

Prayer at the Kotel — A Battle Over More than a Mechitza



On January 14th Israel's Supreme Court met for a four-hour session regarding the issue of women's prayer at the Western Wall. The judges sat with an expanded seven justice panel and heard petitions by five plaintiffs whose suits against the State of Israel go to the heart of what constitutes appropriate prayers and proper decorum at the Kotel and its surrounding vicinity. It was the sixth such hearing on this issue to come before the court over the past twenty years, and the first presided over by the Supreme Court's new chief justice Esther Hayut.

In 2016 the Israeli government brokered a deal concerning Robinson's Arch (which is located at the southern part of the Western Wall) with the Reform and Conservative movements, the Women of the Wall, and the Jewish Agency for Israel. This deal provided that the Robinson's Arch area would allow for egalitarian prayer services. In June the Cabinet suspended that deal, and froze it indefinitely. Now that deal is again under deliberation. Some suggest that this expanded panel of justices – usually there are only three judges on a panel – indicate that a landmark ruling is in the offing. Attorney Daniel Robbins isn't convinced.

"The court often expands its panel in cases of large public interest, especially cases of conscience where the decision is based more on the personal convictions of the judge than on the rational legal argument. It makes the court appear to be more "representative" and tends to give the decision more moral authority," Robbins says.

Still, whether this landmark ruling will happen or not, there is no question that the issues the court will be deliberating over the next few months can potentially change the trajectory of Israeli society: Will Israel go the way of progressive egalitarianism or be steeped in traditional Torah values?

Arguments Presented by Women of the Wall and Original Women of the Wall

During the intense hearing, the court heard arguments from the Women of the Wall and their Reform and Conservative backers. They demand that the government honor its commitment to establish an egalitarian prayer place at Robinson's Arch. If denied,

they threatened that they will argue for mixed-gender prayers at the Western Wall, including the right of women to carry and dance with *sifrei Torah*, wear *tallitot* and *tefillin*, be counted in a *minyan*, and other such egalitarian provisos.

Another plaintiff, the splinter group consisting largely of Orthodox feminists that calls itself the Original Women of the Wall (OWOW) is not interested in egalitarian prayers or in moving to Robinson's Arch, a right they already have won. Rather, the OWOW group wants to conduct services at the Western Wall under its own authority, and not that of Rabbi Shmuel Rabinowitz, the official rabbi of the Kotel. "Our position is that no woman should be banished from the Kotel because of her *minhag tefilah*," says OWOW founder Shulamit Magnus. OWOW is challenging Rabbi Rabinowitz's right to have issued a ruling that effectively denies them access to the Kotel's *sifrei Torah*.

Arguing against the Robinson's Arch agreement are religious groups who, based on the opinions of many rabbinic authorities, including the first Chief Rabbi of Israel, Rabbi Avraham Yitzchak Kook and the Lubavitcher Rebbe, Rabbi Menachem Mendel Schneersohn, contend that Robinson's Arch is as holy as the Western Wall. Therefore, this agreement violates halacha, "defiles" the Kotel, and is prohibited by Israeli law. The authority to make such determinations, they claim, lies with the Minister of Justice, who is obligated by law to confer with the Chief Rabbinate.

According to Robbins, who represents one of the religious plaintiffs, the court asked hard and conflicting questions that were aimed at the Reform and Conservative Movements and WOW and OWOW, as well as the Government of Israel. "Any attempt to try to



Yechezkel Moskowitz, founder and director of the Western Wall Defense Fund, speaking at the Ateret Kohanim Dinner.



Sephardic Chief Rabbi of Jerusalem Rabbi Shlomo Amar with Rabbi Dan at Robinson's Arch.

guess what will be their ultimate decision will be futile. Still, there are indications that the court doesn't intend to interfere with what the government is doing, given that it asked that it update them by March as regards to construction plans at Robinson's Arch, where they are investing NIS 19 million. From our perspective, that's good."

Observers believe that WOW's petition to build up Robinson's Arch to the same height as the *Kotel* with signs directing visitors equally to both locations is dead, and that the court will turn down WOW's request for authority over Robinson's Arch or a seat on the Western Wall Heritage Foundation, the public body that manages the *Kotel*. Neither will the Chief Rabbinate's authority over the Western Wall Heritage Foundation be annulled, as WOW also demanded. There was no decision on OWOW's petitions, but when the government agreed to build up Robinson's Arch, it canceled out, by definition, OWOW's aspirations.

Still to be decided is whether the bylaws that govern the main part of the Western Wall apply to the area near Robinson's Arch, and whether Rabbi Rabinowitz's authority also covers that area. "The court asked the government to submit the State's opinion on that matter, and will be the final decider if it's disputed. Whatever the government decides will be disputed by someone," Robbins says.

