

Against Court and Constitution: A Never-Before-Translated Speech by David Ben-Gurion

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Israel famously has no constitution. It turns out that's no accident but rather the will of its first prime minister, who explains his thinking here.

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David Ben-Gurion in 1961. *Gjon Mili/LIFE Picture Collection via Getty Images.*

“I don’t think it’s possible to delegate authority to the court to decide whether the laws are kosher or not.” These incendiary words were not uttered by a contemporary right-wing critic of the power of the Israeli Supreme Court. They were made, rather, by Israel’s founding father, first prime minister, final editor and ultimate author of Israel’s Declaration of Independence, and promoter of liberty and rights for all: David Ben-Gurion. And he spoke them not in off-the-cuff remarks to a journalist but in a prepared speech to the committee charged with drafting a constitution in Israel’s first Knesset.

Delivered on the morning of July 13, 1949, Ben-Gurion's address to the members of the Knesset's committee on "Constitution, Law, and Justice" expresses his forthright opposition to "judicial review"—a possibility still rather abstract in the Israel of 1949. Ben-Gurion's opposition was vociferous and fierce, and he uses the occasion to present a resounding case for the supremacy of the parliamentary process as well as popular authority, and utter rejection of the possibility of investing judges with the power to throw out laws duly passed by the Knesset.

As followers of its politics perhaps know, Israel today is embroiled in a bitter battle over the proper role of judges and the Supreme Court within the political system. Since the 1990s, the Supreme Court has arrogated to itself broad prerogatives to strike down laws. The Israeli right has in response become fiercely critical of the court, and seeks to rein it in both through changing its composition and through passing legislation—such as the controversial nation-state law—that would constrain it. The court has responded with an attempt to expand its remit even further, while many on the left insist that curtailing the prerogatives of the judiciary will undermine democracy itself.

Thus Ben-Gurion's speech is highly topical—indeed, it is radioactive in the context of the Israeli debate. For it unambiguously states the principal founder of Israel's opposition to the kind of constitutionally activist Supreme Court that in fact emerged.

But the speech is much more than a jeremiad against giving judges constitutional authority. Ben-Gurion uses his invitation to address the constitutional committee to state his outright opposition to a written formal constitution for the Jewish state. Not only this, he opposed the passage of *any* measures that would elevate some laws above others by means of devices such as the supermajority (i.e., requiring a two-thirds or three-quarters majority for the alteration of specific laws with quasi-constitutional status). The Knesset, according to Ben-Gurion, should be able to pass, amend, or change *any* law by a simple majority. Thus both the current and future parliaments would have more freedom of action to legislate as they see fit at any particular time. No written constitution would constrain or shape the future work of parliaments and generations to come.

The speech is quintessential David Ben-Gurion. Striding into the committee room, Ben-Gurion feigns merely to present his modest personal opinion, but instead offers something deeply penetrating, even if it may suffer from weaknesses and blind spots. His blistering attack on the idea of a written constitution for Israel, and on the U.S. Constitution as well, is particularly challenging for those—such as myself—who see the American constitution as containing great wisdom. But there are substantive and important observations to be drawn out from Ben-Gurion's argument.

Whether or not one accepts Ben-Gurion's position, this speech is, to my knowledge, perhaps the deepest treatment of the question of the nature of constitutional government to appear in the founding period of Israel. In the years preceding independence, Ben-Gurion had thought very deeply on the question of what the establishment of a Jewish state would require. And this speech offers a revealing window into how the principal founder of that state saw the enterprise.

What follows is a brief introduction to the major themes of this speech, highlighting both the constitutional issues specific to Israel and Ben-Gurion's views on constitutional government as such.

Constitutional Deadlock

A first order of business of Israel's first government was supposed to have been the writing of a constitution. Indeed, Israel's Declaration of Independence explicitly refers to a "Constitution which shall be adopted by the Elected Constituent Assembly not later than October 1, 1948." The legislative body that in February 1949 would become the Knesset had at first been called the Constituent Assembly, the very name seeming to indicate that its principal task was to draft constitutional laws, if not a formal written constitution. And when the Knesset came into being that February, the drafting of a constitution was still considered a primary piece of business. But the constitution never arrived.

Owing, however, to a kind of legislative deadlock that Ben-Gurion himself helped to engineer, Israel settled in 1950 on a system of Basic Laws that would address foundational or important questions thought to be constitutional. But this was to be done in piecemeal fashion and over an extended period of time—over the whole course of Israel's history until today, it turned out. A single written constitution was never drafted, let alone ratified. And as this speech makes clear, had such a text been proposed for the new state in its first days, Ben-Gurion would have almost certainly opposed it.

Why? Did not the founders of Israel intend for the new state to have a formal written constitution? A simple reading of the texts and history from the founding period might seem to suggest this conclusion. According to this interpretation, the political wrangling and compromises necessary to pass a working constitution were too great, the immediate needs of the new and fragile state too pressing, and the matter was tabled, with every intent of creating a constitution later on.

