

# Tweedledum and Guildenstern

## — The Jewish and Democratic Riddle

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### Abstract

When political language invades the law and political statements masquerade as legal ones, provisions of the law acquire multiple meanings. For laws to be functional, their language must be denotative. Words must correlate with concrete elements of the real world as closely as possible, and actionable legal statements must either create reality or influence it outright. By contrast, political language is connotative. Words have a prospective one-to-many relation with reality, describing a desirable or promised state of affairs. Their influence on behavior is to inspire loyalty. The stack of associations that can be heaped on the back of the meaning of words varies. That pile is much smaller for words like *equal*, *full*, and *exclusive*, than, say, for *lucky*, *dull*, and *elusive*. The definition of the State of Israel as “Jewish and democratic,” which appears in three constitutional provisions, uses two connotative terms uncommonly rich in associations, which renders them legally dysfunctional. Joined together, they are like cheveril gloves that can quickly be turned inside out, making *Jewish and democratic* mean everything (an endless combination of terms open to interpretation) and nothing (out-and-out contradiction between the two) at the same time.

### Keywords

constitutional law, denotative language, connotative language, Jewish and democratic

## 1. Introduction

Since it was first coined in the Israeli Parliament (Knesset), nearly 40 years ago, the term “Jewish and Democratic” (J&D) has been bandied persistently in political debate and the media. Three basic laws (Basic Law: The Knesset, Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation) declare that Israel is a “Jewish and demo-

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cratic state.” In the absence of a constitution in Israel, basic laws impersonate constitutional laws. The academic community has taken up the term with fury and built an industry around it. Courses are being taught on J&D, books and articles published, conferences and congresses held, public forums organized, and centers established for its research. In the inaugural address of the Center for Jewish and Democratic Law of the Faculty of Law at Bar-Ilan University, former Chief Justice, Aharon Barak, said that he treated of this “formula” in five books and wrote more than twenty articles on the subject (Barak, 2015). One would think that after so much ink has been spilled in this worthy cause, we would be a step closer to understanding what J&D means. If this is not the case, it is because for law-making purposes, each of the two terms is individually problematic and together they are meaningless.

It is not a coincidence that an industry sprung up around the J&D formula. The fundamental resource of this industry, the substance it mines, is the deliberately vague language of the formula, intended to accommodate every possible meaning, balancing thesis and antithesis together on the head of a pin. If so much writing cannot elucidate the meaning of two concatenated words, something must be wrong with a formula intended to serve as a constitutional guideline for legislation. What is amiss is that J&D is a political slogan, couched in the language of politics, by a politician, for political purposes.

## 2. The Language of the Law

The law endeavors to speak a denotative language where every word has a one-to-one relation with real actions and behaviors, and clearly points to a concrete scale of values. “Unreasonable searches and seizures” excludes all that are reasonable, as well as all those measured along other scales, such as efficiency or equity. In “Congress shall make no law respecting an establishment of religion [...] or abridging the freedom of speech,” every noun, verb, and adjective has a clear and concrete referent in the real world. What exactly qualifies as *religion* may be debated and interpreted, and there may be disagreement about the kinds of speech being protected. Is pornography included? Is hate speech? But there is no question about the human behavior or about the types of acts and activities that are being protected. Admittedly, the language of the law, especially of constitutional law, to which the J&D formula belongs, need not always be precise. Laws can be fuzzy, by design or circumstance, and their terms open to interpretation. Of all types, constitutional law tolerates the most fuzz and is least dependent on closed-list definitions like “Cattle means one or more bulls, steers, oxen, cows, heifers, or calves, or the carcass or carcasses thereof.” It is more time-resistant than other types of law, and more amenable to reinterpretation over generations. But even constitutional law cannot resort to words that are incapable of bearing the weight of any specificity, or that carry too

large a mixed load. Even if terms like *reasonable* and *proportional* admit of a range of degrees (*habet latitudinem*), and however *speedy and public* or *cruel and unusual* may be defined in any given generation, these words remain in a special relation with reality, which we may call actionable – adapting action to the text, as Dickens would say – creating reality or guiding behavior. Legal statements are either in a constitutive or an imperative relation with reality. “All legislative Powers herein shall be vested in a Congress of the United States” creates such a Congress and invests it with powers. “No Title of Nobility shall be granted by the United States” is a negative imperative statement that rules out a certain type of action.

