CONSTITUTIONAL LIMITS AND THE PUBLIC SPHERE

A CRITICAL STUDY OF BENTHAM'S LEGAL AND CONSTITUTIONAL THEORY

A THESIS SUBMITTED FOR THE DEGREE OF Ph.D
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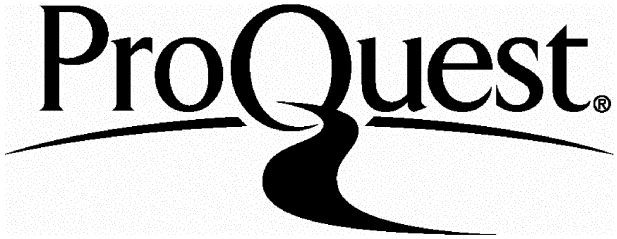

Political liberty depends everywhere upon the free action and frequent and genuine manifestation of the public will: but the free action and genuine manifestation of that will, depend upon the mode of proceeding observed in going through the several steps that must be taken before any such result can be produced...a political body lives only by the manifestation of its will.

Essay on Political Tactics, Bowring, ii. 332.

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ABSTRACT

This thesis is a reconstruction of Jeremy Bentham's legal and constitutional theory. It is based on a close reading of Bentham's unpublished and newly published texts, as well as on a re-reading of his better known works. It is argued that an analysis of constitutionally limited government formed a central theme of Bentham's theoretical arguments, whilst the establishment of a constitutionally limited government, based on representative democracy, was a major practical concern for him.

The theme of constitutional limits brings together many of Bentham's specific preoccupations during his lifetime. Scholarship in legal, constitutional, and political theory, has hitherto failed to establish a unified conception of Bentham's thought.

The main argument of this thesis is that, for Bentham, constitutional limits were socially dynamic in nature. These limits were determined and effectuated by a popular collective judgement with regard to the imposition of obligations within a given community. The people themselves demarcated the extent to which centralised coercion might be exercised. A popular collective judgement also signified a change in the locus of obligations from centralised institutions to the community.

It is argued that the connection between constitutional limits and the public sphere constituted the common, unifying rationale of Bentham's legal and political enterprise. Constitutional limits were established as a result of an interaction between, on the one hand, officials, who were responsible for enacting a system of legislation and rules, and, on the other hand, the people, who passed judgement on the activities of these officials. This interaction determined the social justification, and hence the limits, of authority in any social group. The limits of authority, in turn, determined the sphere of individual inviolability.

The relationship between constitutional limits and the public sphere is discussed in relation to Bentham's ideas about sovereignty, the duty to obey the law, and the dichotomy between legislation and private ethics. The connections which are established and defended between constitutional limits and private ethics, as well as between private ethics and communal consensus formation, are novel for legal and political theory in general, and for Bentham scholarship in particular.

The idea of constitutional limits is, moreover, discussed in the context of the potential evolution of communities. In this context, constitutional limits are conceived as a medium through which a community might evolve from being a community of law into what Bentham called a "community of sympathy", the latter being largely based on self-government.

ABBREVIATIONS

Bowring	*The Works of Jeremy Bentham*, published under the super-intendance of his Executor, John Bowring, 11 volumes, Edinburgh, 1838-43.
Colonies	*Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and other writings on Spain and Spanish America* (CW)
Comment	*A Comment on the Commentaries* (CW)
Constitutional Code	*Constitutional Code*, vol. 1 (CW)
Correspondence	*Correspondence of Jeremy Bentham* (CW)
CW	*The Collected Works of Jeremy Bentham* (1968-)
Deontology	*Deontology together with A Table of The Springs of Action and Article on Utilitarianism* (CW)
First Principles	*First Principles preparatory to Constitutional Code* (CW)
Fragment	*A Fragment on Government* (CW)
IPML	*An Introduction to the Principles of Morals and Legislation* (CW)
OLG	*Of Laws in General* (CW)
PJP	*Principles of Judicial Procedure,* Bowring, ii. 1-188.
SAM	*Securities against Misrule and other Constitutional Writings for Tripoli and Greece* (CW)
UC	*Bentham Papers at University College London (followed by box number in Roman Numerals and folio number in Arabic.*

NOTES

In quotations, bold characters are used by the present author for purposes of emphasis. Words emphasised by the original author appear in italics.

Throughout the thesis, any reference to individuals made in the male gender indicates both male and female.

CHAPTER 1 - INTRODUCTION

I

Bentham's legal and political thought was wide-ranging and voluminous. Based on the principle of utility, Bentham offered insights on subjects ranging from epistemology, psychology, morality, legislation and analytical jurisprudence, to constitutional theory where he offered a utilitarian defence of democracy. In parallel to his theoretical endeavours, Bentham devised institutional schemes with a view to the implementation of his theoretical ideas. These included prison reforms, poor law proposals, and many practical suggestions for the reform of political institutions.

This thesis is a reconstruction of Bentham's legal and political thought. As such, it does not question Bentham's basic assumptions, which were essentially those of the Enlightenment, namely the desire to establish a scientific basis of morals and of the understanding of society. More specifically, it attempts neither to reinterpret Bentham's assumption that the principle of utility formed the foundation of psychology and morality, nor his assumption that communication problems might be solved by the development of language, nor his conviction that he had provided a scientific basis for morality, by means of what he called the two sovereign masters - pain and pleasure.

The thesis tries to reconstruct and defend the most general argument which can maintain the coherence of Bentham's legal and political enterprise, given his most abstract theoretical assumptions - a task that Bentham did not himself undertake.[1] The reconstruction establishes

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[1] The objective of this thesis is not a Skinnerian one of writing a history of ideas: see Q. Skinner, 'Meaning and Understanding in the History of Ideas', in J. Tully and Q. Skinner (ed.), *Meaning and Context*, Cambridge, 1988, pp. 50, 64-7. I am not looking to see by whom Bentham was influenced or understand the particular historical context in which he

a new link between Bentham's early legal and political writings and his mature constitutional ones. It analyses many particular aspects of his theory in the light of this link. The main argument of the thesis is that Bentham's legal and political enterprise provided for constitutional limits which were to be determined and effectuated by a popular collective judgement.

An analysis of constitutional limits could be approached from a variety of perspectives. A study of constitutional limits links issues such as sovereignty, the duty to obey the law, forms of government, and the possibility of a role for some collectivity, which Bentham referred to as the Public Opinion Tribunal, which will be discussed, borrowing Jurgen Habermas's term, under the name of the "public sphere".[2]

Both the understanding of Bentham's particular preoccupations, and the connection between them, have facilitated responses to a hitherto unresolved series of questions which have been asked with regard to Bentham's legal and political theory. How could Bentham offer a command theory of law on the one hand, and provide for a constitutionally limited government on the other? How could the powers of a supreme commander in a state be limited? Could the command theory of law account for the idea of "validity", rather than

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lived. The context within which the argument is set is formed by Bentham's core theoretical presumptions (only in this sense is the thesis historical). It is a reconstruction and not a deconstruction.

[2] The "public sphere" is regarded by Habermas as the public grouping of *private* individuals who debate issues bearing on state authority: see C. Calhoun, *Habermas and the Public Sphere*, Cambridge, Mass., 1992, p. 7. In *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society,* Cambridge, 1989, p. 27, Habermas referred to the public sphere as "the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchange and social labor. The medium of this political confrontation was peculiar and without historical precedent: people's public use of their reason"; see also ibid., pp. 54, 79.

"legality" or "legal permissibility"? How could Bentham reconcile his claim, on the one hand, that sovereignty could be constitutionally limited in given areas, and, on the other hand, to have provided in his later constitutional writings for a government to whose power no limits were prescribed?

An attempt to answer these questions will be made, and it will be argued that these puzzles are not insoluble once the central role played by the public sphere in Bentham's legal and constitutional theory is appreciated.

II

Bentham is well known for the volume and the diversity of his writings. This diversity has created a particular feature which characterises Bentham scholarship: it has not yet arrived at the stage of maturity whereby all scholars agree on definitive sources for argumentation. Study of the Bentham manuscripts in University College London and of the new critical edition of the Collected Works being edited in the Bentham Project, have provided fresh sources for exploring the complexity and subtlety of Bentham's arguments. Bentham scholarship has therefore developed not only on the basis of argumentation about existing texts, but also from the continuous emergence of new texts. Further, the emergence of these texts has enabled new readings of some of Bentham's well-known writings. As a result, the parameters of interpretation of his thought have changed over time. In a sense, these are the most difficult conditions for scholarly debate, because the emergence of new texts repeatedly changes the basis on which that debate takes place.

One example where such a discovery has totally changed the nature of the scholarship was the discovery and publication of the text *The Limits of Jurisprudence Defined*,[3] now known

[3] C.W. Everett, *The Limits of Jurisprudence Defined*, New York, 1945.

as *Of Laws in General*.[4] Before the publication of this work, Bentham's theory of law was seen very much in the shadow of John Austin's command theory of law. Yet, the new materials showed a fresher and much more subtle exposition of the command theory. The result of this discovery was that old debates about the nature of legal positivism were reopened among contemporary legal theorists.[5] *Of Laws in General* led H.L.A. Hart to develop in a more sophisticated fashion, in his *Essays on Bentham*, the criticisms he had developed against Austin's command theory of law in his *The Concept of Law*.[6] However, despite Hart's lucid criticisms of certain distinctions overlooked in Bentham's theory, distinctions which would make sense to lawyers, it is puzzling that *The Concept of Law* has been so generally recognised as paving the way, in Hart's own words, towards a "fresh start" in thinking about the main paradigms of analytical jurisprudence. How could Hart, a scholar who utilised a far narrower philosophical basis, and had far narrower objectives than Bentham, successfully produce a conceptual theory which undertook to refine Bentham's wider, more fundamental and philosophically richer, as well as more meticulous, social and political enterprise? Bentham attempted to show *detailed* connections between many different philosophical, social and political preoccupations, and based these connections on such elementary concepts that any attack on a *single* aspect of this enterprise *in isolation*, such as his theory of law, seems misconceived. An example of this misconception goes to the heart of Hart's own methodology. Hart provided a methodology which he called "descriptive

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[4] *Of Laws in General* (CW), H.L.A. Hart (ed.), London, 1970.

[5] See, for instance, J. Raz, *The Concept of a Legal System*, Oxford, 1980.

[6] H.L.A. Hart, *Essays on Bentham: Studies on Jurisprudence and Political Theory*, Oxford, 1982, and *The Concept of Law*, Oxford, 1961.

sociology",[7] the adoption of which led to many perceptive distinctions, such as between legality and validity, validity and effectiveness, a command and a rule, "being obliged" and "having an obligation", the external and internal points of view, and legal and moral rules. However, it is not clear that these distinctions give rise to a better description of states of affairs which are associated with law, than notions which are far wider and more elementary, such as pain and pleasure, desire, expectation, relationship of superiority and subordination, the unification of duty and interest, the expression of a wish by a superior in relation to a given act, and various types of sanctions. This thesis attempts to clarify certain aspects of this puzzle, and therefore it can be characterised as presenting an account of "Bentham after Hart". In the thesis, Bentham's elementary concepts will be used in order to help analyze the novel, and in some cases arguably cruder distinctions, drawn by Hart.

The appearance of previously unpublished writings by Bentham has also led to a number of revisionist interpretations of Bentham's principle of utility and of his theory of law, which have presented Bentham's arguments in a new and provocative light.[8] A utilitarian theory

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[7] In the preface to *The Concept of Law*, Hart intended to provide a *conceptual* analysis of law, not according to reductionist methods of definition, but in terms of the social context in which legal terms were used. He criticised any attempt to define law as a "command" which failed to investigate whether the social understanding of law corresponded to such a definition. Under the command theory of law, terms which were associated with law such as "rights", "obligations", "rules", "a legal system", were defined in such a way that a conceptually consistent theory was the result. Yet this command theory was a socially detached account of legal phenomena. It ignored many social connotations which formed the necessary context for any assertion of legal terms; see also H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, 1983, pp. 26-35. For an explanation of Hart's methodology, see P.M.S. Hacker, 'Hart's Philosophy of Law', in P.M.S. Hacker and J. Raz (ed.), *Law, Morality and Society - Essays in Honour of H.L.A. Hart*, Oxford, 1977, pp. 1-25, at 8-10.

[8] G.J. Postema, *Bentham and The Common Law Tradition*, Oxford, 1986.

of distributive justice, based on Bentham's writings on the civil law has been defended.[9] There have been new studies in Bentham's constitutional theory, following the publication of the first volume of *Constitutional Code*.[10] All these revisionist interpretations have aimed to challenge Bentham's previous image as being a master of scientific method who was concerned with the attainment of security *rather than* having any inherent commitment to liberty and liberal values.[11]

In respect of his legal and political preoccupations, Bentham's thought has usually been divided into two distinct periods. During the early period, he was mainly preoccupied with the reformation of the moral and the legal world. In the later period of his life, Bentham turned to radicalism and discussed detailed issues in constitutional theory.[12]

The fact that Bentham concentrated on different theoretical fields at different stages of his

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[9] P.J. Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*, Oxford, 1990.

[10] See F. Rosen, *Jeremy Bentham and Representative Democracy: A Study of the Constitutional Code*, Oxford, 1983, and *Bentham, Byron and Greece: Constitutionalism, Nationalism, and early Liberal Political Thought*, Oxford, 1992; see also L.J. Hume, *Bentham and Bureaucracy*, Cambridge, 1981, and R. Harrison, *Bentham*, London, 1983.

[11] Examples of scholars who interpreted Bentham as "illiberal" are E. Halevi, *The Growth of Philosophic Radicalism*, London, 1928, pp. 487, 490-1, 506; J. Steintrager, *Bentham*, New York, 1977; D. Long, *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in relation to his Utilitarianism*, Toronto, 1977, pp. 87-95, 125-7, 159, 168-175; C.F Bahmuller, *The National Charity Company: Jeremy Bentham's Silent Revolution,* California, 1981, pp. 201-6; J.E. Crimmins, *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham*, Oxford, 1990, pp. 73-92, 156-8, 273-302; S.R. Letwin, *The Pursuit of Certainty: David Hume, Jeremy Bentham, John Stewart Mill,* Cambridge, 1965 (reprint 1993), pp. 140-6, 150-4, 187-8.

[12] For the reasons which may have led to "another Bentham", see J. R. Dinwiddy, 'Bentham's Conversion to Political Radicalism 1809-10', Journal of the History of Ideas, 36 (1975) 683-700; J.H. Burns, 'Bentham and the French Revolution', Transactions of the Royal Historical Society, 16 (1966) 95-104, and 'Jeremy Bentham: from Radical Enlightenment to Philosophic Radicalism', The Bentham Newsletter, 8 (1984) 4-14, at 6-7.

life has led to two different limitations of perspective amongst Bentham scholars: first, there have been scholars who have discussed Bentham with reference to only one temporal period, that is in relation to *the time at which particular texts were written*. Examples of this approach are Hart and Long, who simply do not consider Bentham's mature constitutional writings.[13]

Second, there have been scholars who have discussed in depth *certain themes* in Bentham's thought, almost to the point of neglecting others. Examples are Rosen, who has considered both Bentham's early and mature constitutional theory, but hardly refers to Bentham's legal theory, and Postema, who has mainly discussed Bentham's legal theory, and therefore discussed Bentham's constitutional writings almost only from that perspective.

