

HOW ISRAEL'S DECLARATION OF INDEPENDENCE BECAME ITS CONSTITUTION

<https://mosaicmagazine.com/essay/israel-zionism/2021/11/how-israels-declaration-of-independence-became-its-constitution/>

Israel's founders made little of the declaration at the time. It took decades of work by figures of widely different political stripes to make it the towering document it is today.

November 1, 2021 | Martin Kramer

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This is the final installment in Martin Kramer's series on how Israel's declaration of independence came about, and what the text reveals about the country it brought into being. Six previous installments can be seen [here](#).—The Editors

Israel's declaration of independence was publicly read out by David Ben-Gurion late in the afternoon of May 14, 1948, a Friday. Its last, operative section promised that independence would be followed by a "constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948."

In the hours before the ceremony, various members of the People's Council—the temporary legislative body in whose name the state's establishment was proclaimed—objected to certain formulas in the document. Ben-Gurion (as I noted in an [earlier installment](#) of this series) downplayed the document's significance and reassured the objectors in these words: "We're declaring independence, nothing more. This isn't a constitution. As for the constitution, we will have a session on Sunday, when we will deal with it."



Flag-bearing jeeps at the head of a parade marking the 25th anniversary of the Israeli declaration of independence in Jerusalem on May 8, 1973. *Keystone/Hulton Archive/Getty Images.*

But they didn't deal with it on that Sunday, it wasn't adopted on or before October 1, 1948, and it hasn't been adopted to this day. Israel has no constitution.

In retrospect, Elyakim Rubinstein, a former Supreme Court justice, wondered whether Ben-Gurion hadn't erred in failing to push through a constitution simultaneously with the declaration of independence: "Looking back," he wrote,

a wistful murmur suddenly sneaks into the heart. Perhaps a moment of truth was lost on that [pre-Sabbath afternoon] at a rare moment of relative unity in the face of external dangers, when a constitution could have been hammered out.

But then again, Rubinstein added, perhaps "a debate over a constitution then would have derailed passage of the declaration."

Perhaps so, perhaps not. In any case, Rubinstein's speculations assume that, at the time, Ben-Gurion actually had an interest in a constitution. He did not. He was running a war and preparing to build a nation, and he wanted nothing to distract him from those tasks. So he dismissed a constitution, whose details would require debate, as an intolerable distraction.

A year later, in mid-1949, he was still dismissing it:

Debate about a constitution will take years, keeping all of Israel and the Diaspora busy. If a word appears about freedom of conscience, an argument will erupt about this freedom of conscience as opposed to freedom of religion or as part of freedom of religion. In the entire Jewish world, instead of concern for what needs to be done, Jews would argue about the constitution. . . . This is liable to hurt us a great deal.

Ben-Gurion may have had in mind some of the fractious debates that preceded the declaration of independence, especially the heated back-and-forth over including mention of "the Rock of Israel" as a veiled allusion to the Almighty. Did Israel need more of that sort of thing? Ben-Gurion obviously thought not.

More generally, he also seemed to believe that law in Israel would simply be what the legislature determined it to be at any given moment, and that there was thus no real need for constitutional law. This comes through in a pre-state exchange with Felix Rosenblueth in the People's Administration—the provisional executive branch—over the issue of borders. Rosenblueth (soon to be Pinhas Rosen, a future justice) was arguing that, according to international law, a state had to define its borders:

Rosenblueth: This is an issue of international borders; it is impossible to ignore.

Ben-Gurion: Everything is possible. If we decide now not to say "borders," then we won't say it. Nothing is a priori.

Rosenblueth: This is not a case of a priori. This is a legal matter.

Ben-Gurion: Law is a matter that human beings decide.

“Everything is possible.” “Law is a matter that human beings decide.” “Nothing is a priori.” Obviously, Ben-Gurion was not a leader about to invest in constitution-writing.

I. The Rise of Basic Laws

And so no constitution was written. The Knesset, Israel's parliament, which was initially supposed to function as the Constituent Assembly charged with drafting the constitution, tried its hand but failed to make progress. Instead, it resolved to cobble together a constitution in piecemeal fashion. As and when necessary, the Knesset would pass certain “basic laws”; these would stack up over time; eventually, they would be codified into a constitution.

The first basic law—a law regulating the Knesset itself—wasn't passed until 1958, ten years after statehood. Later there would be laws concerning state lands, the president, the prime minister and other ministers, the military, the judiciary, and more. (The famous “Law of Return” from 1950 was separate, having been passed eight years before the Knesset organized itself to pass the first basic law.)