"By erecting a mechitza, Jews proclaimed this space to be what, in fact, it was, the holiest accessible place for Jewry. It's the mechitza that differentiates us from the other nations."

Loud Voices from Small Groups

Given that the Women of the Wall comprise but a minute fraction of the *Kotel's* annual nine million visitors, why should this group be taken so seriously? Women of the Wall was founded in Jerusalem in December, 1988 at the first International Conference of Jewish Feminists. The organization was the brainchild of Montreal's Norma Joseph and the late *agunah* activist Rivka Haut. "[WOW] is about women who are going outside the bounds of what patriarchal society decided are the boundaries of women's limits," Magnus explains.

Despite its 29-year existence, WOW consists of only a few dozen die-hards, mainly radical left-wingers who rarely pray at Robinson's Arch. OWOW meets every *Rosh Hodesh* at the *Kotel*, and their numbers include only fifty to a hundred women, mainly European tourists responding to Facebook announcements. "They give the appearance of a real public movement, but it isn't," says Robbins.

The numbers, though, don't matter. More important is WOW's underlying agenda, which is to wrest authority away from the Rabbinate, paving the way towards religious pluralism. WOW understands that this can only be achieved by attaining state recognition and funding where it counts most, at Israel's holiest site.

WOW is looking for recognition as a way to also confer legitimacy on the Reform and Conservative movements in Israel, with the hope that this legitimacy will help to attract Israelis to the fold. Currently, there are tens of thousands of Orthodox synagogues in Israel, and perhaps only about 100 Reform and Conservative synagogues combined, according to Robbins. Subsequently, the leadership of the Reform and Conservative movements sees WOW as their one-way ticket towards furthering their progressive agenda in the Holy Land. And they are paying big bucks to make that happen. To date, the Reform and Conservative movements support WOW to the tune of NIS 1 million per year. To further their goals, WOW has recently reconsidered the government's offer of Robinson's Arch,

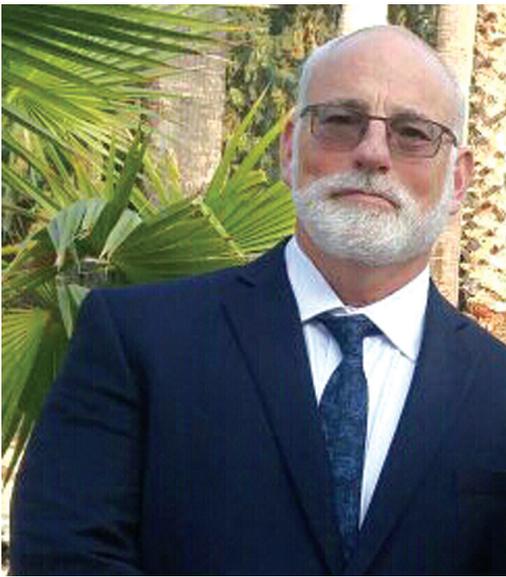
a site WOW Chairman Anat Hoffman had deemed "the back of the bus." In order to make this happen they are willing to sell out their Orthodox sisters, OWOW, whose *raison d'etre* is to attain *tefillah* rights for women at the *Kotel*.

Today, Hoffman, who also chairs the Domari Society of Gypsies in Jerusalem, a member of the Al Quds organization whose website doesn't even acknowledge the Western Wall, waxes poetic about the future possibilities that Robinson's Arch will afford them, should they win their suits. "We will run our plaza in a way that people will be attracted to it. Girls will be invited to have *bat mitzvot* with content and meaning. We will train mothers and grandmothers to have an *Aliyah*, too. We will change how women see themselves in Judaism. If the great vision of all the federations of North America, the two big streams of Jewish life happens, we are looking at a plaza that will be majestic. This will end, I hope, 3,000 years of patriarchy. And will allow us to break the final frontier – the role of women in religion."

One Man's Influence

Seated among the courtroom spectators was a burly, white-haired man with a fuzzy beard. This was Rabbi Matisyahu Hachohen Dan, founder of Ateret Cohanim. Ateret Cohanim is a charitable organization with a yeshiva that is located in the Muslim quarter of the Old City of Jerusalem. Ateret Cohanim redeems old Jewish homes and resettles Jews throughout the Old City and its surroundings. Rabbi Dan may be sitting on the side in the courtroom, but his contributions to these hearings have been highly significant. Protecting the *Kotel's* hallowed grounds is a cause Rabbi Dan has taken on, heart and soul.

About two years ago, the 62-year-old father of eleven was looking at the *haredi* website "Kikar HaShabbat," when a strange notification caught his eye. The notice indicated that the Israeli



Daniel Robbins, representing Betzedek.