Rosen does not seek any common rationale underlying Bentham's legal and political thought. As far as Postema is concerned, although his account is thorough and thought-provoking, and despite his analysis of some texts from later in Bentham's career, he does have a rather limited perspective, namely a discussion of Bentham's legal theory. Nowhere does Postema try to establish a connection between Bentham's legal thought concerning how political society should deal with the issue of constitutional limits, and the treatment of related issues in Bentham's mature constitutional theory. Although his insight into the interactional element between the people and the government in Bentham's theory of sovereignty was a breakthrough in the understanding of Bentham's conception of sovereignty, an insight which has been much relied on and developed in this thesis, Postema did not develop fully the nature of this interaction, and did not assess the *implications* such interaction might have for the understanding of Bentham's constitutional writings. Further, he failed to investigate the

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[13] See, for instance, Hart, *Essays on Bentham*, especially chapter 9, and 'Bentham on sovereignty', in B. Parekh (ed.), *Jeremy Bentham - Ten Critical Essays*, London, 1974, pp. 145-53, at 149-152; see also Long, *Bentham on Liberty*, pp. 87-8, 95.

extent to which Bentham's legal and political thought might have a unified rationale.[14]

As a result of this lack of unity of treatment, Bentham's theory has been exposed to criticisms, for instance that it did not provide strong enough protection for individual rights, for instance by entrenching them as constitutional limits. An example of what could be regarded as a grossly distorted overall picture of Bentham's endeavours was given by Steintrager. He argued:

> Constitutional questions were abstract and remote from the normal interests of the common man whose primary concerns, after all, must be with his family and his fortune. If, as seems the case, Bentham held to the view that truth would win out in the market place, it was not because he had great confidence in the people, but because he counted on a few men who would be responsive to popular needs as articulated by thinkers like himself. Even though he was insistent that the feelings of the people must be taken into consideration, his very concept of the legislative function suggest[s] that change would come from above and not from below.[15]

This thesis, by adopting a unified approach, will seek to challenge every single sentence of this quote. In the course of the work, various criticisms of Bentham scholars will be advanced. The common denominator of all these criticisms is that scholars have not gone, or hitherto could not go, far enough in developing and defending an argument which would serve to present Bentham's legal and political enterprise as a coherent and unified whole.

III

As a result of the newly-published and unpublished constitutional texts, it is now possible to reconstruct Bentham's legal and political enterprise as a whole. It might, of course, be that Bentham did not intend his enterprise to be unified in this way. However, in view of

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[14] An exception to this lack of uniformity is D. Baumgardt, *Bentham and the Ethics of Today*, Princeton, 1952, in which a detailed discussion of Bentham's ideas in relation to general philosophy is provided.

[15] Steintrager, *Bentham*, p. 53.

Bentham's "enlightenment" project of producing a complete code of law, a pannomion, which was to combine a utilitarian theory of legislation with a consistent epistemology, it is at least arguable that he aspired towards the establishment of a unified whole. He did not allow sufficient time for reflecting generally upon this all-embracing enterprise. He devoted his life to detailed expositions of various theoretical and practical subject-matters, and, as a result, provided no general discussion about how all these parts might be welded into a coherent whole. Thus, while it is possible that Bentham had a clear conception of an underlying rationale, he did not in fact reflect generally on the continuity and consistency of the various branches or fields of thought which he considered.

The methodology of this thesis involves by and large what William Twining calls a "discussional" approach, rather then a historical or literal one.[16] A literal approach would involve an account based mainly on an original exposition of unpublished texts by Bentham. A historical approach, by contrast, would answer the question of what Bentham might or might not have meant with reference to the period in which he lived, and the ideas by which he might have been influenced. In contrast, the discussional methodology rejects the commonly-made compartmentalisation of Bentham in respect of a certain period in his career, such as a "legal reformer" or a "political radical".

Being "discussional" in reading Bentham means that the approach adopted here is argumentative. As such, the approach is influenced by Ronald Dworkin's account of interpretation in general, and law as interpretation in particular.[17] The thesis constructs and defends an argument about a "hypothetical" Bentham. It examines the way in which any

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[16] W. L. Twining, 'Reading Bentham', Maccabean Lecture in Jurisprudence, in Proceedings of The British Academy, 75 (1989) 97-141, at 107-128.

[17] R. Dworkin, *Law's Empire,* London, 1986, chapters 1, 2.

particular text under discussion might fit into a larger whole, even if Bentham may have never explicated that whole explicitly. This larger whole, then, must be created by an argument. In other words, certain conflicting views with regard to a particular text are discussed in order to determine which one of them makes the best sense of Bentham's legal and political enterprise as a whole.

In adopting this methodology, it is assumed that in reading Bentham one encounters tensions, or puzzles, or gaps in his argument, both in each specific text that he wrote, and in any attempt to construct unifying themes in relation to his thought. Disagreements among scholars in relation to such tensions which one encounters in reading Bentham do not relate to questions about what Bentham actually wrote, but are of a more theoretical nature. The question at the core of such disagreements is something like this: "What possible justification can be provided to support an argument to the effect that Bentham's claim was such and such?"

My enterprise is to read Bentham's writings in an integrated, unified way. This reading involves the construction of an argument that makes the best sense of his enterprise as a whole. By "integrated", I mean the formation of a general argument according to which the basic tenets of his theory can be viewed as consistent. This approach serves two purposes. First, it constructs a consistent general justification for Bentham's theory. A greater proportion of particular inconsistencies within and between individual texts might be resolved in the light of this general justification. Second, the construction will itself be justified and defended against rival general interpretations, and against criticisms, which, it will be argued, follow from less consistent and comprehensive adherence to the main tenets of his argument. Both what Bentham said and what he did not say in any specific text may be equally interesting. It is only after certain general arguments about his legal and political enterprise

are advanced that apparent theoretical incoherences in his thought can be accounted for.

It is possible to be sceptical, and to claim that Bentham's work is too inconsistent, that he contradicted himself too frequently, and that he repeatedly changed his ideas over the years. As a result of this inconsistency, so the sceptical argument goes, any global claim about his theory is doomed to failure. This kind of argument is what Dworkin calls the "internal sceptic's" argument.[18] Such a sceptic, in our case, a sceptical scholar, would advance *the interpretive argument* that Bentham's enterprise is too indeterminate. However, the aim of this thesis is to construct the best possible argument which presents Bentham's enterprise as a whole, *despite* these inconsistencies. Thus, if the thesis is successful, it will refute such internal scepticism. The only way for the reader to pass a judgement as to whether to prefer the interpretation suggested by this thesis, or another interpretation, would be to ask which of them makes better sense of Bentham's enterprise, all things considered. In the course of the thesis, a justification for many particular arguments in relation to Bentham's texts is furnished by reference to the most general and unifying argument of his utilitarian enterprise, namely that constitutional limits were determined and effectuated by the public sphere.

IV

The term "ought" is bound to mislead. It can signify many things. In the first place, it can stand for a normative attitude which is usually spoken of in relation to authority. In the second, it can signify the status of an alleged universal description according to which a discourse ought to be understood. In the third, it can signify an ideal, that is a critical standard to which whatever exists should aspire. Finally, It can signify a justificatory claim in an interpretive discourse.

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[18] Ibid., pp. 76-85.

The way in which this thesis relates to the last mentioned sense of the "ought" has been discussed in the previous section. However, this thesis also involves discussion of the other three senses of "ought", though the most problematic distinction in terms of the thesis, concerns the second and the third senses of the word.

Bentham claimed to be engaged in a project of a "universal" theory (or more specifically, universal jurisprudence) about individuality, morality, law and society. This project differed from an "expository" account which described central features of a particular culture, at a certain stage of development.[19] Bentham claimed that he was developing a universal theory which would form the basis for an understanding of morality, legislation, political society, law, private ethics and the paradigms of constitutional theory.[20]

The term "universal theory" implied that the given account would have to form the basis for any particular application of it. Universal jurisprudence, therefore, would have to form the basis of *all* description of legal discourse, for all places, in all cultures and for all time. A universal theory would describe features inherent in any aspect of legal activity.

What would the term "ought" mean in the context of a universal theory? It is arguable that when Bentham gave an account of universal jurisprudence, there was no difference between what IS and what OUGHT TO BE. There could not be. By the supposition of universality *any* description ("this is") would have to be what it ought to be. The idea represented in the statement "this is" would have be put in the way it ought to be described. Any refutation of this would deny the supposition of universality. Any theory which claimed universality

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[19] *Fragment*, pp. 397-8; see also *The Influence of Time and Place in Matters of Legislation*, Bowring, i. 170.

[20] See Twining, 'Reading Bentham', pp. 133-8, and 'General and Particular Jurisprudence - Three Chapters in a Story', in S. Guest (ed.), *Positivism Today*, Dartmouth, 1996, pp. 119-46, at 120-25.

would have to insist on this unification of the IS and the OUGHT. That unification between the IS and the OUGHT is what makes plausible a claim for the universality of a theoretical discourse. If a distinction between IS and OUGHT was permitted at a universal level, it would contradict the universal feature of the enterprise described. To give an example from Bentham's corpus: in *OLG* Bentham claimed to have given a universal *definition* of a law for all places, in all cultures, and at all times. A law as *described* there *ought* to be understood only in that way in all places, in all cultures, and all times. The same claim might be made, for instance, in relation to Bentham's description of human psychology and morality, based on pain and pleasure, as expanded in *IPML* and *Deontology*.

Thus, from this perspective, the distinction between a universal expository account, which would be confined to the definition of terms, and a universal censorial account, which would be some ideal model of understanding a discourse, would be very thin indeed. Names of entities like "pain", "pleasure" ,"desire", "relationship of subordination and superiority", as well as the relationship between these names, could survive changes in time, place and culture.

However, new distinctions, which would falsify the universal status of a description, might arise. For example, the understanding of "desire" could change from a conscious atomistic "want" into an unconscious symbolic "lack". Once the idea of "desire" changed, the whole theory, which was "universal" in terms of the previous understanding of "desire", would become particular. A new general and universal descriptive enterprise would need to be erected upon new foundations. In the context of an enterprise like Bentham's discussion of an imperative theory of law, it is possible that the understanding of "a will" as the drive of an atomistic self-contained rational individual, would come to be disputed. A different understanding of the foundation of "a will" might mean that far more complex ideas of

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manifestations of will, and the relationship of subordination and superiority, would be developed. "Time" at this level of discourse would relate to the moment of "advance" at which further distinctions in the basic understanding of the concept are introduced. Thus, a universal account would be historically sensitive only in regard to the development of its own internal distinctions.

Bentham did not discuss the meaning of "universality" in the sense which has just been mentioned. He simply assumed the meaning of the concept in relation to some parts of his thought. Hence his claim was that his descriptions of legislation and of law, for example, would function "beyond time and place". The identification of a universal "theory of law" would mean that all descriptions of law contained in a more particular "theory of law" would presuppose the universal theory of law, and be consistent with it in all the distinctions the more particular theory made at its own level, distinctions which, of course, would be subject to ideology, culture and time. For example, the notion of what law is might be very different in Marxist, liberal, anarchic, and tribal or family based groups. However, Bentham's universal theory of law would apply equally to all of them. From Bentham's point of view, for example, Hart's method of "descriptive sociology" must assume the notion of an act and an expression of will with regard to this act, with some kind of sanction attached, in order to explain the normativity of law. In other words, a description of a rule could never be a better social description of legal phenomena than some expression of will (a command being one of them), because an expression of will forms the generically basic understanding of law as a discourse exercised in a context of superiority and subordination, an understanding which any account of "a rule" would have to accommodate. Bentham would claim that a theory of law based on the idea of "a rule" is not sufficiently engaged with elementary concepts to present a claim for universality.

There is a justification for treating Bentham's theory as aspiring to universality. Bentham devised a method which relied upon elementary concepts of pain and pleasure, as well as a clear epistemology. Although both his understanding of pain and pleasure and his epistemology have been contested by modern philosophers and social theorists, Bentham's theorising at this basic level does mean that his legal and political theory clearly interacts with general philosophy. This interaction with general philosophy means that his theory aspires to universality much more convincingly than any other theory of law which purports to describe this or that aspect of legal practice, as commonly understood, be it the phenomenon of a "rule", or "a theory of adjudication".

It will be argued that Bentham's most famous works in legal and moral theory (*Fragment, IPML,* most of *OLG, Deontology*), and some aspects of his main works in constitutional theory - *First Principles, Securities against Misrule* (the parts which *do not* discuss actual forms of government), can be interpreted together as constituting a universal description of particular discourses. This general description of law might accommodate different regimes of property distribution, or degrees of state intervention. However, as was argued above, it should be emphasised that the thesis does *not* undertake to contest Bentham's basic assumptions. It merely tries to make the best sense of his theory *within the parameters he presumed.*

The second aspect of " ought" which can be identified in Bentham's writings relates to the idea of a temporal unification of IS and OUGHT *within the context* of any given universal theory. Theories would be formed in a given socio-historical context, say a given group which reflects upon the quality of its own internal arrangements. This would mean that in the history of a social group, in an existing state of affairs at a given point in time, an aspiration to a better state of affairs could arise, for example for a change from a pure

monarchy to a representative democracy. The OUGHT in this case would simply involve a better normative application of the universal theory. Once an opportunity for such a better normative application arose, a new arena of "is" and "ought" would be settled according to a succeeding newly-desirable state of affairs. In other words, what *used* to be considered a good normative application would, after a certain time, become unsatisfactory, and hence particular, in the context of a new allegedly "universal" normative application. The crux of this historical understanding of the "ought" is that the IS and the OUGHT would only be unified within the broader context of a universal theory. As far as the relationship between these two senses of the "ought" is concerned, within the basic set of distinctions which make up universal *theory*, many ideologies might be successively accommodated. A temporal change in the universal theory, which would be, by the supposition, made at a slower rate than changes in ideology, would give rise to new ideological possibilities. The distinction between these two senses of the "ought" might be exemplified in the difference between works like *OLG*, which were universal in their nature, and *Constitutional Code*, Bentham's normative application of his universal ideas in the institutions of a democratic government.

The second sense of using the "ought" assumes the possibility of the practical application of the universal description to which all existing systems ought to aspire. The difference between the two senses of the "ought" would be that the first, universal sense, would constitute a speculative observation. It would therefore usually start from very basic notions, and would generalise an all-embracing explanation of a discourse from these basic notions. The historical discourse (the second sense of the "ought") would involve simply participation in a discourse. It would involve the making of normative claims while taking part in the history of facts or events. As such, it would always be undertaken from the point of view of a participant in the practice under the influence of a given culture and ideology. In short,

the second sense of the "ought" would arguably be much more culturally contingent than the first.

For Bentham, a censoring (critical) historical sense of the "ought" might produce an aspiration towards a system which would achieve the greatest happiness for the community. This would amount to no more than saying "my project is to make what I consider the best normative application of the universal description". This would be the paradigm, for instance, of censorial jurisprudence, namely that all existing systems should aspire to this or that model. For example, when Bentham divided offences in chapter 16 of *IPML*, or when he devised a chapter at the end of *OLG* to which he called "the uses of this book", or when he provided for a representative democracy in *First Principles* and *Constitutional Code,* he argued for the best utilitarian application, or the most just application of the first sense of the ought - the universal description.

However, these applications by Bentham of his own universal description were limited by the extent of his own practical vision. His best normative application (representative democracy) might later be replaced by another arrangement which would fit another society at a different stage of its development. An improvement on the institution of representative democracy might arguably be achieved *while still accepting his general propositions about legislation and law.* For example, the basic assumptions Bentham made for the justification of authority, and the factors which would determine the quality of that authority and its limits, would still hold, whether the necessity of a republican state is conceded (which was provided for by Bentham's *Constitutional Code*), or whether another kind of community, much more localised and self-sufficient, is envisaged, a community in which centralised, institutionally-based authority would be much less necessary. In this sense, even Bentham did not exhaust the potential of his own universal account.

The parts of the thesis which analyze the idea of sovereignty, political society, constitutional law and limitations, consensus formation, the dichotomy of public and private ethics, and the different types of community are arguably accounts in the first, universal sense of the "ought". They constitute most of the argument. However, the idea of free government, including Bentham's institutional proposals in *Constitutional Code*, his understanding of obstacles to communication, are all derived from writings dealing with the second, historical sense of the "ought". Sections II and IV of chapter 4, certain parts of sections II and III in chapter 5, and section IV of chapter 6 attempt to relate these two senses of the "ought" to Bentham's legal and political enterprise.

A final point should be made with regard to the relationship between the IS and the OUGHT, although its full consideration exceeds by far the scope of this thesis in that it involves basic approaches to moral theory. The point is that Bentham's theory has been criticised for committing the naturalistic fallacy, by deriving the OUGHT from the IS.[21] This charge is arguably unjustified. Bentham would insist that a proper understanding of the OUGHT should be immanent in a proper understanding of the IS. There was no OUGHT which was totally divorced from the IS. For example, the idea of moral justification can be understood only if the nature of the actual function and formation of desire (and will), as well that of understanding, is tackled. An "ought" can not be contemplated in the abstract. Another example would be Bentham's theory of classification of motives, and the degree to which these motives could operate to facilitate the formation of certain obligations among people. Moral premises would depend on the quality and complexity of social interaction rather then on metaphysics. The quality of communication between people would be, for

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[21] For a discussion of the naturalistic fallacy in relation to Bentham, see Kelly, *Utilitarianism and Distributive Justice*, pp. 45-8.

