Claiming Equal Religious Personhood: Women of the Wall's Constitutional Saga

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I. Introduction

The Women of the Wall, known as WoW, are religious Jewish women who wear the ceremonial prayer shawl (*tallit*), as do men; pray from the Torah Scroll, as do men; and pray aloud in a group (*tfila*), as do men. They have called it the three T's: *tallit, Torah, tfila.* I will present here the aspect of their struggle against religious violence and the public veto of their prayer at the site of the Western Wall in Jerusalem. This is a struggle which has led them to appeal four times over the past fifteen years to the Supreme Court, in the last two of which I represented them as counsel. The WoW are committed to redefining their identities as religious women, claiming equality rather than exit as a feminist strategy in confronting the patriarchy of Judaism.[1] Their struggle against silencing at the site of the Western Wall is highly symbolic in its attempt to redefine public space, designated as subject to patriarchal custom by religious authorities. The narrative of the Supreme Court litigation pro-

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[*] This article is an expression of my appreciation and admiration for the WoW. My warmest appreciation goes to Adv. Nira Azriel who was my "sister in law" and to Adv. Jonathan Misheiker who contributed to the struggle during the 10 years in which we fought for the rights of the WoW before the High Court of Justice. I want to thank Trudy Deutsch for her helpful research assistance.

[1] For an anthology of writings of the experiences of the spiritual leaders of the WoW, see *P. Chesler/R. Haut*, Women of the Wall – Claiming Sacred Ground at Judaism's Holy Site, 2003.

vides the material for a unique exploration of the potential and the limits of law in providing a path to equal religious personhood for women.

II. Hermeneutics or Exit – Issues of Identity

The dilemma facing religious feminists in the monotheistic religions – Judaism, Christianity and Islam – is to choose between various levels of hermeneutic reform within existing Orthodoxy, to join another branch of the religion which is more open to feminist reform, to set up their own women's denominations or to exit from the religions to post-biblical or non-biblical spirituality movements, such as Wicca. Each of these strategies has its own complex implications both for the religious identity of the women and for t eir feminist self-realisation. The WoW are part of the new wave of feminist activism struggling for expression through hermeneutic reform strategy within existing Orthodoxy. They are conducting their struggle at the center of the public space and public ritual of Orthodox Judaism, at the Western Wall.

Hermeneutic reform feminists have, since the 1970s, made some headway in Christianity and Judaism, achieving the ordination of women in some branches of Christianity (Lutheran, Episcopal and Protestant) and Judaism (Reform, Reconstructionist and Conservative). However, these successes have not extended to the Orthodox branches of the monotheistic religions. The Orthodox streams of religion in Christianity and Judaism (Roman Catholicism, Eastern Orthodoxy and Orthodox Judaism) have not agreed to ordain women. A woman-led Moslem mixed-sex prayers for the first time on record on March 18th 2005 at Synod House of the Cathedral of St John the Divine in New York; the service was organized by a group of activists, journalists and scholars who hoped to encourage discussion about the centuries-old tradition of reserving the role of prayer leader for men. However the prayer service was held on the Cathedral premises after three mosques refused to host it, and it was subsequently denounced by Moslem clerics, amongst them Sheik Sayed Tantawi of Cairo's Al-Azhar mosque.[2]

The WoW are mostly Orthodox women and all of them, including the few non-Orthodox among them, have chosen to seek equality as women only within the strictures of Orthodox rulings. The WoW seek

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[2] BBC News (18 March 2005), available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4361931.stm.

the chance to pray as equal partners within the Orthodox Jewish tradition and not as silent, passive shadows of men. Nevertheless they do not challenge the entire corpus of Orthodox patriarchality. They have not chosen to pray in mixed prayer groups of men and women but pray separately from men in the *ezrat nashim,* the women's section, at the Wall. Nor do they attempt to pray in a *minyan*, which is a group of at least ten men required for certain prayers, but pray in a group which is not a *minyan* and does not read those prayers whose recital is restricted to a *minyan.* Additionally, they have chosen to emphasise the womanly narrative in Judaism, meeting on *Rosh Hodesh*, the first day of each Hebrew month, which is associated with the monthly celebration of womanhood. The WoW's mode of prayer is not prohibited by the *halakha* (religious Jewish law). It is customary for men but, although it does not violate prohibitions of Jewish halakhic law, it is not regarded as acceptable for women by the great majority of contemporary Orthodox rabbinical authorities or by Israel's Chief Rabbis.[3] Nevertheless, even as regards its acceptability, the WoW's mode of prayer is not unanimously rejected by Orthodox rabbinical authority and each of its elements is fully recognized as acceptable by well-respected Orthodox authorities.[4] Moreover, it is not regarded as prohibited by most modern Orthodox communities outside Israel.[5] In this way, the WoW's prayer is distinguished from the mode of prayer of Reform and Conservative Jews, in which men and women pray together and women may form part of a *minyan*, which is rejected by Orthodox rabbinical authority.

The struggle for the WoW's feminist reading of the Orthodox texts and for women's participation in Orthodox rituals has been conducted in the public space of Judaism and not in a private women's space. It is not in a Women's Church or Jewish synagogue but at the public place most central for Jewish religious sacredness. The choice of this public space is due to the uniqueness of the Western Wall's symbolism for religious Judaism and the spiritual gravitation of the women in the group to it. Orthodox women's prayer, which requires separation from men, was made

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[3] HCJ 257/89 *Anat Hoffman v. Western Wall Commissioner*, 48(2) PD 265 (Hereinafter*: Hoffman I,* 1994). See judgment of Justice Elon, at 349; Expert opinion of Eliav Schochetman submitted to the court in *Hoffman I*, on file with the author.

[4] Expert opinion of Shmuel Shiloh submitted to the court in *Hoffman I*, on file with the author; *A. Weiss*, Women at Prayer – A Halackhic Analysis of Women's Prayer Groups, 1990, 43-56.

[5] *Chesler/Haut* (note 1) *supra*, at xxvii.

possible because they can pray in the *ezrat nashim,* which is women's space in the Plaza of the Western Wall. Their attempts to pray in their mode in *ezrat nashim* at the Western Wall Plaza were met with violence by other Orthodox Jewish worshippers. In an open letter, Judy Labehnson, one of the early members of the WoW, reminisced about their initial encounter with violence and her own decision to abandon the group and leave the Western Wall to the ultra-Orthodox fanatics. Subsequently she regretted her decision to surrender in light of further manifestations of violence and argued that the generality of Jews cannot allow the Wall to be turned into a bastion of ultra-Orthodox intolerance. She talked of her fear that if this should happen, the words of Lamentations might become prophetically true for those Jews in search of a middle path: "How doth the city sit solitary that was full of people – all her beauty so departed."[6]

In their choice of hermeneutics over more radical solutions, feminist religious women are attempting to maintain a hybrid identity, both Orthodox and feminist. By using this strategy they risk rejection by both the Orthodox community and the feminist community, each of whom from its own position is likely to disclaim the validity of the compromises made in order to combine the two identities. As mentioned, Orthodox Jewish, Christian and Moslem religious leaderships have solidly opposed the ordination of women. The Orthodox rejection was made abundantly clear in the case of the WoW and, indeed, not only was there violent opposition from the fanatics but there was condemnation from many establishment religious figures and no vocal support from Orthodox leaders in Israel at all.

From the radical feminist angle, spiritualist or secular, the endeavor to transform monotheism through interpretation seems futile. The radical view is that the core message of the monotheistic religions is hierarchical and patriarchal by definition, and hence there can be no interpretive transformation. Carol Christ, for instance, claims that the Bible's core message is one of intolerance and that its core symbolism makes male domination appear normal and legitimate, a mirroring on earth of male authority on high.[7] Radical religious feminists or indeed secular feminists could wonder what motivates religious feminists to try to square

[6] Letter by *J. Labehnson*, on file with the author.

[7] *C. P. Christ*, The Laughter of Aphrodite: Reflections on a Journey to the Goddess, 1987, 59-60; in *R. M. Gross*, Feminism and Religion – An Introduction (1996). Gross says: "It's too broken to be fixed: the feminist case against theological transformation of traditional religions," at 140-146.

the circle as the WoW are doing. The answer to this may lie in the impossibility for some religious feminists of separating from the spiritual identity of the Orthodox religion in which they were raised. The depth of spiritual conviction has been clear in the WoW: this is their religion, their *tallit*, their Torah and their place in *ezrat nashim.* Also, beyond theological religious identity, there is a question of community and family identity. Exit from the Orthodox community would entail a split from community and family, as regards shared place and form of worship and ritual. It would affect family events such as children's bar mitzvas or marriages. These are heavy prices for religious women to pay, and they impose a painful choice. It is the choice of WoW to push the feminist limits of Judaism as far as is possible within the Orthodox tradition. This may appear to be a limited agenda from outside the Orthodox circle but the recognition of this as an autonomous choice seems appropriate. The preparedness of these women to face violence and to pursue legal remedies would suggest that this is not a case of coerced consent to a patriarchal culture or religion but of genuine choice.[8]

The religious community of Orthodox Judaism is a social and political world, with its own leadership, its laws, its norms of daily behaviour and its social organisation. The attempt of the WoW to claim their own Orthodox heritage as women within this community can perhaps be compared to the early days of the struggle to gain a voice in democracy. The attempt of women to gain a voice in Western democracies lasted over a hundred years, from the time of the French Revolution. The struggle of the Seneca Falls feminists and the English Suffragettes against exclusion and silencing met with violent opposition from "democratic" governments. On the secular political level, women's participation and voices have become an accepted part of democratic discourse. The feminist struggle against exclusion from the public sphere and silencing is now being re-enacted in the context of religion in general and, in the case of WoW, in the context of Orthodox Judaism.

[8] For my full discussion of the issue of consent to patriarchy, see *F. Raday*, Culture, Religion and Gender, I.Con, International Constitutional Law Journal 1(4) (2003), 663. The choice of hermeneutics rather than exit by women in other situations may not be the result of genuine choice. Thus, for instance, in many Moslem communities, exit is not an option: law, community and family will combine to prevent and heavily punish any such attempt.