Rabbi Dan showcasing old Rabbinic Archives from his personal collection.

government intended to hand over part of the *Kotel* to the Reform and Conservative movements in order to establish an egalitarian prayer area there. Convinced this was a ruse, Rabbi Dan immediately called Agriculture Minister Uri Ariel, whom he knew personally, and was told that the minister was unaware of this development. Rabbi Dan later discovered that the government was pushing this plan through stealthily. Rabbi Dan immediately grasped that the plan not only violated the holy site's tradition of gender-segregated prayers, but also gave de-facto recognition to the Reform and Conservative movements. Equally disturbing, this plan was passed without consulting the Chief Rabbis, the gaon Rabbi David Lau and the *Rishon Letzion*, Hacham Yitzchak Yosef. The move was not only illegal, it was unethical. "The government wouldn't have dared alter the ways of worship in a church or a mosque without consulting *their* religious authorities," Rabbi Dan says.

Rabbi Dan speaks authoritatively on this issue. From his years of involvement with *HaKotel Hakatan*, the Small *Kotel*, Rabbi Dan became familiar with the laws and regulations pertaining to the holy places. ("The Small *Kotel*" is the continuation of the "Large *Kotel*" and is located within the Muslim Quarter of the Old City. Ateret Cohanim was involved extensively in advocating for the right of Jews to pray at the *Kotel Hakatan*.) Rabbi Dan put out a public denouncement of the plan [for an egalitarian prayer section at the *Kotel*] in *haredi* circles. This influenced *haredi* ministers to push for the nullification of the plan, which was temporarily frozen at the Prime Minister's request, and by order of the Chief Rabbinate of Israel. A lengthy document detailing the Chief Rabbinate's position on this issue was submitted to the Supreme Court, which challenged the Court's authority to rule on matters pertaining to religion and holy places.

Historical Documents Support the Tradition of a *Mechitza* at the *Kotel*

Sparked by this unfolding drama, Rabbi Dan further researched and investigated every relevant archive. In the process, he uncovered fascinating historical materials, most of which were never made public. These documents highlighted detailed discussions relating to the religious character of the Western Wall from the 1930s until after the Six-Day War. Who was legally responsible for the Western Wall and its vicinity? Was it considered a national or a religious site? Was the *mechitza* merely a recent add-on that altered the *Kotel* plaza's status to that of a synagogue, or could its existence be traced back hundreds of years? These issues were among many that were

regularly discussed, fought over, and documented. These documents are now before the court.

"The Conservative and Reform are quick to show photos of Jews praying on the Western Wall without a *mechitza* when Jerusalem was under the authority of the Turks," Rabbi Dan says. "But everyone knows that under the Ottomans and the British, Jews didn't exercise political and religious control over the city or the Western Wall. Still, these documents prove that whenever they could, Jews erected a *mechitza*. And even when that wasn't possible, whenever communal prayers were recited, the men and women prayed separately."

A *mechitza* was so important to Palestine's Jews that they were willing to risk their lives to erect one. When Jews put up a *mechitza* at the *Kotel* in 1930 for Yom Kippur, the Grand Mufti of Jerusalem, Mohammad Amin al-Husayni, jumped at the opportunity to instigate a pogrom against them, claiming that they had breached the status quo. This response was not unexpected. Pogroms had been waged against this vulnerable population throughout the 1920s. "The *mechitza* represented more than a halachic requirement; it took on symbolic meaning. By erecting a *mechitza*, Jews proclaimed this space to be what, in fact, it was, the holiest accessible place for Jewry. It's the *mechitza* that differentiates us from the other nations," Rabbi Dan says.

Furthermore, when the British suggested that Jews relinquish their claims to the *Kotel* in return for the right to pray there in accordance with their traditions that included a *mechitza*, some Israeli politicians, concerned for the welfare of their communities, agreed. Fortunately, the chief rabbi did not concur. The price was too high. In an unlikely alliance between *Edah HaCharedis* founder Rav Yosef Chaim Sonnenfeld and Chief Rabbi Avraham Yitzchak Kook, the two together refused to yield the Western Wall to the Muslims. The British then forced the issue in the international courts, which concluded that matters remain as they were, with the exception that all religious ceremonies for Jews taking place at the *Kotel* be placed under the authority of the Chief Rabbinate.

This position was supported by the entire Jewish community in Palestine and abroad, including the head of the US Conservative Movement, Rabbi Porush Cyrus Adler. Rabbi Adler's 1930 opinion was inscribed in his "Memorandum on the *Kotel*" that was presented to the Special Commission of the League of Nations. And in 1967, when the *mechitza* was challenged by the Reform and the Conservatives, these groups were rebuffed by the Ministry of Religious Affairs, which reinforced the rights of the Chief Rabbinate to make that determination, based on British Mandatory Law.