The function of the law limits the types of statements that are ... legal, so to speak, or legitimate. The language in which laws are cast must meet certain semantic criteria that do not necessarily apply to political slogans. This is true even of constitutional law, the most political of all legal dialects. Language that is not in an actionable relation with reality cannot serve the law. “No person shall be a Representative who is subtle, false and treacherous” is not an acceptable constitutional provision because there is no concrete scale of values on which subtlety, falseness, and treachery can be evaluated. Laws may prohibit certain behaviors in order to promote, for example, domestic tranquility, but cannot decree domestic tranquility or declare that domestic tranquility is one of the attributes of the state. “Fair and happy” cannot be a constitutional provision defining a nation state. Therefore, not every type of term is suitable for a legal statement, not even a constitutional one. For the legal statement to be rational according to the formal rules of logic and syntax and according to the meaning of the words in language, it must have an appraisable relation to reality: “No Tax or Duty shall be laid on Articles exported from any State.” It must be based on a concrete scale of values, expressed in common language, and understandable to all: “Excessive bail shall not be required, nor excessive fines imposed.” Judicial review of the laws should include a determination whether they are technically functional, in other words, whether the equivalence between what the law says and what the law is obtains.

### 3. The Language of Politics

The language of politics is connotative. The relation between words and reality is one-to-many. Words can signify different things, and their meaning is flexible. Political statements have a prospective relation with reality. They describe a desired, wishful, or promised state of affairs, and do not constitute reality. A politician or a party platform can declare that “happy days are here again,” but this does not necessarily make the present days any happier than they were before the declaration, any more than a promise of “a chicken in every pot” delivers one in practice. They influence behavior in one way: to inspire loyalty to the speaker or party, and in countries where there are elections, to

influence the vote. Some of the terms are political only in context (*liberty* can mean many things), or in combination with other terms. The test for determining whether an utterance is legal or political is how it influences behavior, and whether it is denotative and actionable in any other way than inspiring loyalty to a party or cause.

Slogans are the bread and butter of political speech. Simplification, misrepresentation, obfuscation are the *métier* of politics, but this in itself is not exceptionable because when politicians speak, the listener is necessarily warned. There is no requirement for logical or even syntactic rigor in political slogans. Terms such as sectorial, utopian, egalitarian, liberal, socialist, monetarist, and so on, singly or in pairs, can be piled one on top of the other and combined readily, without any regard to compatibility, coherence, or cogency. One can freely pair separatist with pluralist, or libertarian with law and order, and utter “free market” and “to each according to his needs” in one breath. The clichés used in political slogans are richly connotative. Patriotism, social justice, strong leadership, economic prosperity, red lines, a better world, a brighter tomorrow, power to the people, can each elicit an abundant set of associations. When such terms are joined together, as for example, in “traditional and liberal,” many connotations may point in different and even opposite directions, resulting in complex multiplicity of meaning. If the terms are compatible, the combination is often redundant. If they are incompatible, it becomes self-contradictory.

#### 4. The Problem with *Jewish*

Somewhat inconveniently for purposes of legislation, the term *Jewish* happens to have two quite distinct meanings, of a nationality and a religion, inasmuch as many individuals define themselves as belonging to the Jewish nation although they have no religious sentiment and do not observe any of the religious practices. Some people would probably challenge this statement, but then hardly anything could be said about Jews and Judaism that someone would not raise some objection to. Still, if *Jewish* in J&D were denotative, it would have to mean either one or the other.

Can *Jewish* in “Jewish and Democratic state” refer to the Jewish people? It would be semantically inconsistent to simultaneously apply two adjectives from different universes of meaning – ethnicity and political belief – to the same noun. It would be similar to describing a state as “French and frank” or “Spanish and robotic.” Applied to a state, in combination with democratic, *Jewish* must refer to certain qualities of the state, rather than to its ethnic composition. We must conclude, therefore, that *Jewish* in J&D cannot denote the Jewish people, and rule out the meaning of *Jewish* as nationality in J&D.