Bentham, the sole foundation of morality. Indeed, Bentham would argue that the understanding of the name of the entity "morality", as some independent source of determining good or evil, was nonsensical.[22] Moral deficiencies would therefore be treated by Bentham as immanent in actual social function, as disturbances in the mutual understanding of people, and not as contrary to metaphysical truth. An "ought" for him (an emancipatory ideal) could be crystallised as a result of antagonisms in free actual communication. Bentham was interested in exploring the possibilities of communication. Formation and crystallisation of ideals would further be related to an understanding of how actual motivations operate in communication. An ideal would evolve due to the random exercise of influences between people, an exercise of influences which could lead to the formation of alternative ideals, and therefore to individual and group enlightenment, and the desire for emancipation. The improvement in the quality *of function* in the IS would produce a new OUGHT. In the course of communication, alternative conceptions of pain and pleasure could be crystallised into moral obligations. Further, as will be argued in chapter 6, moral obligations might have an obligatory status in the mind of each individual, by virtue of the feeling of sympathy that they create in him. The communication which cultivated sympathy would be, inter alia, responsible for the development of morally sensitive beings. Any ideal would relate to a generalisation which would stem from the actual being of actual people. For example, an ideal that "minorities should be accounted for", could not be divorced from social interaction which gave rise to a proposition backed up by some moral (or communal) sanction. A discussion of an ideal could not be totally divorced from the explanation of the social operations (which would involve motives, sanctions, desires). The obligation by which the ideal was communicated would be immanent in these social

[22] See, for instance, *Deontology*, pp. 136-7.

operations. The outcome of a communicative process might lead to a generally accepted communal proposition which advocated sympathy to minorities. Morality therefore, for Bentham, was not metaphysical but related to utility and linguistic possibilities. A metaphysics of morality would be a source of abstraction and obscurity, by which a great deal of misery would be caused by the use of prejudicial justifications like "legitimacy", "gratitude", "honour", "fair play", "balance", "integrity" and last, but not least, "liberty". Morality was first and foremost a cultural phenomenon. Indeed, one of the reasons which equipped Bentham to speak about universality was precisely his lack of commitment to *any* a-priori moral rules. Such a-priori moral rules would make it impossible to assume the position of a philosopher/observer, which was needed in order to find an ahistorical, universal, principled, evaluative methodology, and which would provide an ultimate standard of explanation for any particular moral reflection. Theoretically valid observations would be based only on a method of understanding the principles according to which moral evaluation was made *possible*, not upon any a-priori investigation of what was *desirable*.

V

This thesis firstly offers an argument which accounts for Bentham's legal and political enterprise as a whole. The level of critical engagement with other leading revisionary scholars on Bentham, such as Hart, Rosen, Postema and Kelly, is very general and as such accepts many particular aspects of their arguments. However, the thesis puts forward an alternative view to that of the more traditional scholars,[23] who see Bentham as advocating governmental intervention with little or no concern for continuous public participation and involvement. Bentham's hard-nosed analysis, rigorous analytic methods, his practical

[23] See p. 8, note 11 above.

schemes for the poor and prisons, and above all his reductionism, obscured the main goal of his theory, which consisted in a continuous enlightenment (as opposed to a "one-off" enlightenment) and deliberation, and hence liberation, of communities from dominant preconceptions about how societies ought to be organised.

Second, the thesis rejects the rigid manner in which terms coined by Bentham have been interpreted, and which has created misconception about his work. Here, the formula "constitutional limits as determined and effectuated by a collective communal judgement" replaces the much criticised formula of "sovereignty as determined by the habit (or disposition) of obedience". Again "the command theory of law" is replaced by "the command theory of *a* law", in order to emphasise the different preoccupations Bentham had with regard to the institution of "law" (a social undertaking in which coercive mechanisms would unify duty and interest according to some conception of harm), and his theory of the individuation of a law, which would be the product of a more localised exercise in jurisprudence, one which was undertaken in the context of, and could not be divorced from, the idea of "law" in the first sense.

Third, the thesis emphasises the close affinity which exists between legal and political theory. It arguably casts some light on modern accounts of the public sphere, when it discusses the motivational basis of consensus formation and the idea of influence. It offers a utilitarian (philosophical and empirical) defence for anarchism. The thesis also clarifies the conception of the personification of communities,[24] and offers an analysis of how communal principles might be crystallised and reflected upon, as well as how these principles might limit the extent to which coercion is exercised in a community.

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[24] One example of a theory which advocates the personification of communities is Dworkin's: see *Law's Empire*, pp. 195-219.

Fourth, although mainly theoretical in orientation, the thesis gives an exposition of Bentham's proposals regarding the institution of the Quasi-Jury and the constitutional role of the judiciary. Both proposals are unique. These institutions were applications of Bentham's life-long theoretical enterprise, and demonstrate, yet further, his belief in a vibrant public sphere.

A final point concerns the use of sources. The thesis is based on largely unexplored constitutional texts which have recently been published in the *Collected Works* edition. Passages from these texts have been included in some recent scholarship but there has not yet been a thorough and systematic discussion of them. A study of the relationship of these newly-published texts to Bentham's other writings has hitherto not been undertaken. These newly published texts include *Securities against Misrule and other Constitutional Writings for Tripoli and Greece*, *First Principles preparatory to Constitutional Code*, *Official Aptitude Maximized; Expense Minimized*, and *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and other writings on Spain and Spanish America*.[25] In addition, unpublished material is used. This material consists of *Preparatory Principles* (UC lxix), and material from the forthcoming volume of Bentham's writings at the time of the French Revolution. In the case of the latter, direct reference is made to the relevant essay in the manuscript. These essays are *On the Efficient Cause and Measure of Constitutional Liberty* (UC cxxvi. 8-18; cxxvii. 4, 5.; clxx. 168), *Necessity of an Omnipotent Legislature* (UC cxlvi. 15, 18-25, 27-50), and *On the Influence of the Administrative Power over the Legislative* (UC cxxvi. 1-5). Passages from the Bowring edition of *Constitutional Code*, and *Principles of Judicial Procedure*, which have largely been ignored by other scholars, have also been relied upon. Finally, better-known works by Bentham, such as *A Fragment on*

[25] See the bibliography for full references.

Government and *Deontology*, are given a new interpretation, which, in turn, suggests new argumentative connections with the newly published *Collected Works*.

CHAPTER 2 - SOVEREIGNTY AND THE NATURE OF THE NORMATIVITY OF LAW

I

This chapter deals with the concept of sovereignty and the normativity of law in Bentham's thought. The analysis is inspired by a close reading of Bentham's early works. The jurisprudential claims that are advanced here form the foundation for the remainder of the thesis. The analysis of sovereignty will underpin the subsequent examination of the duty to obey the law, constitutional limits, and the idea of the public sphere.

The reinterpretation suggested here of Bentham's theory of sovereignty contributes to a discussion which has occupied analytical jurisprudence for the last thirty-five years, since the appearance of Hart's *The Concept of Law*, concerning the precise nature of the normative and justificatory elements in the exercise of political authority. "Normative" has reference to a feeling of being under an obligation experienced by agents who participate in a social discourse. In the debate over the "justificatory" element, the question has been whether an appeal is to be made to moral reasons in ascertaining the validity of the actions of a centralised coercive authority. This jurisprudential debate about authority sprang from criticisms levelled by Hart in *The Concept of Law* against Austin. These criticisms were developed by Hart in a more subtle form against Bentham in *Essays on Bentham*.

The main argument of this chapter is that Bentham's theory of sovereignty was socially dynamic. Bentham conceived "sovereignty" as an ongoing activity of a critical nature, rather than as a static "test" according to which the formal legal validity (a criterion of authenticity) of coercive measures could be assessed. A theory of sovereignty for Bentham was not only about authenticity. His account also conceptually linked the authenticity of law with the

social justification of the exercise of centralised coercion. Sovereignty was about the justification of a "political authority".[1]

My argument is that a theory of sovereignty which provides merely for the recognition of a coercive measure as "law" can not properly account for any background critical justificatory dimension which, in fact, forms a conceptual part of such recognition. Reasons for the recognition of law qua law were an important part of Bentham's conception of the origin and persistence of a political society. Any conceptual discussion of the foundation of authority and law which ignores these justificatory reasons will not be persuasive in social terms.[2]

Bentham rooted the validity of legislative commands in moral judgement. This moral judgement was made by the population and concerned the ultimate justification of the centralised institutional authority in the community. There was more to Bentham's understanding of obligation than a prediction of punishment. It will also be argued that Bentham had a theory of obligation which did not get its normativity solely from a customary rule or rules. An important component of such normativity was a judgement, or opinion, with regard to the utility of a given coercive measure. The reinterpreted view of the moral nature of obligation in Bentham's theory of sovereignty shows that he did not fully subscribe to the positivist view which divorces legal validity from moral worth, *at the level of description of an individual law.*

II

In this section, I shall summarise two critical accounts of Bentham's theory of sovereignty

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[1] By a "political authority", I do not mean a theoretical authority (such as an expert's advice), but a one which promulgates coercive measures.

[2] See chapter 1, p. 7, note 7 above.

and its relationship to his theory of law, namely those of H.L.A. Hart and G.J. Postema.

I shall start with Hart's criticisms of Bentham's command theory of law put forward in *Essays on Bentham*. Hart's first criticism related to Bentham's confusion of legal validity and obedience; that is, of legal validity and the effectiveness of the law. Hart embarked on this criticism because Bentham described sovereignty in terms of the "habit" or "disposition" of the people to obey a person or a body of persons.

Hart gave an example of a constitutional limitation which was transgressed by the legislature. This act of transgression could nevertheless be obeyed by a large section of the population for personal reasons:

> It may be that no cases come before the Courts to test the validity of the legislation; yet if such a case does arise, the fact that the legislation has been and is likely to be obeyed would not prevent the Courts holding that, because of the restrictive prohibitions of the constitution, this legislation is invalid and has created no legal obligation.[3]

Hart attempted to detach the "legal" validity of a measure from its effectiveness. A constitutional limitation could be valid even if generally ignored by the population. Constitutional transgressions were nevertheless transgressions, even if they were complied with by the population:

> limited obedience by the *population* is not a necessary condition of legal limitations on government: and legally limited powers to legislate are compatible with general obedience to commands outside the limits. The validity or invalidity of legislation is not to be identified with its effectiveness or ineffectiveness in securing obedience nor are these different properties of legislation always concomitant.[4]

Hart's second main criticism of Bentham was that he failed to distinguish between the aspects of legality and validity of a legislative measure. Hart's understanding of the difference between these notions was that the term "legality" conveyed the notion of acting

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[3] Hart, *Essays on Bentham*, p. 234.

[4] Ibid.

in a way permitted by the law. The term entailed what was legally permissible or impermissible. "Validity", on the other hand, marked the extent of competence. It signified the extent of authority, and so would constitute a boundary to power.

Holding a measure invalid would mean that a body was not conferred powers to act in the first place, so its act should be considered not in the realm of legal permissibility (because it might in fact be legal), but as ultra vires and hence void ab initio. This power, in short, ought not to be recognised *as* a power which could produce legal measures in this particular area.

Because, Hart claimed, Bentham saw all powers as legally based (conceived or adopted by a sovereign), his ability to distinguish between these two notions was limited. Bentham could not distinguish between legal validity and invalidity on the one hand, and between a legally permitted and prohibited act on the other. He thought of all law as an expression of will, and hence a legal limitation for him would come *only* under the dichotomy of legally permitted and prohibited.[5] This failure by Bentham to distinguish between validity and legality seriously undermined his account of the concept of law. For example, Bentham failed to describe coherently legal powers whose function in many everyday situations, like contracting and conveyancing, gave rise to the above distinction.[6] Another example was constitutional limits. Bentham could not account for the fact that a government might be both legally limited (by a legal measure), and also limited in terms of competence (constitutionally limited) by law. This was so because for Bentham, Hart claimed, sovereignty could not be a *legal* power, and therefore he could not conceive any legal limitation on it:

Bentham's difficulties in accommodating the possibility of legal limitations on

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[5] Ibid., p. 225.

[6] Ibid., p. 214.

> supreme legislative power sprang from the conception that the legislative powers of the sovereign are not conferred by law. [7]

Hart's final, yet most fundamental, criticism of Bentham related to Bentham's partial understanding of the notion of obligation. This criticism was more fundamental than the others because it was not restricted to jurisprudential enquiry but extended across the whole field of normative discourse. This criticism was more fundamental than criticisms of Bentham's account of sovereignty, because the manner in which sovereignty was viewed would ultimately depend upon how a discourse about political authority dealt with the normativity of such an authority.

In the final chapter of *Essays on Bentham*, Hart showed that Bentham's idea of a command failed to explain the normative effect of law. Hart's main criticism was that, like Austin's command theory of law, Bentham's theory could not explain the normativity of law.

What did Hart mean by "normativity"? Normativity related to the likelihood of social criticisms of individuals in the case of their deviation from a given course of action, or from social norms. However, it was possible for any normative attitude to become more reflective by encompassing an "internal point of view":

> What is necessary (for the existence of feelings of compulsion with regard to a social rule) is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of "ought", "must", and "should", "right" and "wrong".[8]

Such normativity, with or without an internal point of view, constituted for Hart the main characteristic which distinguished a social rule from mere habitual behaviour, or from

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[7] Ibid., p. 224.

[8] Hart, *The Concept of Law*, p. 56.

behaviour determined by the imposition of sanctions (or threat of sanctions). In order to account for such distinctions, Hart differentiated the idea of "being obliged" (a command which induced compliance by the threat of sanction), from that of "having an obligation" (being influenced by social norms).

It is with this idea of the normative aspect of a rule in mind that one ought to read Hart's final chapter in *Essays on Bentham*. In this chapter, Hart showed how Bentham's theory of law, which had at its foundation the command of a person, or assemblage of persons, who were habitually obeyed, could not fully account for the normativity of law.

Before summarising Hart's main point in this context, let me deal briefly with a relatively minor point Hart raised. He criticised Bentham for not considering the various communicative possibilities in which an authoritative utterance would not convey the actual state of mind of the commander.

Hart criticised Bentham's notion of command as if Bentham assumed that a command was always an exact reflection of the actual wish of the commander. Hart claimed that Bentham did not discuss instances in which the commander gave an insincere command, whereby the object of the command uttered was different from the object intended, such as the case of God giving Abraham a command to sacrifice his son.[9]

This criticism was not justified. A long footnote in *Official Aptitude Maximized; Expense Minimized*, shows that Bentham clearly saw the possibility of a "volitional gap" in the process of uttering a command. Bentham observed that there could be a difference between the effect which *appeared* to be intended by the commander and the effect *in reality* intended by him. One cause for this gap, Bentham argued, might be a lack of the ability to judge a situation correctly (in Bentham's terms, a want of discernment). Alternatively, the gap might result

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[9] Hart, *Essays on Bentham*, pp. 247-52.

from discernment applied to a sinister purpose.[10] In this context, the sinister purpose would be the desire to promote some particular interest of the commander, despite the utterance creating the impression that the command was intended to promote the interest of the commandee.[11] Such a sinister purpose would be a motive which might produce an insincere command.

Further, it is not clear to what extent the *possibility* of the existence of a volitional gap, as raised by Hart, might stand as a significant criticism of Bentham's main working assumption about the sincerity of commands. Since Bentham would have claimed that the actual state of mind of the utterer could be communicated in many cases, Hart's criticism would not have much weight.

A plausible theory of law need not assume that all commands would be sincere. However, a theory of law based on the insincerity of commands would not be plausible. If the *possibility* were conceded that a certain mode of expression of a wish could also indicate the utterer's state of mind (whoever this utterer might be - government, "public opinion"), one might say that Bentham's account of a command was sufficient for what he saw as the main purpose of law, namely to regulate people's conduct.

In fact, Bentham aspired to eliminate insincere commands from the legal system, so that people could understand the law, and thus obey it, censor it, or even resist it successfully. His aim was to promote clarity in communication, a quality which the common law had failed to achieve. In order to establish a regulative system which could promote social happiness, a sincere understanding between the commander and commandee had to be facilitated. One

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[10] *Official Aptitude Maximized; Expense Minimized* (CW), P. Schofield (ed.), Oxford, 1993, p. 16, note a.

