

## Unwritten Law: The Political Ontology of The Implicit

Yuval Kremnitzer

The recent rise of new authoritarian rulers in western democracies calls for a profound rethinking of fundamental concepts such as authority, legitimacy and power in the modern state. The distinctive mark of the emerging form of power is the capacity of new authoritarian leaders to say the unsayable, to break the unwritten rules of political discourse. What should have traditionally spelled doom for these political figures seems instead to be the very source of their power. This striking feature underlies the amazement and frustration of political theorists and commentators trying to come to terms with the emerging phenomenon. What seems to capture the fascination of spectators, abhorred or admiring, is that such leaders make palpable the tacit dimension of social life, what we know but cannot put into words, cannot explicitly formulate (Polanyi). It is as if only in viewing the transgression of these implicit norms can we sense their real presence, and so their violation endows a unique aura upon the ruler, perceived as exhibiting a mysterious social power.

My proposed study, *Unwritten Law: The Political Ontology of The Implicit*, growing out of my dissertation, aims to study the conditions of possibility of contemporary power dynamics, turning to the German-Jewish intellectual tradition, from Moses Mendelssohn to early 20<sup>th</sup> century thinkers such as Freud, Arendt and Benjamin, as a corpus uniquely suited to address these major developments of our time. The challenge these new patterns of political power pose to political theories regarding authority and legitimacy can be explained by reference to the well-known tale of the emperor's new clothes (Hans Christian Anderson), which encapsulates a certain paradigm regarding the modern conception of authority. According to this prevailing paradigm, the authority in the name of which power rules is nothing but cloth, a cover, and what is required in order to unmask such empty pretense is a sober gaze, unencumbered by the inhibitions of custom and received wisdom. If we only look at things from this emancipated position we shall see the ruler as flesh and blood, just like us, and expose his naked body for all to see. The new

authoritarianism is distinguished precisely by proudly declaring itself to be naked, in that it draws its power and mobilizes popular support by tactics of disrobing and exposure. The new authoritarianism thus poses a challenge with regard to deep rooted conceptions of critical thinking. Critical theory supplies us with a wide array of strategies based on exposure: exposure of power dynamics encoded in culture, the exposure of ideological lies, the exposure of subtextual messages. These strategies are based on the presupposition that the real kernel of the political is something hidden, in need of exposure and explication. The political patterns of new authoritarianism call into question the efficiency of these strategies, in the face of a reality in which the exposure – of lies or ignorance, of scandal – do not necessarily undermine political power, and may in fact be its uncanny source of power. In order to address this problem my proposed study, puts at its focus the construction of the concept of Unwritten Law, with special focus on its unique development in the German Jewish intellectual tradition.

Unwritten law comes from nowhere. In juxtaposition to statues that draw their authority from the constitutive act of ‘laying them down’ by the legislator, unwritten laws derive their compelling character from the mystery surrounding their origins. For the Greeks, it was the unwritten character that endowed a divine origin to the laws, indicating a superhuman origin (Brague). But the term loses nothing of its elusive character with its inception in the philosophical tradition, where a deep ambiguity surrounds it, and no systematic treatment of it can be found. What Polanyi had put forward as a definition of tacit knowledge, the resistance to conceptual formulation, seems to mark the epistemological status of the object in question. Already in its first appearance in a philosophical context, it appears as a foundational social ‘thing’, albeit one that doesn’t quite fit its own notion. Thus Plato, in his *laws* writes “although ‘laws’ is the wrong term for these things, we can’t afford to say *nothing* about them, because they are the bonds of the entire social framework, linking all written and established laws with those yet to be passed. They act in the same way as ancestral customs dating from time immemorial, which by virtue of being soundly established and instinctively observed, shield and protect existing written law.” Not only such laws are foundational for the social framework,

they also appear to be uniquely effective, and quasi-universal, as in the case of sexual taboos: "The same law, unwritten though it is, is extremely effective in stopping a man sleeping – secretly or otherwise – with his son or daughter, or making any kind of amorous approach to them." (Plato, *Laws*). Aristotle follows Plato in distinguishing between written laws or statutes and unwritten laws, or customs. In his *Politics* he also makes clear that such customs "have more authority and concern more important matters than do written laws." Sometimes, however Aristotle contrasts written and unwritten law not as statute and custom but as local and universal law: "Law is either special or universal. By special law I mean that law which regulates life of a particular community; by universal law, all those unwritten things which are supposed to be acknowledged everywhere". (Aristotle, *Rhetoric*).

This fundamental tension between the universal and the particular pertaining to unwritten laws may account for the divergent paths of the term's historical trajectories, and the difficulty in placing it conceptually. As an ethical category, the term is held in tension between conceptual opposites, the (descriptive, ontological) conceptions of ethics, such as Hegel's ethical substance, that emphasizes the particular, historical grounding of ethical life, and the prescriptive (deontological), universal attitudes, that transcend historical circumstances, such as Kant's moral imperatives. A similar tension sets the course for the history of the term as a legal (and political) category, the tension between custom law (Maine) and the laws of nations, the international unwritten laws of war and peace, that played an important role in the development of natural rights, and the political theories of 'the state of nature' (Tuck). The unwritten law is split between the universal and the particular, the natural and the historical or cultural.