But can *Jewish* in J&D signify the Jewish religion? Jewish law, the Halakhah, is a complete legal system in its own right. Like Sharia law, Halakhah governs all aspects of life,

from personal status to financial contracts, criminal enforcement, and state sovereignty. It contains personal, criminal, tort, and administrative law. If Jewish state meant Halakhic state, there would be no need for magistrate's and district courts, or for the Supreme Court, because rabbinic courts and the Sanhedrin would handle all adjudication. Although a Knesset-like institution may be making laws in certain areas, its legislation could not be at variance with Halakhah. Executive power would be in the hands of community leaders, vetted and inducted by rabbis. A Halakhic state would therefore denote a theocracy, which is unlikely to qualify as democratic. It is possible to argue that Jewish state refers to one in which some portion of the lives of the citizens is conducted according to Halakhah. In Israel, personal status is indeed dictated by religious law, but not only Jewish. In this case, the revised formula would make Israel a Jewish, Muslim, Christian, Druze, Bahai and democratic state, as the personal status of all citizens, atheists included, is governed by religious law.

If *Jewish* in J&D cannot denote either nationality or religion, the term must be connotative. In this case, its connotations are legion, from history, culture, and religion, to tradition, custom, and convention. If *Jewish* is connotative, it can include anything and everything, making it unfit for the legal vocabulary and placing it squarely in the political realm.

## 5. The Problem with *Democratic*

Language contains some magical terms to describe traits we do not know the origin of, or which we cannot properly define. *Idiopathic* is one such term, much favored by physicians for diseases they do not fully understand. *Talent* is another. *Democracy* is a similar grab bag into which politicians and the media cram a tangle of social and philosophical ideas without regard to accuracy or precision, often demagogically (a term that shares its root with *democracy*). Like charity, it covers a multitude of sins. The noun *democracy* or the adjective *democratic* do not appear in the US Constitution or in any of its amendments. They could not be used in a legal statement that aspires to any rigor in its enactments. Declaring that a country is democratic, or for that matter, free and happy, does not make it so.

The term *democratic* calls forth many connotations, but does not denote any concrete political or social arrangement. It is best used to describe an agenda, the distillation of a mishmash of ideas and ideals accumulated over two and a half millennia, which includes elements of ancient political philosophy, Judaic and Christian ethics, 18th century French and American republicanism, and various recent refinements. Roughly, the democratic agenda advocates civil, personal, and property rights, economic and political freedom, equal justice and opportunity, and an unspecified measure of fairness. To

carry out this agenda, it proposes a representative system that requires a certain separation of the branches of government and representation of the population in some of these branches. Although individually each component of this agenda may be in a particular relation with elements of tangible reality, when bundled in a snug package, the constituent elements are not always compatible and in agreement with each other, and the consolidated term is nothing but a set of vague associations. Democracy can technically comply with some formal set of requirements, say, a partial separation of powers, and at the same time provide no human rights, no equal economic opportunity, and no political freedom. Some rights may be restricted to natural born citizens. Political freedom, translated into majority rule, can and has resulted in severe oppression. Majority rule is a cornerstone of the democratic agenda, and it can be disastrous for even large minorities, not to mention small ones. Similarly, civil rights and political freedom do not necessarily go hand in hand. A freely elected government, the expression of political freedom, can suppress civil rights. The same goes for political and economic freedom. Some of the goals of democracy may be in clear conflict with one another. Economic freedom and equal opportunity, for example, can be traded off one another. Thus, as a blanket term, *democracy* can mean anything and everything, and therefore nothing.

There is another, simpler meaning that the term *democracy* has acquired in the popular mind and vernacular, which is shorthand for representative government in all its forms, and more generally, for any regime or institution that is perceived to be good or desirable. This meaning of *democracy* is even more vague and connotative than the previous one. Democracy is no longer treated as a means to an end or a solution, but as a value in itself, and may be likened to a religion, whose tenets do not require proof. Its doctrine is majority rule; its ritual, elections; its sacred texts, Montesquieu, de Tocqueville, and the American Constitution; its clergy, the elected representatives; its temples of worship, the parliaments and council rooms; its divinity, the voters; and its prophets, the pollsters. In both meanings, *democratic* is connotative rather than denotative, and belongs to the political vocabulary. It is probably the favorite term of politicians everywhere, and alas, it often worms its way into the law. But laws are written by politicians, whose foremost loyalty is to self and sector, and these being served, let the law go whistle.

## 6. The Problem with *and*

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means what I choose it to mean – neither more nor less.”  
 “The question is,” said Alice, “whether you can make words mean different things.”