[11] The term "sinister interest" was a term used by Bentham in his mature constitutional writings: see chapter 5, p. 167 below.

had to believe that for law to exist and to improve, the conveyance of information, or simply communication, was possible. Bentham did not believe that the task of law could be fulfilled once equivocal or corrupt characteristics were an inherent feature of it. The fact that an expression of will might be defective, in certain circumstances, as a means of communication, did not invalidate it from serving as the core of the concept of law. This argument would still hold, even if one put a "rule" rather than "a command", at the centre of a concept of law, as Hart of course did.

Yet this criticism was not Hart's main point. The crux of his argument was that the notion of command failed to explain the normativity of the command itself. In other words, the *fact* that a command was uttered could not explain the normativity which the command possessed as an authoritative measure.

Hart sought to give a further explanation of his own notion of the "normativity of rules" in order to show that the mere fact of a command being uttered could not account for the normativity of such a command.

Hart claimed that inherent to a command was the intention for it to operate as a peremptory reason on the subject's mind. The command would operate to cut off independent reasoning by the subject as to its justification.[12] Its utterance would operate as an exclusionary reason. Hart also maintained that the command operated as "content independent" in the sense that a commander might issue many commands which would be different in content, would be addressed to different people, and would all operate as peremptory reasons.[13] These two characteristics, Hart claimed, were the main ingredients of a command. (Hart combined these

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[12] See in this context J. Raz, *The Authority of Law*, Oxford, 1979, pp. 14-20, and *Practical Reasons and Norms*, Princeton, 1990, pp. 36-41, 63, 82, 100; see also chapter 4, p. 113, note 12 below.

[13] Hart, *Essays on Bentham*, pp. 252-5.

two characteristics in the phrase "content independent peremptory reason" for action (hereafter CIPR).

The fact that a punishment would often be attached to a command, in order to reinforce the motive of compliance on the part of the commandee, would be secondary in importance and would not go to explain the normative status the command had *as such*.[14] Punishment should not be confused with the wider idea of normativity. Punishment could only be but one source for normativity.

A command *in itself*, Hart argued, could not explain its own status as CIPR. To explain the normative attitude which people had with regard to the command, that is their conception of it as authoritative, one had to go beyond the "fact of commanding". CIPR would operate as a description of the ingredients of the phenomena of "a command", but it could not explain why the commander's utterances were perceived *as* CIPR.

Hart was in search of ultimate reasons to explain why the subject recognised the commander as such. Ultimate reasons, Hart claimed, could be diverse. They could include custom or simple conformism, and so would not have to emanate from the threat of sanctions.[15] However, all such reasons were *exterior* to the "fact of commanding". Hart, in effect, backed up the notion introduced in *The Concept of Law* of an ultimate social rule, the reasons for the acceptance of which could be diverse. This master rule would operate as the ultimate source for the recognition of commands as valid law. This rule would be the ultimate criterion of legal validity. This *validity* did not owe its existence to a command backed by the threat of punishment, but might have a variety of social practices at its foundation. Hart's argument in *Essays on Bentham* was a restatement of the idea deployed

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[14] Ibid., p. 254.

[15] Ibid., p. 257.

in *The Concept of Law*. The "fact of commanding" could not explain the notion of legal validity, and the existence of legal limitations in this respect on the exercise of the powers of government:

> The legal limitation of a commander's power to legislate would simply be a reflection of the fact that the sphere of conduct in relation to which his words are recognized as constituting peremptory reasons for action is limited.[16]

On the basis of reading *together* Hart's accounts in *The Concept of Law,* and *Essays on Bentham,* concerning the nature of the normativity of law, his argument might be summarised thus: the reasons which made a commander such resulted from practices that led to his utterances being perceived as CIPR. An ultimate validating social rule in a given society would enable *all* the people in that society to recognise the commander as an authentic source of valid law. In analysing the ideas of the normativity of law and "recognition", Hart endeavoured to show that the notion of "validity" would be distinct from saying that a given measure was legally permissible or impermissible by the "fact of commanding". Further, acts of "recognition" of commands as valid "laws", which operated as CIPR, need not consist in a critical reflective attitude which amounted to the "internal point of view". The CIPR status of utterances could stem from qualitatively different reasons for the people in a community on the one hand, and for the officials on the other. It was sufficient for a legal system to exist if the notion of "validity" entered both as a "recognition" test for the people, and as the critical reflective internal attitude for officials. In other words, there could be a considerable difference between the normativity of the law as the people might see it, and as officials had to see it. However, *both* officials and people would perceive the rule of recognition as "normative, or as an "ought", or as CIPR.

It will be argued, that the difference between officials' and people's acceptance of this rule

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[16] Ibid., pp. 258-9.

as normative would be of degree only, not in kind. It is only a difference of degree because both people and officials would have to entertain a "critical reflective attitude" towards authoritative utterances in a legal system, although these attitudes might be manifested differently in different societies.[17] The argument regarding the critical nature of people's attitudes towards authoritative utterances in a legal system will be developed in the next section.

G.J. Postema's account of Bentham's theory of law and sovereignty attempts to answer Hart's objections as to the relations between validity and effectiveness, validity and legality, and the normativity of law. He attempts to show that there are many similarities between Bentham's account of sovereignty and Hart's account of legal validity. He does so by alleging that Bentham, in his earlier writings, developed a theory of customary-based sovereignty. Bentham provided for a network of customary rules recognised by both governor and governed. The normativity of these customary rules related to a complex web of mutual expectations on the part of governor and governed.

First, Postema shows that Bentham furnished an account of custom. In his *Comment on the Commentaries* and some other unpublished writings, Bentham classified different types of customs. The common denominator between them was that custom was a practice which could become obligatory. A group practice could become obligatory and normative because of the fact that it created expectations between members of the group. These expectations would be interpersonal and would cause each member of the group to conform to some recognised regular pattern of behaviour. These expectations would give this pattern a

[17] See also p. 77, note 105 below.

prescriptive force.[18]

Second, Postema draws on *Fragment* to assert that Bentham drew a distinction between an "immediate" disposition to obey a coercive measure, and an "ultimate" disposition on which obedience to *any* particular law rests.[19] According to Postema, Bentham, when arguing that the authority of the governor was constituted *by* the habit of obedience of the populace, had meant that one should not look only as to whether a *particular* law is obeyed, but also whether there was a general recognition of the person as governor.[20] This important, yet undeveloped, insight by Postema[21] changes the nature of the argument about Bentham's account, that is, from an argument about how sovereignty is created by obedience to a particular measure, into an argument about general validity as signified by the collective judgement which could affect the collective obedience of the people.

Third, in order to account for how a customary rule is formed, Postema relies on Bentham's Cartesian ontology, according to which rules are a product of personal belief, or inference from observation. Postema argues that for Bentham a customary rule was a result of an expression of opinion on a matter of fact, the facts here being reasons for such an opinion. In other words, Bentham conceived customary rules as the opinions of the observer of the practice, to the effect that such practices constituted reasons for actions.[22]

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[18] Postema, *Bentham and The Common Law Tradition*, pp. 222, 226-230. In this way, Postema, (and therefore Bentham) would dispute Raz's claim that a conceptual analysis of rules rooted purely on their being "in practice" can not account for their normative character: see J. Raz, *Practical Reasons and Norms*, pp. 56-8.

[19] Postema, *Bentham and The Common Law Tradition*, p. 240.

[20] Ibid.

[21] See chapter 4, pp. 155-9 below.

[22] Postema, *Bentham and The Common Law Tradition*, pp. 224-5.

Fourth, Postema attributes to Bentham a notion of sovereignty which, like Hart's, involves an ultimate criterion of the validity of laws. For Bentham, Postema argues, saw sovereignty as a publicly identifiable and accessible criterion for recognising a coercive measure as "law", as opposed to any other kind of coercive measure:

> Such criteria have an "ontological" function: they define conditions which entities - rules, principles, norms, commands, acts - must meet for them to *be* authentic legal entities in a given legal system...In addition, such criteria may also be assigned the "epistemic" function of defining tests by which authentic rules, principles, or act-in-law can be identified and distinguished from inauthentic or spurious rules and the like.[23]

In order to fulfil this epistemic task, the criterion of validity would have to specify the *persons* who purported to be recognised as law-makers, and the *procedure* they had to follow in order to produce coercive measures which would be identified as "law". In a way analogous to Hart's rule of recognition, Postema argues, the criteria of validity of law for Bentham were not related to any critical justification of the content of the law, but only to the conditions necessary to satisfy the authenticity of law.[24] Thus, Postema claims that Bentham identified the authenticity and validity of law in a similar fashion to Hart.[25]

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[23] Ibid., p. 231.

[24] Ibid., pp. 238-9.

[25] Postema does not mention the substantive content of law as a criterion of authenticity. He mentions only procedure and certain personnel as possible criteria for the authenticity of law. This is an awkward but understandable move by him. The inclusion of the beliefs in the community, which led to the formation of rules which signified substantive limitations for the authenticity of law, would not fit neatly into the rest of Postema's argument. Such an inclusion would draw Postema into difficulties concerning what he saw as Bentham's distinction between the authenticity of law and the moral merit of it. While admitting that a legal system might produce measures of different content, it will be argued that this does not mean that any substantive content would supply the needed normativity of law; see also in this context, N. MacCormick in his comment on Postema's essay 'The Normativity of Law', in R. Gavison (ed.), *Issues in Contemporary Legal philosophy: The Influence of H.L.A. Hart*, Oxford, 1987, p. 106, criticising the view that the normativity of law is content independent.

Fifthly, Postema attributes to Bentham's account of custom the feature that the custom which was the foundation of rules of sovereignty was not of a mechanical but an interactional nature. By using the term "interaction", Postema means that a customary rule could be inferred by the people as a part of the complex network of expectations in the group. This interactional model of custom could provide the explanation of the basic social practice from which customary rules of sovereignty could be inferred.[26] The interaction occurred when there was some collective public inference regarding the identification of the rules of sovereignty which created and limited law-making authority. However, the authority which was created by these rules could also change the customary practice, and hence the inference of customary rules by the collective body of the people. Therefore, although sovereignty was created by the practices of the people, it could also be shaped by the authority in question.

Interaction both shaped sovereign legislative power and could be shaped by the exercise of the sovereign legislative power. In part power issued from the legislature, though ultimately it rested on the practice of the people.[27]

Postema contrasts the interactional model of customary practice and rule-inferring with a "mechanical" model of custom. Under this "mechanical" model, there would simply be an inference of rules from existing practice by the population. This inference would then give rise to the habit of obedience. There would be no account of the two-way relationship between governors and governed. As argued above, Hart's general criticism of Bentham's theory was that the conceptual connection between the ideas of "sovereignty" and "a command which is habitually obeyed" could not furnish an explanation for the ultimate normativity, *outside this fact of habitual obedience*, which provided for reasons for obedience

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[26] Postema, *Bentham and The Common Law Tradition*, pp. 229, 232-7.

[27] Ibid., p. 237.

in the first place. Hence, Bentham's argument which connected sovereignty to obedience was circular.

As has been seen, the interactional model operated at the ultimate level of obedience as opposed to the immediate level. Even on this ultimate level, however, a mechanical mode would be prone to the charge of circularity, for if the population obeyed a sovereign, an explanation would be needed as to what established this sovereignty in the first place. Only an interactional model of customary obedience could provide an explanation of an ultimate criterion of validity. This is because the disposition of the people to obey would also modify the limits of sovereignty, as opposed to such a disposition being determined solely *by* the action of the sovereign. Sovereignty under the interactional model would be a dynamic state of affairs, involving the body of the people *and* the body which produced coercive measures. An interactional model, by allowing mutual modifications of the limits of sovereignty, would fall outside the circularity to which a mechanical argument is subject.[28] A dynamic activity would not be prone, *by its nature*, to the charge of circularity. An interactional model does not view the "habit of obedience" as simultaneously creating and being created by the exercise of coercion. Postema points out the emphasis on collectivity in Bentham's theory. The will of the sovereign had to be collectively authenticated as "law". There had to be some communal recognition of the fact of sovereignty. Postema explains that Bentham's aim was to produce clear and publicly accessible signs which would enable the people collectively to infer a new customary rule. Violations of the boundaries constituted by these signs should easily be perceived.[29]

Bentham discussed various types of mandates which could limit sovereign power. In

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[28] Ibid., pp. 233-4.

[29] Ibid., p. 245.

Fragment he argued that sovereignty could be limited by an "express convention" (a term which signified a treaty between two political authorities in a state or federation, or between a political authority in a state and the people of that state),[30] constitutional promises of self-limitations by an authority,[31] or by constitutional laws in principem, which were certain expressed volitions of which the sovereign, as opposed to the people, was the subject.[32] Postema concludes that, for Bentham, these signs were communal triggers, both formed by the existing state of expectations in the collective body of the people, and also operating to modify expectations in the collective body of the people.[33]

The argument in the rest of this chapter will be that Bentham saw in sovereignty not only a criterion of authenticity, but also an element of critical justification. It will be argued that the distinction between the authenticity and the critical justification of law was not so plausible once interaction became the main model for the account of sovereignty. Bentham saw sovereignty as necessarily involving the subjects in making moral judgements, in which the content of law could and would be a factor in socially justifying the use of coercive measures.

III

This section aims to reinterpret the concept of sovereignty in Bentham's theory. It connects Bentham's understanding of "sovereignty" to the idea of the justification and normativity of the exercise of coercion in a social group. Generally speaking, any social

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[30] *Fragment, pp. 488-9.*

[31] *OLG*, p. 16.

[32] Ibid., pp. 64-5.

[33] Postema, *Bentham and The Common Law Tradition*, pp. 253-4.

observation would reveal that the query "why does a certain authoritative measure, or coercion, have normative force?" is potentially wide in scope. The immediate reasons for people's conformity with an authoritative measure need not involve considerations regarding the morality of that authority. Social practices in themselves can, and often do, imply various degrees of superiority and subordination among people. Certain social "codes" often lead to behaviour which may not be a result of a moral judgement arising from a process of reasoning carried out by a given participant in the practice. However, it will be argued that Bentham's account of sovereignty showed that a pure exercise of coercion - an exercise of coercion without some critical reflection upon it by another body - could not be an adequate description of sovereignty in a political society.

A first preliminary point should be made with regard to the various ways Bentham used the term "sovereignty". Bentham used this concept to signify different ideas depending on the nature of the particular problem with which he was dealing. Sometimes he used "sovereignty" in the sense of power to legislate - what modern writers would classify as "legal sovereignty".[34] Sometimes he used it to signify a certain degree of superiority within the context of an abstract discussion of powers, in which the concept seemed to be detached from any specific political discussion altogether, and assumed a characteristic of endless relativity in relationships of superiority and subordination.[35] In his mature constitutional writings, he used "sovereignty" in relation to the right of the people to locate officials in their positions - or what modern scholars would call "political sovereignty".[36]

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[34] For example, in *Fragment.*

[35] See, for instance, *OLG*, chapter 9, where Bentham discussed the generality of a law. The relativity of sovereignty will be discussed in chapter 3 below.

[36] A.V. Dicey, *An Introduction to Study of The Law of the Constitution*, Indianapolis, 1982, pp. 285-7.

My argument is that there was a common denominator uniting these different senses of sovereignty.[37] This common denominator centred on a *popular critical justification* of a given authoritative measure. This general meaning of sovereignty did not change, regardless of the context in which Bentham used the concept. This thesis will argue that throughout his career Bentham retained the same general theory of "sovereignty", although the *use* he made out of it varied with the subject matter in hand.

The split nature of sovereignty

The common core of Bentham's definition of sovereignty is to be found in the first chapter of *Fragment*, in which he distinguished a political society from a natural one. The heart of the distinction stemmed from the fact that only in the former would the people habitually obey a common superior.[38]

In *OLG*, Bentham replaced the idea of "habit of obedience" with a "disposition to pay obedience":

> By a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience.[39]

The difference between the notions of "habit" and "disposition" was that the former would

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[37] Postema had the insight that in his mature democratic theory Bentham had not advanced a different theory of law, in which a conception of popular sovereignty replaced an earlier conception: see *Bentham and The Common Law Tradition*, pp. 260-1. Postema was responding to Hart's argument in *Essays on Bentham*, pp. 228-9.

