**YESHIVAT HAR ETZION**

**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**

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**Halakha and Jewish History**

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**Shiur #21:**

**1789**

**French Revolution and the Making of a Constitution**

***Can the community of faith accept a constitution other than the Torah?***

Two great revolutions occurred during the 18th century: the American one in 1776 and the French revolution of 1789.

It is difficult to comprehend all the ramifications and the ways these great acts of revolt impacted the western world. Separation of Church and State, freedom of speech, the freedoms of religion, press, and assembly, as well as the right to gather and protest, are just a few of the rights that developed during these historical events.

In America, the driving forces behind breaking off from the British Empire were independence, freedom, and liberty.

The French rebellion against the rule of monarchy, aristocrats, and nobles was influenced by the American revolution as well as by philosophers like Hobbes, Locke, Montesquieu, and Rousseau. It was also motivated by poor living conditions, poverty, government corruption, and the minimal rights of the common people.

These moves created the foundation of the democracies of today.

Both revolutions involved violence, resulting in large causalities on all sides.

Both revolutions also produced bills of rights and declarations of independence.

In America, the founding fathers (John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, and George Washington) composed a Constitution. Written in 1788, the Constitution was influenced by the Greek historian Polybius, who wrote about [separation of powers](https://en.wikipedia.org/wiki/Separation_of_powers) in government, as well as by modern philosophers of the enlightenment era – such as [Locke](https://en.wikipedia.org/wiki/John_Locke), who introduced the idea of governmental checks and balances.

In France, a French officer who fought in the American revolution – Marie-Joseph, Marquis de La Fayette – composed a document, with the assistance of Thomas Jefferson, called the [Declaration of the Rights of Man and of the Citizen](https://en.wikipedia.org/wiki/Declaration_of_the_Rights_of_Man_and_of_the_Citizen). This Declaration, written in 1789 and influenced by the American Bill of Rights, is based on the doctrine of "[natural right](https://en.wikipedia.org/wiki/Natural_and_legal_rights)" and protects the rights of men, making all equal in the eye of the law. This document eventually became the first French constitution, on September 3, 1791.

These historical declarations serve as the basis of all popular conceptions of [individual liberty](https://en.wikipedia.org/wiki/Individual_liberty) and [democracy](https://en.wikipedia.org/wiki/Democracy) in the world today.

**The lack of an Israeli constitution**

As of today, Israel is one of only 6 countries in the world that functions with an uncodified constitution.

The State of Israel has 14 Basic Laws that serve functions similar to constitutional laws and that can only be changed by a large majority. These laws deal with relations between the State’s authorities as well as with rights of citizens. These Basic Laws serve as a *de facto* constitution until such time as the Israeli government succeeds in composing a constitution.[[1]](#footnote-1)

Though one has not yet been written, the idea of Israeli constitution was proposed decades ago. On the day Israel was established, May 14, 1948, David ben Gurion read out the [Declaration of Independence](https://en.wikipedia.org/wiki/Israeli_Declaration_of_Independence). Amid many declarations and decisions that recognize Jewish and universal values, the document mentions that an Israeli constitution must be created by October 1, 1948. However, the adoption of a constitution was postponed again and again.

There were then, as there are today, those who oppose the very idea of an Israeli constitution. Many people believe the main opposition comes from the religious communities; however, Prime Minister Ben Gurion himself actually voiced strong objections to it.