III. Feminist Ritual – Patriarchy Challenged

It has been the pain of exclusion from leadership roles and ritual practices that has been the first motivating factor for many religious feminists to challenge the patriarchal status quo. Rita Gross writes:

> … in Christianity and Judaism … continued reflection and experiences led us to the realization that we were excluded from ritual and leadership because of certain theological concepts, especially the image of the deity as male. It became clear that if patriarchal control of ritual was eliminated, the patriarchal naming of god would closely follow, which could lead to even more experimentation with praxis in other areas.[9]

The exclusion of Orthodox Jewish women from wearing a *tallit*, reading from a Torah scroll and praying aloud in a group are obvious ways of excluding women from both ritual and leadership. The attempt of the WoW to break the patriarchality of this ritual exclusion is, of course, a very important first step on the way to challenging the patriarchality of Orthodox Judaism as such. The WoW's manner of prayer is, as said, in a women's prayer group (*tfila*), wearing prayer shawls (*tallit*) and praying aloud from the Torah: the three Ts. In all aspects of the WoW's mode of prayer – the group prayer, the wearing of prayer shawls, and the raising of voices in prayer from the Torah Scroll – there is a challenge to the patriarchal hegemony of the religion. The reasons why each of the attributes of the WoW's mode of prayer is considered offensive and unacceptable by those rabbinical authorities that oppose it are richly expressive of patriarchy in feminist discourse. It is this that explains the violent opposition by fundamentalist forces to their manifestation. It also explains the importance to Orthodox feminism of changing the rituals.

The different aspects of the WoW's mode of prayer are all linked to public participatory prayer and are hence directly or indirectly connected to the performance of active duties at fixed times (*mizvot 'asse she-ha-zman gramman*). Women are exempt from performing such duties and there is conflicting opinion as to whether they may waive this exemption even if the exemption is not to their advantage but to their disadvantage. The objection to women's active participatory public prayer, since it involves performance of active duties at fixed times, is ostensibly attributable to the family role of women, and it would seem

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[9] *Gross* (note 7) *supra*, at 200.

as though the primary concern is that they may abandon their traditional child-caring role. However, on closer examination, this ostensibly pragmatic exemption turns out to be much more. A Middle Ages tract, the Book of Abudraham, spells out for us the family functions which will pre-empt a woman from carrying out performance of active duties at fixed times:

> And the reason why women are exempted from *mizvat asse she-hazman gramma* is that the woman is bound to her husband to tender to his needs. And had she been obliged to do *mizvat asse she hazman gramma,* it is possible that at the appointed time for the carrying out of the *mitzva* the husband might order her to do his *mitzva*. And if she carries out the Almighty's *mitzva* and neglects his *mitzva* , let her beware of her husband. And if she carries out her husband's *mitzva* and neglects the Almighty's *mitzva,* let her beware her Creator. Hence, the Almighty exempted her from His *mitzvot* so that she should be at peace with her husband.[10]

There are few such well articulated pieces of evidence regarding the connection between ritual, maleness of the deity and the hierarchical power of men in family and society.

The objection to group prayer with a Torah Scroll is an expression of the exclusion of women from the public sphere and public functions. In this context, it touches also on that aspect of public sphere activity that is associated with the acquisition of power through knowledge and spiritual authority. This exclusion is a well worn theme of feminist analysis. In her book, *Public Man Private Woman,* Jean Elshtain summarizes the course of Western civilization, starting from the Greeks:

> Truly public, political speech was the exclusive preserve of free male citizens. Neither women nor slaves were public beings. Their tongues were silent on the public issues of the day. Their speech was severed from the name of action: it filled the air, echoed for a time,

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[10] Even for the skeptical, this tract portrays an unexpectedly patriarchal picture. It does not relate to women's childbearing role or even to child rearing but concentrates solely on the competing duties which a woman has to her husband and to God. It should be noted that there are sources which deny that a wife has to be submissive and obedient to her husband and, in particular, it is clearly provided that it is forbidden for a husband to coerce his wife to have intercourse with him. Be that as it may, in the context of *mizvat asse she hazman gramma,* the emphasis put on wifely duty to her husband and the competition between her husband and the Almighty for the right to her obedience express patriarchal hegemony.

and faded from public memory with none to record it or to embody it in public forms.[11]

As regards the wearing of prayer shawls, Professor Eliav Schochetman, the *halakhic* expert for the State respondent in the WoW litigation, concluded that women may not wear prayer shawls, at least in public. He argued that, although it might be theoretically permissible, it would be an exhibition of "arrogance" for them to do so. Arrogance, in this context, is "behaviour which is vulgar and proud, shows contempt for others, and is unconventional in the community"; arrogant behaviour by women even in private but most certainly in public is considered improper and impermissible. Furthermore, Schochetman points out that the wearing of *tallit* is contrary to the prohibition in the Torah according to which "a woman must not take man's apparel."[12] This prohibition is reminiscent of Naomi Wolf's analysis, in her book *The Beauty Myth*, of the role which the differentiation between male and female clothing has played in retaining male superiority.[13]

Perhaps the most emotive objection that has been brought to bear against the WoW is the argument that it is forbidden to hear women's voices in song. The fear of the disturbing impact of women's voices first appears in the Babylonian Talmud. There, in a commentary on the sayings of the Rav Shmuel, the Talmud says that Shmuel spoke of the need for modesty in women's dress, saying: "A woman's thigh is seductive" and admonishing women: "If you show your thigh you show your shamefulness." In this context, the Talmud reports, Shmuel also said: "A woman's voice is seductive, as it has been said 'your voice is sweet and your countenance comely.'" Shmuel's saying came to be taken as requiring women to preserve their modesty by not exposing their voices in song in public, analogously to not exposing their bodies.[14] However, the original source of the phrase referred to by Shmuel was the Song of Songs:

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[11] *J. B. Elshtain*, Public Man Private Woman – Women in Social and Political Thought, 1981, 14.

[12] Note 3 *supra.*

[13] See *N. Wolf*, The Beauty Myth: How Images of Beauty are Used against Women, 1991.

[14] The requirement that women not raise their voices in song at the time of prayers later found expression as a prohibition in the *Shuklhan Aruch*. *Y. Qaro*, Shulkhan Aruch [Code of Jewish Law] (c.1500s).

> O my dove, that art in the clefts of the rock, in the secret places of the stairs, let me see thy countenance, let me hear thy voice; for sweet is thy voice and thy countenance is comely.

The transposition is revealing. From a sensual rejoicing in women's beauty, amongst the most exquisitely erotic pieces of love poetry ever written, with its repetitive mutual themes of sensual longing, was derived a ruling which turns women's sensual beauty to shameful seductiveness. This etymological source of the "seductiveness" (*ervah*, lit. 'pubes,' fig. 'shame,' 'prostitution') of women's voices is evidence of the interlinking of the silencing of women not only with the politics of patriarchal domination but also with the psychology of sexual fear of women's sensuality. It is reminiscent of the Sirens of Greek mythology whose song lured sailors to their deaths. The move is from sensuality to silencing. Thus, the purpose of the silencing is double: silencing women's voices in implementation of the exclusion of women from participation in the public arena and silencing women's voices in order to protect men against women's sensuality.

The accumulation of reasons for preventing Jewish women from praying in a group with the three Ts – *tallit*, *Torah*, *tefila* – signifies deep patriarchal fears of women's active participation and partnership in the public sphere of social life. The impact on women is marginalisation. As Elshtain writes:

> Because women have throughout much of Western history been a silenced population in the arena of public speech, their views on these matters, and their role in the process of humanization, have either been taken for granted or assigned a lesser order of significance and honor compared to the public, political activities of males. Women were silenced in part because that which defines them and to which they are inescapably linked – sexuality, natality, the human body (images of uncleanness and taboo, visions of dependency, helplessness, vulnerability) – was omitted from public speech.[15]

IV. The Wall and Its Symbolisms

The mode of the prayer of the WoW has special significance for Judaism and for Israel because of the women's commitment to praying at the Western Wall. The spiritual gravitation of the women to this loca-

[15] *Elshtain* (note 11) *supra*, at 15.

tion is because of the Wall's symbolism for religious Judaism. They, like many other Jews, men and women, from Israel and elsewhere, regard this place as a religious and cultural center. The choice of the Western Wall brings its different symbolisms into play in the diverse perceptions of the identity of the WoW, which I will discuss below.

The Wall is the only structure remaining from King Solomon's ancient Temple of Jerusalem, rebuilt in glorious style by King Herod, and destroyed by the Romans in 70 AD. It is a high wall built of enormous Herodian stones which formed part of the western perimeter wall of the Temple. After the destruction of the Temple, the Romans expelled almost all the Jews from the Land of Israel and they were dispersed, in what they called the exile or the Diaspora. Some Jews remained in Jerusalem, and the tradition of praying at the Wall began around 200-300 AD. It is known as the Wailing Wall in English because Jews, throughout the centuries, have come there from all over the world to write prayers and messages on paper and stick them in the nooks between the stones and to lament the loss of the temple and their land. Jews had access to the Wall during the time of the Ottoman Empire and the British Mandate, and pictures remain of the prayer of men and women intermingled. Attempts by the Jewish population, in 1928, to set up a *mexitza* (a barrier to separate men from women) were thwarted by opposition from the Moslems and the British Governor on the grounds that it would be an expression of Jewish national identity. After the War of Independence, in 1948, when the Wall fell under the control of Jordan, Jewish access to the Wall was prevented. Up to this point the symbolism of the Wall was of Jewish dispersal and longing for a return to nationhood in Jerusalem.

After the Six Day War in 1967, Israel gained control of the Western Wall, and for the first time since 70 AD Jews were able to worship publicly and without fear. In the post-1967 State of Israel, the Wall has been regarded as a site of great symbolic significance, both for Jews in Israel and for Jews in the Diaspora, not only as a holy place but also as a historical, national and cultural symbol: "a symbol of the sadness of generations and the desire to return to Zion … an expression of the strength and survival of the nation and of its ancient roots and eternality."[16] It has been described as a "contemporary shrine," where "the heterogeneity of the Jewish people brought together in a single space, is

[16] See judgment of President Shamgar in *Hoffman I,* at 353.

captured, condensed and highlighted."[17] Prayers, bar mitzvas, the swearing in ceremony of the paratroopers, singing and dancing take place by the Wall. When Pope John Paul II visited Israel in 2000, he wedged a note in a nook of the Wall in acknowledgment of the Jewish custom.[18]

This historical, national, cultural and sacred symbolism is not accepted by all. From a Muslim perspective, Jewish worship by the Wall is perceived as symbolic of Jewish nationalism, as it has been since 1928, and is regarded currently as a manifestation of the hegemony of Occupation. During the second *Intifada*, the Wall became a site of Israeli-Palestinian conflict. The Wall, still the perimeter of Temple Mount, and the Plaza were targets of stone-throwing by Muslim worshippers from the great El Ahksa Mosque Plaza just above it. Also, within Judaism, not all are content to see the Wall as a contemporary shrine. The Jewish religion has traditionally refrained from regarding the sacred as located at geographical or physical sites and has chosen to regard it as embodied in the Torah scroll and in the teachings of the Jewish religion. For this reason Prof. Yeshayahu Leibovitch considered the attitude of veneration towards the Wall as idolatrous.[19] For some of the radical secular Jewish Left the Wall symbolises the ethnocracy of the Zionist project in general and the Occupation in particular. Some Jewish feminists have regarded feminist activism in the context of the Wall as conflicting with their political activities for peace, in organisations such as Women in Black. Leah Shakdiel, who belongs to this group, has described the Wall as "all maleness and war,"[20] and has asked whether this is not such a defining essence as to be beyond the reach of feminist activism. She has also said, albeit tentatively, that the WoW appear to have fallen inadvertently into the trap of maintaining Jewish national sovereignty in the Wall Plaza, Judaizing the space.[21]

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[17] *D. Storper-Perez/H. Goldberg*, The Kotel: Towards an Ethnographic Portrait, Religion, 24(4) (1994), 309. Taken from *Shakdiel* (note 19) *infra*, at 144.