The closer one looks into this story, however, the more untenable this conclusion becomes. It is impossible to point to the text of the Declaration as proof that a written constitution was a priority for David Ben-Gurion and the other signatories. That language had not been inserted into the text as a result of any firm conviction on the part of the drafters of the Declaration. It was rather placed there because the United Nations Resolution of November 29, 1947 (Resolution 181) had specified that the new states that were to emerge in Palestine after the end of the British Mandate were required to draft written constitutions as a signpost on their road to statehood. It was the belief of some of the central figures involved in declaring independence—particularly the foreign-minister-to-be Moshe Shertok and the justice-minister-to-be Felix Rosenblüth—that the United States and possibly other foreign nations would only recognize the new state if it committed itself to the explicit details of UN Resolution 181. Although Ben-Gurion allowed this and other nods to Resolution 181 into the Declaration of Independence, he was indifferent to them and actually disagreed with them. As he puts it: "Even in the [provisional] government there was a different opinion that said: we need some constitution to specify what authority the state has and what authority belongs to a different body. But this was not accepted."

A constitutional manifesto (*nusah ha-minshar*) that accompanied the Declaration of Independence on May 14 was simply procedural: it asserted that the temporary state council (*Mo'etset M'dinah Zmanit*) had authority to draft a constitution. The central purpose of the manifesto was to articulate the state's first substantive legal act: the cancellation of the 1939 British White Paper that had restricted Jewish immigration.

Even as work on a constitution was supposed to begin on the very Sunday following the Friday of Israel's independence, it quickly slid down the list of state priorities. And very soon, Ben-Gurion developed a rhetorical position he would deploy with expert effect over the next few years: "There are more urgent matters at hand that we need to focus on. Maybe later." As he told his coalition partners before the founding of the first government: "We have to build houses for immigrants. A constitution we'll draft when we're a bit more comfortable." Ben-Gurion is seen repeating a similar line of argument in this speech.

But we see a much deeper set of arguments here: a permanent theoretical and practical opposition to a constitution. Notwithstanding Ben-Gurion's characteristically humorous and falsely modest assertion that he was only conveying "the opinion of one man," we see a statement that is incisive theoretically and decisive politically. Theoretically: a wide-ranging study of the main currents of political thought, running through a survey of the constitutional histories of Greece, Rome, England, France, and the United States. And politically: Ben-Gurion indicated that he would use his considerable political strength against the drafting of a constitution. By that summer, Ben-Gurion would develop a position in favor of Basic Laws rather than a formal written constitution. And, of course, this position carried the day. On the basis of this text, even his assent to "basic laws" would seem like a compromise. Why did he oppose a constitution for Israel so vociferously?

Practical Reasons

The political circumstances in the summer of 1949 were entirely different from those of the days leading up to independence in May 1948, when the issue of a constitution for the new state had emerged. With the War of Independence over, Ben-Gurion was no longer the head of the provisional government of a country fighting for its existence, but prime minister. He knew that a written constitution would likely inhibit the maximum freedom of action that he sought for himself. In this speech, we can see hints of that practical consideration. For instance, he discusses what he sees as the "reactionary" role played by the Supreme Court of the United States in curtailing FDR's freedom of action both as he implemented the New Deal and during World War II. "America is a big and rich nation, with big capabilities. It doesn't matter to it what absurdities are in it," Ben-Gurion says. Israel is a small country and cannot afford "absurdities."

As the Israeli scholar Nir Kedar has argued, Ben-Gurion's opposition to constitutions had a further practical rationale. Israel was a country full of cantankerous Jews who loved, as he puts it in the speech, to have "theoretical debate." The country was astoundingly diverse intellectually and politically. Ben-Gurion worried that the task of creating a document that could cross Israel's enormous ideological divisions would have occupied the attention of the entire country, possibly forcing decisions that would undermine the delicate balance necessary to sustain a diverse nation:

If we begin to argue about declarations, this will embroil most of the members of the Knesset, and of course the newspapers—*Ma'ariv* and *Y'diyot Ahronot* surely. The matters are maybe important, but they'd instigate a fight and an argument. . . . If we begin to engage in major philosophic arguments, we will damage the essential needs of the state.

Ben-Gurion understood that the political reality at the time did not lend itself toward drafting declarations or constitutions that express the substance of the state, much as such a document might have been helpful. As he points out, a great author would likely have been able to improve on aspects of the Declaration of Independence. But for this, the state would need to call on great literary figures, what he calls *anshey ruah* or “men of spirit.” Such figures were not likely to be at the helm of a committee on the Constitution, Law, and Justice.

Ideas

The speech also presents some of Ben-Gurion's more theoretical reflections on the nature of constitutional government. As he argues eloquently, a written constitution may, in certain times and in certain lands, be an important aspect of constitutional government. But it is not the only form that constitutional government can take.

