Kotel." (See an announcement of the Masorti/Conservative Movement that was published the newspaper "Kol Ha'ir on 6/16/00 which was attached as Exhibit "B" in the written summations presented by the petitioners, as well as the letter to the president of the Masorti Movement from Isaac Herzog Esq., then the Government Mazkir, which was attached as Exhibit "A" to the written summaries presented by the petitioners.)

5. It is noteworthy, that according to the recommendation of the NC, the rights of the respondents - who claim that their custom is "orthodox Custom (minhag)" – to approach the Ezrat Nashim in the Kotel Plaza will be protected, including their right to pray there according to the custom of the place. The only limitation on the respondents' prayers there will be with regard to their custom of praying "group prayer, wrapped in tallitot, carrying a Sefer Torah and reading in it" : Moreover that custom they will be able to carry out in the RA location, which is a continuation of the Western Kotel. The respondents will have the right, therefore, to carry out all of their prayer customs, part of them in the prayer plaza opposite the Western Kotel and part in the "RA." Also for this reason the solution chosen by the NC and adopted by the government is suitable, worthy and balanced.

This decision does not contradict the statements of President Shamgar in the first decision in which he said: "I suggest to the government to consider appointing a committee that examine this topic in depth in order to reach a solution that will establish freedom of access to the Kotel and will minimize offending the feelings of the worshipers." (my emphasis, Y.T.) I doubt that the intention of President Shamgar in those quoted words was to determine that the respondents, Neshot Hakotel, has a right to pray in the Plaza of the Western Kotel -- specifically in the narrow sense, which would not include the RA location – and particularly (davka) according to their custom. Similarly his (Shamgar's) intent can be gleaned from the fact that in contrast to the position of Judge (his title then) S. Levine in the first verdict – who wanted to issue a verdict that recognized the right of Neshot Hakotel " to pray in the Kotel Plaza while wrapped in Tallitot with a Sefer Torah in hand", President Shamgar expressed himself with the term "freedom of access to the Kotel" and no more. The NC's decision promises, therefore, both the respondents' freedom of access and right to pray, as per President Shamgar's recommendation, though partially limiting their prayer custom to "part" of the Western Kotel which is the RA location. In this there is no justification for intervention.

Mishpat Shalom

6. In concluding, a few word about Darkhei shalom, peaceful ways. It say in the tractate Derekh Eretz Zuta, chapter of Shalom: Teman teninan Rashbag says, " The existence of the

world stands on three things, the law(din), the truth and the peace." R. Muna says, "And the three are one. If law is done, then truth is done, then peace is done. And all three were stated in on verse, as it is written (Zechariah 8) Decide truth, judgment and peace in your gates. Every place where there is judgment there is peace…." The judgment which the government rendered in adopting the chosen solution is judgment and peace.

Conclusion
If my opinion had prevailed, we would have accepted the appeal, voided the order that the Court gave in the second verdict and decreed that since the government adopted the decision of the NC by choosing RA as the prayer site for the respondents, the government fulfilled its responsibilities. However, since my colleague Judge Heshin arrived in his way, which is the way of compromise, at the decision that " it is worthy (appropriate" for Neshot Hakotel to pray according to their custom at the Western Kotel at the RA location," I concur in my opinion to his at the concluding section of paragraph 47 of his decision.
The first installment I sent was the end of Judge Tirkel's opinion.

Judge D. Beinish

I join the opinion of my colleague S. Levine, Deputy President of the Court, and the Judges A Matza and T. Stasssberg-Cohen, who hold that the petition is to be denied. I have not changed my opinion that Neshot Hakotel have the right to pray according to their custom in Kotel Plaza and that the government is obligated to establish the arrangements and conditions that will minimize, to the extent possible, offending the feelings of other worshippers, concerning regard to suitable location, suitable scheduling and suitable security arrangements.