[18] During his visit to the Western Wall, John Paul II observed the custom of inserting a short prayer into a nook in the wall. There is a copy of that signed and stamped prayer preserved at Yad Vashem.

[19] *L. Shakdiel*, Women of the Wall: Radical Feminism as an Opportunity for a New Discourse in Israel, Journal of Israeli History, 21(1/2) (2002), 126 (143-145).

[20] *Ibid., at* 143.

[21] *Ibid*., at 155.

Discussion of the right of the Jewish people to national sovereignty in general and at the Western Wall in particular is beyond the scope of the present paper.[22] The present focus is on women's role within the existing frameworks of religious organisation. Whatever political perspective one takes regarding the Wall's place in Israel's political ethos, in 1967, the Wall became a blatant symbol of women's marginalisation in the public space of Jewish Orthodoxy and at the heart of the Nation. The area facing the central section of the Wall, previously crowded with tenements, was levelled and paved, and the space was divided by a *mechitza,* with three quarters of the space allocated to men and only a quarter to women. Furthermore, the men's area contains the access to the underground tunnels and synagogues, along the lower levels of the Herodian walls, considered to be even closer to the Holy of Holies of the Second Temple. Thus with the conjunction of state power and religious institutionalism, the space became clearly, and patriarchally, gendered.

V. Identifying the Ideological Basis of the Confrontation

The WoW's prayer met violent opposition from other Orthodox worshippers, male and female. On December 9th 1988, a group of Orthodox feminists held their first prayer service, in the *ezrat nashim* at the Western Wall, based on the custom of women's prayer groups with the three Ts, which had been introduced by Jewish feminists in the United States. The women were verbally abused and men praying on the far side of the *mechitsa* screamed at them and made threatening gestures. In 1989, an additional group of women from the United States, who were later to form an International Committee for the Women of the Wall, also began to hold prayer meetings by the Wall. At the following prayer meetings the violence increased. The women were subjected to physical attacks from Orthodox men and women praying at the Wall who threw objects at them, pushed them and hit them. Similar violence erupted against Reform and Conservative Jews who attempted to pray near the Wall in mixed-sex prayer groups. There have been incidents of spitting and even the throwing of excrement at these groups. The repeated violence was orchestrated by small groups of fanatics, mostly *yeshiva* stu-

[22] I have discussed the issues of the rights of the Jewish and Palestinian peoples to self-determination elsewhere: *F. Raday*, Determination and Minority Rights, Fordham Int'l L. J 26 (2003), 453.

dents who study and live in the vicinity of the Wall. However, its importance exceeds the number of its perpetrators. Many people who would not identify themselves with the violence have not condemned it but rather harshly condemned the women for provoking it.

Why the violence against the WoW at the site of the Wall Plaza? Admittedly, this is not the way every Orthodox Jewish woman wants to pray, but why should it arouse opposition to the point of violence? What is so threatening about it? It is not an activity that directly threatens or even delegitimises the right of others to pray in their own way. It is not a way of prayer that violates *halakhic* prohibitions. There is some *halakhic* authority for the legitimacy of this mode of prayer and, furthermore, even those who oppose it base their opposition not on general *halakhic* prohibition but on its "unacceptability" and on the "custom of the place." Nevertheless, the WoW's attempt to pray in their manner arouses furious opposition and fanatical violence. The reason for the violence is clearly that the WoW's prayer threatens something deep in religious conviction which both permeates and extends beyond the *halakhic* debate.

It is my view that the "something" beyond the *halakhic* debate that produces violence is the desire of the Orthodox Jewish establishment to preserve religious patriarchal hegemony against the challenge of religious feminism. This view is not accepted by all. There are two alternative accounts of the conflict. The first is Leah Shakdiel's account of the conflict as resistance of a nationalistic and religious alliance to a feminist challenge. The second is Ran Hirschl's account of the conflict as a contest for cultural hegemony between a secularist-libertarian elite and traditionally peripheral groups, in this case the ultra-Orthodox community. I will look more closely at each of these alternative accounts in turn.

Leah Shakdiel argues that most Israelis perceive the WoW, in their demand to change the custom of prayer by the Wall, as challenging Jewish-Israeli nationalism and that it is this that produces the vigorous opposition to any attempt to disrupt the status quo at the Wall. It is, in her view, the alliance between nationalism and religion that forms a male chauvinistic barrier to the WoW.[23] She cites the secular media's bias against the WoW in substantiation of this approach.[24] She considers that the "WoW chose to take on this double political alignment, in a specific

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23 *Shakdiel* (note 19) *supra*, at 150-151.

24 *Ibid.*, at 129.

site that unites the parties participating in its meaning, religious as well as national." Denoting the struggle as being against religious and national patriarchy allied, Shakdiel states that women's failure to win priority for gender issues over communal ones is innate to secular politics just as it is to Torah politics, and suggests that secular feminists are often no more successful in challenging cultural patriarchy than religious feminists in contesting religious patriarchy.[25] This analysis is problematic in both the Israeli and the international context.

Direct opposition to the WoW in Israel is solely religious. Religious patriarchy forms the hard core of patriarchal norms in Israeli society, and the State endorses this religious patriarchy on a basis of pragmatic political considerations. The WoW's struggle is against the maintenance of religious patriarchy, which is endorsed by the State. The flaunting of female autonomy, or for that matter secular or homosexual agendas, in defiance of Orthodoxy is enough to raise the fury of fundamentalist religious activists and no additional ulterior motive of nationalist fervour is needed to explain the phenomenon. Similar displays of fury and violence have been exhibited by this sector in situations which have in no way involved nationalistic symbolism. Thus, there have been violent demonstrations by the ultra-Orthodox against the driving of cars on public thoroughfares on the Sabbath, against the recognition of homosexual rights, against the proposal to draft ultra-Orthodox youth to army service, against the recognition of the right of women to sit on religious councils and their right to equal shares of the matrimonial property in divorce proceedings in rabbinical courts. These demonstrate that there is an independent religious political agenda that is quite divorced from nationalism and is, indeed, often in conflict with it. The common factor in all the situations is resistance to the challenge to Orthodox hegemony. In some of the cases, the State, through its judicial authority, has attempted to mitigate religious coercion or privilege and in others it has not. There is no proof here of a nationalistic and religious alliance over a whole range of issues.

The State's motives for acting as agent to support the religious status quo in the case of the WoW are not only not manifestly nationalistic, they are also not manifestly sexist. In this regard, I would contest Shakdiel's claim that feminists have made as little headway in achieving recognition for their agenda in the secular-civil demos as in the religious realm. In both legislation and litigation, the feminist lobby in Israel has been highly successful in achieving radical norms of equality in all fields

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[25] *Ibid.*, at 152-154.

other than that of personal status, which was delegated by the Knesset to the jurisdiction of the religious courts of all three communities, Jewish, Moslem and Christian. Thus legislation on women's equal rights, equal employment opportunity, working parents' rights, sexual harassment, retirement age, prevention of family violence, division of matrimonial property and income tax is very progressive. Supreme Court judgments on equality between the sexes have endorsed a strong equality principle, with a form of strict scrutiny, affirmative action as integral to equality and recognition of the necessity of paying the costs of accommodation of women's biological makeup in order to ensure equality of opportunity.[26] The only form of group discrimination currently endorsed by the Israeli legal system (as opposed to group discrimination practised in violation of legal norms) is in the religious jurisdiction over personal status. Rather than seeking ulterior nationalist or patriarchal motives for the Knesset's continuing endorsement of this religious discrimination against women, it might be appropriate to remind ourselves of the price that the religious public and the religious political parties would surely exact from coalition governments in the face of an attempt to repeal this legal arrangement. Furthermore, it seems clear that the political reason for not confronting the religious parties is not because it serves a hidden anti-feminist agenda. After all, although women are the primary victims of the discrimination generated under the personal law, they are not the only ones. For instance, secular persons who do not want a religious marriage and mixed-religion couples are unable to marry in Israel. Additional victims of the political concessions to the religious parties are the soldiers and reservists who carry an unequal burden of military service in view of the exemption of ultra-Orthodox youths from compulsory service. By this more pragmatic analysis, the endorsement of Orthodox patriarchy in the case of the WoW is a part of the endorsement of religious hegemony in general by the State and it seems more likely to rest on political pragmatism than on ideology of one kind or another.

Fundamentalist religious resistance to women's rights is unique neither to Judaism nor to Jerusalem. Indeed, religious fundamentalism constitutes the most virulent form of patriarchal politics in this era. Religious fundamentalism has the subjugation of women high on its agenda. At the beginning of the 21st century, the patriarchal hegemony of religion persists as an ideologically patriarchal core, in the centre of the growing

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[26] For my fuller discussion of this issue, see *F. Raday*, On Equality - Judicial Profiles, Isr. L. Rev. 35 (2003), 380.

egalitarian regulation of women's role in society. Religious institutions not only preach but also proselytise patriarchy, linking into pockets of resistance to feminist change. Jewish fundamentalism aims to exclude women from active participation in public religious life and to retain the husband's exclusive power of divorce. Christian fundamentalism aims for control of women's bodies by the Church; it opposes contraception and violently opposes autonomous choice in abortion. It preaches return to traditional family values, with wifely obedience and mothers educating their children at home. Moslem fundamentalism subjects women to polygamy, obedience to their husbands in all social and sexual matters and the veil, depriving them of both private power and public participation. Fury at criticism of these patriarchal politics led to the fatwa against Salman Rushdie and to the killing of Theo Van Gogh. Hindu fundamentalists have rallied to support reintroduction of the institution of *sati*. The fundamentalist religious communities are not only holding on to an internal ethos of patriarchy, they are also trying to reintroduce this ethos into the realm of universal norm. The opponents of the WoW, like fundamentalists elsewhere, are not content to preserve the patriarchal character of the Jewish Orthodox rituals in private space such as Orthodox synagogues. They insist on the visibility of patriarchy in the public space and, indeed in this case, at the symbolic centre of national space.