Ben-Gurion points to the United Kingdom, which lacks a formal constitution but instead has the train of precedent and laws made by parliament. The new state of Israel, he argues, was already headed down that road; many of the items that it would be the business of a constitution to create were already in place. By this time it had a legislature, a cabinet, a system of courts, and a presidency, and had used elections to nominate the legislature and leadership. Many of these elements had evolved out of pre-state institutions. Other matters of sufficient importance to be deemed constitutional, including the frequency of elections and the laws around the military, still had to be determined. But Ben-Gurion's point is that similarly vital (indeed more important) constitutional matters had already been decided without a constitution. Why couldn't remaining issues be decided that way moving forward?

Ben-Gurion's more crucial point—and the more controversial one, that makes the speech especially salient today—pertains to majoritarianism. Ben-Gurion articulates the most absolute possible view of majoritarianism: that all of the laws should be decided by the majority. His words speak for themselves: “Better that they pass a bad law than that a minority takes over. For the people will not accept this! Even the rule of the majority is not so quickly accepted among us. The rule of a minority? This won't be accepted. There also isn't any moral or logical justification for it.”

Ben-Gurion spends a significant amount of time in the speech arguing that wisdom rests in the people—and forcefully rejecting racist (or at least chauvinistic) arguments to the effect that Israel's population, and particularly its newest immigrants from the lands of the Middle East, are not prepared for self-government. Not only does he argue against this view from the perspective of human equality, but he also pokes fun at the absurd claims of ethnic superiority on the part of the Ashkenazi establishment: “They say to me that there are thieves among [the new immigrants]. I'm a Polish Jew. I am very doubtful that there is some Jewish community somewhere where there are more thieves than among the Jews of Poland.”

The target of these arguments is the committee's seeming preference that a two-thirds or three-quarters supermajority be required to change constitutional or basic laws. Ben-Gurion by contrast believes that all laws should be decided by simple majority. As he puts it, a written constitution binds future generations to the laws or practices of the past. And most controversially, he argues against empowering judges to assign for themselves authorities that should be left to the parliamentary body (or, framed more demagogically, in the hands of the people).

The core of Ben-Gurion's argument, however, runs deeper. To Ben-Gurion's astute political mind, a constitution is fundamentally political rather than simply legal. It stands or falls on the ability of the state to maintain its own ideas and principles. In his view, there are no fixed principles of constitutions, no set of absolute laws which a constitution must exposit. Should a legislature be unicameral or bicameral? Should there be a constitutional court or not? Should the representatives be allocated by proportion or geography? Should the constitution be written or not? To make the matter explicit: should there be 120 members of the Knesset or 122? All of these are contingent questions that depend on contingent circumstances. As he puts it in some shocking remarks that may better typify his political mind than anything else he ever said: "In general, parliament involves itself in the making of laws for the needs of the time and the hour. Law is the fruit of its time; there is no eternity in law."

Ben-Gurion in effect argues that all law is contingent. There may be timeless ideas underlining a state, and Ben-Gurion is not opposed to the idea of moral laws as such. But the praetorian guard protecting the ideas that underlie the state is the body politic itself and not the laws. And it is surely not, in Ben-Gurion's controversial formulation, judges: "I think giving this kind of authority to judges is a reactionary thing. With us this can't exist, the community wouldn't accept it. . . . Only the nation determines the constitution. A constitution is what the nation wants after free debate and judgment and after a vote."

There are of course many arguments against this view. The famous phrase "the tyranny of the majority" sums up one. Another is the argument that even a majoritarian government requires a constitution to perpetuate the rule of the majority. A third—best articulated in *Federalist* 49—is that states without a written constitution serving as a "law of laws" can miss out on a healthy reverence for laws that can contribute to good government. A fourth is that the majority is just a check on power and not a governing body: the majority restrains the power of the legislature via elections, but other rules and institutions are in turn necessary to restrain the passions of the majority. And as Ben-Gurion intimates, there are moral laws that inhere in the nature of things, which the state invalidates itself by violating—even if condoned by the majority. A majority that wins an election cannot decide, for instance, not to hold future elections. The reader must judge the ability of Ben-Gurion's arguments to counter these powerful points.

What about the work that some constitutions do in articulating the ethical principles of the nation and the rights and duties of citizens? Here Ben-Gurion is particularly acid. France's constitutions (of which there had been many) proclaim liberty, equality, and fraternity, he says. This is fine and good, but the principles are violated all of the time with nothing but indifference. Napoleon was democratically confirmed as emperor in the land of equality and fraternity. Ben-Gurion argues that Israel, for what it's worth, has a document that does some of this work: the Declaration of Independence, which speaks of equality, freedom, and the vision of the prophets.