Unwritten laws seem to operate either as a source or foundation for sovereignly constituted laws, or in between sovereign entities. In his rhetoric, reflecting on the superiority of unwritten over written laws, Aristotle offers a suggestion that might connect these disparate domains: "written laws depend on force while unwritten laws do not." What might bring these opposing poles together, mentioned in passing by Aristotle and further developed by Mendelssohn, is also what puts them in

juxtaposition to Kelsen's definition of legal norms; unlike the latter, unwritten laws, whether those of custom or international law, do not rely on enforceability for their efficacy, thus raising a deep puzzle for our notions of power and force.

The Key discovery of my dissertation, *How to Believe in Nothing: Moses Mendelssohn's Subjectivity and the Empty Core of Tradition*, which my proposed research aims to follow up on and expand, was that the thread running through different areas of Mendelssohn's thought was a unique articulation of the power of the implicit, tacit dimension, in politics and in science. In part due to his background as an observant Jew forced to reflect on the Jewish Law and the difference between laws and commandments, Mendelssohn developed a unique political theory. A theory that accounts for the emergence of political, sovereign power (and logic), distinctive by its capacity to define its own boundaries, and set explicit distinctions and written laws, but is not reducible to this logic, and necessarily entails a supplementary power and logic that precisely disturbs the setting of totalizing, exclusionary limits, consisting of unwritten, implicit laws. Mendelssohn's locates the fault of the standard (i.e, Christian) political theology in its reliance on the spatial imagery of 'two kingdoms', leading to attempts at erecting a boundary between religion (the realm of unwritten laws) and politics, ironically resulting in constant border disputes, and the bleeding, figurative and literal(Anidjar), of one domain into the other. In my proposed study I will follow this, thus far unacknowledged line of thought, as it informs the intellectual work of Freud (in Particular his use of the notion of unwritten laws to distinguish between Christian and Jewish psychic dynamics), Benjamin (in particular, his use of the notion in his distinction between divine and mythic violence), Bloch and Strauss in their respective theories of natural law and Arendt in her reflections on political power and authority and the rise of totalitarianism.

Mendelssohn's formulation is necessary in order to gauge the extent of the contemporary political and ethical crisis, in which the dividing line between written and unwritten laws is progressively effaced, and transgression has become law. Unwritten laws seem to be intrinsically linked with the transgressive. They often

function as unspoken meta rules, the social know-how as to which explicit rules are actually to be respected and which are to be violated as a matter of course (Žižek), such that the mastery of these codes is a good criterion to distinguish “insiders” of a cultural system from “outsiders”. The complex relation between the transgressive and the proper is foundational to many theories of culture, society and politics. According to this paradigm, political, cultural and societal order is founded on the domestication, repression or sublimation of pre-societal drives. Variations of this framework can be found in Freud, Nietzsche and Elias, but it extends further, and can be seen as inclusive of social contract theories of the one hand, and Foucault’s work on discipline and sexuality, or Agamben’s genealogy of sovereignty, on the other. In the more sophisticated developments of this paradigm, the relation between the proper and the transgressive is dialectical: the transgressive is not a primal, natural force but coextensive with the proper and sanctioned and remains with it as its indelible remainder. However else such theoretical orientations might differ, what remains common to theories operating within this paradigm is the location of the political, social and cultural on the side of the proper and sanctioned. Although the transgressive is sometimes seen as the necessary supplement of culture and order, it remains conceived as the obverse, hidden aspect, the dirty little secret that can only be alluded to. Even if political power draws legitimacy by alluding to the transgressive, it does so by maintaining the boundaries between the proper and the transgressive, maintaining transgression on the side of the implicit and unnamable.

Indeed, the demarcation of the transgressive is dependent on the distinction between written and unwritten laws. In contradistinction to the violation of written statutes, transgression is distinguishable as an epistemological thing by being something any member of the social group should be able to identify, but for which there is no clear-cut definition, no explicit rule determining what falls under the category. The current tendency to codify in legal terms things previously left to the domain of the unwritten, from the Israeli ‘Nation’ law, to codes of sexual behavior, has the paradoxical result of obfuscating, rather than clearly demarcating the line between the written and unwritten. The more things are explicitly codified and forbidden,

more is revealed to be in need of codification and clarification, resulting in an atmosphere of generalized suspicion and systemic ambiguity, destabilizing the line separating the written from the unwritten, and the proper from the obscene. The challenging task of critical theory today is to understand the conditions of possibility of the reversal of the above-mentioned dialectics, the conditions under which transgression has come to occupy the center of political power.