As for the reaction of the secular to the WoW, popular reaction to the group was generally hostile. Even academics, intellectuals and journalists who generally committed to a liberal point of view demonstrated overt hostility to the WoW. They claimed in newspaper articles and public discussion that this was a "provocation." Unlike the religious-nationalist stance, this reaction is rather one of indifference and incomprehension. It is consonant with the general perspective of the secular majority in Israel that the Jewish religion is what the Orthodox establishment says it is. The secular liberal community has no interest in the women's struggle to open up Orthodoxy and make it more egalitarian, regarding it as irrelevant to human rights concerns. Their attitude to the WoW is that if they want to worship as Orthodox Jews, they should take the whole bundle, including the discrimination against them. This attitude, that the culture or religious community is homogenous and that there is no need to seek out and protect cultural dissent within the community is, of course, commonly found in multiculturalist literature and does not require the rationale of nationalist motives to explain it.

Ran Hirschl regards the conflict as a contest for cultural hegemony between a secularist-libertarian elite and traditionally peripheral groups,

in this case the ultra-Orthodox community. His classification of the WoW as belonging to a secularist-libertarian elite is echoed in Leah Shakdiel's writing. She presents the association of the WoW with a secularist-libertarian elite not as an identity choice but rather as an identity trap, resulting from the group's "Jewish-Ashkenazi exclusivity," its struggle for the legitimacy of Jewish religious pluralism and its resort to the judicial system for support. Hirschl's perception of the ultra-Orthodox as belonging to the social periphery in Israel and, by implication as being socially excluded, disadvantaged and powerless, has strong echoes in Israeli legal multiculturalist writing.[27] Juxtaposing these two groups, he suggests that support for the WoW's position represents the creation of a "safe haven" for threatened secularist-libertarian elites.[28] Hirschl's representation of the conflict is seemingly justified by Shakdiel, who says the WoW "cannot escape the problems that [their] strategy entails: … an anti-religious struggle concealed in the rituals of secular nationalism."[29] These classifications and their juxtaposition are all based, in my view, on a wrong reading of Israeli reality.

The fact that the WoW is an exclusively Jewish group is necessitated by the nature of the agenda. The WoW is also certainly largely composed of Ashkenazi women; furthermore many of these women are either from the Western world or influenced by practices brought from the Western world. The group's "exclusivity" as Ashkenazi is not, however, by choice. The group's aim was to be open to all religious Jewish women and indeed its insistence on prayer at the Wall rather than elsewhere was in large part based on the philosophy of inclusiveness. The group has been rejected and does not reject. The employment of liberal-pluralist arguments and processes in their struggle was not the philosophical choice of the WoW: their choice was to pray in their way and

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[27] See *A. Harel/A. Shenrech*, Separation between the Sexes on Public Transportation, Academic College of Law L. Rev. 1 (2003) [in Hebrew]; for an opposing view see *N. Rimault*, The Separation between Men and Women as Sexual Discrimination, Academic College of Law L. Rev. 1 (2003), 112 [in Hebrew]. See also *M. Halberthal/A. Margelit*, Liberalism and Cultural Rights, in: M. Mautner (ed.), Multiculturalism in a Democratic Jewish State: Memorial Book for Ariel Rozen-Zvi, 1998, 93-104 [in Hebrew]; for an opposing view see *J. Brunner/Y. Peled*, Autonomy, Capability and Democracy: A Critique of Multiculturalism, in: M. Mautner (ed.), *ibid,* 107-131[in Hebrew].

[28] *R. Hirschl*, Towards Juristocracy: The Origins and the Consequences of the New Constitutionalism, 2004, 67-68.

[29] *Shakdiel* (note 19) *supra*, at 154.

their way was barred by the secular arm of the State, including by the secular exercise of authority by the Supervisor of the Wall. The only way to remove that barrier was by taking legal proceedings to prevent violation of their human rights and to preserve the right of women to equal access to and use of a public facility, the prayer facility of the Wall Plaza. Thus, the choice of the liberal-secular playing field was in fact made by the Supervisor of the Wall and the Ministry for Religious Affairs and not by the WoW.

The ultra-Orthodox minority in Israel is far from the archetype of peripheral or socially excluded groups treated by human rights norms. They are not politically disempowered. They have, rather, for most of the history of Statehood, held crucial leverage power in coalition governments. They have used this political power to maintain their own school and higher education institutions subsidised by the state, the exemption of ultra-Orthodox yeshiva students from military service, the provision of special budgets for religious needs in education and housing and an Orthodox monopoly over marriage and divorce.

To address the WoW's fight for the right to pray in public as an issue of secularism versus religion is to ignore entirely the intra-religious agenda of Orthodox Jewish women. This is dismissive not only of the rhetoric of the WoW's claims but also of their consistent commitment to prayer by the Wall in their mode over a period of seventeen years. As already noted, the method forced on the women may have been secular but the agenda was religious. As McClain and Fleming remark in their critique of Hirschl, "… it seems inapt to characterize a dispute between groups of observant Jews over prayer rights as illustrating a secular-religious cleavage."[30] Treating the women as an elitist hegemony over a discrete minority is disingenuous. The minority concerned is far from politically powerless and, in any case, women are a sub-group subjected to pervasive discrimination within that minority. Hence, the WoW provides a voice regarding the status of the Orthodox and ultra-Orthodox women that should be heard.

Although she calls the opposition to the WoW a nationalist-religious alliance, Shakdiel delegitimises the WoW's project by making ambivalent claims as to whether the women challenge this alliance or whether they are maintaining nationalistic goals at the Wall. Hirschl delegitimises the WoW's project by labelling it an elitist haven. Despite their different

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[30] *L. C. McClain/J. E. Fleming*, Constitutionalism, Judicial Review and Progressive Change, lecture presented to the Maryland/Georgetown Discussion Group on Constitutional Law, March 4-5, 2005. On file with the author.

emphases, Shakdiel and Hirschl share a common goal. They both attempt to recategorise the WoW's struggle, divorcing it from its religious and feminist hermeneutic roots, and they both seem to suspect the WoW of promoting elitist anti-religious secularism. Shakdiel does so by confusing it with nationalist issues, and Hirschl, by categorising the struggle as one between secularism and religion, and its proponents as an elitist group, delegitimising the whole project of women's hermeneutical reform of religion by branding its proponents as secular elitist outsiders.

VI. The Reach of the Law

The Western Wall is one of the sites governed by the Protection of Holy Places Law, 1967, which provides that the necessary measures will be taken to prevent desecration of holy places or behaviour which is likely to obstruct the freedom of access to the sites or offend the sensitivities of the members of the religious communities to whom they are holy.[31] The implementation of the Law is placed in the hands of a supervisor appointed by the Minister of Religious Affairs,[32] in consultation with the Chief Rabbis. The Wall is a Holy Place subject to public administrative law. This regulation of the legal status of the holy places is in a context of the promotionism of religion in the Israeli legal system. The *millett* system, introduced under the Ottoman Empire and adopted by the British Mandate, has been maintained in Israel. The *millet* system is pluralistic as regards the major religions in Israel: the various communities, Jewish, Moslem and Christian, have their own religious courts which have exclusive jurisdiction over questions of personal status of the members of their communities (i.e. the rights to marriage and divorce). They also have their own officially recognised days of rest and holidays and their own holy places. As regards the promotionism of the Jewish religion, there is in most contexts a monopolistic preference given to Orthodox Judaism over other streams of Judaism.

At the time of the initial violent reaction to the WoW, the Government intervened. Its intervention, however, was not to remove the violent fa-

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[31] The same provisions are included in the Basic Law: the Capital City of Jerusalem.

[32] Now the Minister of Tourism, subsequent to the closure of the Ministry of Religious Affairs.

natics from the Wall Plaza, but to banish the WoW, excluding the women from praying in their own manner by the Wall. The police, rather than protecting the women against attack and arresting their attackers, forced the women to leave, with female police officers dragging away those who resisted, claiming this was necessary to prevent a breach of the peace and desecration of the Wall. The Supervisor of the Wall, Rabbi Getz, an Ultra-Orthodox rabbi, issued an order preventing the WoW from praying by the Wall wrapped in prayer shawls and reading from a torah scroll. He issued this order despite his initial admission that their prayers were not prohibited by the *halakha.*[33]

In reaction, on March 21st 1989, the WoW petitioned the Supreme Court sitting as the High Court of Justice, challenging the prohibition of their mode of prayer. Their petition was based on their constitutional right to freedom of worship, their right of access to the Wall and, less emphatically, their right to equality as women. They also claimed that the Supervisor of the Wall had acted beyond the limits of his statutory powers, as determined in the Regulations under the Holy Places Law. After the submission of the WoW's petition, the Minister of Religious Affairs promptly amended the Regulations in order to expressly "prohibit the conduct of a religious ceremony which is not according to the custom of the place and which injures the sensitivities of the worshipping public towards the place."[34]

The Supreme Court sitting as the High Court of Justice rejected the WoW's petition (*Hoffman I*, 1994). However, although rejecting the petition, Justices Shamgar and Levine, in a majority on this point, recognised in principle the WoW's right of access and freedom of worship by the Wall. They recognised the women's "right to pray according to their custom in the Plaza of the Western Wall."[35] Justice Shamgar, then President of the Court, held that the common denominator for Jewish worship at the Wall should not be the strictest *halakhic* ruling but should

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[33] *Chesler/Haut* (note 1) *supra*, at xx.

[34] Regulation 2(a)(1a), Regulations for the Protection of Holy Places for Jews, 1981.

[35] There was subsequently much controversy as to the bottom line of Justice Shamgar's judgment, with the State claiming that he had not recognised this right and that he had given a majority opinion rejecting the right together with Justice Elon. The majority opinions in *Hoffman II* (*infra* note 34) and *III* (*infra* note 35) held that Justice Shamgar had, together with Justice Levine, recognised this right. The interpretation quoted here is from the judgment of Justice Cheshin in *Hoffman III.*

allow good faith worship by all who wish to pray by the Wall. Shamgar recommended that the Government should find a solution which would "allow the petitioners to enjoy freedom of access to the Wall, while minimising the injury to the sensitivities of other worshippers." He based his recommendation on the need for mutual tolerance between groups and opinions and on the need to respect human dignity. He did not mention the disempowerment of women and the need to guarantee their constitutional right to participate equally in the public arena. He was silent on the issue of equality, even though he noted, with the most tentative of criticisms, one of the primary manifestations of that inequality, the objection to the hearing of women's voices:

> "The singing of the petitioners aroused fury, even though it was singing in prayer; and anyway is there any prohibition of singing by the Wall? After all, there is dancing and singing there not infrequently and it is unthinkable that the singing in dignified fashion of pilgrims, whether Israeli or foreign, soldiers or citizens, whether male or female, should be prevented. In view of this, it may be, and I emphasise "may be," that the opponents are confusing their opposition to the identity of the singers with their opposition to the fact of the singing, and this should not be."

Justice Levine based his recognition of the WoW's right to pray in their manner at the Wall on more liberal grounds, regarding the Wall as having not only religious but also national and historical importance to all the different groups and persons who come there, in good faith, for the purpose of prayer or for any other legitimate purpose.