Ben-Gurion's position, well-articulated in this speech, prevailed only in part. While he succeeded in preventing the drafting of a written constitution, even as he spoke Israel's courts were beginning to lay the groundwork for a system of judicial review that has gathered even more steam since the 1990s. The question of the proper roles for the Supreme Court, parliament, and the people is perhaps the fundamental question in Israeli politics today. Although it's a dangerous game to speculate about what yesteryear's leaders would say about today's problems, it is hard to believe that Ben-Gurion would approve of the expansive powers the Supreme Court now wields. Indeed, it has become precisely the sort of undemocratic and non-majoritarian institution he warned against.

Could a written constitution have defused this question? I am skeptical. Whatever the merits of written constitutions in other lands, the obstacles to the passage of a sound one in contemporary Israel remain nearly insurmountable. Many of Ben-Gurion's objections retain their force.

And yet Ben-Gurion's position contains its own perplexities and paradoxes which the reader must consider. These perplexities make the speech worth reading. Ben-Gurion's eloquent case against a written constitution presents much fodder for reflection on constitutional questions today.

David Ben-Gurion

Speech to the Knesset's Committee on Constitution, Law, and Justice, given July 13, 1949, translated by Neil Rogachevsky

I am a little astonished that I've been asked to come here, for in this matter I'm not presenting the opinion of any political group, and certainly not the opinion of the government. The government has not yet debated this question even once. When the government put together the agenda for the Knesset, which was approved by the Knesset, it stayed away from this question. Consequently, everything I will say here is my personal and private opinion.

I don't know what the value of these remarks are, because I'm not an expert in the field. However, for about thirteen years I had thought we had to found a state as soon as possible, and since I believed there was a chance that a state would arise, I thought during those thirteen years about problems related to the founding of a state. And the central conclusion that I came to was this: the state of Israel, if it were to arise, could not look at what's been done in other nations and simply do as they've done, but rather would need to deliberate on every matter for itself, to decide whether a particular thing is necessary for the state of Israel in that moment or not. The fact that something is done or not done in another place—that doesn't obligate us. For I knew that the state of Israel would arise in special historical circumstances and that it had particular tasks that nearly no other nation has. Consequently, I also came to the conclusion that in the matter of the constitution and laws we cannot act according to conventional practice. We should examine why particular nations did things [certain ways], and consider whether these justifications do or do not hold for us—if a particular thing is good or not for the state of Israel.

The question of whether a constitution is necessary or not necessary depends in the first instance on what one understands by the word “constitution.” Most arguments between people stem from the fact that each one has a different definition of the things that are the subject of debate. If we mean by the word “constitution” laws that establish the regime of the state—clearly a constitution of this kind is necessary. Just as there’s a need for a law that determines who gives bicycle permits, it’s necessary that there be a law that determines how the representatives of the nation are selected, what are their powers, how the government is chosen, how the government is assembled, is there or is there not a president, what’s the power of the president, is the government responsible [to the parliament, etc.], how long does a parliament last, and so on. Laws such as these, which determine the operating of the state, are certainly necessary.

And if this is the constitutional question, it seems to me there is no need at all to debate; by now we already more or less have a constitution, though maybe not a complete one. We have a presidency, we have a Knesset, we have parliamentary government—that is to say, directly responsible government through the Knesset, since we have one Knesset and not two. We haven’t yet determined how long a Knesset will sit; we’ve determined that there are courts, that there’s a Supreme Court. Many of the things that are called “constitutional”—maybe not all—we’ve already determined. It’s possible that we’ll have to add to them some things regarding the military regime, some things regarding the substance of the laws regarding the Knesset—since the way we’re proceeding now was perhaps appropriate for the National Council, but is not adequate, in my opinion, for the Knesset. No one would dispute that these sorts of things certainly determine the operations of the regime and the state.

But there is also another meaning to *constitution*, which is that there is a series of laws, or a single law, that have a legal standing different from the other laws. With respect to all the other laws, one parliament permits, and a subsequent parliament forbids; one parliament decides thusly and a subsequent parliament cancels or modifies its decision. But there are states in which there are particular, special laws touching on a series of things, and these have greater validity than other laws. As far as I understand it, that’s the question to be debated here: not [the character of] foundational laws but whether to pass a law that is called a “foundational law”—because the term [“constitution”] itself doesn’t mean anything. Things included in this kind of a law [i.e., a written constitution] are not the same in all countries. There are some in which [the constitutional] law contains many things, there are others in which it contains fewer, and there are those which contain mere declarations that no one carries out and are impossible to obligate people to carry out since they lack any sanction. Some countries have given this law ceremonial standing, making it a ceremonial proclamation, and thus it becomes a historical document.

The question is: why should one give a specific law a different legal standing? Historically, as far as I know, there have been two main reasons for this.

