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Violence Is Not Grounds for Divorce
by Batya Kahana-Dror
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The approach to women's rights in the rabbinical courts today is pitting Jewish values against the democratic reality we live in. It is not a pretty picture. In the rabbinical courts the chasm between dayanim and litigants is widening. The dayanim, under the guise of democratic self-expression, refute civil law as an authoritative source, and litigants are helpless to act. The civil rights revolution has been bypassed.
The struggle of *mesoravot get* poses one of the greatest challenges to the religious legal system, a system that functions within a democratic reality. Points of contention include halakha versus civil law, rabbinical courts versus civil courts, theocracy versus Western liberalism, Jewish feminism versus spreading fundamentalism, and conservative, reactionary Orthodoxy versus modern liberal Orthodoxy. In the State of Israel, marriage and divorce between Jews is only performed, in accordance with religious law, by the Rabbinical Courts, under the authority granted by the Law of Jurisdiction in the Rabbinical Courts. In the last few decades, the handling of issues of women's status by the rabbinical courts has sorely tested Jewish values against the liberal, democratic values of the State. In the rabbinical courts, the chasm widens between the dayanim and those who stand before them, as the two sides do not speak the same language. The dayanim, using the facade of democratic discourse, refute civil law as a source of authority, and litigants are helpless. There is no synthesis between Orthodoxy and modernity that would provide a solution.

[H1] Human Rights and the Rabbinical Court

Human rights—such as the right of a person to his or her life, body, honor, property, freedom and privacy—have been determined by the Basic Law of Human Rights and Freedom. Concurrently, this law allows for legal restrictions on an individual's human rights in cases where the values of the State of Israel are challenged. Time and time again, the rabbinical courts create a schism between the halakha they believe they are applying and the values that the Basic Law represents.

This begs the question of whether the violation of a *mesorevet get's* rights is a case in which personal freedom is justly restricted, akin to that of a tax evader or the arrest of a criminal suspect. Is the violation of the rights of a *mesorevet get,* whose only crime is to ask for a divorce, a reasonable infringement, one that is deemed necessary by law? What is the benefit to the general public of a woman being denied the right to have children or being freed from a failed marriage? Is this the way to implement the Jewish values of the State of Israel?

For example, the rabbinical court in Tel Aviv granted a recalcitrant husband compensation of 60,000 NIS in exchange for his consent to grant a divorce. "The husband deserves compensation in return for his consent to grant a divorce against the position that he has expressed throughout the years" (six years). The *Beit Din Hagadol* [the religious supreme court] added that, "The husband had the halakhic right to continue being married. The husband agreed to abdicate this right in exchange for the right to sue for damages" ("*HaDin ve-haDayan*"—The Law and the Judge—edited by Dr. Amichai Redziner, published by the Rackman Center for the Status of Women, and *Yad L'Isha,* 4[8] and 11[10]). The court recognized the man's right to marriage and completely ignored the woman's right to freedom and her right to choose whether or not she wanted to live with this man. In addition, not only was this recognition of rights one-sided, but the court also violated the woman's basic economic rights in order to protect the man's right to be married.

In another example, the rabbinical court does not view "regular" violence—defined as “beatings that cannot kill”—as grounds for divorce. The Ashdod rabbinical court imprisoned a man because of violence and his refusal to grant a divorce. Yet the court differentiated between "regular beatings" which does not merit a *hiyuv get* [a rabbinical mandate to force the man to grant a divorce], and beatings that can kill, which does in fact merit a *hiyuv get* (see *haDin ve-haDayan 4*[3]).

In the opinion of the rabbinical court, it seems that "regular" beatings are something that a woman is capable of living with, and in any event, divorce should not be imposed because of it. An act that constitutes a criminal offense in the State of Israel does not constitute grounds for divorce in the rabbinical court.

[H1] "The Altar Sheds Tears..."

Like every legal system, halakha is naturally conservative by nature, and aspires to maintain ancient legal traditions. Since halakha is a religious legal system that considers itself to be of Divine origin, it is even more conservative than the secular legal system. Despite the fact that over the centuries there has been room for creating mechanisms for halakhic change and renewal (such as edicts, special rulings, needs of the day) nevertheless, objective circumstances prevented major halakhic renewal in Orthodox society, in particular over the past 200 years.