The majority judgments were, as said, devoid of any mention of the WoW's right to equality, upholding the need to protect pluralism but not addressing the issue of religious patriarchy. It was only in the minority opinion, written by Justice Elon, who was then the incumbent of the religious seat on the Supreme Court, that the issue of equality for women was discussed. Justice Elon examined in depth the various *halakhic* opinions on women's prayer groups. He concluded:

> "It is conceivable that the substantial change in women's status and position in the present century, in which also religiously observant women are full participants, will in the course of time bring about an appropriate solution to the complicated and sensitive issue of women's prayer groups. However, the area for prayer beside the Western Wall is not the place for a "war" of deeds and ideas on this issue. As of today, the fact is that a decisive majority of the *halakhic* authorities, including Israel's Chief Rabbis, would regard acceptance of the petition of the petitioners a travesty of the custom of a syna-

> gogue and its sacredness. … such is the case as regards the Western Wall which is the most sacred synagogue in the Jewish religion."

And so, Justice Elon examines the issue of women's right to equality in the modern world only to dismiss the possibility of addressing it at the Wall, which is, in his view, a synagogue and the most sacred in the Jewish religion.

In response to the High Court of Justice's recommendation, the Government set up a Committee of Directors General of various Ministries. This Committee, after deliberating for two years, finally made its recommendations: the WoW could pray in their manner. However, this prayer was to be outside the South Eastern corner of the battlements of the Old City – well away from the Wall – at the Wall they could not pray in their manner for reasons of internal security, i.e. a threat to the breach of the peace. The Government then appointed a Ministerial Committee which, after taking a year to deliberate, concluded that the WoW could not pray at the Western Wall for internal security reasons and, in addition, could not pray at any of the alternative sites considered because of external security reasons, that is the danger of causing a conflagration with the Palestinians who look down on these various sites from the Dome of the Rock (built on what was Temple Mount) and want to prevent any change in the status quo. The third committee to sit on the matter, the Neeman Committee, recommended Robinson's Arch as the most practical alternative. Robinson's Arch is further to the South and is entirely hidden from the Wall Plaza by a rampway up to the Dome of the Rock.

After the conclusions of the first committee were issued, the WoW retraced their steps to the Supreme Court. We argued that, since the Government had shown itself to be clearly incapable of implementing the recommendations of the Court and securing the WoW's rights of worship and their right of access to the Wall, the Court itself was the last resort. We also emphasised more strongly the issue of women's equality involved in the denial of ritual rights. Only after the conclusions of the third committee, did the repeated hearings before the Supreme Court and the repeated postponements requested by the Government and conceded to by the Court culminate, in May 2000, in a summing up and a decision.[36] Our arguments were heard by Justices Matza, Beinish and Strassberg-Cohen and they conducted a tour of the Wall and all the

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[36] HCJ 3358/95 *Anat Hoffman v. Prime Minister Office*, Tak-Al 2000(2) 846 (Hereinafter: *Hoffman II*, 2000).

various alternative sites which had been considered by the various committees before rendering judgment. It is worthy of note that, while, in the first decision all the justices had been male, in *Hoffman II*, the Court was composed of two women and one man.

In *Hoffman II*, Justice Matza wrote the opinion of the Court and Justices Beinish and Strassberg-Cohen concurred. The Court held that the majority in *Hoffman I* had recognised the right of the WoW to pray in their manner at the site of the Wall itself. Hence, it concluded that the recommendations of the various governmental committees, in seeking alternative sites, had all been contrary to the directions of the Court. Indeed, the Court held, on the basis of its own impressions from the tour of the sites, that none of the alternative sites could serve, even partially, to implement the WoW's right to pray in the Wall Plaza. The Court directed the Government to implement the WoW's prayer rights in the Wall Plaza within six months.

The decision was a path-breaking opinion and constituted a significant step forward towards implementation of the WoW's previously abstract right. It clarified that the *Hoffman I* decision bestowed full recognition of the WoW's right to pray in accordance with their custom in the Wall Plaza. It also transformed the Shamgar recommendation into a judicial directive and concretised the government's obligation to implement the right as an obligation fixed in time and place. However, the Court refrained from actively intervening and itself establishing the prayer arrangements at the Wall. It held that it was, at this stage, refraining from doing so because the petition had been presented in the context of an expected Government decision and, in the event, the Government had not actually issued a decision. This somewhat evasive conclusion is probably to be attributed to the Court's defensiveness in the face of ongoing attacks by politicians, religious elements and some academics, that the Court is too activist, particularly in matters of state and religion. None of the judges made a new analysis of the rights at issue and none of them referred to the question of women's right to equality.

The reactions in Israel to the decision in *Hoffman II* were aggressive. The religious parties immediately tabled a legislative proposal to convert the area in front of the Wall into a synagogue exclusively for Orthodox religious practice and to impose a penalty of seven years imprisonment on any woman violating the status quo of Orthodox custom at the Wall. This legislative proposal was also supported by a number of Knesset members from secular parties. In addition, the then Attorney General, Eliakim Rubinstein, asked the President of the Supreme Court to grant a further hearing of the case and to overrule

Hoffman II, a surprising request in legal terms, since the decision had been unanimous. He claimed among other things that the Court had misunderstood *Hoffman I*. The decision of the Attorney General was a political decision demonstrating the reluctance of the Government to implement the human rights of the WoW in accordance with the Supreme Court's decision.

The President of the Supreme Court, Aharon Barak, granted the Attorney General's request and appointed an expanded panel of 9 Justices to reconsider the issue. In *Hoffman III*, the Court was divided and gave an ambivalent decision.[37] The majority judgment given by Justice Michael Cheshin, in which Justice Barak and Justice Or concurred, held that the right of the WoW to pray in their way at the Western Wall Plaza had been recognised but that it was not absolute and that the best way to implement it in a manner that would reduce offense to the sensitivities of other worshippers would be to provide the WoW with an alternative place of prayer at Robinson's Arch. Four members of the Court – Justices Mazza, Beinish, Strasberg-Cohen and Shlomo Levin – wrote a minority opinion advocating full and immediate acceptance of the WoW's petition to pray in the Wall Plaza. The two religious members of the Court, Justice Englard and Justice Terkal, opposed any recognition of the WoW's rights of prayer in the Western Wall Plaza. No member of the Court discussed the women's right to equality.

The majority decision provided that, should the Government fail within 12 months to convert Robinson's Arch into a proper prayer area, the WoW would have the right to pray in their manner in the Wall Plaza. The way in which this rather strange, conditional judgment gained majority support in the 9 member Court was through tactical alliances. There was a majority of 5 in favour of the Robinson's Arch option: the two religious members of the Court, Justice Englard and Justice Terkal, opposing the WoW's prayer by the Wall, joined the Robinson's Arch option. Justice Englard remarked that he did so "regretfully," only because he knew that his was a minority view, and that had he had his way the decision in *Hoffman II* would have been overturned. There was a majority of seven for the default option of prayer in the Wall Plaza, if the Government failed to provide the proposed alternative: the three judges of the majority were joined in this by the four minority judges who supported this as the only option. The Court,

[37] HCJ 4128/00 *Prime Minister Office v. Anat Hoffman*, P.D. 57(3), 289 (Hereinafter: *Hoffman III*, 2003).

in effect, returned the issue to the government playing field, placing the option and the onus of action on the executive branch.

Robinson's Arch is an archaeological site, which lies south of the Western Wall Plaza but out of direct eye contact with it and with a separate approach and entrance. It lies adjacent to the Wall but has not traditionally been a prayer site; it is, rather, a much valued archaeological site with huge Herodian stones which fell from the Temple mount in 70 AD, at the time of the Roman destruction and have lain there ever since. Robinson's Arch is not an area which has traditionally attracted Jewish worshippers. Such prayer, as is practiced there, is by Reform and Conservative Jews, who, unlike the WoW, cannot conduct their mixed-sex prayer in the separated prayer areas for men and women at the Western Wall Plaza. This site is hence not integrated into the historical site for communal prayer of the Jewish people. The significance of the consensus that the WoW should pray at Robinson's Arch is therefore the exclusion of rebellious women from the shared public space, which is regarded by religious consensus as sanctified.

Pursuant to the judgment, the Government spent considerable funds in order to convert the Robinson's Arch site into a prayer site, without damaging access to the site's important archaeological remains. The work was not however completed within the 12 months and, on the lapse of the Supreme Court's injunction, the WoW prayed in their manner – with the three Ts – at the Wall Plaza. The State Attorney returned to Court to ask for a prolongation of the injunction for a further month to allow completion of the work at Robinson's Arch and the request was accepted. The construction work at Robinson's Arch was completed and at present there is no express court injunction in force. Presumably, should the State again request an injunction against prayer by the WoW in the Wall Plaza, the Court will accede. Hence, effectively, the WoW are not permitted to pray with the three Ts in the Western Wall Plaza but only at Robinson's Arch.

VII. Right to Equality and Identity as Religious Women

On the matter of equality, the WoW claimed from the outset that the denial of their right to pray with the three Ts violated their right to equality. We made this claim central in the *Hoffman II* and *Hoffman III* hearings. All the secular judges, including the female judges, entirely ignored the issue of women's right to equality. The secular judges based

their recognition of the women's right variously on freedom of access, freedom of expression or freedom of worship and not on equality for Orthodox women. This choice is remarkable because, although it never appeared in either our pleadings or those of the State, the contingencies of recognising freedom of worship are problematic; thus, for instance, they might lead to claims by Jews for Jesus to worship with crosses by the Western Wall. The result is a preference for the threat of apostasy as compared to the threat of women's equality within the religion. This paradoxical motif in the secular judges' choices is unlikely to be the result of conscious preference. The refusal of the secular judges to engage the issue of equality can be more readily deconstructed in the light of the secular ethos regarding the autonomy of religion. Amongst the secular, the ways of religion seem to be outside the framework of secular ethical analysis. The religious are a closed community whose members act according to their own norms. Religious communities are entitled to autonomy and the Court will hesitate to interfere by imposing universalistic values on their internal organisation. This attitude may rest on a freedom of religion rationale or a multiculturalist conviction that abdicates responsibility for repressed sub-groups within the autonomous religious community. The rights appropriate for the implementation of these attitudes are freedom of expression, access or worship and not the right to intra-religious equality. Sub-groups who belong to the religious community are taken to have consented to its entire set of mores, including their own inequality. This being so, the issue of equality for women within the religion becomes, for the secular, a non-issue. Indeed the rhetoric of the secular judges supports this conclusion as, beyond their studied disregard of the right to equality, it shows no indication of awareness of the femaleness of the petitioners' identity.