The first reason: in a federal state there is the problem of the division of powers between the federation and the parts of the federation. Such a question emerged for example in America. In America there is a Union, a union of states. The thirteen states that built the Union were very jealous of their special authorities. They did not want to give up their sovereignty and powers completely, and they agreed to establish the Union only because of the necessity of self-defense and other reasons. But they wanted this Union to have limited powers, and for the principal responsibilities to stay in the hands of the states. In such a situation, it is

necessary to delineate and state clearly what powers lie with the federal government and what powers lie with the states. But it's not enough to say this. There needs to be a sanction; there has to be a legal institution so that if the federal government oversteps its powers, it's possible to say: this is invalid. This is one of the reasons why the American constitution has a kind of authority that, as far as I know, no other constitution has. And as a result a [Supreme] Court was created that has a kind of authority that no other court has: it can invalidate any law that the Congress passes with a large majority, if it doesn't fit the constitution—that is to say, if the parliament, whose name is Congress, takes upon itself authority that the Constitution didn't delegate to it. I don't want to say now whether this is good or bad. When I come to our affairs, I'll say something about why it's bad.

In other nations there was a different reason. There was a tyrannical regime, a regime of the rule of one, the regime of a king. Back then they called it a king; today they call it a dictator or another name that I don't want to mention [i.e., *Führer*]. There was a revolution and they wanted to found a popular regime, with or without a king, and there was a need to express this revolution in a declaration or a constitution or in both such documents together: a kind of constitution that is both a declaration and a constitution. This thing came about in order to promise that there would be no return to what was there before, to give the revolution greater authority—even though [this kind of constitution] doesn't have much value insofar as a dictator would show contempt for the constitution if he happened to return to rule. But some think there is logic in this. And so they gave to these laws, declaring the freedom of the nation, its independence, its democracy, a special authority. They made this superior since it ratifies the establishment of a state after hundreds of years of fighting for freedom. This was how it was basically in France. But nearly every year they produced a new constitution: in 1789, 1791, 1792, 1793, 1795, and when Napoleon came, he showed contempt for all the constitutions together, and indeed with the help of an instrument of democracy, [i.e., a plebiscite], made himself emperor.

These are the two main reasons why a specific law was invested with particular legal authority that gave this law special value in the eyes of the nation. These two factors aren't present here. There is no question of separation of powers between the nation and the municipality of Tel Aviv, or somewhere else. There were actors [i.e. the Revisionists] who wanted to present "conditions" to the state, but the state did not accept these conditions, and said to them: you must submit to [the authority] of the state. Even in the [provisional] government there was a different opinion that said: we need some sort of constitution to specify what authority the state has and what authority belongs to a different body [i.e. international bodies such as the United Nations]. But this was not accepted. This is a unitary state, not a union between different bodies, not a union among different states coming together. This is not a state that fought for hundreds of years against tyranny within the state and thereby wanted to declare its freedoms by means of a special law.

What about a constitution in the sense of a ceremonial declaration of known principles? These do not have [the power] of sanction behind them. There are many constitutions in the world in which, perhaps, good things are written. But they have no substance since they lack sanction. For instance, the French constitution speaks of equality and fraternity, but without any sanctions. If one man is not equal to the second in reality, a statement to that effect means nothing. It's only a beautiful slogan.

But if that's the meaning [of a constitution], we already have something like this: the Declaration of Independence. It was necessary to state [in May 1948] that we were independent—for until that moment we were under foreign rule. And it wasn't necessary only to state that we were independent; we also spoke about principles, about the vision of the prophets, about equality, and about freedom [in the Declaration].

It may be that it's possible to improve the style [of the Declaration.] But I'm uncertain if we'd produce a document very different from the document we have. The value of this document is that it founded the state. A [talented] writer could sit down and do the work with a more ornamental style. Maybe some poetic flourishes could be added. But it wouldn't change this: the [central importance] of the Declaration is that it expresses the transfer from foreign rule to independence. Not every day does one pass from foreign rule to independence. Just once—well, I pray it's just once.

Let's now consider whether we need two kinds of laws: laws that can be changed and laws that can't be changed except by a relative majority, or a supermajority. And just as I am against special privileges [in politics], I am also against privileged laws. If I were in the minority—and I could be in the minority, since my party is in fact a minority, and it's only a majority by joining with others—even then I would oppose the supermajority. Why would the minority restrict itself? I believe that every minority fancies that it will one day be a majority. Otherwise there's no reason for its existence. To what end would it restrict itself? If we now make bad laws [with constitutional status], when the [minority] becomes the majority it won't be able to change them and will be subject to the minority. Why would they do this?

I also don't know what authority we have to tie the hands of those who will be elected in a year, or in five years. I do indeed think that this generation has a special right, since it built the state, and through building the state is shaping its character. But essentially this is a natural right. If there were people of our generation demanding for themselves special *legal privileges*, I would oppose it.