The ongoing changes in issues of personal status create a serious challenge for halakhic adjudication in the modern age. Even those who generally favor the approach of "sit and do nothing" cannot help but apply some minimal halakhic thought to modern-day situations. How much more so, religious judges in the State of Israel, whose authority rests on the principle "rise and act," must deal with the new reality in which most of the people in need of their services are not religiously observant.

The huge immigration to Israel and the establishment of the State raised expectations among certain sectors of the Orthodox community that there would be a religious, halakhic renewal with varied and broader interpretations of the Torah. However, this has not been the case. Although solutions to some halakhic issues such as *kashruth* and *shemita* were created, the scope of halakhic jurisdiction in Israel shrunk compared to its jurisdiction in the Diaspora. All civil and criminal legislation was given to the State, which rules according to civil law. Personal status remained in the hands of the religious judges, yet it was defined and placed under the auspices of the rabbinical court system by the State.

Over time, as a result of the increasing political power of the Hareidi sector, the rabbinical court took on the character of the Hareidi community, which succeeded in positioning its own people as dayanim, judges. Only the protest of women's organizations stirred the religious-Zionist public to act, but it was too little too late. This situation created a dearth of Modern Orthodox halakhic rulings that recognize women's suffering and women's rights. In practice, the religious-Zionist community accepted the authority of the rabbinical court and did not establish an alternative model of halakhic jurisdiction.
Why did the Modern Orthodox community accept this situation? First, the rabbinical court is a national entity working on behalf of the State of Israel. The Modern Orthodox sector is predominantly Zionist and thus maintains a loyal attitude toward State institutions even though the rabbinical courts do not represent State policy. An example of this attitude can be found in the actions of Zevulun Orlev and Rabbi Yitzhak Levy, Knesset members from the now defunct National Religious Party (NRP), who continue to introduce bills to expand the judicial power of the rabbinical courts—the same court that they claim does not have enough Modern Orthodox judges. Another reason is the religious-Zionist community's narrow focus on settlements. Finally, there is a fear of opening the door to Reform and Conservative Judaism.
Women's organizations filled this void. At first they concentrated on representing women seeking divorce whose rights were being compromised. Only later, after the magnitude of the injustice came to light, did they embark on a public campaign. The accessibility of halakhic knowledge coupled with the revolution in women's religious learning enabled women to promote halakhic solutions that the rabbinical courts chose to ignore. Orthodox women's groups started calling for change. The women themselves, most of whom belong to "*Kolech*," slowly adopted the feminist lexicon and became flag bearers of the struggle for women's equality in the rabbinical courts. Their positions caused a furor and their actions were viewed by the Hareidi and even the Modern Orthodox as undermining halakha. Women's organizations were trapped. Their members stopped believing in the rabbis and in their ability to institute change, but at the same time did not dare to take action without rabbinic consent (although the more radical among them claimed that a struggle that relies on rabbis actually empowers rabbis and thus makes the situation worse).
While expanding the struggle for women's rights, two steps were taken. The first was recruiting the civil courts, (whether through appeals to the Supreme Court or through lawsuits in the family court) claiming compensation for damages caused by the rabbinical court. The second step was investing more resources in bringing the issue into the public arena. Lawyers, religious pleaders, and social workers were joined by women campaigners who publicized the procedures of the rabbinical courts and worked to promote legislative change that would restrict the rabbinical courts' authority.
The fact that Orthodox women's organizations are leading the campaign has its disadvantages. First, the women's campaign is viewed in the religious world as a feminist issue and not in its broader context—as a struggle between liberal and conservative attitudes—and as such does not enjoy the support of most religious men, who tend to support the rabbis. Second, the push by Orthodox women is perceived by the general public as an internal religious issue and not as a battle against the violation of human rights, so the secular public and human rights organizations are barely involved in the campaign.