The only judge to relate to the issue of women's equality was Justice Elon. As a progressive religious leader, he sees religion as a way of life that should provide solutions for current social problems, among them the status of women. In 1988, Justice Elon, adjudicating Leah Shakdiel's petition to have her election to a religious council enforced, had indicated his conviction that religious institutions should not fail to take account of the change in women's status over the past two hundred years. He ruled in that case that the *halakha* should not be interpreted as prohibiting women from being elected to public institutions (in the case at hand, religious councils). Justice Elon only hints at this view in the case of the WoW itself. Nevertheless, as regards the WoW petition, he holds that the Western Wall is an inappropriate place for the conflict which

will accompany change in religious ritual. Ironically and significantly, he holds that the Wall is too important as a spiritual and religious center to be the site for the struggle over women's rights. The message is yet again the marginalisation of women's issues even by those male leaders who are the advocates of change within the Orthodox community.

The other religious judges involved in the case, Justices Tirkal and Englard did not mention the right to equality. However, they both related to the identity of the women as women. Justice Tirkal points out that the WoW can continue to pray in *ezrat nashim,* provided it is without the three Ts. Justice Englard, although attributing the accusation to "some who say," stigmatised the women with provocative behaviour and possible bad faith, apparently unable to visualise the possibility of a genuine spiritual need for religious women to express themselves as equals in Orthodox Judaism.

The identity of the WoW as Orthodox feminists was not established in the secular rhetoric and was rejected by the religious justices. In the remedy given by the Court, there is an ambivalent result. On one hand, the remedy might be seen as advancing the goal of Orthodox feminists by giving them a public "room of their own." The Court did confer on the group the right to pray in an important public space, with historical, cultural and religious significance, and required the Government to allocate considerable resources to making the site appropriate for prayer, within touching distance of the stones of the Western Wall. On the other hand, the Court did not empower the WoW to participate in the Orthodox prayer center of the Western Wall, in *ezrat nashim.* It refused to allow them to perform an egalitarian version of Orthodox ritual as equal members of the Orthodox community. It hence denied them the identity and the heritage which they claim as Orthodox Jewish women.

1. Constitutional Balancing

The constitutional issue raised in the WoW is the right of women to equality in their religious personhood. There are two different ways in which women members of traditionalist cultural or religious communities may seek equality: one is the attempt to achieve equal personhood within the community, and the other is the attempt to ensure egalitarian

alternatives outside the community.[38] The claim of the WoW is for equal personhood within the religious community. This is a more holistic claim and more far-reaching than the claim of a right of exit. It is a claim which reflects a new mood in the international community of religious women. There is a growing body of academic enquiry into the insider perspective of feminist religious reconstruction. Sharma and Young recently published a comparative study regarding the perspectives of female insiders within world religions: Hinduism, Buddhism, Confucianism, Taoism, Judaism, Christianity and Islam. From each and every one of the contributors comes the conviction that equality for women must and can be found within the religion. In none of them did the female insiders feel that this had yet been achieved.[39] In constitutional balancing, the claim against the State for full religious personhood is a more difficult claim to satisfy than the right to exit. This is because acceptance of the claim by the State will carry with it a greater potential for infringement of community autonomy. Nevertheless, constitutional support for the equality claim to religious identity is conceivable in some circumstances, as I shall show in the discussion that follows.

The purpose of the theoretical examination that follows is to discuss the way in which constitutional norms should, as a matter of constitutional principle, deal with clashes between the right to culture or religion, on the one hand, and the right to gender equality, on the other.[40] In order to ascertain the principles that should govern the role of constitutional law in regulating the interaction between religious and equality values, I shall examine the theoretical arguments that support deference to cultural or religious values over universalistic values. To the extent that such contentions fail, I argue that we should regard gender equality as a universalistic value entitled to dominance in the legal system and that on this basis women may, in some circumstances, pursue constitutional remedies for denial of equal religious personhood, including the rights to equal participation in the ritual and leadership of their religions.

A number of theories of justice have been advanced in support of deference to cultural or religious values. I will examine three. The first, or

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[38] The right of exit is beyond the scope of discussion in the present article. For fuller discussion, see *Raday* (note 8) *supra*.

[39] *A. Sharma/K. K. Young* (eds.), Feminism and World Religions, 1999, 18-22.

[40] For a fuller exploration of certain aspects of the hierarchy of values, see *F. Raday*, Religion, Multiculturalism and Equality – The Israeli Case, *Isr. Y.B. Hum. Rts.* 25 (1995), 193.

"multiculturalist" approach, contends that preservation of a community's autonomy is a sufficiently important value to override equality claims. The second, which I call the "consensus" approach, argues that if cultural or religious values have the sanction of political consensus in a democratic system, then this is enough to legitimate their hegemony. The third, which I label the "consent or waiver" approach, claims that where there is individual consent to cultural or religious values it must be respected.

2. Multiculturalism

Communitarian claims that adherence to the traditions of a particular culture is necessary in order to give value, coherence, and a sense of meaning to our lives are used to justify traditionalist cultural or religious hegemony over universalistic principles of equality. Alasdair MacIntyre argues that the ethics of tradition, rooted in a particular social order, are the key to sound reasoning about justice.[41] Communitarianism of this kind is closely allied with anthropological concepts of enculturation and cultural relativism – the idea that moral consciousness is unconsciously acquired in the process of growing up in a specific cultural environment.[42] From this description of the way human morality evolves, some have concluded that there is no objective social justice and that each cultural system has its own internal validity that should be tolerated.[43] The culture is identified by its existing patterns and standards, and recognition of the culture's intrinsic value seems to go together with a desire to preserve these standards.[44] Normative communitarianism is thus oriented to the preservation of tradition within the culture. Where the communitarian norms are based on religion, traditionalism often means deference to written sources formulated in an era from the sixth century B.C. (the Old Testament), to the first century A.D. (the New Testament), to the seventh century A.D. (the Qur'an).

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[41] *A. MacIntyre*, After Virtue: A Study in Moral Theory, 1981.

[42] *M. J. Herskovits*, Cultural Anthropology, 1955, 326-29.

[43] *C. Kluckhohn*, Ethical Relativity: Sic et Non, J. Phil. 52 (1995), 663. "Morality differs in every society and is a convenient tenet for socially approved habits." *R. Benedict*, Anthropology and the Abnormal, in: R. Beehler/A. Drengson (eds.), The Philosophy of Society, 1978, 279 (286).

[44] *A. MacIntyre,* Whose Justice? Which Rationality?, 1988.

Two aspects of the communitarian argument – cultural relativism and the preservation of tradition – deserve particular attention in examining the impact of communitarianism on women. First, the cultural relativism implicit in normative communitarianism must displace the value of gender equality as, by definition, traditionalist cultures and religions, in which gender equality is not an accepted norm, are in no way inferior to those social systems in which it is. This communitarian argument is, however, logically flawed. If cultural relativism is taken to its logical conclusion, it undermines not only the value of human rights and gender equality but also the value of communitarianism itself, since communitarianism is also the product of a particular cultural pattern of thinking.[45] Indeed, taken to extremes, cultural relativism is another name for moral nihilism; if cultural relativism were to be taken as the dominant value basis of a legal system, it would be impossible to justify any moral criticism of the system's norms.[46] At this level, multiculturalism could not be useful in any attempt to engineer legal policy in a positive legal system. Alternately, we could regard cultural relativism merely as a tool that helps us to distinguish ethnocentric from universal standards, so that we will be able to refrain from insisting on ethnocentric values as mandatory on a global scale. This form of multiculturalism would not, I contend, override the value of gender equality. This stems from the fact that gender equality is one of the universally shared ideals of our time and, hence, its global application is neither ethnocentric nor morally imperialistic.[47]

Second, let us take a look at the way in which the preservation of tradition impacts on gender equality. If the preservation of tradition is an aspect of communitarianism, as some of its proponents suggest, then the legitimacy of the claims of communitarianism to override universal principles (such as the right to equality) must stand or fall along with the legitimacy of the claim that traditionalism itself should also override universal principles. There is a whole battery of reasons why traditionalism cannot legitimately be regarded as overriding the principle of

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[45] See *A. Dundes Renteln*, International Human Rights – Universalism versus Relativism, 1990, 61-78

[46] *Kluckhohn* (note 43) *supra.*

[47] Evidence of the fact that gender equality is a universally shared ideal is to be found in the fact that 170 States have ratified CEDAW; while it is true that there are many reservations on religious grounds of Islamic States and of Israel – primarily to Article 16 which provides for equality in family law – the validity of these reservations is dubious, under the principles of international law.

equality. Traditional patterns cannot form the dominant foundation for contemporary meaningfulness, except in a static society. It may be that the ethical norms of a society are themselves a factor in determining the dynamism of the society, and it is not inconceivable that a society that believed in traditionalism as an ethical imperative might "choose" to be static. However, where and when, as an empirical fact, a society does change as a result of environmental or socio-economic developments not dictated by the ethical traditions of the society, a rigid application of traditional norms will produce dissonance. Communitarians do not tell us how we can continue to apply the community's traditional values to changed socio-economic institutions.[48] A central example demonstrating this dissonance is the clinging to traditionalist patriarchal norms that exclude women from the public sphere in a world where women, in fact, work outside the home and are often responsible for their own and their children's economic survival, in a world where, in fact, they are no longer "protected" and "supported" within the hierarchy of an extended traditional family. As a matter of political ethics, if traditionalism is allowed to oust egalitarianism, it will be an effective way of continuing to silence any voices that were not instrumental in determining the traditions. As Susan Okin shows, the Aristotelian-Christian traditions chosen by MacIntyre to demonstrate the appeal of his communitarian theory are not women's traditions.[49] Women were excluded not only from the active process of formulating those traditions but also from inclusion, as full human subjects, in the very theories of justice developed within those traditions.[50] The same can be said for Judaism and Islam. Women's voices are silenced where traditionalist values are imposed.[51]

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[48] In his discussion of the changing meaning of child sacrifices, Peter Winch writes, "it would be no more open to anyone to propose the rejection of the Second Law of Thermodynamics in physics. My point is not just that no one would listen to such a proposal but that no one would understand what was being proposed. What made child sacrifice what it was, was the role it played in the life of the society in which it was practised; there is a logical absurdity in supposing that the very same practice could be instituted in our own very different society." *P. Winch*, Nature and Convention, in: Beehler/Drengson (note 43) *supra*, at 15-16.

[49] See *S. Okin*, Justice, Gender and the Family, 1989, 41-62.