Signature of Beinish

Judge Englard

I disagree with my judicial colleagues, the majority, by every means of disagreement. It is not a narrow disagreement but an across-the-board disagreement. Starting from the interpretation of the Halachic p'sak that was "paskined," , so to speak, in verdict in the first phase of this case, Bagatz 257/89, 2410/90 - Hoffman et al. V. the Memuneh of the western Kotel et al. , P'D 48(2) 265 (referred to from hereon as "phase one") and ending with the main core of the approach that was accepted in the opinion of the Court in the second phase which is Bagatz 3358/95 Hoffman v. the Prime Minister's Office P"D 54(2) 245 (referred to from hereon as "phase two), the subject of this appeal.

1. I will begin with my differing understanding of the Halachah that was Paskined in the first phase. My colleague A Matza attempted to deduce from the three different opinions, that were given in the first phase, a majority opinion of the Halachah – that would then give binding guidance – that recognizes the fundamental right of the petitioners to pray according to their custom in the Western Kotel Plaza. That is the trouble; this attempt, which revolved around President Shamgar's opinion, is very problematic since from a legal point of view the only outcome of the p'sak din was the denial of the petitioners/plaintiff's petition , pending the

government's considering the appointment of a commission. Therefore, the balance of President Shamgar's remarks, be their meaning what they may be, were nothing but peripheral, and have no legally binding effect. And indeed, President Shamgar determined explicitly at the end of his statement that it was his opinion that "a decision should not be made with regard to this issue before us and this point in time, in a way that an average legal dispute is decided." And he adds, "the gates of the Court are always open, but of course it is necessary first to seek other available means." With these remarks as background, I cannot agree with the Court's assumption in the second phase that the commissions that dealt with this issue "slipped into concepts that that were rejected by the majority of judges in the first phase." More than that, as Judge Shamgar stated, in the context of the search for practical ways by which every person seeking to turn to his creator in prayer would be able to do so according to his style and way, **provided that it not constitute an offense to the realization of other worshippers' prayers**" (ibid. page 335 5-6, no emphasis in the original). Therefore, even according to the standard of "the majority opinion", it is wrong to attack the committees that investigated and found that the prayer in way and version of the petitioners offends in a very real way the prayers of others, and, therefore, they proposed what they proposed. It should be pointed out with the preservation of the custom of the place, there is no fundamental denial of approaching and praying next to the Kotel. The denial is with regard to the external form of worship, and to this I will return in the rest of my opinion. I will be content with one remark: It is a condition agreed to by all that the right to pray must be in good faith (Shamgar, first phase, page 335[5-6]; Levine, ibid., page 357[3]; Matza second phase, page 363 [4]. And now there are those who believe that the petitioners form of prayer is a form of "provokatzia" or "war" to attain ideological goals, and the Western Wall is not the proper place to carry this on.(Elon 329, 350) And this question was discerned by the Court in the first phase. From all that has been said, from my point of view, there is no legal basis for this Court's assumption that the commissions that dealt with the issue of the petition following phase one did not fulfill the responsibility imposed on them according to the guidelines of the pesak din. No such guidelines existed, and therefore, for that reason alone, the verdict regarding the claim in this appeal should be in favor of the appellant.

2. But, it is clear that formal reasoning alone is insufficient to conclude the deliberation of this matter. Because after all, behind the formal reliance on the verdict in the first phase stands a substantive point of view on this issue that guided my colleagues in the second phase, a point of view that fundamentally adopted the opinion of my colleague Judge S. Levine in the first phase, and thus rejecting all of the point of view of the Deputy President M. Elon. This calls for, therefore, on me to address the substantive approach that was expressed in the second phase. I will say at the outset that this approach is very problematic in my eyes because of its shaky legal basis. The questions are many, and I did not find in the opinions of my colleagues, Judge S. Levine in the first phase, A. Matza in the second phase, and M. Heshin in this petition, a good answer to them. I will deal with the main points on these questions in brief.