[H1] The Response of the Rabbinical Courts

The threat of reducing the judicial powers of the rabbinical courts, along with the growing opposition to court rulings that do not support Western liberal tenets, have led the rabbinical courts to issue more defensive and conservative rulings.
One example of this is the ruling by the *Bet Din haGadol* on an erroneous *get*. A *get* was cancelled as the rabbinical court decided that it was a "mistaken *get*" and insisted on arranging an additional *get*—regardless of the fact that the rabbinical court believed that there were enough halakhic options and explanations to view it as a valid *get* (*HaDin ve-haDayan*, 16th edition, 5 [17] 8). The rabbinical court clarified that "the rabbinical court does not rush to annul a *get*, and in fact this happens very rarely," but they added that they are annulling the *get* because "in this new reality, in which [the civil courts] want to bind the hands of the rabbinical courts so that they will be unable to continue to rule on

agreements that they ratified [Sima Amir's appeal to the Supreme Court], and in which civil courts enjoy easily nullifying decisions of the rabbinical courts, this situation has the potential to cause serious harm...".

It is clear from the judges' language that they obviously weigh issues that have nothing to do with the specific case before them—considerations that take into account the erosion of their authority by the civil courts. Similar statements were made by the rabbinical courts with respect to the civil courts to explain the decision to become much more stringent in this particular case and invalidate the *get*: "The problem is that the civil courts created an opening for parents to sue on behalf of their children in order to evade the commitments of parents toward one another in their agreements, even though we are dealing with a case in which the parents themselves are suing. This trend distorts the law and the halakha and its only purpose is to undermine the authority of the rabbinical court and is exploited by family court judges."

[H1] Halakhic Pluralism

It is important to emphasize that pluralism does exist within halakha, both intellectually and in its practical application. It developed through the geographic dispersal of the Jews, and had evolved over time since its development in Mishnaic times. If we take into account the entirety of halakhic rulings and the span of literature connected to it, we can see that the dayanim have wide avenues to maneuver within halakha. In this respect, dayanim have a broader range of choices than civil judges who are limited to one legislative codex. As such, the dayan*'s* beliefs and attitudes have a very significant and determining influence on his choices in his rulings.

The famous ruling of Maimonides states that, "If [a woman] says, “[my husband] is repulsive to me”... he is pressured until he gives it of his own will..." In other words, according to Maimonides, a woman who claims "he is repulsive to me" will be granted an immediate *get* by pressuring the husband. Rabbeinu Tam, who gave more weight to the fear of "forced *get*" over the principle of leniency, abolished this approach. However, of all the available halakhic rulings, the rabbinical courts chose to reinstate the halakha of the Maharashdam, Shemuel ben Moshe de Medina, who lived in Salonika in the sixteenth century. The rabbinical courts have accepted his position that one has to accept the husband's conditions if the court considers them reasonable, even when the husband has already been halakhically obligated or forced to grant the *get*. Consequently, the man's bargaining power is increased—even though he had significantly more power than the woman to begin with—as he is entitled to absolute free will during the divorce process.

In one case, the district rabbinical court decided not to discuss forcing the husband to grant his wife a *get* because he agreed to grant the *get* if she complied with a number of conditions. In this case, the rabbinical court listed what they considered to be reasonable conditions: "We want to clarify that the right to set conditions exists, not only in the financial realm, but also in the behavioral realm, for example, she will not be allowed to eat certain foods or wear certain items of clothing. Even the rabbinical court cannot force the woman to agree to these demands, but they are binding as conditions for a *get* and have to be implemented even in the situation where a husband has been obligated or forced to grant the *get"* (*HaDin ve-haDayan*, 7[5]). The rabbinical court thus sees as legitimate and even reasonable to violate the freedom of choice and the dignity of women by imposing the husband's conditions on her, even after the two are completely disconnected from one another, in order not to force the husband to give the *get*.

Reliance on this Maharashdam ruling with its current religious-court interpretation absolves the rabbinical court of all responsibility and abandons the woman to the husband's caprices. The rabbinical court thus reduces the woman's power and makes her efforts to obtain a *hiyuv get* from her husband irrelevant, since the *hiyuv get* loses its effectiveness if the husband's conditions have to be accepted. The use of the Maharashdam's halakha leads to unprecedented extortion of the woman, and legitimizes the phenomenon of *get* denial.