But these “basic laws” still didn't form a constitution endowed with superiority over other laws—for the simple reason that there were, as the Knesset's website delicately points out, significant “differences of opinion” on the desirability of any such instrument. Thus, it would be a step too far to assume that the basic laws enacted by the Knesset could ever have functioned like the U.S. Constitution.

What, then, about the legal status of the declaration of independence? That question came up fairly soon. In December 1948, a case came to the Supreme Court concerning the government's requisitioning of a private apartment, a move justified under a provision inherited from British mandatory law. Citing a passage of the declaration—namely, “The State of Israel shall be based on freedom, justice, and peace as envisaged by the prophets of Israel”—the owner of the apartment claimed that the state had violated his property rights. The court rejected the claim in these words:

The only object of the declaration was to affirm the fact of the foundation and establishment of the state for the purpose of its recognition by international law. It gives expression to the vision of the people and its faith, but it contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal.

The declaration, in other words, had a single intended purpose: the time-limited purpose, cited by Ben-Gurion, of *hasbarah*, public diplomacy. It couldn't be misapplied as constitutional law, and certainly couldn't serve as a basis for judicial review.

Still, the idea that the declaration *also* embodied “the vision of the people and its faith” created a small opening. The intended purpose of the declaration may have been time-limited, but the

declaration nevertheless did manage to capture the state's core values. Since these had been approved by a unanimous vote, they had some indeterminate value going forward.

Later, in 1953, the Supreme Court took up a case involving the government's attempt to shut down a newspaper. Such censorship had been completely legal under the colonial-era regulations of the British mandate. But could the relevant laws also be applied by the government of Israel? The court decided that they could not, thereby accepting, at least in part, the argument that the declaration of independence *did* matter. Although it still couldn't be the basis of judicial review,

the matters set forth in the declaration of independence, especially as regards the basing of the state on the foundations of freedom and the securing of freedom of conscience, mean that Israel is a freedom-loving state. . . . [I]nsofar as [the declaration] “expresses the vision of the people and its faith,” . . . we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the state, . . . for it is a well-known axiom that the law of a people must be studied in the light of its national way of life.

When it came to interpreting law, therefore, the declaration warranted *attention*, as an expression of the national consensus. This suggested that, as the enduring vessel of “the vision of the people and its faith,” the document was gaining stature. But while it might be invoked to annul inherited, dictatorial British legislation that preceded the state, what voice did it have concerning laws enacted by the Knesset itself—that is, laws passed by the elected representatives of all the state's citizens?

Here the declaration's standing was much weaker. The situation through the 1980s was succinctly described by Ze'ev Segal, a legal expert, journalist, and law professor:

Along with its great power, the declaration of independence is limited in terms of its legal application. The principles of the declaration, which recognize the fundamental freedoms of the individual, cannot stand up to explicit, unequivocal Knesset legislation. The Knesset may legislate as it wishes, and if its laws entail discrimination, then this is legislated discrimination which takes precedence over all that appears in the declaration of independence.

Segal's conclusion: Israel still needed a “formal, written constitution whose explicit directive will establish its supremacy over regular legislation, such that any law that contradicts it will be invalid.” But in 1988, the year in which his article appeared, even he must have realized that such a “formal, written constitution” wasn't in the cards. And it is safe to say that it isn't in the cards today.

II. The “Constitutional Revolution”

This was not, however, the end of the story. Around 1990, when the Soviet bloc broke up and the Soviet Union came down, the formerly Communist states, now transformed into new or restored democracies, embarked on a slew of constitution-writing projects. All of them contained provisions for the guarantee and maintenance of basic rights.

Suddenly Israel, by comparison, seemed legally impoverished. It had no constitution, not even a “basic law” constituting a bill of rights. Such protections as existed were embedded in regular legislation that could be overturned at any time. The whole looked far too improvised for what had by now become one of the world's older continuous democracies.

This became the background to Israel's so-called “constitutional revolution,” led by Supreme Court Justice Aharon Barak. In that revolution, the declaration of independence played a central role, being pressed into service as a virtual constitution. That was particularly the case with regard to the document's third and fourth sections, which allude to individual rights and freedoms. (For the traditional breakdown into sections, see the first [installment](#) in this series.)

The Knesset proceeded to pass two new basic laws guaranteeing those individual rights; in each, a stipulation required that the law be interpreted in accord with the declaration.