In a meeting of the Israeli government on December 11, 1949, the Prime Minister explained his opinion. Firstly, he argued against the entire theory that every country needs a constitution. He questioned the logic of giving certain laws more strength and power than others, and also explained that given the current challenges (of 1949), there just wasn’t enough time to deal with all the legal and sensitive matters that such a task would entail.[[2]](#footnote-2)

**What do the Rabbis and religious leaders say about a constitution?**

As mentioned above, the popular view within the Israeli public is that religious people can only accept the Torah as a constitution and will not recognize any alternative code of law. This view was brought up prior to the establishment of the State. At the Agudah convention of 1937, the following declaration was made:

The existence of a Jewish state is only possible if the Torah is recognized as the fundamental constitution of this state and the ruling of the (laws) of the Torah is recognized and practiced…. a State of Jews which does not place the Torah and its laws in its center is denying the essence of Israel… and cannot be named a Jewish state.[[3]](#footnote-3)

A similar view appears in the writings of Rav Chaim Ozer Grodzinski (1863 –1940). In a letter written the same year, he argues that if the Jewish State is established and a constitution is created, then Torah-fearing Jews must ensure that their religious rights are protected.[[4]](#footnote-4)

However, although concern about a secular constitution appears in these and other sources and writings, it was not necessarily the original rabbinic consensus.[[5]](#footnote-5)

Some Rabbis associated with the ultra-Orthodox community attempted to write Torah-based constitutions. A magazine dedicated to Torah-based constitutions contained two suggestions.[[6]](#footnote-6) One was written by Rav Moshe Blau, a leader of *ha-Edah ha-Charedit*, and the other by Dr. Yitzchak Breuer, the first president of *[Poalei Agudat Yisrael](https://en.wikipedia.org/wiki/Poalei_Agudat_Yisrael%22%20%5Co%20%22Poalei%20Agudat%20Yisrael)*.

Both suggestions were mostly based on Torah values and laws. However, neither was very practical and they did not take into account the fact that the majority of Jews in Israel at the time were not religious.

These attempts prove that there were those from within the *Charedi* community who believed (at least in the beginning) that the religious community could be part of the State of Israel.

In fact, rabbis considered, discussed, and argued about composing a constitution for the Jewish modern state as early as 1937.[[7]](#footnote-7)

Ashkenazi Chief Rabbi Yitzchak Herzog was heavily invested in the attempt to create a constitution. His many correspondences, articles, and compositions on the subject testify to his great passion for it.[[8]](#footnote-8)

Rabbi Herzog was convinced that it would be possible to base a constitution on the Torah’s laws. He believed he could convince the leaders of the new state to accept Jewish law as the official code of law, and worked vigorously to communicate religious ideas that seemed difficult for the modern secular person to accept. Rights of non-Jews, electing women, and the status of secular courts were just some of the many challenging issues he dealt with.

Rabbi Dr. Zerach Warhaftig (1906-2002), a leader of the Mizrachi movement, was a pioneer within the Israeli legal community in his attempt to create an Israeli constitution. In 1947, he was officially appointed by the Jewish National Council to lead the effort.

After the U.N. vote and historical declaration on November 29, 1947, Ben Gurion decided the Jewish Agency should be involved in the process of creating a constitution. He nominated Dr. Leo Cohen, an expert in constitutional law who worked for the Jewish Agency, to write the new state’s constitution.

Dr. Cohen, a religious Jew, had received his legal education in Germany. In August 1948, he delivered his suggestion to Warhaftig’s committee. Four others were also offered, but Cohen’s draft was accepted.

Although Cohen’s proposal begins with an introduction recognizing the religious meaning of the establishment of the State Israel and thanking God for it, the legal part makes no mention of the Torah’s laws. Dr. Warhaftig sent the proposal to sixteen rabbis and asked them for their opinion. The rabbis’ responses indicate they were disappointed in the text, which they felt was completely secular and did not offer much religious meaning.[[9]](#footnote-9)

Rav Herzog was especially disappointed, as Cohen’s suggestion was very different from his ideal proposal. His response acknowledges the religious introduction (unlike the Israeli Declaration of Independence, which lacks any explicit references to the Almighty); however, he protests the secular language of the proposal and questions the legitimacy any proposal that may contradict the Torah laws.

Responding to concerns that declaring Judaism as the official religion of Israel would contradict democratic values, he argues that there are precedents of other democratic countries, such as Ireland, whose official religion is Christianity.