I'll give an example from another domain. There is a settlement in the land that sadly I'm not a member of now. But I have a certain relationship to this settlement—I was a partner in its creation. The settlement is Kibbutz Ein-Harod. It's not just any settlement. In this settlement there are certain ideals. There is a man there who was one of its first builders and in fact the initiator of this settlement. This man is named Shlomo Lavi. He worked for 45 years, invested his whole life in this settlement. His two sons were killed in battle.

I am certain that [Shlomo Lavi] would protest if we gave him special rights over a pioneer who came yesterday, settling in this place and thus becoming his equal. With respect to history maybe he has rights—he founded the place. But those are moral rights. When he votes in Ein-Harod he lifts one hand, and a pioneer who just came to the country and became a member of this settlement—I think membership takes twelve months, I'm not sure—he also raises one hand. I think it's a good thing, that when [President Chaim] Weizmann inserts a ballot into the ballot box, his ballot is worth exactly as much as the ballot of a chimney sweeper. There is in this immense moral value.

There are certain people who have rights, but these are moral rights, not legal rights. It's possible that this generation has a certain ethical weight, but it doesn't have greater wisdom than those that will come after it. Are we sure that those who come after us will not have the same wisdom, the same devotion, that they will

not understand the needs of the nation as we do? Why should we restrict them? I think this idea is baseless, both morally and logically. There isn't here the justification for [special, hard-to-change laws] as there was in America. And even in America this was exploited for ill. I'll get to that.

If you compare constitutions, you'll see that they differ in the scope of their concerns. There are states that bring into the constitution one class of things, and there are states that bring into it another class of things. Take the law regarding the [freedom of] the press, for example. There are states for which this is in the constitution, and there are states where it's not; the law on [freedom of] assembly is another example. With us it's not necessary to declare that assembly is permitted, since in our state it's permitted to do everything that the law doesn't forbid. In this state it's permitted to do anything unless it's forbidden. And if it's forbidden, it's forbidden. There is no need in our state to declare that there is freedom of the press. In France, after the fall of Louis XVI, the [revolutionaries] gathered and declared the freedom of the press, because beforehand there was no such freedom.

Something like this happened in my life. One of my friends, I won't mention his name, was one of the first pioneers who came to this country. He was from a very observant family. They annoyed him greatly, not allowing him to attend meetings of the Zionist youth movement [in the old country]. When his family learned there was a meeting, they would lock his clothing closet so that he wouldn't have anything to wear and couldn't go. He ran away from home with intent to make *aliyah*. And when he came into my room in Warsaw, he threw down his head covering and yelled: "David! [Let's have] pork sausage!" He felt it was necessary to throw off what burdened him.

So it was in France. When they threw off their burden [in the Revolution], they declared freedom of the press and of assembly. With us there's no need to declare freedom of assembly. We assemble. It's impossible to forbid assembly. And if there will be a law on assembly, it will be like any other law. And, my friend [Yisrael] Bar-Yehuda, if it's possible to change the law that was passed yesterday [on defense and security] only by means of a two-thirds majority, so that when Bar-Yehuda's party becomes the majority—I don't know if he wants that—it won't be possible to change it by a majority of 51. Instead he'll need to have two thirds or three quarters of the votes. Why would he limit himself thus? If later on the nation wants a better law, let them be able to change it!

I'll next say something on a subject considered constitutional by all opinions even though I'm a bit afraid to say it, because I'm in the presence here of jurists: I don't appreciate the different [normative standing] ascribed to one law compared to another. In my opinion there's no difference. Which law is more important? A law mandating an eight-hour workday that hasn't made it into a constitution, or a law that says it's forbidden for a king to get married if the prime minister doesn't consent, which is constitutional. It's hard to know. In my opinion the law on the eight-hour workday is more important even if it's not included in a constitution. Or take something more important: what's the authority of the president? Does he simply sign off on a law or does he have the veto power? As far as I know the president [of Israel] right now doesn't have veto power, but I don't know why we can't change this in four years. We have lately been deliberating on a law regarding the length of time that a president can travel outside the country. This is a constitutional law, if we accept a certain definition of constitutional law. Why was it impossible to decide one way a month ago, and now something different? Why would we need a supermajority on this question?

There are no grounds for restricting future elected representatives, and no justifications either. There are no laws that have a special nature, some special importance, so that one has to give them special authority. In my opinion, the decision of the Knesset that authorized the [austerity] program of Dov Yosef—although it wasn't even in the form of a law—was far more important than constitutional laws, since this is a way to accept immigrants, and there's nothing more important than that. In my opinion, that's even more important than the possible ways of assembling a government, and than the government itself. It's very difficult to determine which law is important and which is less important. Why would the parliament decide that the majority of today—since the majority decides—has less power than a majority of the future? I don't understand that.

It's especially the case that there's no logical reason that we should do what was done in America: delegate to the court the authority to invalidate laws if these laws oppose the constitution. And, absent this move, there's almost no reason to establish a special constitution for "special" laws. This would be a reactionary step, simply an attempt to hinder the development and legal progress of the state.