3. The first fundamental issue dealt with the general jurisdiction of this Court to deal with the topic of freedom of worship in the Holy Places. This issue was raised and decided, in a brief fashion, in the first phase by the Deputy President M. Elon (ibid., pages 297-298).. It should be noted that the claim of lack of jurisdiction was raised not by the government but by other respondents, and thus the Court says there in the words of Deputy President Elon:

Devar Hamelekh with regard to the Holy Sites does not negate the

> authority of this Court to rule on the preservation of public order and the prevention of violent acts, as was stated in the statute and regulations of the Preservation of Holy Sites. With regard to nationalist groups (Bagatz 222/68, PD 24) 141 (2) The majority opinion is that Devar Hamelekh negates the authority of the Court to rule with regard to freedom of worship at the Holy Sites, but it does not negate the authority to rule with regard to freedom of access to the Holy Sites, the obligations to safeguard against acts desecrating the Holy Sites, and the obligation to protect the feelings of the members of religions with regard to their Holy Sites, which the regulations we are considering deal with. The issue in the petition is freedom of access for the petitioners to the Western Kotel, the danger of desecration of the Site, and offending the feelings of worshippers. And the Court does have jurisdiction on the issues of the petition.

It should be pointed out that Judge Levine expressed his agreement with this opinion with regard to the jurisdiction of the Court with regard to ruling on the issue of the petition. (ibid., page [B] 356)

4. That is the trouble, this conclusion with regard to the authority of the Court, with the instructions of the King's Order in Council as background and the majority opinion in Bagatz 222/68, H'M 15/69 Nationalist Groups Incorporated et al v. The Minister of Police, P'D 24(2) 141 (hereafter the Nationalist Groups matter) does not stand up to criticism. The issue being deliberated here directly involves freedom of worship and not freedom of access or criminal offenses against the Holy Places. As was mentioned, no one is blocking the petitioners from approaching to pray close to the Kotel. Rather the only denial is in the matter of their outward style of worship. A dispute like this was caught, in my opinion by the instructions of the King's Order in Council, and this is also in accord with the limitations that were set the President S. Agranat in Nationalist Group matter. It should be noted that the majority Halachah in the Nationalist Groups matter is accepted by this Court. Likewise as it comes up in Bagatz 4185/90 Temple Mount Faithful Inc. v. The Att. General et al. P'D 47(5) 221 page 282:

> > And so, this too was decided by this Court that the authority to arrange the realization of the right of worship is granted to the executive and not to the judiciary, for this is what is declared in section 2 of the King's Order in Council about Israel (the Holy Places), 1924 as was explained in the matter of Nationalist Groups above.

It is true that the litigants in the matter before us did not raise this claim, but since we are dealing with substantive jurisdiction, the Court is not dependent on them. The Court is charged to raise this issue on its own initiative the question of lack of substantive jurisdiction because this question reaches to the root of the juridical status and the force of its verdict. As is known, the agreement of the parties cannot cure a lack of substantive jurisdiction. It is likely that there is a need to look again at the majority opinion in the matter of Nationalist Groups. But as long as the precedent set is not nullified, the authority to make arrangements for worship in the Holy Places, including the Kotel Plaza, is given solely to the executive. In order to concretize this, would it

enter the mind of the Court to intervene in the arrangement of worship of the various Christian groups in the Church of the Holy Sepulcher, in the process of changing the status Quo!? Is it not self-evident that according the King's Order in Council which was mentioned, a controversy like this is not adjudicable?!

