

The Reality of Political Fictions: Democracy between Modernity and Postmodernity

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In contemporary democratic states, socially relevant knowledge appears too complex and underdetermined to effectively check arbitrary political power and power has become too diffused to guide and effectively regulate the production and uses of socially and politically relevant knowledge. The increasing commercialization of public services and functions and the shift of state powers to principal private actors in the market have been eroding the authority of both scientists and politicians to speak as collective nonpartisan voices respectively in the name of Science and the State. This fragmentation of the voices of knowledge and the public, this depletion of the authority to view policy issues from the synoptic or integrated perspectives of science and the state viewed respectively as wholes, is perhaps the most important cause of the reconfiguration of the relations of expert (including legal) and political authorities in our time. An increasingly wider recognition that Enlightenment visions of the role of knowledge and expertise in inducing political consensus, rationalizing the political, and improving the apolitical instrumentality of the state in the service of public goals, have been utopian, has prepared the way for more realistic appreciation of the problems that the relations between knowledge and politics raise (Ezrahi 1990). Contemporary historians, sociologists, anthropologists, legal scholars, and political scientists are now in a

much better position to recognize the persistent series of past and current systematic misunderstandings between members of the communities of knowledge and politics, the related discontinuities between their epistemologies, norms and practices, and their implications for future relations between knowledge and politics. Perhaps the most important insight that drives post-Enlightenment political thinking is that science cannot provide an escape route from politics and therefore agents of knowledge and politics must learn to cooperate in mutual respect for their diverse languages and perspectives. One of the main questions before us, considering the fragmentations, discontinuities, and constraints involved in bringing the two cultures together, is what can be done to enhance, under *current circumstances*, the production, regulation, and adaptation of expertise for social, constitutional, and policy choices.

Without getting into details, I would like to note first epistemological discontinuities between the ways scientists or other experts and lay officials and citizens respectively know things together. “Civil epistemology,” which consists, among other things, in what makes citizens accept claims of fact and what underlies lay distinctions between facts and fictions, is profoundly different from the criteria used by scientists (Ezrahi 1993; Jasanoff 2005). While partially valid, the persistent view that laymen are usually wrong and need the guidance of experts tends to ignore the role of such crucial building blocks of the political order as regulatory fictions. To illustrate, Thomas Hobbes insisted that regardless of whether people are or are not “equal by nature,” such “equality must be accepted”; otherwise “men that think themselves equal will not enter conditions of peace.”¹ As early as in fifth-century BCE Athens, the recognition

1 For an overview of the relations of science and politics, see Ezrahi 2001.

of the difference between philosophical and popular knowledge was expressed in the distinction between *episteme* and *doxa*. Ever since Plato, the attempts to replace *doxa* or civic epistemology or working popular political fictions as the frame of political discourse by philosophical or scientific *episteme* were inherently antidemocratic and therefore antipolitical. Their usual failure reflected the unwarranted belief that democratic politics, invented in the *Agora* of the ancient Athenian democracy as the continual lay negotiation of compromises between opposites and incommensurables, can be reduced to coherent, rationally guided choices and behaviors. By contrast to the logic of philosophical and scientific discourses within the contexts of popular knowledge, politics, and law, some fictions must enjoy the status of fixed reality in order to enable the working of particular sets of normative principles and pragmatic practices. Whereas the realization that fictions, or to use Vico's words, publicly "believable impossibilities," may be more consequential in the contexts of politics and the law than facts certified by experts was shared by thinkers such as Montaigne, Spinoza, Vico, Hume, and Rousseau, such insights, as professor Stephen Toulmin (1990) indicates, were effectively repressed by the overpowering vision of the Enlightenment.

Now in the post-Enlightenment condition, one is struck by the sense that Vico's observations that the history of politics and legal structures is the history of historically successful fictions could have been written yesterday by a postmodern thinker. Note for example his observations about the ancient Roman law:

Ancient Jurisprudence was thoroughly poetic. It imagined the real as unreal, the unreal as real, the living as dead, and (and in cases of pending) the dead as still alive. It introduced many empty masks without subjects, *iura imaginaria*, rights invented by the imagination. Its entire

reputation depended upon the invention of myths which could preserve the dignity of the laws and administer justice to the facts. Thus all the fictions of ancient jurisprudence were masked truths . . . in this way all Roman law was a serious poem acted out by the Romans in their forum. (Vico 1999 [1744], 1036–1037)