[50] See *ibid.*

[51] See *Elshtain* (note 11) *supra.*

3. Consensus

If communitarianism does not justify the domination of religious/traditionalist patterns of social organisation in the legal system, might a broad social consensus become a legitimising factor? Michael Walzer has argued that justice is relative to social meanings and a given society is just if its substantive life is lived in a way faithful to the "shared understandings" of its members.[52] This view legitimises the adoption of particularist principles of justice in preference to universalistic ones. The process of reaching shared understandings is seen as a dynamic one based on a dialectic of affirmation by the ruling group and the development of dissent by others. Walzer's theory of justice has been criticised in so far as it applies to situations of "pervasive domination."[53] Okin points out that in societies with a caste or gender hierarchy, it is not just or realistic to seek either shared understandings or (a) dialectic of dissent.[54] Where there is pervasive inequality, the oppressed are unlikely to acquire either the tools or the opportunity to make themselves heard. Under such circumstances, it cannot be assumed that the oppressed participate in a shared understanding of justice. Rather, there would be two irreconcilable accounts of what is just. Application of a shared understandings theory only could be justified if the dissenters were assured equal opportunity to express their interpretation of the world and to challenge the status quo. The principle and practice of equality are, hence, a prerequisite for the application of the shared understandings theory and the claim for gender equality must be immune to oppression by the dominant shared understanding if the system is to operate in a just fashion.

If the cultural practices or religious convictions of the community condone the unequal treatment of groups within it, at what level should "shared understanding" be ascertained? If there are slaves, Dalits (treated as untouchables), or women within the community, excluded from equality of opportunity, such subgroups cannot be taken to share in the community's shared understanding, even if it does not formulate its own dissent. The silencing of any such subgroup should pre-empt wholesale deference to community autonomy; such deference to the community's autonomy would defeat concern for the autonomy of op-

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[52] *M. Walzer*, Spheres of Justice: A Defense of Pluralism and Equality, 1983, 312-13.

[53] *Ibid*.

[54] Okin, *supra* (note 49), at 62-73.

pressed subgroups within it.[55] This is true of the subgroup of women in traditionalist cultures and monotheistic religions. Their sharing of the community understanding, where that understanding is based on a patriarchal tradition, cannot be taken for granted, even if they do not express dissent. In the words of Simone de Beauvoir: "Now what peculiarly signifies the situation of women is that she – a free and autonomous being like all other human creatures – nevertheless finds herself living in a world where men compel her to assume the status of the Other … How can independence be recovered in a state of dependency? What circumstances limit women's liberty and how can they be overcome?"[56] More recently, in the words of Okin: "When the family is founded in law and custom on allegedly natural male dominance and female dependence and subordination, when religions inculcate the same hierarchy and enhance it with the mystical and sacred symbol of a male god, and when the educational system... establishes as truth and reason the same intellectual bulwarks of patriarchy, the opportunity for competing visions of sexual difference or the questioning of gender is seriously limited."[57]

Nevertheless, multiculturalist and consensus philosophers present the clash between the religious and liberal agendas on human rights as symmetrical. On this basis, both Charles Taylor and Paul Horowitz critique the impact of the liberal state on religious subgroups.[58] Arguing for a more supportive and accommodating approach toward religious belief and practices, they claim that liberalism is not value-neutral – it is a "fighting creed": "At the very least, liberalism's focus on the autonomous individual and on the maximisation of individual concepts of the good tends to give it in practice an emphasis on freedom over tradition,

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[55] In John Cook's words: "[Cultural relativism] amounts to the view that the code of any culture really does create moral obligations for its members, that we really are obligated by the code of our culture – whatever it may be. In other words, Herskovits's interpretation turns relativism into an endorsement of tyranny." *J. Cook*, Cultural Relativism as an Ethnocentric Notion, in: Beehler/Drengson (note 43) *supra*, at 289 (296).

[56] *S. de Beauvoir*, The Second Sex, H. M. Parshley (trans. & ed., 1989), 1952, 688-89.

[57] *Okin* (note 49) *supra*, at 66.

[58] *C. Taylor*, Philosophical Arguments, 1995 249; *P. Horowitz*, The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond, U. Toronto Fac. L. Rev 54 (1996), 1 (14).

will over obligation, and individual over community."[59] The impression given is of symmetry between religious and liberal values.[60]

There are good grounds for rejecting the symmetry thesis. There is no symmetry between religious and liberal human rights values. Inverting Taylor's and Horowitz's critique of liberalism will emphasise the values of tradition over freedom, obligation over will, and community over individual. While liberal values leave space for the religious individual and, to a considerable extent, the religious community, religious values do not recognise the entitlement of the liberal individual or community. There is no symmetry between the normative dominance of liberal values (freedom, will, individual) and the normative dominance of religious values (tradition, obligation, community) because the latter does not even acknowledge the private space of the dissident, the heretic, or the silenced voice within its jurisdiction. These values are primarily tools for the perpetuation of existing power hierarchies. The claim for symmetry is, therefore, based on tolerance of inequality and lack of liberty for those deprived of a voice within the religious community. This is a flawed basis for communitarian theory.

There is a flaw in the reasoning that calls for the autonomy of communities, where that autonomy denies or reduces the right of some to equality and liberty, since the basis for the community's claim to autonomy rests on these very norms of equality and liberty.[61] Autonomy demands by minority communities have been organised in a useful typology by Jack Levy. Under this typology, Levy describes various minority claims for external rules limiting the freedom of non-members and for internal rules limiting the freedom of members, all in order to protect an endangered culture or cultural practice.[62] However, the legitimacy of the claim to pluralistic freedom of religion is itself dependent in a constitutional framework on the very concepts of equality and liberty that patriarchal religious regimes deny women. Hence, were the rules of

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[59] *Horowitz*, *ibid*; *Taylor* (note 58) *supra.*

[60] Logically, in the case of an irresolvable clash of values, the outcome of symmetry would be stalemate and not, as suggested by Taylor and Horowitz, justification for accommodation and support for religious values that otherwise clash with human rights.

[61] See *Renteln* (note 43) *supra*, at 62-65; *M. J. Herskovits*, Cultural Relativism: Perspectives in Cultural Pluralism, 1972, 11-34.

[62] See *J. T. Levy*, Classifying Cultural Rights, in: I. Shapiro/W. Kymlicka (eds.), Ethnicity and Group Rights, 1997, 39.

Levy's typology used to defeat gender equality claims; they would use the value of liberty to defeat liberty and of equality to defeat equality.

The premise to be derived from an analysis of the divide between the cultural and the religious versus equality and human rights is that, in constitutional societies, equality and liberty should be the governing norms – the *Grundnorm* on which the whole system rests, including the right to enjoy one's culture and religion. Constitutional democracy cannot tolerate enclaves of illiberalism whose inhabitants are deprived of access to human rights guarantees.

4. Consent

Even if we reject the arguments of multiculturalism and consensus as justifying the imposition on individuals of inegalitarian cultural or religious norms, this will not invalidate direct individual consent to those norms. The autonomy of the individual is the ultimate source of legitimacy. It seems clear that a genuine choice to accept certain cultural practices or religious norms should be accepted as valid even if they are to the disadvantage of the consenting individual. This liberty to choose is an essential part of the freedom of religion and of the right to equal autonomy of the individual.[63] The need to recognise the autonomy of the individual is a practical as well as a theoretical matter because, in situations of genuine consent, there will be no complaint emanating from women disadvantaged by the patriarchal community, nor much opportunity to intervene. However, recognition of individual consent to patriarchy and the concomitant disadvantage as a woman is problematic. Subjection to patriarchal authority inherently reduces the capacity for public dissent. Thus, consent is suspect, and it is incumbent on the state both to increase the opportunity for and to verify the existence of genuine consent by a variety of methods. I shall indicate some of them.

Consent cannot be recognised as effective when inegalitarian norms are so oppressive they undermine, at the outset, the capacity of members of the oppressed group to exercise an autonomous choice to dissent. In such a situation, no consent can be considered genuine. Such oppressive practices can properly be classified as repugnant, and consent will not

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[63] See *N. Duclos*, Lessons of Difference: Feminist Theory on Cultural Diversity, Buff. L. Rev. 38 (1990), 325.

validate them.[64] In such extreme cases, mandatory legal techniques should be employed to protect individuals from their inegalitarian status.[65] Thus, the invalidation of consent may be applied in cases of extreme oppression – examples of which include slavery, coerced marriage, and mutilation, including FGM, as well as polygamy, where it forms part of a coercive patriarchal family system.[66]

Moreover, absent repugnant practices, consent to inequality, though not automatically void, will still be suspect. In the context of pervasive oppression or discrimination, consent cannot be assumed from silence and even express consent is not necessarily evidence of genuine consent. In such situations, all consent must be suspect, since pervasive oppression seriously diminishes the possibility of dissent and hence the probability of genuine consent. Individuals who consent to the perpetuation of their inequality, within the religious/cultural community to which they belong, often have little real choice but to accept their oppression. Because of their socio-economic status, their alternatives to acceptance of the group's dictates may be very limited or non-existent. Where individuals are compelled by socio-economic necessity to accept an inferior status, their consent cannot be freely given. Ascertaining that consent is genuine, without negating the right of women to choose cultural diversity at the cost of gender equality, presents a difficult challenge for normative systems. Nevertheless, some measures can negotiate this precarious divide and enhance women's autonomy, thus facilitating their power to give or withhold genuine consent.

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[64] See *S. Poulter*, Ethnic Minority Customs, English Law and Human Rights, Int'l & Comp. L.Q. 36 (1987), 589. Indeed, even those writers who regard autonomous choices to forfeit autonomy as irrevocable impose a strict test of voluntariness on consent to such severe forms of self-harm. See *J. Feinberg*, Harm to Self: The Moral Limits of the Criminal Law, 1986, 71-87, 118-19.

[65] Thus, for instance, in the case of polygamy, wives should be released of all marital obligations but their rights to maintenance, property, and child custody should be protected.

[66] But see *M. C. Nussbaum*, Women and Human Development: The Capabilities Approach, 2000, 229-30. Joel Feinberg, in reviewing the writings of John Stuart Mill on the issue of polygamy, concentrates on the impact of the voluntary decision of the woman to marry on her future autonomy, stating: "… but it would be an autonomously chosen life in any case, and to interfere with its choice would be to infringe the chooser's autonomy at the time he makes the choice." *Feinberg* (note 64) *supra*, at 78.

States must take a priori measures to augment women's autonomy and their power to dissent. Women's ability to withhold consent should be buttressed by provision of an educational and economic infrastructure that will nurture their autonomy and ability to dissent from discriminatory norms or practices. The state, endeavouring to ensure that consent is informed, should insist on the disclosure of options so that all members of society, including girls and women, will be able to make their decisions on the basis of full information. Ensuring women's literacy and free access to information is a primary requirement. Beyond this, compulsory education laws should incorporate a core curriculum requirement that all children be exposed to information regarding fundamental human rights, including the right to gender equality.[67] However, information alone is not enough. In order to be able to dissent from patriarchal family patterns, women need to have feasible economic options. Socio-economic alternatives to consent must be made available. Thus, the state must, of course, provide women with the right to own resources and to inherit property, including land. The state should also provide training to girls and women for income-generating occupations, which will allow women the economic option of not remaining totally dependent on patriarchal family support, thereby increasing their ability to dissent.