[H1] Between "Din Torah" and "Giving Advice"

In contrast to the Maharashdam's halakha, the judges have another, just as easily accessible ruling by Rabbi Haim Palachi (an adjudicator of Jewish Law who lived in Izmir in the nineteenth century). He ruled that in a case of a couple living apart for eighteen months, the husband has to be forced to give the *get*. This pragmatic ruling could have solved many cases of *get* denial, but for the most part this ruling is not used in the rabbinical courts. Furthermore, the court warned against applying Rabbi Palachi's halakha: "It is not his intention to force the couple to divorce but is merely a piece of advice to adjudicators" (*HaDin ve-haDayan*, 18[8]). Redefining Rav Palachi's ruling as "a piece of advice" rather than "Torah law" suits the increasingly stringent bias in the rabbinical courts. The juxtaposition of these rulings—that of the Maharashdam versus that of Rav Palachi's—and the ways in which they are used or not used, epitomizes the ways in which dayanim make choices, the influence of a dayan′ s personal outlook on his rulings, and the outrageous situation in the rabbinical courts today. Another practice that is often used in many rabbinical courts today is to recommend that the couple come to an agreement instead of the court making a decision and imposing a *get*. This practice is upheld even in cases where it is clear that a couple will never be able to reach an agreement because the case has dragged on for many years. In this way the dayanim encourage the prolongation of proceedings and increase the possibilities of blackmail. To emphasize the philosophy behind these procedures, MK Moshe Gafni in the State Audit Commission stated: "There is a vested interest that the rulings should not be implemented. I said this in the legislative commission as well. The altar sheds tears for a man and a woman who separate". It seems clear that the rabbinical court has its own agenda, and is not at all concerned with the parties' needs. There is a disregard for the wishes or the rights of an individual to divorce, as halakhic conservatism will always override those individual wishes.

[H1] Expansion of the Judicial Powers of the Rabbinical Courts

In a 2006 ruling (Supreme Court ruling 8638/03 Sima Amir vs the Higher Rabbinical Court in Jerusalem), the Supreme Court ruled that "legislative principles" dictate that the authority of the rabbinical courts to rule on plaintiffs outside of the issue of marriage and divorce needs to be legislatively effectuated. The Supreme Court thus explicitly determined that it is illegal for rabbinical courts to act as arbitrators with authority on civil matters and personal status disputes that erupted as a result of their own rulings.

As a result, Knesset members from the religious parties re-proposed a law to set this expansion of jurisdiction in law. A few months after this Supreme Court ruling, the new Kadima-led government was formed, based on a coalition agreement with Shas that included a commitment to legislate on the expansion of the rabbinical court authority. Until the Sima Amir Supreme Court ruling, and even afterwards (according to the State Comptroller), the rabbinical court acted as an arbitrator on all matters.

This practice demonstrates that the rabbinical courts see themselves as an independent judicial body with added authority—a judicial body that deviates from the mandate given it by the law (personal status) and converts itself into an autonomous body. This is similar, however inconceivable, to a case in which the Labor Courts, for example, might begin judging cases under the jurisdiction of the magistrates' court because they have declared themselves arbitrators. Moreover, the rabbinical courts did not distinguish between the authority they were given and the authority they simply took for themselves. When the dayanim would act as arbitrators, they would often use the rabbinical courtrooms and stationery with the State of Israel's letterhead. The hours they dedicated to arbitration were also considered part of their regular working hours.

The dayanim were also inclined to send refusal notices to parties who refused to appear before them—in direct defiance of the arbitration law that states that a condition granting authority to the arbitrator is consent of both sides—and in this way they expressed their view that the rabbinical court is in essence the defining authority for the religious community, with no need for that society's consensus. Incidentally, the Supreme Court ruling in the case of Joseph Katz put an end to these practices (Supreme Court ruling no. 95/3260, Joseph Katz vs. the Jerusalem District Rabbinical Court [4], 590).

The rabbinical court is trying to use the governmental authority it has been given over one specific matter in order to establish itself as a court that rules on Torah issues as well as civil matters, and to promote itself as a substitute to the Israeli Justice System. These ideas find expression in the ruling of the Jerusalem Religious District Court by which the halakha forbidding litigation in courts also applies to litigation in the Israeli Civil Courts system "as it stands today" (file 38/2824, 11 [259]).

The rabbinical courts do not allow room for error. This is a halakhic ruling of the rabbinical court in the State of Israel that takes on a role and authority that was not granted to it, and emphatically forbids one to be judged in the Israeli Court system "as it stands today." This attitude of the rabbinical courts also finds expression in the disapproval that judges convey toward women who have opened cases in the family courts, and in their support of the demand (usually from the husband) to transfer cases from the civil to the rabbinical courts, and even to reopen cases that have already been settled. Even graver are cases in which the wife presented a damages claim against the recalcitrant husband. In these situations, the women are subjected to threats by the dayanim who claim that they will not continue to judge the *get* cases until the women withdraw their damages claims.