[38] *Fragment*, pp. 428-32. Note that Raz delivers a comparable argument in his "social thesis" of authority. This thesis links the very existence of a political society with the fact that the people in it recognise a commonly perceived authority: see 'Authority and Justification', in J. Raz (ed.), *Authority*, Oxford, 1990, pp. 115-41, at 118. The difference between "recognition" and "habit of obedience" will be discussed as the section progresses.

[39] *OLG*, p. 18.

be backward looking in that it was rooted in past practice, whereas the latter meant that people would have the inclination to obey the authority in the future.[40]

Bentham linked the concept of political power to the concept of obedience on the part of the people. The argument in the rest of this thesis will be that this tight relationship between obedience and a social, popular justification for the use of coercion characterised Bentham's constitutional theory in the later stages of his career.

Bentham thought of the "habit" or "disposition" to obey as a significant social process, something which would precede the actual action of obedience or disobedience. Bentham did not equate the actual *action* of obedience with the limits of sovereignty. That *act* of obedience, or disobedience, was the practical implication of reflection upon the collective social justification of authority. Social justification of authority meant for Bentham a collective judgement which conditioned obedience or disobedience. The present section will try to determine the precise nature of this collective judgement as well as the relationship it bore to the concept of "sovereignty".

There appear to be two ways in which a "habit" or "disposition" could produce normative effects. The first would be through the normative force created by custom. On this interpretation, people obey because they infer rules from expectations, these expectations being the result of a certain existing practice. (This, essentially was Postema's claim.) Hence the force of a custom *would be* the source by which power was authenticated, and seen to be

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[40] In *Essays on Bentham*, p. 236, Hart argued that the reason Bentham shifted from "habit" to "disposition" to obey was in order to explain how past practice could create intentions as to future practice. Disposition signified an inclination to obey as long as legislative practices were within the permitted area of competence. Hart criticised both formulations. A habit which must be based on *some* repetition of behaviour, could not capture a violation which would take place for the first time. Also, a disposition could not *create* constitutional limits, but could only be created by them. Constitutional limits, in other words, were to function as a condition upon the satisfaction of which a disposition to obey would depend and persist.

validly exercised as a legal power.

The second interpretation would give custom only a prima facie status, so that the cognitive state of mind of an obedient citizen would be the crucial component. I shall explain why Bentham saw the notion of a rule which was inferred from a custom as forming only one element in a wider judgement which citizens had to make in assessing the social justification of a specific authoritative measure. Bentham did not intend the concept of a custom to capture the whole explanation of sovereignty, as Postema claimed.

The most important passages about sovereignty are in *OLG*. The purpose of this monumental work was to find a solution to a problem which had remained unresolved from *An Introduction to the Principles of Morals and Legislation (hereafter IPML)*, namely the distinction between penal and civil law. This distinction was important for the establishment of universal principles for a system of legislation. Legislation was needed in order to fill the gap between the principle of utility as a principle of hedonistic psychology, and as a principle of moral evaluation. Legislation would aim artificially to unite people's duty and interest. In order to bring about such unification, offences would be constituted, each on account of the mischief that they caused. In order to be comprehensible, the classification and arrangement of individual laws would have to mirror the classification of offences, and, in turn, of mischiefs. Thus, in order to provide for a single offence, Bentham was required to individuate an individual law.[41] The prevailing view defined offences as either "civil" or "criminal", but Bentham recognised that *any* offence would contain civil and penal elements. These elements would exist both in the criminal law, say, of murder, and in civil law, say, of contract. It seemed necessary to analyze their respective roles in each individual law. He

[41] On "individuation", see M. James, 'Bentham on the Individuation of Laws', Northern Ireland Legal Quarterly, 24 (1973) 357-82.

therefore had to rethink the distinction between civil and penal law. While he was trying to grasp this distinction, Bentham got caught up in a problem, still one of the most controversial questions in analytical jurisprudence, namely what constituted a *complete* individual law, be its subject matter what it may. The whole of *OLG* was written to answer this particular question.

In the course of defining an individual law, Bentham sought to establish the minimal requirements for an individual law to exist. Bentham argued that there were only two such basic requirements. These were an act, which would serve as the object of a volition of the sovereign, and some expression of will by that sovereign with regard to that act.[42]

One of the problems involved in the process of individuation was to determine what would make this measure a "law", as distinct from any other coercive measure. The solution to this problem was the task of a theory of sovereignty. What made a certain person or body of persons into a sovereign who could promulgate laws? What was the point at which this body would no longer be a sovereign?

These questions led to a difficulty. Under the simple definition of a law as an act and an expression of will with regard to that act, it was logically impossible for a sovereign itself to be the subject of a law. The notion of constitutional law, which in part is law dealing with the nature and limitations of validity of legislation, becomes incoherent. An escape from this logical impossibility might be attempted by saying that for a sovereign to be subject to a constitutional law, this law must be related in some way to a volition expressed by some other bodies. These other bodies would have to form a part of any analysis of the concept of a law. Otherwise the legislature's volition would not itself be that of a true perceived sovereign, even for the purposes of ordinary legislation.

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[42] *OLG*, p. 93.

The ingredients of a law, namely an act and the sovereign's volition in relation to this act, would also exist in a constitutional law. Yet, what would be the characteristic mark of this law? It must be that this law would connote a certain tension which exists *as a part of* the concept of sovereignty. There would be a qualitative difference between a law which limited sovereignty and any other individual law, in that the former must be assumed in any validation of the latter. Thus in a sense every law of the system would include two volitions, one of the legislature, and one of another body which expressed some volition having the first body as the subject of its volition. Both these types of laws would form an integral part of the concept of law if the authoritative foundation of a single individual law as the exercise of sovereign power was to be understood properly. Sovereignty seemed to be a dynamic concept which could be exercised at different levels. To what extent a legislature was subject, and to what extent it was sovereign, was the task of a theory of sovereignty to explain. This point would have to be addressed in any *description* of a law.

Bentham thought it would be a misuse of language to assert that the legislature could be *legally* limited:

> In the definition that hath just been given of a legal mandate it follows that the mandate **of the sovereign** be it what it will, cannot be illegal: it may be cruel; it may be impolitic; it may even be unconstitutional: but it cannot be illegal.[43]

As has been said, Constitutional laws in principem were a special kind of laws the subject of which would be the legislature and not the people (as opposed to other laws in populum). These laws would limit sovereign power. These laws signified what "mandates [the sovereign] may or may not address to [his subjects]".[44] These laws, Bentham argued, stemmed from the sovereign. The subject of such constitutional laws would be some present

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[43] Ibid., p. 16.

[44] Ibid., p. 64.

political authority. However, the promulgation of such laws would serve as "recommendatory mandates" for any future authorities. Such a recommendation meant that the laws in question would have to be taken into account by that future political authority in assessing the limits of its competence.[45]

It was not clear why the sovereign would bother to bind itself in this way. As Postema noted, Bentham put a lot of emphasis on the idea of the expectations which such a law would create in the people. The force of these expectations would exert pressure upon political authorities to bind themselves. Moreover, the state of expectations would be so intense that the succeeding political authorities would have no choice but to adopt it, or face a massive outcry or even a revolt.[46]

In the context of discussing the possible ways in which constitutional laws in principem could be given effect, Bentham paused to explain the import of the term "sovereignty". This is a key passage and hence it is quoted in full:

> the truth of [the fact that the sovereign can not be coerced by the political sanction] depends upon the idea annexed to the word *sovereign*. The case is, that supposing the power in the state to be [distributed so as to coerce the sovereign], there is no one person or body of persons in whose hands the sovereignty is reposed. Suppose two bodies of men, or for shortness' sake two men, the one possessing every power in the state, except that the other in case of public accusation, preferred in such or such forms, has the power of judging him; including such power as may be necessary to carry the judgement into execution. It is plain that sovereignty would not be exclusively in either: it would be conjunctively in both. Yet, in common speech it is probable that the first man would be styled *the* sovereign, or at least *a* sovereign: ...if the narrow sense were to be given to the word *sovereign*, it is plain that the proposition above mentioned concerning the impossibility of the sovereign's being judged by anyone, would not be true.... Taking advantage of the inexplicit notions annexed to the words *superior* and *inferior*, he would perhaps assume for his medium this proposition, that it is impossible for a man to be superior and inferior to another at the same time: or perhaps in different propositions he would use the same word *sovereign* in two different senses: at one time in its strict and proper sense; at another

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[45] Ibid., p. 65.

[46] Ibid. Discussed in Postema, *Bentham and the Common Law Tradition*, p. 253.

> time in its **popular and improper** sense, according to the distinction above taken.... It may occur, that the distribution of power above supposed is not an expedient one, or that it cannot be a lasting one. This may or may not be the case: but the expediency or the durability of such an arrangement are points with which we have nothing to do here. I consider here only what is **possible.**[47]

Elsewhere, when discussing the distribution of powers in any state, Bentham said that the power to legislate was inherently limited in terms of its functioning:

> [By] legislative power ordinarily so called, I mean the power of legislating *de classibus* even though it be supreme, can never of itself be **absolute and unlimited.** It can never so much as amount to the entire power of imperation: It will fall short of **being equal** to that power by so much as is contained in whatever powers of aggregation or disaggregation are established in the state.[48]

These two passages are very revealing about Bentham's formulation of the word "sovereignty", and despite their relative brevity they contain a complete argument. They convey in a concise way some key features which explain how the concept of sovereignty *ought* to be understood as opposed to how it is commonly understood.

The first point was that the term "sovereignty" in the sense of power to make laws, properly understood, *must* involve a relationship between two bodies. It had to be understood as an inherently "split" concept. It was like a sheet of paper which must have two sides to it. There were two interdependent dimensions which this concept contained. The two dimensions were inherent to any state of affairs signified by the word "sovereignty", and the terminology "split concept" is used here to connote this feature.[49] The notion of a "split concept" means that there must be two bodies, the interaction between which constitutes

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[47] *OLG*, pp. 68-9, note n.

[48] Ibid., p. 91.

[49] When it is argued that such a "split" is inherent to the concept, a statement in universal theory is made: see chapter 1, pp. 14-17 above. This means that one body can not be a sovereign unless there is another body which judges it to be a sovereign and if necessary gives effect to this judgement. In Bowring, ii. 541, Bentham used the term "essence" of sovereignty. I avoid using the term "essence" because of its phenomenological connotations.

sovereignty. One would *be* a sovereign so long as the other judges it to be so. Only on this basis would Bentham be able to assert that the sovereign might be bound and still remain sovereign. This peculiar feature of sovereignty would not ordinarily be obvious, but would become so only when constitutional problems were raised.[50] Only in the popular and misguided sense could sovereignty be seen as a concept involving just one body. Such a misguided view has been attributed to Bentham by his critics, but here he has shown that this was not his position, nor was it one that could be substantiated. One body was, for *most* purposes, superior, the other inferior. However, the very existence and extent[51] of the first body's superiority would be determined *by* a judgement of the second one.

The second point related to the nature of the judgement in which the ordinarily inferior body would have to be engaged. This judgement would reflect the cognitive capacity which the judging body would need in order successfully to judge the first, law-making, one.

In order for an exercise of coercion to be discussed in terms of "sovereignty", it must be an exercise of a legitimate authority. By "legitimate", Bentham meant the exercise of an inherently limited authority; an authority limited by a critical judgement made by the subjects of that authority.[52] The coercion must, if it was to be regarded as an exercise of

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[50] See chapter 4, pp. 155-7 below.

[51] In Bowring, ii. 540-4, Bentham used the word "dominion" to signify the extent of sovereignty.

[52] The word "legitimacy" has hitherto been carefully avoided. Bentham did not like this word and mounted a host of objections to it in his mature constitutional writings. He saw "legitimacy" as a notion which could be utilised to support bad governments. Theories of legitimacy (such as the divine right theory) claimed that there was some sort of basic entitlement for a person or a government to be in power irrespective of its quality. The issue of legitimacy thrived on prejudices and as such the use of it in political vocabulary could persuade people to act contrary to their interests: see chapter 6, pp. 275-6, note 69 below, and *First Principles*, pp. 113-16. However, it goes without saying that Bentham would accept the idea of legitimacy not in an a priori way, but in the sense of limits to acceptable exercise of power. Bentham explicitly linked legitimacy to the limits of validity of the act

"sovereign" power, logically operate, *to a certain extent,* in the context of a judgement by the coerced body as to the justification of the coercion. This feature of sovereignty would hold, it will be argued, even in the case of a pure monarchy.

Thirdly, it is important to note how the relationship of superiority and subordination should be understood in the context of the "split" nature of sovereignty. Bentham clearly opposed the popular idea that a relationship of superiority and subordination provided a sufficient explanation of the concept of sovereignty. Such an explanation would be implausible if one were to assert that authority could be constitutionally limited. A more appropriate notion was that of mutual dependence, or interaction, or equality of power, which would characterise this "split" in most instances. The judging, coerced body, would pass a judgement, the subject of which would be the very superiority of the coercing body. However, "split" sovereignty equally implied that the judging body must be ultimately superior, despite the assumption that in most cases it would be inferior. Hence the mutual dependence: nobody could be absolutely supreme.

Fourthly, Bentham went on to give a hint regarding the nature of the second, judging body. Bentham made it clear that the body which judged the law-maker did so through a process of *public accusation*. This implied that the judging body expressed some public discontent which led to the process of judging or questioning the extent of the law-making body's superiority. It was quite clear that the public had the capacity to bring accusations. In order to make such accusations, the body of the people must be conceived as constantly engaging in the task of censoring the limits of the lawgiver's superiority. This conception would hold good even if the particular judgement did not lead to the performance of a specific action. There was, therefore, a dimension of popular participation in the very conception of the term

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of command: see *A General View of a Complete Code Of Laws*, Bowring, iii. 197.

"sovereignty".

It should be stressed that a democratic government did not follow directly from this requirement of social justification, although no doubt such a popular judging body was perfectly compatible with democracy.[53] Further, the requirement of some reflective judgement on the part of the people did not guarantee that their judgement was necessarily in their best interest. The people could arrive at a judgement contrary to their interest as a result of obstacles to communication, obstacles such as intimidation by the government, or prejudices.[54] Bentham did not attempt an evaluation of this judgement in these two passages, only an assertion that for a proper understanding of the term "sovereignty", there must be a reflective judgement by the people. As Bentham himself said, he did not describe what was "desirable" but only what was "possible". The important point here is that the more interaction was facilitated between the people and the government, the more the political society in question engaged in reflection on the limits of coercion exercised within it.[55]

When one thinks about an authority which commands, one immediately thinks about a surrender of moral autonomy. This is why a command operates in such a way as to exclude independent reasoning. But the greater the extent to which the questioning of the limits of authority or commanding is facilitated, the more legitimate the authority becomes. As will be argued, the idea of questioning the limitations of authority is compatible with the authority

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[53] See chapter 4, pp. 139-48 below.

[54] This point will be discussed in chapter 6, pp. 275-6, note 69 below.

[55] It is interesting to note the extent to which the ideas expressed in these two passages resemble those of one of the principal contemporary thinkers on the issue of authority. In *Authority*, p. 12, Raz claims that the idea of limited authority is sensitive to, and therefore is limited by, a judgement which relates to varying social, technological and cultural circumstances. Arguably however, Raz would not go as far as saying that every political authority must be limited by such a judgement.

having very great powers indeed.[56]

Finally, it seems that Bentham envisaged some *real* judicial institution, which would be distinct from the popular judging body, whose responsibility it would be to carry that body's judgement into execution.[57]

Bentham's account in *OLG* was conceptual and aimed at describing how the notion of sovereignty ought to be understood. Bentham formulated a minimal, formal account of a legitimate authority which had the *right* to make laws, as opposed to a de facto authority based purely on physical superiority and subordination. It was a formal account, because it did not advocate any particular system of exercising authority. It pointed at a minimal, ultimate requirement for a legitimate government. Any government, however bad and cruel it might be, must ultimately be understood according to this criterion. This inherently "split" feature of sovereignty was the basic criterion for a socially justified exercise of authority, as opposed to a naked act of power. Without it there would be no difference between an order given to a dog and a law addressed to a human being.