5. For the sake of continuing with the case, I will assume that it is possible to overcome this problem of lack of authority, following the approach taken by this Court in the two matters mentioned above. That is to say that I will work under the assumption that it is possible to fit this matter before us into the provisions of the Law of Preservation of the Holy Sites and the Basic Law: Jerusalem, the capital of Israel. My colleague S. Levine stated in the first phase his perspective on the meaning of the Law of Preservation and the regulations that were promulgated under it. His point of view was adopted in-full -- so it seems – in the second phase. I will cite first the words of my colleague S. Levine with regard to the Law of Safeguarding the Holy Places (ibid., pages 356-357):

    a. In my opinion we should not make a determination on the matter of this petition only on the basis of Halachic concerns. After all it is clear that the Law of Preservation of Holy Sites of TSKZ-1967 (Hereafter the Law) is a secular law. It takes into account the concerns of members of the relevant religions, including the concerns of the chief rabbis(see paragraph 4), though not only those concerns, and the terms included in it should be interpreted according to the common denominator which is collectively held by the Jewish community as a whole. Consequently, the interpretation of the terms "hilul" (desecration) "offensive" and "something liable to offend the feelings (of the members of the religions) with regard to those Holy Sites" in the first paragraph of the aforementioned law, should be an interpretation that will give expression to, on the one hand, freedom of worship and religion, as is accepted in a democratic society and is "tolerated", and on the other hand, conserving the interest in public order and offenses to others that are "intolerable" in that society.

    b. There is no doubt that the Western Kotel (and its plaza) have been consecrated by the people of Israel for generations as a religious site and a prayer site. Yet at the same time it has acquired a symbolic national meaning as the only historic remnant of the walls of the Temple, a symbol of the monarchy (sovereignty) of Israel for which the people of the house of Israel have longed for countless generations. Given these circumstances, the fact that the Kotel serves as a place of prayer is not an inescapable determining factor with regard to limiting the range of activities permitted there. In this sense, I am not ready to accept as a given that with regard to the Law one must view the Western Kotel with regard to every matter as a "synagogue" in which all activity

conducted there is governed
exclusively by the Halachah that would apply to a synagogue.

c. There are two central conclusions that flow from the above.
One - with regard to freedom of worship at the Kotel, and
the other – with regard to maintaining other types of activities
of a suitable character there. With regard to both of these types of
issues, we should recognize the authority in principle for
activities as long as nothing in those activities constitutes a
"desecration",
"some other type of offense" or "offense to the feelings" in the
sense that I have already mentioned above. With regard to this – in
my opinion --
it is not productive to use the broadest common denominator,
in the sense that my respected colleague did. Thus, for
example, even if there are those who think that a certain style
of prayer is strictly forbidden according to Halachah or that an
an activity of nationalist character at the Kotel Site is like thorns in
their eyes,
this fact, in and of itself is not sufficient to justify imposing a
ban on said type of activity. For me, the common denominator
that should be applied in the matter before us – and I agree that
it is possible to make use of this type of standard -
it is the common denominator of all groups and people who
strive in good faith for the opening of the Kotel site and its
plaza whether for prayer needs or other legitimate goals. If
one does not take this position, you find yourself giving as
exclusive monopoly to one view of freedom of
of expression over another, with the result that the rights to
freedom of worship and expression suffer impairment.

Of course, this point of view was adopted by the Court in the second phase, see there, page 352(5).

6. Before I deal with the basic viewpoint of the Court mentioned above with regard to the meaning of the Law of Preservation of the Holy Sites and its interpretation, it is appropriate to mention as well Regulation 2(a) (1a) to the Regulations for the Preservation of Jewish Holy Sites, TSMA-1981, that was added in the wake of the dispute which is the subject of this petition, and here is the language:

Forbidden Activities
In the confines of the Holy Sites….It is forbidden: to conduct a

> religious ceremony that is not according to the custom of the place,
> which offends the feelings of the praying public with regard to the place.

This Court in the first phase agreed that this regulation was not beyond (outside) the bounds of the law. See the words of Judge S. Levine, ibid., page 357(E). With this, Judge S. Levine elucidated with regard to the interpretation of this amendment that:

> But as for me, the concept "custom of the place" (minhag hamakom) need not be interpreted exclusively according to Halachah or the existing situation. The nature of custom is that it changes in accordion with changing times, and within it one must allow expression of a pluralistic and tolerant approach with regard to the beliefs and customs of others, within the same limits which I mentioned above.