This is how it was in America. When America wanted to pass a law on the protection of children, stating that it's not allowed to put young children in to labor, or for not many hours, the Supreme Court ruled that this was against the constitution. The Supreme Court of the United States threw out the income tax on the grounds that this was confiscation of property, and confiscation of property is forbidden according to the constitution. The American constitution has turned into a conservative, reactionary institution that stands against the will of the people. America is a big and rich nation, with big capabilities; it doesn't matter what absurdities are within it. Despite them, the country exists.

But in a country such as ours, imagine for yourselves that the nation wants something, and seven people designated with the rank of judge cancel something that the nation wants! All respect to judges. I'm not questioning their individual characters but referring to the fact that they, and particularly the Supreme Court, are said to represent the law. This, in our country, would lead to revolution. For the people will say: we will do what we want. I think giving this kind of authority to judges is a reactionary thing. With us this can't exist. The community wouldn't accept it. The Knesset, or, if we have in the future, a different kind of parliament, will pass a law which will rely on the will of the majority—and the Supreme Court will throw it out because in its opinion it doesn't fit some line in the constitution! Only the nation determines the constitution. A constitution is what the nation wants after free debate and judgment and after a vote.

And so: we can't hand this responsibility to judges as they did in America. In America this thing works. And in the American constitution there are many strange things. In my opinion this could turn into a big international danger, just as it was during the two wars. Only thanks to the great wisdom of Roosevelt was a change brought about in this regard. In America there is separation of powers between different branches. But every branch just does whatever it wants.

We chose a parliamentary form of government. The nation decides on the laws, and their representatives implement them. I don't think it's possible to delegate authority to the court to decide whether the laws are kosher or not kosher. Even now some cases could occur—though in the Knesset this hasn't happened yet, but it's said that this has happened elsewhere—where people say: "pass laws, I'll hold them in contempt. I

do what I want.” We’ve also heard of property owners saying, “We’re not paying taxes. You pass laws, but we’re not paying them.” In no orderly place should something like this happen. But if [the Knesset] decides that a minority can prevent laws—our people won’t tolerate that. With the divisions that exist among us, with the hysteria, and with our need to educate ourselves in the rule of law, to educate ourselves in recognition of democratic practice in the nation, we must not allow a minority to prevent the passage of laws on the grounds that a supermajority is required for certain “special” laws. I think this would be dangerous here. Better that they pass a bad law than that a minority takes over. For the people will not accept this! Even the rule of the majority is not so quickly accepted among us. The rule of a minority? This won’t be accepted. There also isn’t any moral or logical justification for it.

Some people are saying that at the moment there is a big *aliyah*, and “who knows what sort of people” are coming. Unruly people. Savages, [it is said]. From Morocco, from Yemen. I for one very much hope that they’ll come from Persia and other nations like that. I can’t count myself among those many people who are afraid of this sort of *aliyah*. If I have any fear—I fear non-Jews. Due to this fear I was for thirteen years in favor of the founding of a state for ourselves. I choose to be under the rule of bad Jews rather than under the good rule of refined non-Jews in a popular democracy or another kind of democracy.

I absolutely deny the view that the current immigrants are “different.” They say to me that there are thieves among them. I’m a Polish Jew. I am very doubtful if there is some Jewish community somewhere where there are more thieves than among the Jews of Poland. They say of us, who came from Eastern Europe, that we’re pioneers. I deny this to the ends of denial, since I am here amidst my people, and I have known many good Zionists, that bought shekels [donations to the Zionist Congress], sometimes even travelled to the Zionist Congresses—but to come to the Land of Israel? That they wouldn’t do. I know many good Zionists who did not allow their sons to leave their countries for Israel. They started to come when things got bad, when the pogroms started.

I think it’s absurd that people now say that those who are coming are coming “against their will.” We all came against our will. The people of BILU, [the initial pioneer movement of the early 1880s], came because of pogroms. The people of the Second Aliyah [1904 -1914] also came when there were pogroms, or when they thought there would be pogroms, or revolutions: I fled [the abortive 1905 Russian] revolution. I was in favor of revolution, and when it came, I felt it wasn’t giving me what I wanted—that I had to make my own revolution. This is also how the German Jews came: from recognition [of their situation]. I do not know about the particular “shame” of the Moroccan Jews. Thank God, there are thieves among every people. I know the Jews of Turkey. On this basis I could try to restrict the Turkish Jews [from coming]. They didn’t produce a Brenner or a Bialik. They didn’t give us any pioneers. But I meet excellent Turkish pioneers. I completely reject this fear. It has no basis. It also has no moral justification.