This basic formal normative principle of constitutionalism - this minimal *conceptual* requirement in the shape of a critical attitude as to the extent of social justification - will be referred to as *the self-reflexivity* of sovereignty. It entails some minimal capacity for popular adjudication as to the limits of sovereignty. For an authority to be socially justified, it must operate in a context wherein those subject to it have some sphere of moral autonomy which gives them the capacity to invalidate this authority. This minimal judgement could relate to

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[56] See chapter 4, pp. 142-3, and chapter 5, pp. 177-9 below.

[57] On this, see chapter 7, pp. 315-32 below.

the basic need for survival or security,[58] but, as will be argued below, could expand to many other fields, and indeed include individual rights.

The self-reflexivity of sovereignty is an important concept to grasp, in that it clarifies the nature of constitutional government.[59] Even under forms of government such as a pure monarchy, based on naked power, there would be some judgement which would make the exercise of power socially justified. This is not to say that these will be good forms of government. The formal requirement of sovereignty means that sovereignty implies an exercise of superiority which is judged to be justified by another body. Again, however bad a public judgement happened to be, whatever the role of fear and prejudice in it, this formal requirement would have to exist if sovereign power were exercised. In this sense, even a pure monarchy would be a limited government. Even in a pure monarchy there would be some limitation as a result of some judgement, a limitation which could be encapsulated in constitutional law and which would limit the monarch. This judgement, a judgement with regard to the social justification of authority, might not be readily observed. It might be more observable in one form of government, and more hidden in another. In some forms of government it might have no other means of expressing itself but through physical

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[58] This is reminiscent of Hart's minimum content of natural law in *The Concept of Law*, pp. 189-95. Hart's view was static in that he considered only the minimal moral *conceptual* grounds of law. However, he did not allow for situations in which, in more developed societies, this *conceptual* (as opposed to merely influential) link between law and morality would be extended beyond these minimal domains.

[59] I want to caution against a possible misinterpretation of what has been said so far. The argument that the concept of sovereignty is a split concept does not simply say that sovereignty *could* be divided in a state in the sense of its being exercised by two or more different bodies at the same time. This type of division will be discussed in the next chapter in terms of the relative and plural nature of sovereignty. A division of sovereignty in this way would be vulnerable to Postema's criticism that, if one accepted the division of sovereignty, at least a single law which had given rise to this division would have to be assumed: see Postema, *Bentham and The Common Law Tradition*, p. 234.

resistance. However it must exist as an inherent part of the concept of sovereignty. This point will become more apparent in the next section, and as the thesis progresses.

The trust which constitutes political authority

When an authority promulgated a constitutional law, it would produce a sign (or piece of information) which from one perspective could be seen as its own will. This was because it would, strictly speaking, form the source of the command. Yet, if one accepts the inherently "split" nature of sovereignty, while still adhering to Bentham's basic definition of a law as an act and an expression of will with regard to this act, one must come to the conclusion that the act of the authority in question must relate in some way to a volition of another body. This other body would supply the motives for the legislature to limit itself, by means of a sanction which, of course, must be different from the legal sanction.[60]

In order to make sense of the precise nature of the communication or interaction between the "judging" body and the body which exercises coercion, attention must be paid to Bentham's conception of investitive and divestitive powers.

J.H. Burns points out that in *IPML*, when Bentham discussed offences against sovereign power, he mentioned the fiduciary relationship between the government and another authority which could invest the government with, and divest it of, its powers. Burns's interpretation is that Bentham had recognised very early in his writings the importance of the *people* in which sovereign power originated, and that this might reveal democratic tendencies as early as the late 1770s.[61]

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[60] For a discussion of the physical, legal, moral and religious sanctions, see *IPML*, chapter 3. As far as the sympathetic sanction is concerned, see chapter 6, pp. 260-6 below.

[61] J.H. Burns, 'Bentham on Sovereignty: An Exploration', Northern Ireland Legal Quarterly, 24 (1973) 399-416, at 403-5.

In *OLG* Bentham defined two types of powers in terms of the person by whom they might be exercised:

> [The power] may be styled direct, when the acts in which the exercise of it consists are the acts of the very person by whom the power is said to be possessed: in this case it may be styled the power or right of occupation: it may be termed indirect, when those acts though still taking their origin in some measure from his will, are not his acts but those of some other person.[62]

The indirect powers, continued Bentham, were of two sorts - investitive and divestitive. They were investitive when the *will* of one person was that another would exercise the act in question; divestitive when the will of one person was that another would exercise the act in question no longer.[63]

From the forgoing discussion of the idea of sovereignty, it would seem that a natural investment of power - one which simply happens, as in the case of the power of a parent over a child - was not appropriate to a discussion of sovereignty. "Natural" power would involve no judgement on the part of the coerced body. Instead, it would simply receive and act on authoritative utterances. These utterances would replace *all* the independent reasoning on the part of the coerced body. This would be the case with any natural authority.[64] A natural authority would be unconditional, apart from the trivial condition that the utterance must in fact be made. Indeed, in the case of a natural society, there is no point of talking about a constitutive body, that is, a body which constitutes it.

Political authority, however bad, cruel and absolute it might be, must be related to voluntary investiture. There must be some judgement, and, as will be argued, certain

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[62] *OLG*, p. 268.

[63] Ibid.

[64] On the connection between natural and political authority, see J.H. Burns, 'Nature and Natural Authority in Bentham', Utilitas, 5 (1993) 209-19, at 213-6; see also chapter 3, pp. 88-9 below.

conditions attached to the exercise of political authority. Again, it must be emphasised that these judgements might be based on misconception, or false consciousness. Fear and prejudice might give a certain direction to such a judgement, but the judgement must exist nevertheless.

It might be argued that all that is meant by "natural" is "not criticising the commonly held social view", that is, not being involved in any active process of justification. This lack of justification on the part of the coerced would result in a state of affairs which might be described as "natural". Therefore, the objection goes, an investment of political power could be conceived as "natural". However, if the objection were to be accepted, any meaningful qualitative difference between "natural" and "political" would no longer exist. The whole point of talking about "natural" investiture is that it is part of the nature of the case, for instance, when a huge gap, whether in physical or intellectual powers, exists between the coercer and coerced. A "natural" investiture, if it signifies any distinct state of affairs, must signify a relationship of superiority and subordination that has nothing to do with a judgement, good or bad, on the part of anybody. It would simply happen. In short, the objection trivialises the whole idea of "natural" investiture.

A "natural" investiture could not give rise to a relationship of sovereignty. In the rest of this chapter, and indeed throughout this thesis, it will be argued that Bentham envisaged a voluntary conception of investiture when he discussed sovereignty, constitutional limits, and political society. Voluntary investiture would exist even when it was latent in, say, an indolent or oppressed social group. Sovereignty and the limitations of its exercise were understood by Bentham as a cultural phenomenon rather than as a natural one.

If sovereignty involved voluntary investiture, would the act of investing someone with sovereign power amount to a blank cheque? On the contrary, Bentham maintained that every

investitive and divestitive event had to accommodate a condition understood at the point in time when the investiture took place. In a voluntary investiture, the body which had the investitive or divestitive powers would attach a condition for the investment.[65]

Bentham distinguished between two kinds of power according to the identity of the party which the power purported to benefit. In the first case, the power was intended to benefit the power-holder only, and was a beneficial power. In the second, the power was intended to benefit some other party, and was termed a "fiduciary" power. Beneficial and fiduciary elements co-existed in every exercise of political power.[66]

He elaborated on the idea of trust in his discussion of powers in *OLG*:

> For the benefit of somebody [powers] must have been designed, so long as the legislator has acted with a view to utility, or in short with any view whatever. This party or parties must have been either the person himself to whom the power is given or some other: in the first case the power may be styled a beneficial power or simply a power; in the other case a fiduciary power or trust.[67]

In the latter case, added Bentham, the beneficiary could be an individual, some unassignable individuals, or the public at large. The fiduciary relationship, in the case where the public at large was the intended beneficiary, was called by Bentham a "public trust".[68]

This concept of trust carried the notion of a limiting condition. To say "you are trusted" means that you are trusted for some purpose. There could be no trust in the abstract. Any trustee must be able to show that the purpose of the trust had been adhered to (adhered to in

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[65] *OLG*, pp. 286-7.

[66] Ibid., pp. 295-6.

[67] Ibid., p. 271.

[68] See also ibid., p. 86, where Bentham said: "When the right or power which is conveyed is one that is exercisable only on a public account, that is for the benefit of the public at large, the power of conveyance is a *constitutional* power, for public powers differ no otherwise from private fiduciary powers than in respect of the scale on which they are exercisable: they are the same powers exercisable on a greater scale."

some sense, although it might not be the best sense).

It has been argued that the interaction between the two bodies gave the concept of sovereignty its social significance. The investing body would judge the body which, for most of the time, exercised the coercion. The condition which would, to some degree, be attached by the first, investing body to the investiture of power in the second body, would be that the authority thus created would pay regard to the utility of the investing body.

The exercise of coercive power would be conditional, in that the authority would have to exercise its power to the benefit of the investing body. The reason for investing this power might be summarised thus: that some of the investing body's goals would be better achieved by investing (delegating) the power rather than by not so doing.

Therefore, investing a body with authoritative power on trust would form an inherent limitation on the exercise of its powers. Public trust would form one ingredient of the definition of a law, namely a volition of the investing body.[69] This volition would be what Bentham called a "conditional command", as opposed to an "absolute command". A conditional command was where the addressee was not obliged in all cases to use the power conferred, but if he decided to use it, he would have to do so in compliance with the expressed condition.[70]

One characteristic of this act of investing power was that it would be a global expression of will. It would have no specific object apart from the general condition inherent in the

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[69] This will be discussed further in chapter 7, pp. 299-302 below.

[70] *OLG*, pp. 112-3, 296-7. This explanation of the trust by a conditional command has implications for Hart's argument in the last chapter of *Essays on Bentham*. Bentham envisaged the possibility of a command operating as CIPR only if the commander exercised it in a certain fashion. It was not necessary that a command excluded all independent reasoning by the commandee, only restricted that reasoning; see also chapter 4, pp. 155-7 below, where the immediate and categorical spheres of reflection upon coercive measures are discussed.

power of investment. In manuscripts entitled *Preparatory Principles*, Bentham stated that the exercise of investitive power was unlike the ordinary exercise of legislative power, which necessitated an expression of volition and an object of volition:

> The acts of the Legislative power are commands: But an act of this investitive power is not a command. To every command belongs a modal object: the act or the forbearance of the person who is the personal object of the same command. But of an expression of the investitive power there is no such modal object.[71]

Bentham in fact cancelled this passage. However, the question which perhaps bothered Bentham was the precise difference between an act of commanding and an act of investitive power. He was clearly unsatisfied with a mutually exclusive definition of these two ideas. At first Bentham thought that the act of the investitive power could not be the same as a command at all. This, however, would not sit comfortably with the idea that a condition must be attached to investitive power which could serve as a general modal object of the volition to invest. A conditional command would therefore also have a modal object.

If we try to identify the common denominator between the view expressed in this cancelled passage and the notion of a conditional command as defined in *OLG*, it can be seen that both lack a specific object of volition. However, both have a general condition as a "suspended" object of volition.

The idea of a political authority which is entrusted with powers by a conditional command would be equivalent to an investment of authority by employing an undecided expression of will. Bentham discussed in *OLG* certain legal mandates where the aspect of the will might be "undecided".[72] Permissions and non-commands could both be seen as conditional

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[71] UC lxix. 236.

[72] For an explanation of Bentham's idea of the logic of the will, see *OLG*, chapter 10; Hart, *Essays on Bentham*, pp. 112-5; and L.J. Lysaght, 'Bentham on the Aspects of A Law', Northern Ireland Legal Quarterly, 24 (1973) 383-98.

commands. These types of mandates express a wish in relation to a certain limitation on the exercise of power by a subordinate power holder. An example might be a mandate which aimed to protect some spheres of liberty. Bentham added:

> In this case indeed the effect is produced not so much from the literal import of the mandate itself, as from another mandate which is so connected with it that if not expressed it may of course be looked upon as implied. I mean a mandate which in the form of a prohibition is addressed to subordinate power-holders in general restraining them from breaking in upon the liberty of the party whom the uncoercive mandate in question is meant to favour. Thus much must be inferred of course: to which may be added in some cases a law of a particular kind **including the sovereign himself under the same restriction.** It is easy to see that some of the **most important** laws that can enter into the code, laws in which the people found what are called their liberties, may be of this description.[73]

In the context of the relationship between the two bodies whose inter-action constituted "sovereignty", this would mean that the authority could exercise its powers only on the basis of the implied mandate that it operated to the benefit of the investing power. There would be no justification for the authority's exercise of power outside the sphere of competence allowed to it by this mandate.

To recapitulate, it has been argued that sovereign power is inherently "split". This "split" could be characterised as a trust or as a fiduciary relationship. This relationship meant that there would have to be a body which would invest (or constitute) an authority subject to a conditional command, the condition being that power should be exercised for the benefit of the investing body. The importance of the "split" within the concept of sovereignty was that the condition of investment of power would be the ground for a continuous moral judgement regarding the extent to which the existence of the authority benefited the investing body. This would remain the case no matter how misconceived this judgement might be, on account of, say, fear or prejudice. The benefit was characterised, generally speaking, by what

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[73] *OLG*, p. 99.

Bentham called "original utility" in so far as investment was more likely to achieve some goal than non-investment.[74] Hence, the existence of socially justified authority involved a continuing process of evaluating whether the authority could ultimately serve its purpose.

Sovereignty, therefore, could be limited by a constitutional *law*. This was because the law limiting sovereignty would have the two components essential for a law, namely an act and an expression of will with regard to this act. Constitutional laws in principem, "express conventions" and the like, would only constitute signals which could have a prima facie status in focusing the investing body's attention on the justification of authority. Their importance lay in the manner in which they facilitated an efficient and effective moral judgement based on authentic criteria. However, these laws must not encompass the whole activity which the concept of "sovereignty" signified. The mere assertion involved in their expression could not exhaust conceptually the criteria of constitutional law.[75]

An authority might be given licence to legislate on every matter whatsoever, without saying categorically what it could not do. Hence a legislative authority could be theoretically unlimited because all the signs of limitation relating to it would be of prima facie status and hence subject to a fresh moral judgement by the "trusting", investing body. In short, the theoretical unlimitability of sovereignty is compatible with prima facie social limitations on it. Every legislature might try to coerce the population in a new way. In this sense it would be unlimited. However, each new attempt to extend such coercion would be subject to a

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[74] For the precise nature of the distinction between expectation utility and original utility, see Postema, *Bentham and The Common Law Tradition*, pp. 148-83. Postema bases his discussion mainly on *Comment on the Commentaries*; see also chapter 4, pp. 133-7, especially pp. 134-5 below.

[75] Much more will be said in chapter 7 below on constitutional law and its relationship to sovereignty.

moral judgement by the people as to its necessity.[76]

An authority invested with power could not be legally limited. Yet it could be constitutionally limited by a constitutional law. It could be objected that a written constitution was some kind of entrenched basic law which limited legislative authority. Such a written constitution would be a procedurally entrenched limitation on the exercise of coercion by the legislature. By accepting the existence of a written constitution, the need for Bentham's distinction between the sovereign's never be legally limited, and its being constitutionally limited by constitutional law, could be avoided.

Bentham would answer that even if one identified some basic entrenched "sign" expressing the limits of sovereignty, ultimately the sovereign who made *this basic law* would face the same problem of being superior and inferior at the same time. Any attempt to explain constitutional limits would face the same problem of legal limitation upon the supreme authority which promulgated these constitutional laws. Any such attempt would therefore amount to no more than a shifting of the problem to a more general level; it would by no means eliminate the question of how a sovereign could be legally limited. There was no alternative to an excursion into the extra-legal, if constitutional law was to be conceptually accounted for. Hence, for Bentham, talk about basic laws was not a meaningful exercise.

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[76] Such a state of affairs will be referred to below as the "enabling rationale" for the exercise of governmental powers: see chapter 5, pp. 142-3, 177-9 below. In *Constitutional Code*, when Bentham said that to the legislature's power there were no limits, only checks, he meant that there should never be areas where potential coercion was totally excluded, since there could be a need for such coercion. However, there would be a check to prevent the legislature from acting against the public interest, and this check would constitute the *moral* general limitation on the sovereign: see *Constitutional Code*, pp. 41-2.