Sephardi Chief Rabbi Ben-Tzion Uziel also responded to Dr. Cohen’s draft. Among several notes, he writes against the rule that Shabbat must be a day of rest for all those living in Israel. His argument is that such a law could harm Jews living abroad in Christian countries, as one could argue that they must similarly refrain from working on the Christians’ Sabbath, Sunday.

Dr. Cohen changed the draft and added more religious emphasis. Although the rabbis offered critiques, they did not reject the concept of a constitution.

In 1950, Rav Shmuel Tuvia (Tibor) Stern (1920 - 2004), a rabbi who served in several communities – including Kansas City, Oakland, and Miami Beach – published an impressive work of two volumes called *Chukat Olam*, which offered a scholarly interpretation of Dr. Cohen’s proposed constitution.

In the introduction to his book, he called dramatically upon all Jews who care about Torah and its values to involve themselves in influencing the making of an Israeli constitution.

**Religious approaches to a Jewish secular state**

The above perspectives reflect three classic approaches the religious world has taken to the State of Israel, since the beginning of Zionism through today.

The first is the opinion that there is no value in a Jewish State if it doesn’t match the Torah word for word – a nearly impossible standard. This view is reflected in the Agudah’s declaration, mentioned above, and begins a train of thought that leads to the religious community separating itself from the State.

The second view can be found in the writings of Rav Herzog, who believed that it is possible to integrate Torah laws within a modern state. According to this thesis, the establishment of the Jewish State is not only about redeeming the people but is also about redeeming the Torah itself.

In this perspective, the dream of the prophet Yeshayahu (1:26), *v'ashiva shoftayikh k’va-rishona v'yoatzayikh k’va-techila* (and I will restore your judges as at first, and your counsellors as in the beginning), is an essential element of the future redemption. Here at last, after two thousand years, is the opportunity to fulfill the ideal of implanting the Torah’s laws in a Jewish country.

As mentioned above, some members of the ultra-Orthodox community leaned towards this belief. The challenge, obviously, is how to translate the ideal into reality.

The third school of thought within the religious community is the most pragmatic. Dr. Cohen’s proposal, as well as some rabbinic responses to him, are excellent examples of an attitude which believes that compromises must be made if we want to create a Jewish home for all of *Am Yisrael*. Although this might be far from the ideal world of a Torah State, it is still a Jewish state.

1. For a summary (past, present, and future) of the State of Israel’s constitution, see Prof. Gideon Sapir, *Ha-Mahapaicha Hachukatit*, Bar Ilan University*.* [↑](#footnote-ref-1)
2. For the complete minutes taken at this meeting, see: <https://toldotofakim.cet.ac.il/CETHandler.ashx?n=CetEntities.FileViewer&i=7b6c26a9-ffd0-426d-b508-19d6c9d151f1&id=145159>. [↑](#footnote-ref-2)
3. As quoted by Zerech Varhaftig, “*Chuka L’Yisrael dat U’Medina*,” *Ha-Poel Ha-Mizrachi* p.55. [↑](#footnote-ref-3)
4. *Iggrot Reb Chaim Ozer*, Bnei Brak 2000, p.338. [↑](#footnote-ref-4)
5. This argument is the main thesis of a booklet written by law professors Shuki Friedman and Amichai Radzyner, *Chuka Shelo Ketuva B’Torah*, published by the Israel Democracy Institute. [↑](#footnote-ref-5)
6. *Yavneh*, Jerusalem, Nissan 1949. [↑](#footnote-ref-6)
7. The rabbis were mostly concerned with safeguarding the religious rights of the religious community. See note 5, above, pp. 27-32 [↑](#footnote-ref-7)
8. Three volumes of his writings have been published by Rabbi Dr. Itamar Warhaftig called *Techuka L’Yisrael Al Pi Ha-Torah*, Mossad Ha-Rav Kook. [↑](#footnote-ref-8)
9. For a summary of the rabbinical responses, see Rav Herzog’s book, above, Vol. 3 p.37-48. [↑](#footnote-ref-9)