In their campaign to expand their judicial authority, the rabbinical courts found a supportive argument from an unexpected source: postmodern theory on pluralistic systems of law, which recognizes the rights of religious sects to live and be judged according to their own beliefs. These postmodern Hareidi groups want to have their cake and eat it too. On the one hand, they hold on to their own mandatory role on all issues of personal status, and are unwilling to open another rabbinic court. They are also unwilling to forego their unequivocal authority on all issues related to divorce (Law of the Jurisdiction of Rabbinical Courts, section 3, marriage and divorce, 1953). On the other hand, they demand judicial pluralism for their own people, claiming, "There is nothing wrong with people wanting to live according to their beliefs and be judged by a different set of laws."

Leaving aside the inherent contradiction, I would like to focus on the issue of judicial pluralism. From the perspective of a democratic society, there are problematic issues in this approach: voluntarism and basic values. The nagging questions generally and in this specific case are: how to ensure that only those who want to be part of a separatist legal system will be included in it; how to ensure that neither social pressure nor any other pressure will cause people to seek out the rabbinical courts; and how to ensure that basic democratic values, such as human dignity and freedom (for example, the right not to be beaten), will be preserved.

Even those who support pluralism cannot ignore the fact that religious rulings as they are applied today in rabbinical courts often do not recognize phenomena that are considered criminal—such as violence, drugs, gambling, and more—as grounds for divorce.

[H1] "I Am Satisfied"

An important tool for establishing democratic norms in the rabbinical courts is assistance from the State Comptroller's Office and the Knesset Comptroller's Committee. In contrast to other courts, the religious courts "excel" in their high number of procedural and disciplinary irregularities.

The latest State Comptroller's report, published in May this year, paints a particularly distressing portrait: reports of breaches in 83 percent of the cases in Petach Tikva, and in 75 percent of the cases in Tel Aviv; reports of excessive foot-dragging and abuse of the law; 26 percent of hearings that took place in the absence of a full panel of dayanim (which causes delays in receiving a *get*); 257 cases of arbitration opened in direct contravention of a clear Supreme court ruling, (decision of Sima Amir, see above); irregularities in dayanim's attendance records; dayanim taking up residence outside their area of jurisdiction, which unequivocally violates the conditions of their contract— even after being issued warning letters regarding this practice. In addition to these facts and figures, the report creates a dismal picture regarding the attitude of the management of the rabbinical court toward civil law and the rule of law. The rabbinical courts and their judges do not view the State, the law, and the body that elects them—The Committee for Appointment of Dayanim—as a source of authority over them, despite the fact that, outwardly, they present themselves as a system willing to accept criticism and to correct any improprieties.

The common attitude in the rabbinical courts about the source of their authority is that Israeli law is man-made but the rabbinical courts rely on divine authority. Former Chief Rabbi Avraham Shapiro wrote, "Courts of law derive their authority from State law, they make their rulings based on the administration of the day, what the members of the elected house of government happen to legislate. By contrast, we, the judges of the rabbinical courts, rule with the power of the authority of the Torah for all of Israel, according to the laws of the Torah" (quoted by Judge Menachem Elon in "Jewish Law", Magnus, 5733/1973).

Particularly surprising was the position taken by the Chair of the State Comptroller's Committee, a member of the now defunct National Religious Party (NRP) that examined the report's findings. Besides the compliments he showered on the management of the rabbinical courts and on the Chief Rabbis for their streamlining and efforts at improvement, he expressed a clear discomfort with the content of the report to other participants in the meeting. It seemed that there was an incomprehensible gulf between the complacency felt at the meeting and the outrage felt by the public.