First came the basic law of 1992 on “Human Dignity and Liberty,” which also, for the first time, defined Israel as “a Jewish and democratic state.” As amended in 1994, the law reads as follows:

Fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel.

The same paragraph appears in the 1994 basic law on “Freedom of Occupation.” And there, too, Israel is defined as “a Jewish and democratic state.”

Justice Barak described this formula as totally transforming the status of the declaration. Not only did that document now enjoy legal validity, but the rights in it weren't just the “legal rights” that appeared in other laws but “constitutional rights,” and it therefore now became a “constitutional obligation” to respect them as such. In the words of Justice Dov Levin, the two basic laws had

brought about a dramatic change in the status of the declaration of independence, so that it is no longer just a source of interpretation, but an independent source of human rights. . . . [The declaration] gives the citizen in Israel a bill of rights on a supra-legal constitutional level.

In parallel, there emerged the false impression that the declaration itself established Israel as a “Jewish and democratic state.” That isn't so; as we saw in this series' [previous installment](#), the word “democratic” not only does not appear in the declaration, it was specifically deleted from that document by Moshe Shertok, Ben-Gurion's ally and soon (as Moshe Sharett) to become Israel's first foreign minister and then its second prime minister. Only since the 1992 basic law on

“Human Dignity and Liberty” has Israel been defined *by law* as “Jewish and democratic,” a definition that rests not on the declaration but on legislation of the Knesset.

The subsequent expansion of juridical review by Israel's Supreme Court, enabled by and grounded in these two basic laws, has been hugely controversial in Israel, where the notion that everything is judiciable has been at the core of a long-running struggle between a left-liberal court and right-conservative governments. That struggle deserves its own treatment, but the point here is that nothing in the declaration itself can be said to foster such judicial activism.

To the contrary: the founders never intended their declaration to be used as a basis for judicial review. Indeed, the declaration disavows its own character as a constitution by mandating a totally different procedure to produce such a document. Those who pushed the declaration to the constitutional level did so in the absence of anything else.

III. The Nation-State Law

The two basic laws mentioned above deal with individual rights and freedoms. Arguably, they may be said to institutionalize and amplify certain promises made in the third and fourth sections of the declaration. But what about the collective rights in the first and second sections—and, specifically, the collective rights of the Jewish people to a Jewish state? Wouldn't those sections also need to be institutionalized and amplified in basic laws?

Aharon Barak, in his long tenure first as justice and then as president of the Supreme Court until his retirement in 2006, argued that they were already covered in the declaration of independence itself—which, he claimed and has continued to claim, cannot be invoked selectively. Rather, the first and second sections enable the following two sections. The state is Jewish and democratic, and its Jewish character is therefore fundamental; were the Knesset, by some strange fluke, to pass legislation making Israel a bi-national state, it would be unconstitutional. So there is no need for any specific legislation to anchor Israel as a Jewish state. It's already anchored.

Not everyone agreed, however; some took the view that there should be a basic law for this as well, especially since, after all, the day might come when all the basic laws were combined in a constitution. This was the rationale behind the drafting of a basic law entitled “Israel as the Nation-State of the Jewish People,” first submitted to the Knesset in 2011. The argument for this law was made by onetime justice minister Ayelet Shaked:

In our laws there are universal values, rights, already enshrined in a very serious way. But the national and the Jewish values are not enshrined. Over the past twenty years, there has been more of a focus on rulings over universal values and less over the Jewish character of the state. This tool [the nation-state bill] is a tool that we want to give the court for the future.

The bill soon became part of the left-right political warfare in Israel. Some on the left insisted that Israel should reconstitute itself as a “state of all its citizens,” while some on the right countered that Israel must be defined as “the nation-state of the Jewish people.” Many in the center already figured Israel was the Jewish state, so why the brouhaha? After all, what most everyday Israelis know about the foundations of their state comes from remembered fragments of the declaration of independence. The declaration affirms “the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign state.” What’s not clear about that?

In 2018, after much contentious debate, the basic law “Israel: The Nation-State of the Jewish People” passed in the Knesset, but so pared down from earlier drafts as to raise a doubt that its passage will have much discernible effect. In nearly all respects it tracks the declaration of independence in less rich language.