We have no justification to be so arrogant as to pass laws that people who come after us can’t change. I also don’t think we have to despair. Those who are sitting here today will also be in the Knesset in five years. At any rate the movement that I’m a part of believes that if there are elections in four years it will be in the Knesset, and it will not have fewer seats than it has now. My friend Bar-Yehuda thinks that in the last year we’ve lost our prudence. But I don’t know why others have to think that they are in worse shape and less strong. We have to have faith in ourselves. I have faith in the Jews that are coming, I have faith in ourselves,

and thus I don't know why it's necessary to have laws that can't be changed except by a two-thirds or three-quarters majority. We are passing laws by majority now. In four years we'll also pass laws by majority. In four years maybe we'll be a little smarter. Even if there are among us people who do not know how to learn, they'll know the reality of the situation in four years. We don't know what that situation will be—but they will know. They'll be living in that reality and they'll see what has to be done to meet the needs of the state at that time.

Why limit them? Because this is done in some other country? First, hasn't been the case in all the nations. I don't know if there was such a law in ancient Rome. Not everything must be learned from Rome, but one can learn some wisdom from critical engagement with it rather than from imitation. This was a nation that was a little bit gifted in legal understanding and a little bit gifted in military understanding. I don't think that in Rome there existed a law like this [requiring a supermajority to overturn certain laws]. I don't know of a law like this in [ancient] Athens. And I don't think there was a law like this in [ancient] Israel that required two thirds in order to make a change. There were things in the laws of ancient Israel that certainly couldn't be changed since the Holy One Blessed be He commanded them, but that's something else.

There is another nation—and I know there are people who will devour me if I mention them—and that is the English nation. The English were indeed anti-Semitic. The Anglo-Saxon race is like another race in the world, [the Germans]—but I admire the political intelligence of this people in its country. The English have no constitution, and their progress was not arrested because of this. On the contrary, in England it's possible to pass a law by a simple majority, provided the king signs it. But he has to sign it. In England they began a great revolution when they decided that women have the right to vote. And they decided this by means of a simple parliamentary majority. And there, the same class of law that determines whether or not the king is allowed to marry a woman he loves also determines how much cigarettes can be sold for.

A constitution isn't something accepted all over the world. And even if it were accepted, we should choose what's fitting for us. In my opinion it isn't something we need; it doesn't suit us morally or intellectually. If you think differently—you are allowed to think differently. I've just presented the opinion of one man. But in this matter I have only the prerogative of a single person, perhaps an unreliable one. I don't bow down to everything that's conventional in the rest of the world. On things related to our lives, I am determined to think things anew. When I thought about this free from the perspective of what's customary and conventional elsewhere, I couldn't find any justification that would obligate us to do what they did in America. I am in favor of laws in the Knesset: laws regarding elections, on the presidency, on the government. But let us not involve ourselves in declarations. We made a declaration once. That time it was just. And the Declaration has pedagogic value. In general, parliament involves itself in the making of laws for the needs of the time and the hour. Law is the fruit of its time; there is no eternity in law.

I see what's before the Knesset over the next three or four years. When I say "Knesset," I mean state, and when I say "government," I also mean state. In my opinion we have tremendous labors in front of us. We inherited many laws. Some of them are not so bad, even though they are Anglo-Saxon laws. But we also [inherited] many bad laws that are not fitting for us. Not only were they made with malice, but they're not suitable for an independent nation. These were laws made for a colonized nation. Civil law in my opinion is absurd. I spent two years of my life studying Mecelle, [the civil law of the Ottoman empire]. And I enjoyed

very much seeing parallels in it with our Talmud. But it's absurd that we'd live in a regime from the Middle Ages. I also think the criminal law we inherited from the British is not fitting given our morality. [English law] is also currently the basis of judicial procedural, commercial law, and other matters.

The current Knesset is already burdened with work. If we begin to argue about declarations, we will embroil most of the members of the Knesset, and of course the newspapers—*Ma'ariv* and *Y'diyot Ahronot* surely. These matters are perhaps important, but they'd instigate a fight and an argument, and would deflect attention from the work that it has to do in order to set up proper public services and to oversee and scrutinize the government. And I pray for criticism of the government—press criticism of the government is positive for the state. But I don't see that we have time to busy ourselves with [constitutional] declarations. This is matter, perhaps, for literary people. We need laws. This state now requires laws [halakhah] rather than legend [*aggadah*], which is not necessary.

If we begin to engage in major philosophic arguments, we will damage the essential needs of the state: preparations for *aliyah*, settlement, raising living standards. These to my mind are the most pressing matters for the Knesset and for the state. The matter of a constitution will completely deflect us to another course. We very much love theoretical debates. One person will declare allegiance to Israel, another to socialist revolution. A third will say he's loyal to popular democracy, and another to pioneering. It's a divisive and futile debate that will take time in the Knesset and in the newspapers, and it will distract us from the essence of the matter. But in spite of all this, if the majority thinks differently, we will follow what the majority thinks.