Religious Zionism and its Knesset representatives have adapted themselves to ultra-Orthodox practice, and not only in halakhic matters. They accept guidelines on a range of issues from rabbis—including from Chief Rabbi Shlomo Amar, a member of Shas, who himself is susceptible to the pressures of the ultra-Orthodox Lithuanian stream. The Chief Rabbis' office and the rabbinical courts, despite the fact that they are completely controlled by the ultra-Orthodox, are still supported by the religious Zionist camp, who views them as one of their own. Religious Zionist Knesset members and religious Zionism views the issue of State authority as a centerpiece of their ideology (even though after the disengagement from Gush Katif, an increasing number of voices within the Religious Zionist camp began challenging this assumption). The national religious public is still reluctant to openly come out against State institutions, even though it is clear to them that little if any national awareness exists in the present religious establishment. The national religious public is unwilling or unable to come out systematically and offer an alternative to the State establishment. Therefore, at the end of the State Comptroller's Committee meeting, Knesset member Orlev placed the primary blame for the problems in the rabbinical courts squarely on issues of funding and legislation, and concluded, "I am satisfied."

[H1] *"It Is Not Your Responsibility to Finish the Work, But Neither Are You Free to Bypass It*"

We have reached the peak of evading accountability. The conversion crisis exposed the differing approaches to conversion within Orthodoxy. The gap between the progressive approach and the more defensive, conservative approach within Orthodoxy has not been so clearly delineated in a long time. The public is beginning to gain an understanding about halakhic alternatives that are unavailable in today's religious establishment. The tensions between the religious legal system and the system that propounds equality and human rights are starting to show.

Two bills to improve the processes of conversion and divorce were recently proposed and then rejected. The laws intended to give communal rabbis the authority to convert potential individuals and correct the law on division of property. (This article was written in August, and since then the law on division of property before the giving of the *get* has passed after years of campaigning by groups such as ours.) When it comes to the injustices in the religious courts, not only does the political system avoid helping, but political pragmatism and coalition concerns overcome the need to resolve the problem of divorce in Israel. It seems that the apathy of the general public enables the emissaries of the law to displace this issue with their own political, economic and security interests

The inability to effect change has caused sectors of society to lose faith in the political system that tends to regularly cave in to ultra-Orthodox demands. This capitulation is not only politically motivated, but also emanates from the belief that ultra-Orthodox Jews are the true guardians of the Book, who see their unofficial role as maintaining the Jewish character of the State.

A Modern Orthodox alternative does not exist. The ultra-Orthodox have access to the State rabbinical courts as well as their own private courts. The Reform and Conservative movements have their own organizations. It is only the Modern Orthodox, national religious public that has no alternative. Since many traditional people identify with the national religious camp (that is, the synagogue they *do* attend is Orthodox), this is not a struggle between various factions, but rather the creation of an alternative

that will serve a large portion of the Israeli public, and would therefore have tremendous societal importance.

The State's position, which disallows an alternative Orthodox voice, is leading us to disengagement. We have not yet healed from the wounds of the first disengagement, and we are on the brink of another huge rift in Israeli society. The degree of aversion to the religious establishment is only deepening, both in the national-religious and the secular population. The Israeli public finds it difficult to come to terms with the personal suffering caused by conservative and inflexible halakhic thinking. At the same time, the popularity of religious marriage ceremonies, which are not conducted by the rabbinical establishment, is rising among religious and secular couples- a clear show of distrust in the rabbinical establishment and the rabbinical courts.

It is up to the national religious community to publicly break away from the apologetic, defensive, conservative Orthodoxy of today, a break that would mean establishing a new Israeli Orthodox stream that would, among other things, establish its own religious courts.

Modern Orthodoxy must propose and build this alternative in an organized, systematic way. It must propose an alternative that includes broad halakhic thinking, which, while based on halakha, recognizes the greater good and modern day needs. It must propose an alternative that incorporates the knowledge acquired through the twenty-first century, including civil rights, changes in women's status, and public consensus, and seek to find solutions (including recognizing civil marriage) for the entire public.

This stream of Orthodoxy cannot define itself merely through Zionism and settlement of the land, but has to embrace halakha and its modern-day development against a backdrop of liberal Western values. It is not enough to create lenient rulings versus stringent rulings. A clear line must be drawn between halakha and its relationship to contemporary times and the society in which it operates.

The creation of an alternative religious establishment will integrate an additional halakhic outlook within the Jewish mainstream—one that has a body of followers among the religious and traditional sectors. Its institutions will return halakha to its essential dynamic state, reconnecting it to our everyday lives and at the same time reconnecting all of society to the essential character of the State of Israel as a Jewish state.