Among the many reasons why some in the Jewish public thought the law essential, one remained unspoken but key. As I pointed out in the previous installment, Israel’s Jewish majority is what makes Israeli democracy possible. It is because of the solid Jewish majority, still in the neighborhood of 75 percent, that all Israelis can and do have equal political rights. Were that majority to dwindle, by any process foreseen or unforeseen, then both the need and the demand for legal assertions of the state’s Jewishness would grow.

It was Ze’ev Jabotinsky who put his finger on this issue:

I do not believe that the constitution of any state ought to include special paragraphs explicitly guaranteeing its “national” character. Rather, I believe that it would be better for the constitution if there were fewer of those kinds of paragraphs. The best and most natural way is for the “national” character of the state to be guaranteed by the fact of its having a certain majority.

If Israel’s “certain” Jewish majority were ever threatened in any way, then “Jewish and democratic,” which today are mutually dependent, would indeed become mutually contradictory, and the pressure would increase for legislating Jewish preeminence. We are far from that today. But we should not take the Jewish state, as outlined in the declaration, for granted.

IV. Controversy and Consensus

On Israel’s 60th anniversary in 2008, a Knesset member called for a ceremonial ratification of the declaration of independence. Some 30 Arab and ultra-Orthodox members of the Knesset opposed the idea. Uriel Reichman, a jurist and the founder of a college and law school, was stunned:

It is not possible to imagine any American politician turning his or her back on the United States' Declaration of Independence. For me it was a bad omen. It was a stand against the Zionist message, against the very framework of our society.

A bad omen it may have been, but it shouldn't have come as a surprise. Earlier in this series I quoted an ultra-Orthodox signatory of the declaration as saying that he put his name to it only to create the impression of solidarity in the midst of an emergency and in the face of invading enemies; otherwise, he wouldn't have signed. Today an ultra-Orthodox member might think twice before putting his name to such a document.

Similarly for some Arabs. In the declaration, the Jews are the "we" who appeal to the Arab inhabitants of the land "to preserve peace and participate in the upbuilding of the state on the basis of full and equal citizenship." But the declaration doesn't mince words about the reason for the establishment of the state and for its Jewish character. Should an Arab member today be expected automatically to sign on?

So the declaration remains controversial. Nevertheless, for the vast majority, it still retains its power—though some of those responsible for it weren't sure it would. Consider the reaction of Moshe Gurari, the head of the Jewish Agency office in Tel Aviv. Gurari had worked closely with Moshe Shertok on the latter's draft of the declaration. The text was long, with many literary turns of phrase, some of them so elevated that everyday speakers of Hebrew would not have understood them. As we have seen, during the night before the declaration Ben-Gurion took this text, cut back its length and shifted its tone, and early in the afternoon of the next day presented it to the People's Council as a *fait accompli*.

Gurari was present later in the afternoon for the public reading, and he later described his reaction:

When Ben-Gurion began to read the declaration, my heart sank: things that weren't in "our" version. Such gray prose: "Eretz-Israel was the birthplace of the Jewish people. Here their spiritual, religious, and political identity was shaped, . . ." and so on. With restrained pathos, without any dramatic gestures rising to the occasion, Ben-Gurion spilled out the declaration on the establishment of the state, from which he had mercilessly extracted every gem Shertok embedded in it with such love, and obscured every shining phrase within.

After the ceremony, Gurari asked Shertok what had happened to "their" text. Shertok "whispered to me, half in jest and half in anger, putting space between each word: 'He—killed—us—in cold blood!'"

Yet, on rereading the declaration many years later, Gurari also admitted that Ben-Gurion had given the document "a powerful simplicity." What did he grasp that Shertok didn't? That the moment called for just such "powerful simplicity"—indeed, that the ethos of Israel, like that of the Yishuv, would be one of plainspoken directness.

And so, not only did the declaration live on as a legal document, it also entered the consciousness of modern Israel. Because of its succinct precision, people remember its most potent passages,

even if only as disconnected fragments. That is especially true of the opening that Gurari found so plodding: “Eretz-Israel was the birthplace of the Jewish people.”

Ben-Gurion had added this at the last minute. In retrospect, it was an inspired stroke of genius.