7. In my opinion, the interpretive approach that was accepted in the thinking of the Court is incorrect. The idea that because of the secular nature of Law of Preservation of Holy Sites and of the regulations passed in connection with it one should also interpret terms appearing in them according to secular standards – this idea does not stand up under scrutiny. And this we must be clear on: All of the laws of the Knesset are, by their very nature, secular norms because the Knesset is not a religious institution. Therefore, one cannot conclude anything from the nature of Knesset laws with regard to interpreting concepts that appear in those laws. There is no fundamental barrier to a secular law referring to a religious entity. And indeed this is what is done. To give one example from among many, in the matter of the Law of Judicial Authority of Rabbinical Courts (marriage and divorce)TSYG-1953. No one disputes that the term "Din Torah" in the second paragraph of the law, refers to the body of Jewish Halachah. The fact that the Law of Judicial Authority of Rabbinical Courts is a secular law does not make any difference with regard to the legislature's intention to turn to the body of religious law.
8. From what has been said it follows that the secular nature of the Law of Preservation of Holy Sites says nothing about the approach for interpreting its terms or those of any regulations that were promulgated in accordance with it. Everything depends on the intent of the legislature in using these terms. On the contrary, it is well established that terms taken from the religious sector should be interpreted consistent with that sector. More than that, the idea of sanctity – in connection with certain places – is clearly a religious concept, which has no real meaning in the secular world. Compare on this matter the classic book R. Otto, Das Heilige (Breslau, 1917: Id. The Idea of the Holy (trans. J.W. Harvey, Oxford, 1923, 2nd ed. 1950). Therefore, I cannot accept the general approach of this Court, that assigned, in the context of The Law of Preservation of Holy Sites, a nationalistic meaning to the Western Kotel. Of course, I am not disputing the national significance that may attach to the Holy Sites, but that was not the aim of the Law, which was clearly focused on the holy stature of those places.
9. The result is that the terms taken from the world of religion, like "hilul" (desecration) should be interpreted first and foremost according to their religious meaning. This is obvious in Regulation 2(1a) of the Preservation Regulations, that forbids "the desecration (hilul) of the Sabbath and holidays of Israel." And is there any room for doubt that the intention is to defer to Jewish Halachah to define what "desecration (hilul) of the Sabbath and holidays of Israel" means?!

10. I disagree in every possible way with the idea that was expressed by my colleague Judge S. Levine in the first phase, that he is not "prepared to accept at the outset and as self-evident that with regard to the Law the Western Kotel should be for all purposes regarded as a synagogue, where all activities that take place must be governed by all of the Halachic laws of a synagogues and no other. ibid., page 356(E) The Law of Preservation of Holy Sites and its regulations, when they speak of the Western Kotel and its plaza as holy places, must have intended to regard the Western Kotel as a synagogue. For this is the status, according to Halachah, that provided that place with its sanctity. This concept follows from the opinion of Deputy President Justice M. Elon, who elaborated on this point in the first phase and concluded that the law of the Kotel Plaza is the law of a synagogue. See ibid., pages 318-319, where among the rest are quoted the worlds of the Rishon Lezion, Rabbi Ovadiah Yosef:

> That place certainly can be no less than a synagogue, which is a small beit mikdash. Likewise with regard to the Halachot of a synagogue … certainly everything that is customary there should apply to the Western Kotel. One must accord it at least the stringency of a synagogue and a small beit mikdash. (The Western Kotel and Its Environs in " Western Kotel, Jerusalem, TSLV, pages 9-13.