The nature of the investing body's judgement.

What did Bentham mean by "judgement" of the investing body? Would the resolution of the investing body follow, as Postema argued, an inference of a rule arising from some practice - and thus be simply a matter of the authentication of customary rules about sovereignty? Or would it follow a critical moral judgement, namely a judgement which would operate to justify, according to utility, a choice between two courses of action?

In the first place the necessity for the investiture of a power to legislate calls for some explanation. In providing such an explanation it is essential to understand what "desire" meant for Bentham. Bentham maintained that once a person wanted to bring about an event, this event became an object of desire - an object of volition.[77] However, it might happen that in the view of the person who had a certain desire, its fulfilment could only be realised through an action undertaken by someone else. Under such circumstances, the required action by this other person would become the object of desire. The person who had the desire could then communicate his or her volition to the other person, who could bring about the desired event.[78] At the point of time at which a desire was formed, there might not exist any expectations as to the manner in which the other person would bring about the desired event.[79] Only at later stages of social development would the desire to bring about the event be influenced by existing patterns of behaviour or expectations. Utility, as the basis of evaluation, therefore, had to precede any convention of understanding with regard to how things might be done.

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[77] Bowring, viii. 329.

[78] Ibid., pp. 329-30.

[79] Social and cultural circumstances would of course form the context in which a person formed his or her desires: see chapter 6, sections II-IV below.

In our context, such an analysis explains the primary motive for investing a centralised power of coercion in some person. This investment occurred because of the *moral belief* that an action was necessary in order to bring about a better state of affairs than that which already prevailed. This state of affairs could not become a reality without such an investment. Here lies the reason for investment - the moral basis of socially justified authority. This point is absolutely crucial for the understanding of sovereignty. Centrally, sovereignty was a two-dimensional term, which involved two persons. One person must have the desire that the other should be superior. It might be said, by way of historical justification, that the original act of investment *had to be* voluntary and not natural, in that it was the product of the will of an investing person. This will would constitute the political authority. Although there was no need to invoke notions like a "social contract", an act of constitution was nevertheless necessary, although the terms of the constitution would be the subject of continuous change.[80] This explains why sovereignty *must* be a "split" concept in the sense discussed above, and why a socially justified authority would be inherently limited.

This idea of desire helps to explain more specifically how a relationship of superiority and subordination originated in a social context, and how the ground for the exercise of power was formed:

> In respect of power, **regard being had to the particular occasion and purpose in question**, what is his situation in life in relation and comparison to mine? Is it that, **in my view of the matter, I have it in my power** to exercise a greater influence on his wellbeing than he has on mine?[81]

This passage shows that Bentham characterised the relationships of superiority, equality and subordination of power in the same way. The "view" or imagination in question would

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[80] See chapter 4, p. 131, note 41 below.

[81] Bowring, viii. 330.

always relate to a specific situation, or a specific goal, and would also depend on an assessment made by the person in question as to whether it would be in his power to bring about certain consequences. The decision to invest would mean that it was thought to be *better* that the invested person exercise the authority in question.

Such an assessment was the starting point of the existence of political society and so it logically preceded any customary rule, a rule based on expectations concerning how authority should be exercised. The specific context of the following passage, namely a time of war, should be seen in the broader context of Bentham's discussion, in *Pannomial Fragments*, of the origin and persistence of coercive authority. The impulse towards the first establishment of authority was some "lack". The origin and development of authority in a political society was motivated by the expected pain which would arise from its non-existence:

> It is not the rights of man which causes government to be established: - on the contrary, it is the non-existence of those rights. What is true is, that from the beginning of things it has always been desirable that rights should exist; and *that* because they do not exist - since, so long as there are no rights, there can only be misery upon the earth - no sources of political happiness, no security for person, for abundance, for subsistence, for equality: - for where is the equality between the famished savage who has caught some game, and the still more famishing savage who is dying because he has not caught any?[82]

It has been seen that a critical judgement would form the object of the "judging" or "investing" body. This judgement was an inherent ingredient of "sovereignty". In the long footnote quoted from *OLG,*[83] it was shown that this body could then bring accusations against the coercing body concerning questions arising from its judgement.

In the context of sovereignty, this judgement could consist in the inference of a customary rule, an inference founded on observation of the practice of the legislature. The legislature

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[82] Pannomial Fragments, Bowring, iii. 219.

[83] See pp. 48-9 above.

would be expected to behave according to certain conventions, but Bentham also said:

> So great in short is the influence of all these [original considerations of expediency which had produced measures of self-limitation] when taken together, that in any tolerably well settled government the successor is as much expected to abide by the covenants of his predecessor as by any covenants of his own: **unless where any change of circumstances has made a manifest and indisputable change in the utility of such adherence.**[84]

Ultimately therefore, there would be a utilitarian judgement, *in addition to the custom,* which determined the limits of sovereignty, or more precisely the limits of the social justification for coercion. A judgement was, for Bentham, an opinion. It was a dictate of utility.[85] A judgement or opinion was an act which belonged to a faculty of the mind which Bentham called the understanding.[86] Sovereignty, as well as legal validity, was something more then the mere authenticity of law. A moral judgement was immanent in a resolution which concerned the limits of sovereignty. Such a judgement would be arrived at after a discussion and assessment by the investing body in response to the fact that an alleged transgression of a custom had taken place.

Bentham's theory of sovereignty purported to explain the way in which one might have a desire, based on whatever reasons, to establish a body which would be superior to oneself. It helped to explain why there existed the desire for the investment of power. However, it was also equally clear that this investment should cease to operate once the subject arrived at a judgement, based on an understanding, that some superiority over him was no longer morally justified.

Sovereignty for Bentham was not only concerned with a test for the "recognition" of

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[84] *OLG*, pp. 65-6.

[85] UC lxix. 90.

[86] Bowring, viii. 320. The exact meaning of "understanding" in this context will be discussed in more detail in chapter 6, pp. 244-55 below.

measures as "authentic law". Sovereignty also embodied an evaluation of the need for authority. A point which marked the limitation of authority, or a constitutional limitation,[87] must be rooted in a moral judgement of "original utility" (whatever the actual quality of the judgement).

Summary, and implications for Bentham's legal positivism

It is now possible to reconstruct Bentham's understanding of the nature of sovereignty. Sovereignty was inherently "split" in that the concept *presupposed* a dynamic relationship between two bodies. The relationship which characterised sovereignty was that of a trust. The trust would be exercised by an authority acting as a fiduciary towards the body which had invested it with power. This trust was not a legal concept, in the normal sense of the word, because it lay within the concept of sovereignty. Yet, it could be regarded as constitutional *law*, which was a peculiar type of law.[88] Suffice to say, at this stage, that like any other law, constitutional law, in its bare essentials, was composed of an act of volition and an object of volition. The act of volition was the act of an investing power. The object of the volition was that authority should be exercised in the investing body's interest. This object of the volition was dynamic in that it could change over time, as a group developed. As the group reflected on its practices, sometimes in relation to other groups, the object of volition could become more concrete in certain respects, or more abstract in other respects. Communal judgements would be triggered once potential transgressions by the authority

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[87] It might be argued in terms of terminology that "*constitutional* limits" conveyed the idea of a "constitutive" or "investing" body which conditionally "constituted" or "invested" a body with authority. Thus under the interpretation suggested here, limits of sovereignty and constitutional limits connote the same meaning.

[88] The nature of constitutional law will be discussed in Chapter 7, pp. 297-306 below.

occurred. The judgement consisted of an inference of a rule of custom, an inference which was an exercise of opinion, and one whose normativity was derived from expectations. However, the judgement which constituted sovereignty, and hence, constitutional limits, could be modified according to considerations of overall utility. Suppose a transgression of an existing customary rule. The investing body could form an opinion, an obligatory opinion, which could either accept the transgression of a customary rule as a legitimate practice, or not. In the latter case, the judgement might generate a volition to exercise divestitive powers.

A convention was, for Bentham, a sign which announced the will of the public at a certain moment, and which the will of any other moment might revoke.[89] A convention was only of prima facie status, as the whole notion of "disposition" was a prima facie concept. If obedience was to constitute sovereign power, if the limits of sovereignty were the limits of obedience, there would have to be an extra critical stage through which a judging body must go, namely a moral judgement in relation to the utility of a new measure, *which could accord with or contradict an existing convention pointing to this or that course of action*. Only then would the process of a critical judgement, intrinsic to the concept of sovereignty, be completed. Bentham said:

> The true rampart, the only rampart, against a tyrannical government has always been, and still is, the **faculty of allowing this disposition to obedience** - without which there is no government - **either to subsist or to cease.** The existence of this faculty is as notorious as its power is efficacious.[90]

The decision whether to persist or not in the disposition to obey could not be explained by merely saying there is a "disposition to obey".

Arguably, this analysis of sovereignty suggests that it formed a central aspect of Bentham's

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[89] Bowring, iii. 219

[90] Ibid.

theory of law, which can not in consequence be regarded as completely positivistic. As far as his analysis of sovereignty was concerned, the law *as it is* had to be what it *ought to be*. Bentham's account did not merely imply that law is *influenced, censored*, or *disobeyed* because of moral considerations - a claim which is compatible with the conceptual separation of these moral considerations from legal validity. In his account, moral considerations were conceptually linked to a socially-sensitive understanding of an individual law. This is not to say that morally pernicious laws were not laws according to Bentham's account. My claim is entirely compatible with the existence of an unjust, or as it commonly called a "wicked", manifestation of sovereignty, and as a result, of law.

What I claim is similar in nature to modern accounts of natural law. Modern accounts of natural law, such as that of Fuller's desiderata which accounted for what he called procedural-natural law,[91] and Finnis's idea of the self-evident basic goods,[92] and even Hart's account of the minimum content of natural law,[93] are all compatible with the existence of wicked legal systems. While admitting the existence of valid law in a wicked legal system, all these accounts claim that there are some moral features of law which are an inherent part of its description. All these accounts, in their different ways, maintain that because certain moral features are necessary for the fulfilment of some *fundamental purpose* of the law, they must form an inherent part of the *concept* of law. Accordingly, these moral features can not be reduced to the semantics of formal legal validity.[94] The fact of a law's

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[91] L. Fuller, *The Morality of Law*, New Haven , 1969.

[92] J. Finnis, *Natural Law and Natural Rights*, Oxford, 1981.

[93] Hart, *The Concept of Law*, pp. 189-95.

[94] Reciprocity between officials and the population, involving moral considerations, has been included in a conceptual analysis of law by modern scholars: see R. Sartorius, 'Positivism and the Foundation of Legal Authority', in R. Gavison (ed.), *Issues in*

being unjust is compatible with the *concept* of law having moral features which relate to the purpose of law. Thus, the positivist claim that a law may be unjust and still be a law, is as much a tautology as saying that a moral judgement may be unjust and still be a moral judgement.

The attempt by legal positivism to ascertain the validity of law in purely formal terms of authenticity may make sense.[95] However, there is a price to pay in terms of crudeness and over-generalisation when it comes to the explanation of the foundation of law, for instance in notions like a rule of recognition. An attempt to explain a legal system in positivist terms is unable to account for the manner in which people commonly use concepts like sovereignty, and the limits thereto.

Positivist theories have made an assumption about the importance of separating legal validity and moral worth, and then proceeded to produce a conceptually coherent theory around this basic assumption. However, both the assumption and the theory on which it is based make limited sense in social terms. An argument such as Hart's, that all laws are validated by a master rule of recognition, which is incorporated into every other law, but whose validity is not legal but social, requires further magnification and analysis of what the recognition of such a rule consists in.[96]

The nature of law has been debated on the basis of fixed theoretical assumptions. For example, legal positivists assume that the danger of anarchy is one of the most important reasons for the separation of legal validity from moral worth. As Fuller pointed out in his

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Contemporary Legal Philosophy, pp. 43-61, at 43.

[95] See Bentham's *Anarchical Fallacies*, Bowring, ii, and Hart, *The Concept of Law*, pp. 195-207, especially p. 205.

[96] In *Natural Law and Natural Rights*, p. 21, Finnis stresses the need for further analysis of the rule of recognition.

debate with Hart, positivists imply that the legal system would collapse once law and morality are conceptually fused.[97] It may make sense to acknowledge that for the majority of social situations, the positivist assumption is appropriate, and that the existence of law can be separated from its moral merit. However, and this is an important caveat, the positivist's basic rationale for separating law and morality, namely the avoidance of anarchy, is entirely compatible with the existence of a certain social manifestation of law in which moral judgement and legal validity are fused. It makes no sense to adhere too rigidly to basic theoretical positions where this leads to oversimplification.

The social manifestation of pernicious coercive measures, whether in a procedural or substantive sense, may affect the validity of the measures that a system of law produces in two ways. First, a certain pernicious coercive measure may not be seen as law (that is, not being socially justified) *without* this fact leading to the demolition of the validity of all other measures of the system. The basic positivist assumption which justifies the separation of law and morality can accommodate such an scenario, for it involves no danger of anarchy. An example of this situation would be a very iniquitous measure in a generally just system. Such a situation would lead to the claim that beyond a certain moral threshold the social justification of authority can cease to exist in a given subject matter.

Second, in an evil legal system, the occurrence of a political revolution would imply that at a certain point the validity of law could be conceptually fused with its morality.[98] The positivist concern for the avoidance of anarchy may or may not be substantiated in such a situation. However, such a revolution would be a possible social situation for which the

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[97] L. Fuller, 'Positivism and fidelity to law - a Reply to Professor Hart', Harvard Law Review 71 (1957-8) 630-672, at 634-6.

[98] Revolutions will be discussed in chapter 4, pp. 146-8 below.

concept of law must account. I think that Bentham (as has been argued with regard to sovereignty), Fuller and Finnis, all claimed that despite the existence of wicked legal systems, there were latent moral features which were part of the concept of law. The fact of their being latent may give the impression that law can be defined and recognised without any appeal to moral evaluation. However, the diversity of the social manifestations of law shows that there are certain *moral* features of the *concept* of law which should not be neglected.

This chapter is related to this argument in the sense that it discusses the moral features of the *concept* of sovereignty. At some point in a universal description of *the* concept of law, if this description includes the concept of sovereignty (or any kind of normativity which would imply the operation of utterances as content-independent peremptory reasons for action), *moral* considerations, which aim at some benefit for an investing body, have also to be included.[99] No accusation of deriving an OUGHT from an IS can possibly be made here. The OUGHT was immanent in the IS.[100] In most social situations the argument

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[99] In *Essays on Bentham*, pp. 262-7, Hart claimed that there were two versions of conceptual fusion between legal validity and moral worth. The extreme version would claim that legal obligations were species of moral obligations. This would be refuted by the existence of wicked legal systems. The moderate view would be that a legal obligation included moral beliefs, true or false, sincere or pretended (the last distinction is referred to by J. Raz, *The Authority of Law*, p. 28), that justify it. The moderate view would be compatible with legal positivism. The moderate view could confine its application to officials and judges. However, Hart questioned even this moderate version by pointing towards social situations in which officials were not engaged in moral reasoning, and so concluded that a "committed" attitude to legal obligations *could*, but *need not*, include moral considerations.

Yet, in the context of the argument advanced here, Hart had a narrow view of the meaning of "moral considerations". "Moral considerations" could include many kinds of mental operations in considering the justness of an action. For example, a committed attitude which stemmed from adherence to custom could form *a part* of a critical reflection upon a state of affairs. In other words, many of the social situations which Hart raised to refute the moderate version of a conceptual fusion between law and morality, might be regarded *as* moral considerations which would operate to evaluate substantively the trust which constituted political authority. Much more will be said on this point as the thesis progresses: see pp. 77-8, note 106, chapter 4, pp. 133-7, 155-7, and chapter 6, pp. 235-78 below.

[100] See chapter 1, pp. 20-22 above.

advanced in this chapter is compatible with the notion that unjust law is still law. However, following Fuller, Finnis, and Hart, this account also claims that beyond a certain point, where certain moral criteria are not met, there would be no law. Exactly who might assess these moral considerations, and in what situations their assessment might be manifested, will be the task of the next five chapters to explain.