V. The Living Declaration

Still, the words themselves did not make the state. Let's return to the other events of May 14, 1948, as enumerated by Ben-Gurion in his diary entry for that day. The Jewish surrender at Kfar Etzion to the Arab Legion led to the massacre of its defenders. At Latrun, there was a forced retreat after “our people were badly hit by artillery fire.” The Alexandroni Brigade captured the Arab part of Kfar Saba. There were talks with the Irgun about its participation in a planned assault on Ramleh. An isolated settlement in the Arava Valley was in danger. There was a discussion with Yitzhak Sadeh, Palmah commander, on strategy. Another commander insisted the public be told of “the urgent need for entrenchments and barricades.” (Ben-Gurion added: “I drafted a public notice [on this matter] in the name of the General Staff.”) The call-up of more troops was decided upon. There was a problem of providing sufficient armor for the Negev brigade.

And, at the end of the entry, a simple laconic notation:

One pm at the People's Council. We approved the text of the declaration. At four o'clock in the afternoon, we declared independence. The nation was jubilant—and I mourn in the midst of the rejoicing. Our fate is in the hands of the defense forces.

Independence had been declared, but it had still to be won. Years later, asked for his view of the declaration's significance, Ben-Gurion replied:

I didn't attribute much value to declarations. Not that they didn't have great value, but at the time I didn't make much of them or attribute to them any value.

Immediately afterward they danced in the streets of Tel Aviv. I didn't dance, I went to headquarters, we made preparations, during the night we received the news that an Egyptian column had invaded, a Syrian column, an Iraqi column, and then nothing else interested me.

It was at this point that the declaration receded into the background, and the war came back into the foreground. One can therefore understand the historians of May 1948 who have seen that day as Ben-Gurion did: consumed by a war for independence, which the declaration was meant to support.

It did the job. Israel gained swift recognition from the United States and the Soviet Union. Arms began to flow from abroad. The new state used its coercive powers to requisition war materiel and

draft soldiers, including fresh immigrants. In this total mobilization, the declaration pulled its weight.

It isn't surprising, then, that many years later, when Ben-Gurion was asked whether he would change the declaration if he could, he answered bluntly: "I wouldn't add or change anything." On the day he proclaimed it, he had admitted to the People's Council that the draft declaration wasn't "the height of perfection." But it had performed just fine; when he looked back on it, he saw perfection itself.

Thus did Ben-Gurion's perspective evolve over time. And this is a remarkable aspect of the document. Although it hasn't changed, perspectives do constantly change, and during more than 70 years each generation has read it differently.

This series of essays, culminating in the present one, has focused on the genesis of the declaration. As for its life post-1948, we've touched here on one aspect specifically in the realm of law. But much more could be said. How has the declaration been interpreted and reinterpreted by intellectuals and scholars? What role has it played in the rhetoric and mindsets of politicians? How has it been deployed in Israel's educational system? How have artists made reference to it? How have Israel's enemies understood it? (Mahmud Darwish, the poet who wrote the Palestinian so-called declaration of independence of 1988, said he took the Israeli declaration as his model.)

Not only has the declaration lived many lives in the past, but there are plans for its future. Until now, the scroll itself has been kept in storage. But it is slated to be put on regular public display in Tel Aviv's Independence Hall, itself now undergoing a renovation scheduled for completion in 2023. At that point, the declaration will go from an iconic image in facsimile to an object of Israeli pilgrimage. How will access to the original artifact affect the public perception of the content? We cannot know, but the future of the declaration may prove as significant as its past.

I began by calling the declaration the most consequential document composed by Jews since antiquity. It wasn't a miracle; it was the work of individuals with strong preferences and prejudices. But it also expressed the collective wisdom of the most determined and driven Jews in modern history, in the finest and most fateful hour of the Jewish people.

In 1948, as we saw, Israel's Supreme Court found that the declaration "expresses the vision of the people and its faith." Given all that we know about the document's tangled drafting, about the many debates and criticisms by the drafters themselves concerning both the substance and the style, that it should indeed have successfully captured that vision and that faith—the spirit of a people arisen—and have then continued to express it so enduringly, is amazing. But there it is. The troubled but proud history of the Jews, the national aspirations of the Zionist movement and the Yishuv, the grit of the people of Israel: all shine through.

More than 70 years after Israel's declaration of independence, its drafters and signatories are long gone, their signatures have begun to fade, and some of the names are forgotten. But the document lives: in Israel's politics, culture, and law, and in debates over Israel's future. It also lives because declaring and winning independence aren't one-time acts but repeated actions.

The struggle for independence is perpetual. That is why the declaration, drafted in a rush against a deadline, by preoccupied leaders, in the midst of a war, remains timeless. “In every generation one is obligated to see himself as though he came out from Egypt,” the Mishnah states. In every generation, Israel is summoned anew to declare and defend its independence.