Rabbi Dan with Western Wall Defense Fund Director Yechezkel Moskowitz.



Rabbi Dan being escorted in the Old City in Jerusalem.

The Role of the Chief Rabbinate

Robbins explains. "Until 1948, it was the Chief Rabbinate of Palestine while today it's the Chief Rabbinate of Israel who determines all religious matters. The League of Nations, when they created the Mandate, asserted that the Mandatory government in London had no authority to litigate disputes regarding the holy places, except to keep public order. The Mandatory Law, which was enacted in 1924 and which is called 'The King's Word on the Council in Public Places,' asserts that no secular court in Israel 'should arbitrate or decide any trial or issue relating to the holy sites...' This law remains in effect today."

The government's obligation to consult with the Chief Rabbinate on all matters pertaining to Jewish holy places and customs was further enshrined in the fourth clause of 1967 law entitled "The Preservation of the Holy Sites Law." That law confers responsibility on the Minister of Religious Affairs to protect all holy places from physical abuse as well as spiritual defilement but only after consulting with "representatives of the religions," – the Chief Rabbinate, which the government failed to do in regard Robinson's Arch.

Even so, it's also authoritative Jewish law – halacha – that should weigh heavily, reminds international lawyer Allen Z. Hertz, a former senior advisor in the Privy Council Office serving Canada's Prime Minister, particularly regarding aboriginal issues. "Questions of prayer and pilgrimage are at the very center of aboriginal rights, whether for Jews in *Eretz Yisrael* or for the Native Peoples in Canada. Do we exalt a *goyische* perspective while discounting the universal claims of halacha, which is the always continuing legal system that is probably the oldest in the world?" he cogently asks.

The Supreme Court and Religious Matters

Still, it is on the basis of British Mandatory and Israeli law that Robbins will be arguing his case before the court, although he admits that it won't be easy sailing. When it comes to these matters, one never knows how the court will respond. In the case of the Church of the Holy Sepulcher, there was a very clear decision that the Supreme Court does not have authority to rule on religious matters. "Legally, I don't think there is a basis for any difference because it's clear that the court has to relate to non-Jewish holy places the same way it has to relate to Jewish holy places," Hertz says.

Perhaps in theory. But, when it comes to the *Kotel*, the court has been ambivalent as to where its authority lies. Supreme Court Justice Engelhard, for example, wrote an opinion in 2003 stating that the

court had no authority in this matter, but the other judges remained silent on the issue. In one case a judge changed his mind. "In the 1996 WOW case, Judge Menahem Alon claimed that the court does have the authority to adjudicate, but after he retired, he admitted that he was wrong," Robbins says.

Despite this ambiguity, the courts did adjudicate these suits many times in the past, and in the majority of cases, have ruled in WOW's favor. So, what new arguments will be presented this time that may bring about a different result?

"This time, we are challenging the prime minister's directive to create a prayer place adjacent to the Robinson's Arch for the use of non-religious [Reform and Conservative] groups. That matter was never adjudicated. Today's WOW is different than the group that won the right to pray there in the past. The [1996] court decision concerned women who don't pray mixed and who contended in court that they abide by the laws of Orthodox Judaism, if not by its customs. We contend that these kinds of prayers, as well as certain aspects of WOW prayers, such as '*Birkat kohanut*' and a female *minyan*, are against any possible interpretation of halacha, are actually perceived as mocking halacha and, therefore 'defile' the *Kotel* and are illegal. Even though the Reform and Conservatives were given the right to conduct *bar mitzvah* services at Robinson's Arch, that was a de-facto situation that developed with certain ministers' encouragement, and not from the court's decision.

Rabbi Dan's Activism Pays Off

Robbins greatly credits Rabbi Dan's efforts for these results, so far. "He was personally responsible for the nullification of the roadmap that resulted in bringing this matter before the court. I have no doubt that the court would have backed up WOW and the Reform Jews if there hadn't been a counterweight presented claiming that mixed-gender prayers at the southern part of the Western Wall are a form of 'defilement,' as defined by the Rabbinate."

Meanwhile, Rabbi Dan continues bussing in a thousand men every *Rosh Hodesh* from throughout Israel to counter WOW demonstrations at the *Kotel*. He is also looking to hire top lawyers to continue these legal challenges. If the court does not see that there are real consequences to their decisions, he says, they will vote according to their inclinations, in WOW's favor. To date, Rabbi Dan's expenses have topped over half a million dollars, and continue to dramatically rise. He believes that it is money well spent. After all, what he is fighting for is not only the future standing of the *Kotel*, but the religious character of *Eretz Yisrael* itself.