Unlike philosophical knowledge and political science as fields of systematic *propositional knowledge*, the business of political, constitutional and legal *wisdom* is not so much to explain or rationally justify but to guide what Vico so insightfully called the acting out—or the enactment of—the fictions which are necessary to the foundation and the regulation of the civic order. Alexis de Tocqueville observed that the fragility of the American democracy relates to the fact that “the government of the Union rests almost wholly on legal fictions. The Union is an ideal nation that exists so to speak only in the minds, and whose extent and bounds intelligence alone discovers” (1957 [1835], 127). But at the same time, Tocqueville argued that he “never admired the good sense and practical intelligence of the Americans more than in the manner by which they escape the innumerable difficulties to which their federal constitution gives rise” (*ibid.*, 156). Much practical wisdom was displayed also by the French revolutionaries when they chose to iconographically embody the secular Declaration of the Rights of Man and Citizen within the image of the Mosaic tablets, thus tapping deeply ingrained religious sensibilities in support of man-made or “natural laws.” Ernst Kantorowicz (1997) has famously provided another example for the role of political fictions in solving practical political and constitutional problems when he pointed out how the rituals of the European monarchies wisely and effectively enacted the fiction of the king’s two bodies.

I would like to turn now to discuss briefly the constraints on, and the politics of, the enactment of necessary democratic political and constitutional fictions such as the transparency of democratic power, the distinct boundaries between law and politics, and the separation of powers. I will then conclude with a few observations on the changing status of political fictions in the postmodern condition.

Political analysts are usually aware of the fact that the transparency of political power and especially the role of public information in rendering governmental power transparent in democracy is a worthy norm, which can be only marginally supported by the practice of “informing the public” and the very possibility of an “informed public.” And yet, freedom of information legislation is a politically effective gesture in support of rituals of holding the government accountable. This is largely because although government accountability is not sustained by actual transparency, it is sustainable by rituals aimed at articulating the commitment to render the government dependent on the public judgment, a commitment which is sometimes backed up by moments where some information is effectively used by critics to embarrass the government and demonstrate its—largely in principle—vulnerability. Underlying these observations is the realization, supported by massive research, that theatrical gestures or the “choreography” of transparency have developed into a high art of political stagecraft serving actual concealment, and that information disclosure and transmission are almost always tendentiously selective, largely ambiguous, and inherently open to contradictory interpretations.

Similarly, the necessary fiction of the dichotomy between law and politics is sustained by a myriad of rituals, language domains reflecting among other things the technicalization of legal language as a sign of the apolitical status of the judicial process, differential institutions and careers, willing suspensions of disbelief and even

the distinct uniforms of legal functionaries. All these cannot really conceal from experts the fact that the highly visible political character of the legislative process does not suddenly dissipate once the laws are passed by the legislature and disappear in the following stages where the laws are always subject to selective interpretation and execution. What actually happens in the wider context is a switch to a domain regulated by fictions of the apolitical! Despite this difference between perceptions and actual practice, the fiction of the separation between politics and the law is enormously important *regulatory* fiction, which allows society to develop mechanisms for at least partly making the uses of state powers no longer arbitrary. As a matter of fact, from a theoretical point of view legalizing power is a technique whereby politics sets limits to itself. Together with the uses of other experts by the state such as economists, statisticians, defense strategists, etc., also legal experts are means by which the modern state has sought to acquire legitimation and enhance its ability to control conflicts by processes of dividing and depoliticizing the exercise of some of its powers between different normative-functional domains.

This brings me to the super fiction of the separation of powers. Political and legal analysts have long been aware of the fact that what has been usually referred to as the “separation of powers” is more accurately represented as the institutional “division of labor in exercising shared powers.” There is, of course, a vast literature about the quasi-legislative powers of the state bureaucracy, the penetrations of the legislature to the domain of the executive branch, and the quasi-judicial powers used by the executive. Still, of course, the fiction of the separation of powers is capable of marshaling enough hard facts to maintain a measure of public credibility that allows the state to divide and allocate its powers to different domains thus allowing a

power play of checks and balances, which is congenial for enacting a constitutional democratic form of government.

So how is a society supposed to enact its necessary political fictions to deserve Tocqueville's admiration for its "good sense and practical intelligence"?

This, of course, is a difficult question whose answer would depend very much on circumstances of time and place. Nevertheless, I think I can argue that considering both the necessity of such political fictions for enacting the political order and their fragility, good sense and practical intelligence would be manifest in the ability to resist both the over-literalizing of such fictions as dogmas and their presentation as mere metaphors. Necessary fictions must be protected to have regulatory efficacy in guiding behavior and canalizing processes of political legitimation and deligitimation. But such necessary political and constitutional fictions must be flexible enough to allow the dynamic open-ended process of democratic politics to evolve without being arrested by political and legal dogmas. It is, of course, very hard to maintain the balance between these two poles. But the imaginaries and structures of a constitutional democracy must, on the one hand, allow for the creative politics by which a democracy continually examines and sometimes changes its own fundamental rules—adjusting to new circumstances—while, at the same time, preventing democratic politics from self-destructive transgressions.