When the two terms of a condition are joined by an *and* operator (e.g., *candidates must have a PhD degree and at least five years of teaching experience*), the two terms are mutually limiting – only those with the right degree who also have the required experience, and vice versa, are considered. Such a joining narrows the set of items that satisfy the condition. A condition stipulating that insurance coverage applies only when traveling and only for purchases charged to a given card restricts coverage to the area of overlap between the two conditions. In all these cases, the two terms restrict each other. But when the terms of the condition are connotative rather than denotative, the *and* operator fails in its duty to narrow the opening through which the included items are allowed to pass. A condition stipulating that a program must be, say, *innovative and adaptive*, or *enriching and farsighted*, does not limit the number of items included in the list because each vague term has endless connotations that are open to interpretation, and the joining of the two terms only increases the possible combinations. When some of the connotations of one term directly contradict some of the connotations of the other, the result may be an absurd condition that means nothing, and therefore can mean anything.

A combination of two connotative terms, each of which can mean just about anything, is the ultimate recipe for a political utterance, and disqualifier of legal statements. *Jewish and democratic*, joined by the operator *and*, cannot limit each other. *Jewish*, in its religious sense alone, already spans the entire spectrum, from Reform to ultra-Orthodox, and *democratic* certainly covers all shades, from New Zealand to North Korea (democratic rights feature more than once in the North Korean constitution). The number of connotations in both the *Jewish* and the *democratic* set is so large, and membership in each set so easy to achieve that some members of one, say, work is prohibited on the Sabbath, must inevitably collide with some members of the other, say, freedom of occupation. By way of political compromise, laws are designed to regulate such conflicts and provide actionable solutions to them. To the extent that J&D means anything, it states such a problem but does not even hint at a solution.

Granted, legislators propose, by shaping the law, and the courts dispose, by interpreting it – occasionally clarifying controversial concepts. But on tottering propositions, only teetering rulings can be built. When the Supreme Court of Israel took up J&D, it merely underscored and illustrated its ambiguities, rather than clarifying them. In Ahmed Tibi case,<sup>1</sup> the Court gave J&D a narrow interpretation. *Jewish* was grounded in the

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<sup>1</sup> EC 11280/02 The Chairman of the Central Elections Committee for the Sixteenth Knesset v. Ahmed Tibi.

values of Zionism and heritage, and it included the right of return for all Jews, Hebrew as the official language, and observance of holidays and symbols that reflect the revival of the Jewish People. With unassailable tautological logic, the Court explained: “The heritage of the Jewish People is a central component of its religious and cultural heritage.” *Democracy* was grounded in free elections, a core of human rights, including dignity and equality, separation of powers, rule of law, and an independent judiciary. Without going into details about the rule of law in the minimally Jewish and minimally democratic state depicted by the Court, it is immediately clear that two of the components that happen to denote concrete, actionable points – the right of return of all Jews and equality – are in stark contradiction with one another. To reconcile the two, equality must be cut loose from its denotative mooring and allowed to ride freely the connotative swell.

The J&D formula is not the only instance of the politization of the language of the law. J&D is the special case, one that gained greater purchase than others with the legal and academic community, of the general problem of political language invading the law, especially constitutional law. After listing a series of lofty entitlements, Basic Law: Human Dignity and Liberty decrees that the enumerated rights shall not be violated “except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required” (Basic Law: Human Dignity and Liberty, 1992). Vague connotative terms like *values of the State*, *proper purposes*, and *required extent* provide a built-in self-destruct mechanism for the law, allowing the emptying of its provision of all content. As long as political language survives in the enacted law, the political debate is not resolved, which is the same as throwing the law back into the political arena to be renegotiated. Laws are the result of political give and take, but the finished product should not be a political statement. The political compromise that the law enshrines cannot be subject to further political interpretation. The political stage is over with the enactment of the legislation. The only interpretation within the legal system that terms of the law should suffer after enactment must be largely technical, conducted in court, and concerning the sway of the law, not its nature.

The J&D industry will not be forestalled by such quibbles, however. All tools and techniques of analysis will be applied to it, from Talmudic casuistry to Marxist hermeneutics and deconstructionist exegesis, and every possible meaning will be ascribed to it. All legal, social, political, economic, and other questions can and will be debated with reference to the J&D formula. In the course of this reevaluation, everything can and will be said, in line with the political orientation of the debaters, because the formula accommodates all utterances with ease, which will all cancel each other and the net result will be naught. J&D will be shown to mean, like division by zero, everything and nothing at the same time.



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