11. With these remarks as background, it must be concluded that this Court's concept of the meaning of the term "religious ceremony that is not according to the custom of the place" is fundamentally flawed. It clearly emerges from the words of Deputy President M. Elon's remarks in the first phase that the term "custom of the place" is unquestionably a Halachic term, The purpose of "the custom of the place' is to express the existence of traditional prayer services which are specific to a particular place. Therefore, there is no basis for the Court's view that "within its scope expression should be given to a pluralistic tolerant approach and to the opinions and customs of others." In my opinion, this interpretation absolutely contradicts both the intention of the formulator of the regulations and the language of the regulation, and therefore one cannot find any legal basis for it (this interpretation).
12. Working with the assumption that the regulation was promulgated within the bounds of the law – an assumption which is accepted by me and this Court – the decision to give the petition which is the subject of this appeal the status of an absolute order cannot stand. Moreover: according to the halachic decisions which were cited in Deputy President Menachem Elon's opinion, which were handed down by the Chief Rabbis Abraham Shapira and Mordechai Eliyahu, acceptance of the petitioners' petition constitutes a violation of the holiness and custom of a synagogue. (First lawsuit, pages 328-329, also pp. 319-320). In connection with this the Deputy President Elon wrote (ibid., p. 350):

> Today, the reality is that according to the vast majority of Halachic decisors, including Israel's Chief Rabbis, acceptance of the petitioners' petition ….entails desecration of the prayer site of the Western Wall, which is the holiest site in Halachah and Judaism and for the entire Jewish people.

I ask with amazement, from where does this Court get the authority to contradict these halachic decisions, according to which yielding to the petition constitutes a violation of the terms of paragraph 1 in the Law for Preservation of Holy Sites, which protects the Western Kotel from

desecration?

13. Finally, even if I were to close my eyes to the legal problems which I have enumerated in my opinion, there are also "legs" to the argument that, in light of the Halachic background, granting the petition, which would allow the petitioners to deport themselves according to their mode and custom constitutes an actual offense to the prayers of others. (Shamgar, Phase One p. 355[E]) or an unreasonable offense against the feelings of others. (Levine, ibid., p. 357[E]), which represents an offense also according to the criteria which have been accepted in the opinion of this Court.
14. A marginal comment with regard to the alternate site which was suggested to the petitioners, Robinson's Arch. During the Court's visit to the site, it became apparent that, fundamentally, the site is suitable for conducting prayer near the Kotel. Nevertheless, the antiquities staff expressed opposition to any change at the site, be it the smallest one. The opposition was in connection with a boulder that had fallen from the ancient wall, and according to antiquities people this boulder should not be moved or concealed. I was not persuaded that there is any hindrance to arranging the place so that approaching the Kotel itself will be possible, with only the slightest impact on the fallen boulder. It pains me that I get the impression that in some people's eyes archeological "sanctity" overrides the sanctity of a synagogue.

From all this, if my opinion were to prevail, the petition for an appeal would be granted and this Court's decision in Bagatz 3358/95 would be nullified.

However, since my opinion remains a minority, I agree, at least, to the first section of my colleague Judge Heshin's decision, according to which if the government prepares the RA site – fittingly and as is required – within twelve months of today, then WOW will be permitted to pray in that place according to their custom.

Signature of Englard

We decide by a majority including the President Barak and the Judges Or, Heshin, Tirkel, and Englard, opposing the opinions of the Deputy President Levine and Judges Matza, Strassberg-Cohen and Beinish, as it says in the second part of the 47th paragraph, of Judge Heshin's opinion, in connection with the preparation of the location Robinson's Arch as a prayer site for WOW. And indeed, if the RA site is not prepared as a prayer site for Neshot Hakotel within twelve months from the date of this decision, then our decision by a majority including President Barak, Deputy President Levine and Judges Or, Matza, Heshin, Strassberg-Cohen and Beinish, in opposition to the opinion of Judges Tirkel and
Englard, according to the 48th paragraph of Judge Heshin, that is, the government will be required to make arrangements and create suitable conditions within which Neshot Hakotel will be able to realize their right to pray according to their custom in the Western Kotel Plaza.

In connection with this matter no order for costs has been issued.

Dated: 4 Nissan TSSG, (6.4.2003)

Signatures of the 9 Judges