The politics of necessary fictions requires, therefore, a balanced employment of the distinct strategies of *literalizing* and making figurative, or for present purposes, *figurativizing* political-legal fictions in the sense of treating them at times as incontestable givens or facts and at times as mere useful but pliable metaphors. In the current constitutional politics of Israel concerning the status of the Supreme Court, I think I can use these terms to discern two principal positions. On the one hand, there are the "literalists" who treat the separation

of powers as a dogma in order to severely limit the Supreme Court's powers of judicial review and what they call its illegitimate "judicial activism." This party is identified with the former Minister of Justice Professor Daniel Friedman and vehemently supported by the Israeli ultra-Orthodox religious parties as well as the religious and secular right. The opposing position is held by what I would like to call a group of "figurativists," such as former Chief Justice Aharon Barak, who do not construe the "separation of powers" literally but as a useful guiding metaphor that should allow limited transgressions to serve the protection of high liberal democratic principles as human and citizen rights against the abuses of government and facilitate selective court interventions in cases of unconstitutional legislation by an unrestrained majority. According to this position, no other state institution is better suited than the Supreme Court to serve this goal. Former Supreme Court Justice Dalia Dorner, who belongs to the figurativists' "party," has repeatedly insisted that the excessive powers falsely attributed by the literalists to the Supreme Court they seek to limit are more apparent than real. But it is precisely this unwarranted image of great powers that is more effective in deterring constitutional transgressions of government agencies than the actually meager powers of the court. To many Israeli jurists and political scientists, the most dangerous aspect of this debate is the popular appeal of the simplified slogan of the separation of powers pushed by dogmatic literalists to its extreme with the possible effects of thoroughgoing erosion of the fragile foundations of the authority of the Supreme Court. Literalizers have always had an advantage in appealing to the lay public because unlike figurativists like Dorner, they present such conflicts as simple clashes between self-evident principles or facts and their violations or distortions. Figurativists usually have a much greater difficulty in communicating to the lay public the complicated dualistic message that when it comes to

necessary fictions the apparent and the real are respectively limited but mutually supportive.

I would like to suggest that in the postmodern condition the rhetorical powers of the literalists and, therefore, their advantage over the figurativists in appealing to the public may be eroding across the board. This may be due to the widely recognized signs that due to the massive effects of the exposure to television and other deep sociocultural currents, postmodern publics have been increasingly losing their confidence in clearly distinguishing between facts and fictions. Put another way, the blurred boundaries between facts and fictions as well as a declining trust in claims of self-evident truths have been weakening the authority of literalizers to insist on incontestable givens (Latour 1999; Poovey 1998; Rorty 1989). This development raises the question of whether figurativism unchecked by literalism in the enactment or actualization of vital political and constitutional fictions can still allow for maintaining a balance between stability and flexibility in the democratic constitutional order. This question relates to the general issue of the effects of the popular spread of reflexivity and undecidability concerning the distinction between facts and fictions on the long-term ability of necessary fictions to regulate institutional and individual behaviors. Lawrence H. Tribe (1989) has suggested in a somewhat odd article entitled “The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics” that lawyers like physicists should adopt a more plastic open-ended understanding of their basic theoretical entities or necessary fictions. Tribe is warning against treating constitutional principles or entities like the state as reified givens. This warning is most pertinent in a society like Israel that has not as yet moved confidently, like many western democracies, across the border line between modernity and postmodernity. In such a society, where the political and institutional culture of democracy

is underdeveloped, democratic legitimating powers tend to be granted largely and falsely to simple parliamentary majorities of elected representatives regardless of the contents of the decisions, their implications for the constitutional role of the opposition, as well as the rights of individuals and minorities. In such a context, the conservative literalists tend to assume the view that insofar as the judges of the Supreme Court are not elected, a strict application of the constitutional metaphor of the separation of powers would serve their purpose of diminishing its authority to declare parliamentary legislation that violates basic principles of freedom, equality, and rights as unconstitutional and, therefore, void. Because even in a most balanced and constitutionally proper democracy there is, as I indicated above, only a meager correspondence between central regulating fictions such as the separation of powers and political-constitutional practices, a politically powerful literalist version of such constitutional fictions, when it is backed up by populist rhetoric, is a prescription for the increasing erosion of the authority of the judicial branch. A healthy constitutional democracy must be able to work with what Vico called “masked truths” and exercise the ability to sometimes change its perception of the line separating the real from the unreal in politics and the law, without falling into the respective traps of extreme literalism or figurativism.

To conclude, as of this writing, Tocqueville’s conception of “good sense” and “practical intelligence” seems not yet applicable to the current constitutional debate in Israel. From a more general perspective, the collective talent for keeping necessary political and constitutional fictions both sufficiently flexible and stable is very much a matter of political culture shaped by both traditions and experience. In this country we are just beginning to develop these collective skills.

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