The state should also scrutinise, ex posteriori, individual women's consent to inequality within a strongly patriarchal context and should be able to void it where it is not genuine. If the inequality is not repugnant, the state cannot intervene to void consent unless requested by women to do so. However, acknowledging that consent to inequality is suspect, the state should be highly responsive to women's requests to void their consent. Thus, where women wish to withdraw prior consent to inequality within a traditionalist cultural or religious community, their subsequent dissent should be given full recognition.[68] In legal terms, this would mean that the consent to inequality should be considered

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[67] Compare *Wisconsin v. Yoder*, 406 U.S. 205 (1972) with Re State in Interest of Lack, 283 P. 2d 887 (1955).

[68] See *Okin* (note 49) *supra*, at 137. The liberal notion of freedom of religion includes the right of each individual to change his religion at will; people have a basic interest in their capacity to form and to revise their concept of the good. See *W. Kymlicka*, Two Models of Pluralism and Tolerance, 1993 (unpublished manuscript). This is especially so where the revised concept of the good that is being chosen is the fundamental human right to equality.

voidable.[69] Since the possibility of legitimising inequality rests primarily on consent, which, in situations of pervasive inequality, is suspect, the voidability of consent is an effective ex post facto way of ensuring that women are not being forced to consent. Consent to a patriarchal marriage regime, for instance, will usually be made when a woman is young and dependent on her own traditionalist family; such consent should be able to be voided at any later stage, if and when the woman finds the terms of her traditionalist marriage unacceptable.

VIII. The Claim to Equal Religious Personhood

That women rebel against patriarchal standards that disadvantage them in traditionalist societies is an empirical fact. Martha Nussbaum has documented the widespread existence of dissent among women in traditionalist cultures or religious communities in her outstanding work on women and culture.[70] With regard to the view that the disadvantage of women in traditionalist cultures should not be examined on the basis of universalistic norms, which undermine cultural diversity, she analysed "anti-universalistic conversations" and, although answering many of them effectively, concludes: "Each of these objections has some merit. Many universal conceptions of the human being have been insular in an arrogant way and neglectful of differences among cultures and ways of life."[71] For this reason, she attempts to reconcile the clash between liberal values and cultural or religious norms, without relying on the priority of the right to equality. Accordingly, she adopts the "capabilities approach" of Amartya Sen to provide "political principles that can underlie national constitutions" in a way specific to the requirements of the citizens of each nation.[72] Nussbaum's sensitivity to cultural diversity is extremely important. There can be no denying that traditionalist cultural and religious ways of life have been an important source of social cohesion and individual solace for many people. There is also no doubt that, in the foreseeable future, these traditions are not going to disappear. Hence, on both an ideological and a pragmatic basis,

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[69] See F. H. 22/82, *Beit Yules v. Raviv*, 43(l) P.D. 441, 460-64. Consent to inequality may be held contrary to public policy.

[70] *Nussbaum* (note 66) *supra*, at 105.

[71] *M. Nussbaum*, Sex and Social Justice, 1999, 39.

[72] *Nussbaum* (note 66) *supra*, at 105.

efforts to achieve equality for women should work, as far as possible, within the constraints of the traditionalist or religious culture as well as outside them.

However, that said, the important condition is that all such efforts should respect cultural diversity only up to a certain extent. Such respect cannot be at the cost of women's right to choose equality. Indeed, Nussbaum herself adds this condition. Although Nussbaum's approach rightly emphasises the need for sensitivity to cultural and religious differences, the solution that she provides for the dilemma of the struggle between liberal values and cultural or religious norms, in fact, takes us back to the dominance of equality rights over religious norms. She proposes a universally applicable model for dealing with the religious dilemma: "The state and its agents may impose a substantial burden on religion only when it can show a compelling interest. But … protection of the central capabilities of citizens should always be understood to ground a compelling state interest."[73] This required protection of central capabilities extends to those functions particularly crucial to humans as dignified, free beings who shape their own lives in co-operation and reciprocity with others. Nussbaum's list of central human functional capabilities includes many of the capabilities denied women by traditionalist cultures and religious norms: e.g., the right to hold property or seek employment on an equal basis with others; to participate effectively in political choices; to move freely from place to place; to have one's bodily boundaries treated as sovereign; to be secure against sexual abuse; to have, in Nussbaum's formulation, the social bases of self-respect and non-humiliation; and to be treated as a dignified being whose worth is equal to that of others, which, as she adds, "entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin."[74] For legal or constitutional purposes, this all translates with some ease into the language of human rights protected under the UN treaties; indeed, as a constitutional matter, the way to give substance to the Nussbaum/Sen capabilities approach is to guarantee them through rights, whether political and civil or economic and social. Nussbaum herself acknowledges the closeness of the connection between the two and the importance of rights per se.[75]

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[73] *Ibid*. at 202.

[74] *Ibid*. at 79.

[75] *Ibid*. at 96-101.

I would agree with Nussbaum's emphasis on the need for sensitivity to cultural and religious differences, but I would also contend that the role of constitutional law is to give expression to the bottom line of her argument, according to which "[w]e should refuse to give deference to religion when its practices harm people in the areas covered by the major capabilities."[76] There is a difference of emphasis in this approach from Susan Moller Okin's position that "no argument [should] be made on the basis of self-respect or freedom that the female members of the culture have a clear interest in its preservation. Indeed they might be better off if the culture into which they were born were either to become extinct (so its members would become integrated into the less sexist surrounding culture) or, preferably, to be encouraged to alter itself so as to reinforce the equality of women."[77] In my view, there is an argument to be made – on the basis of freedom – that some female members of a traditionalist culture may have an interest in its preservation. That is the reason why, as Okin adds, the preferable course is to encourage the reform of cultures and religions in order to accord equality to women who wish to live within them. It is only in the event of failure of this course of action – to achieve equal personhood for women within a culture or a religion – that the best the state can offer is a right of exit to those who want it.

The case of the WoW is clear evidence of the growing body of feminist thought within religions which demands redefinition and reconstruction of religious hierarchies in order to secure equality for religious women within their religions. There has been little attempt, practical or theoretical, to translate this religious dissent into constitutional right. Such claims have been made as regard traditionalist cultures. Equal cultural personhood was the kind of claim made by tribal women, in the United States and Canada, for example, who wished to retain their tribal membership when marrying persons outside the tribe. It is the kind of claim made by the Women of the Wall in their demand to be allowed to pray in the public space, in an active prayer mode, customarily reserved for men. The claim of the women within these groups is absolutely valid – it is an attempt to improve their terms of membership and to bring their communities into line with modern standards of gender equality. However, there is also an apparent anomaly in this claim; on the one hand, it is based on the right to membership, and, on the other, on a rejection of the terms of membership as offered.

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[76] *Ibid*. at 192.

[77] *Okin* (note 49) *supra*, at 22-23.

Where women members of traditionalist cultural or religious communities seek to achieve equal personhood within the community, theirs is a holistic and far-reaching claim and a state response to the claim carries with it a negative potential for intervention in community autonomy. The claim of women for equality within a traditionalist group may transform the *modus vivendi* of the group in a way that conflicts with the wishes of the majority of members of the group, both men and women. Thus, it seems clear that states should be more reluctant to intervene in religious or cultural groups and, for the most part, should not invalidate the community rule per se. Thus, individual women's dissent will not necessarily justify state intervention to prohibit the internal norms and practices of traditionalist communities.

Nevertheless, there are ways in which the state may and should intervene. As said, if the religious discrimination results in the infringement of women's human dignity, in violence, or in economic injury, intervention is justified. Furthermore, even in cases of functional or ceremonial discrimination, there will be situations in which the state should take a constitutional stance as, for instance, where the claim for equality is consonant with some authoritative internal interpretation of the group norms or, alternately, where a critical number of women within the group support the claim for equality. Where these conditions are met, although states should be circumspect in intervening to invalidate functional or ceremonial discrimination, they should be decisive in denying state support, facilities, or subsidies for the discriminatory activities of the traditionalist groups.

In the case of the WoW, all the criteria for intervention apply. First, though this is controversial, their mode of prayer is consonant with some authoritative internal interpretations of the group religious norms. Second, there is a critical mass of women who either participate in or support the WoW's mode of prayer. Third, the WoW are asking the State of Israel to deny state facilities and subsidies to discriminatory practices, in this case backed up by violent fanaticism. Furthermore, they are asking the State to deny the cooption of its symbolic center for patriarchal goals.

As regards the probability of judicial intervention in constitutional issues of women's equality and religion and the effectiveness of such intervention, this is a difficult issue. Although the normative hegemony of gender equality where there is a clash with cultural or religious norms has been established at the international level, in international treaties and in decisions of international treaty bodies and tribunals, thereby establishing state obligations at the constitutional level, this principle is

only unevenly applied. The application depends on political will. Some constitutional courts have attempted to implement gender equality in the face of religious resistance, but such efforts have usually been transient or ineffectual where the government has not supported them. It is apparent that the courts cannot be left with the sole burden of securing the human rights of women and that both international obligation and constitutional theory require the intervention of government .[78]

The WoW form a case that may be seen as substantiating this conclusion regarding the limits on the effectiveness of judiciary in the absence of governmental support. In spite of the fact that out of the eleven Supreme Court judges who sat on their case in three separate proceedings, eight fully recognized their right to pray in their mode in the Western Wall Plaza, they were not, finally, given that right. However, the WoW saga also demonstrates the importance of the contribution of the judiciary. The WoW received recognition from the State far beyond the recognition that they received from the Israeli Orthodox leadership. The continuing debate in the public forum provided by the Court gave their mode of prayer and the dialectic surrounding it a visibility which it would not otherwise have had. The judicial proceedings have been parallel to the increase in the number of women's prayer groups with the three Ts who are actively carrying out their ritual in synagogues throughout Israel. Though cause and effect cannot be proved, it seems that the judicial proceedings contributed to the cultural and social development of the WoW's message.

The case of the WoW is heavy with symbolism. The violent opposition they aroused, condoned by the Government and with public collusion, symbolizes the silencing of women through the ages; it speaks of tradition and patriarchy at the heart of nationhood. The WoW petitions pursue a universalistic and feminist ethic. Their demand is for full and equal religious personhood. Their fate is of great significance not only for religious women and men but also for the secular world and constitutional values. Their success would have signified the victory of pluralism and tolerance over fundamentalism. The ambivalent outcome is illustrative of the weakness of courts to uphold women's human rights in the face of violent religious opposition and in the absence of governmental support. The saga of the WoW is a saga for us all – to redefine

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[78] This conclusion is based on research into comparative constitutional and international legal regulation of the clash between religion and culture and women's right to equality: *Raday* (note 8) *supra*.

and transform the patriarchal public space so that women share it and fill it with their voices, intermingling with those of men.