IV

This section assesses the implications of the above reconstruction of Bentham's theory of sovereignty for both Hart's critique and Postema's interpretation. In relation to Hart's criticism of Bentham with regard to the normativity of law, it is conceded that a volition of *a sovereign* would on most occasions appear to operate as a CIPR. However, Hart did not allow any room for the socially dynamic and critical dimension which characterised the concept of sovereignty. This dimension meant that authority would be justified only to the extent that the investing body understood it to be morally expedient for it to operate as CIPR. Hart would probably treat such an argument as circular. Yet, the level of reflection about sovereignty was more general and latent than the apparent and immediate level of the operation of volitions as CIPR. A command would operate to exclude only immediate reasoning and would be peremptory content-independent only to this "immediate" extent. The immediate exclusion of reasoning could be observed by any anthropologist who perceived the authority that the *law* actually has. However, categorical reasoning which related to the most general critical justifications of the institution of law could not be fully excluded by a political authority. The nature of such categorical reasoning could change from one social group to another. In some groups it could be made ineffective, for various reasons, but it could never be fully excluded. The self-reflexivity of sovereignty must operate, to some

degree at least, in order to justify the authority in question. In short, there would be a constitutional, or categorical level, which will be discussed in more detail in chapter 4, at which critical reasoning relating to the social justification of coercion could never be excluded by authoritative utterances.

Hart can not consistently claim on the one hand that there is a customary social rule of recognition which operates to validate other rules, and on the other hand exclude the moral dimension which the existence and operation of such a customary rule would necessarily involve. Further, he can not exclude from a universal explanation of "validity" the moral judgement of the governed, which would be triggered in every case of transgression of collective expectations, whether such a moral judgement was sound or based on misconceptions. This chapter has argued that Hart did not succeed in doing away with the concept of "sovereignty" (which, according to Austin's account, seemed to involve the existence of a de facto relationship of power), and replacing it with the idea of "recognition", which arguably better represented the normative dimension of law.[101]

Postema detected considerable similarity between Hart's and Bentham's accounts of sovereignty. Both saw sovereignty *as* an authenticity test by which coercive measures were categorised as law. Further, for both, Postema claimed, sovereignty connoted a normativity which would ultimately be generated by social facts or practices. However, he also argued that Bentham's theory was more sophisticated than Hart's. Bentham allowed people more participation in determining the limits of this authenticity test. More particularly, Postema firstly claimed that Hart did not emphasise the potential social effects which people's attitudes might have in determining the limits of sovereignty. Secondly and further, Postema's account

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[101] The distinction between legality and validity in relation to Hart is discussed in chapter 7, pp. 306-12 below.

implied that Hart did not elaborate sufficiently on the *normative* dimension of the epistemic test of ascertaining rules concerning legal validity, as far as the people, as opposed to officials, were concerned. As far as the second of Postema's arguments is concerned, it has been maintained above[102] that Hart suggested that the people, even if not necessarily in possession of a critical reflective attitude towards the rule of recognition, would, for various reasons, see authoritative utterances as peremptory content independent, that is as normative. In other words, contrary to what Postema's account implied, Hart did recognise that the test of recognition *is* normative for anyone, though such normativity could take many shapes. Arguably also for Hart, a minimal requirement for the existence of a legal system - a recognition test applied by the people - would be normative in nature. Hence, only the first of the above claims by Postema is fully accepted here, namely that Hart underestimated the role people necessarily played in the general network of social interaction which determined the limits of sovereignty.

By not including the normative acceptance of the people, Postema rightly claimed, Hart could easily distinguish between the validity and the efficacy of the law. His initial move was to explicate the term "recognition" as connoting authenticity. The next was to oversimplify this understanding of "recognition" by removing the people's participation in shaping the criteria of authenticity from his analysis of the minimal conditions for the existence of a legal system. This Hart did at the expense of not explaining how officials would be influenced by the people in this regard.[103]

Having said that, Postema's interpretation of the epistemic normative recognition as a test for the "authenticity" of law does not capture fully the justificatory and critical elements in

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[102] see pp. 35-6 above.

[103] Postema, *Bentham and The Common Law Tradition*, pp. 256-7.

Bentham's account of the concept of sovereignty. Postema was incorrect in attributing to Bentham a total identification of the authentic recognition of a coercive measure as "law" with a doctrine of sovereignty.[104] Such an account is incomplete.[105] Bentham's theory of sovereignty attempted not only to deal with the identification of authority, but also with the social justification of the exercise of authority, *despite his recognition that these were different notions*.

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[104] Ibid., p. 238.

[105] An argument to the effect that notions of sovereignty and the normativity of law might consist of more than authenticity was firstly put forward by MacCormick in his analysis of Hart's "internal point of view". MacCormick claims that one should look more closely at the normativity of law and hence into the social manifestation of the "internal point of view". Normativity may not only concern authenticity (which would depend on a cognitive faculty), but may involve volitional elements on the part of persons who accept it. Even in what appears to be an uncritical reflection, these volitional elements would include some judgements according to which the act of recognition would be founded on some perceived satisfaction of self-interest: see *Legal Reasoning and Legal Theory*, Oxford, 1978 (2nd ed. 1994), pp. 290-1. Volition certainly seems necessary to the internal point of view. What MacCormick calls a volitional element would also involve a judgement upon which the volition should be based. Otherwise the volition would be an effect without a cause.

MacCormick's argument is refined in *H.L.A. Hart*, London, 1981, pp. 33-40, especially p. 35, where he argues that the "internal point of view" might consist of both cognitive *and* volitional elements. MacCormick goes further to explicate something akin to what Raz called a "detached statement" (*The Authority of Law*, pp. 157-9). MacCormick calls such statements "non-extreme external statements", in which people have the cognitive *but not the volitional* element in their attitude towards rules. One would need, MacCormick argues, only to assume a hypothetical "internal point of view" in order to describe legal phenomena in a socially sensitive way. Further still, it would be possible for people to argue critically about a basic proposition in regard to the acceptance of a rule as authoritative, without feeling any volition as a result of these critical judgements, that is without feeling "a commitment" towards them. In short, a critical judgement, in whatever form, need not lead to volition.

The argument in this chapter is that although some individuals may be purely conformists, and as such could hardly have any volitional elements in their acceptance of rules (or indeed, some of them *may* be critical without having any volition in relation their acceptance), the people as a "trusting body" would of necessity have a volitional element, based on a judgement or preference, however minimal this judgement might be. Hence, under my interpretation of Bentham, both officials and "the people" as a judging body would ultimately have both volitional and cognitive elements in their acceptance of rules as authoritative. The distinction between "officials" and "people" in this respect would be one of degree only; see also pp. 35-6 above.

In one instance the authenticity of the authority might be identified with its justification. This instance was where expectations were created by a common customary recognition of such authority. Customary rules could, therefore, be seen as justifying this authority. However, this would be only a "weak" sense of justification. A "stronger" notion would also be present, that is in answering the questions whether the authority in question was necessary, and whether there would be occasions on which its existence could not be justified, despite its operation being within the criteria provided by the customary rules, and indeed vice versa. The point is that authenticity and justification can not be functionally separated, although on many occasions the critical justificatory dimension of sovereignty may be latent or inoperative.

I must caution again against a possible misinterpretation of the argument. It is not my claim that Bentham identified the issue of justification of authority with a view that authority did not exist if it did not act justly. People could, and often would, arrive at a misguided judgement as to the justification of the authority in their society.[106] What is claimed, however, is that the people, to some extent, must regard the authority's existence as justified on the balance of utilities, *in addition* to any inference of a customary rule from existing practices. My claim is that although legal positivism, in conceptually separating legal validity and moral worth, attempts to provide a complete account of political authority, ultimately it fails to do so convincingly. It fails because it does not recognise an irreducibly morally evaluative dimension in the justification of authority, involving the exercise of a collective moral judgement. This morally evaluative dimension does not wholly discredit the positivist description, because a morally "just" exercise of coercion, and a critically "justified" exercise

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[106] See the discussion of the senses of "ought" in Bentham's theory, chapter 1, pp. 13-20 above.

of coercion need not converge, but the latter was an ingredient in Bentham's concept of law.

Postema attributes to Bentham an account of authenticity which is based purely on custom. Postema is correct to claim that a given customary practice would be the basis from which ultimate constitutional rules would be inferred, at least on a prima facie basis. Yet this account does not address Bentham's central concerns. Why did certain people have authority? What ultimate mischief could such an authority prevent? Must some belief exist about the possibility of such prevention, *however mistaken this belief might be*? Would there be a point where the danger of such ultimate mischief would cease to exist? Was a discussion of the notion of "sovereignty" exhausted by describing the normativity arising solely from past social practices?

It is claimed that a custom can have only prima facie status, and can only form a *part* of a doctrine of sovereignty. Bentham recognised this, and, in one of the passages quoted by Postema from *OLG*, he wrote: "the authority of the sovereign is founded *or at least in a great degree influenced* by custom and disposition".[107] It was clearly not Bentham's intention fully to identify custom with sovereignty, since, on his own account, custom only influenced sovereignty.

Custom would not be sufficient, of itself, to explain the relationship between rulers and ruled. Why, for instance, is a transgression of a certain custom sometimes accepted by the people, and sometimes not? Could the answer to such a question involve something more fundamental than asserting that "the people's opinion *censures* the authority"? As has been argued above, when Bentham wrote about constitutional laws in principem, he argued that the recommendatory mandate from one sovereign to the other would, as a matter of expediency, in *most cases* be adopted.

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[107] Quoted in Postema, *Bentham and The Common Law Tradition*, p. 255.

Postema's account of custom is intended to be interactional. As has just been argued, Bentham claimed that custom would play a part in influencing the judgement about the justification of a coercive authority. However, the idea of "interactional custom" is incoherent. One should look more closely at the general meaning of the idea of interaction. If x's act contradicts y's expectations with regard to what should be x's act, to say that y would resist x's act would still be a mechanical, not an interactional, description. However, if y does not resist, something *other than* these expectations must cause him not to resist. This "something" which causes him not to resist is exactly the reason by which x influenced him, something which has to do with his understanding. Hence, by going beyond the notion of mechanical obedience, Postema should give us an account of the nature of this extra "something". This "something" can not be explicated by stating merely that the custom is interactional. To argue thus would be stating the tautology: "x interacts with y because x interacts with y".

Where Postema quotes Bentham to the effect that the essence of the interaction is contained in a habit of commanding on one side, accompanied by a habit of obeying on the other, or on the one part in a disposition to expect obedience, and on other in the disposition to pay it, he arguably says very little.[108] He does not succeed in transforming the mechanical model of the relationship between rulers and ruled into an interactional one.

In short, it is not clear that Postema's account is able to differentiate between two cases: first, where the sign constitutes a signal for resistance, because an act had transgressed expectations; and second, where the transgression of expectations would operate merely to *shape* future expectations. Hence, my claim is that Postema's account is unsuccessful in explaining Bentham's repeated assertion that sovereignty is constituted *by* the obedience of

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[108] Ibid.

the governed. Postema's account does not allow sufficiently for the variety of judgements which might operate in the mind of the governed.[109]

[109] Postema's view of the justification of authority (which gets closer to my reading of Bentham) is one of "constructive conventionalism", which arguably implies a critical judgement: see 'The Normativity of Law', in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy*, pp. 74-104, at 92-104.

CHAPTER 3 - THE RELATIVITY AND PLURALITY OF SOVEREIGNTY

> It is evident that in point of fact sovereignty over any given individual is a matter which is liable to much diversity and continual fluctuation. Subjection depends for its commencement upon birth: but for its continuance it depends upon a thousand accidents. In body he can be subject to but one at a time: but in mind, in reputation and in property he may be subject to multitudes at once.
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> *OLG*, p. 20.

> That the quantity of these [possessions, such as, Reputation, Honour, Glory] which, in the situation of sovereign, it will be in a man's power to possess will be in proportion to the quantity of power in the international and in the national sense which he possesses - the power which he and his subjects possess with reference to the rulers and subjects of other nations and the power which he possesses with reference to and at the expense of his own subjects - is manifest enough.
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> *Deontology*, p. 231

I

In this chapter two important features of sovereignty - namely its relative and plural nature - are discussed. In *OLG*, Bentham, as part of his initial definition of an individual law, noted that a law would be made in *a state.*[1] This appears awkward, because the aim of the book was to give a universal definition of an individual law, that is one which held for all places and at all times. The inclusion of a state was an odd step for Bentham to take, because many other forms of legal activity can exist without it. One can imagine the existence of various legal frameworks, some narrower, and some wider than of the state.

By "state" Bentham may have meant something very different from the popular understanding of it. The popular understanding of a state characterises it as consisting of an

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[1] *OLG*, p. 1.

assignable territory populated by assignable people, with a centralised regulative agency.[2] In contrast, Bentham, it will be argued, used this word to signify the crystallisation of some relationship of superiority and subordination in a social group which could persist over time. This general understanding of "a state" is more in accord with Bentham's account of a "political society" put forward in *A Fragment on Government.*

It will be argued that Bentham realised that an individual law was capable of existing in many more contexts than that of the state. Bentham saw sovereignty both as a relative concept, and as one which could have plural applications in a social group. First, with regard to the relative nature of sovereignty, the possibility of flexible social manifestations of an individual law has generally been treated by Bentham scholars as involving the division of sovereignty.[3] However, the notion of a "division" of sovereignty can not fully capture the way in which law is able to mirror the flexible nature of a "political community". The idea of "division" is static, and does not capture the dynamic, reciprocal influences of the various spheres of legal operation. Although the notion of division may convey the sense of a number of sovereign spheres (such as judiciary and legislature), it can hardly account for their interdependence. The language of "division" is the language of static facts. For example, to say, "In this community sovereign power is exercised by such and such agencies in this other matter, and by such and such other agencies in this matter", is to describe a "division" of sovereignty. The language of the relativity of sovereignty, on the other hand, captures the divided nature of sovereignty, but in addition conveys the mutual normative

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[2] For a definition of a state in international law, see L. Henkin, R.C. Pugh, O. Schachter, H. Smit (ed.), *International Law - Cases and Materials*, Minnesota, 1987, pp. 229-30.

[3] See, for instance, J.H. Burns, 'Bentham on Sovereignty: An Exploration', Northern Ireland Legal Quarterly, 24 (1973) 399-416, at 406-7; Hart, *Essays on Bentham*, pp. 226-7.

influence and interdependence of the divided spheres. In other words, through the idea of "division", each sphere of legal operation can be described in isolation from the other spheres. The idea of relativity implies that each sphere *can not be fully understood* without some reference to its relationship with another sphere. "Relativity" means that a particular legal sphere can not be conceptually distinguished from the context in which it operates.

The notion of relativity, unlike that of division, permits discussion of many spheres, all of which, *at the same time*, operate as a context for other spheres, and within the context of yet other spheres. In short, the idea of relativity conveys more adequately the social dynamism which exists between various spheres of legal operation.

Another question relates to the importance of the state, or any other form of centralised institutional enterprise. At any moment in time, and a fortiori in historical processes, the social manifestations of sovereignty are liable to change. Sovereignty need not imply that institutions exist within the framework of a state. Sovereignty relates to the idea of "political community", of which a state is but one particular manifestation. As far as historical development is concerned, the state has been very important. It was vital that, to use Bentham's phrase, the "track of civilization" for a given society should reach a stage where political processes occur within what is usually understood by "a state", and should be realised in such a state in a manner which would achieve the greatest happiness. A stage of mature "statehood" was important in that it facilitated the continuation of a process of self-reflection by the community on the desirability of the persistence of state-based coercion.

Second, with regard to the plurality of sovereignty, the argument in chapter 2 was conceptual. It was argued there that sovereignty was a two-dimensional, or a "split", concept, in that it involved both a coercive body, and another body which would both constitute and continuously pass judgement on the social justification of coercive measures.

This conceptual discussion of sovereignty implied a unity of judgement on the part of a trusting, or constituting, body. However, as well as a legal philosopher, Bentham was a social theorist who also looked at actual social possibilities in assessing the plausibility of an analysis of legal concepts. He theorised that the actual function of "communities" in general, and "political societies" in particular, was constantly changing. The flexibility of his view of a "community" influenced his view with regard to what state of affairs could amount to "legislation" and "a law". Both his theory of legislation and his theory of an individual law formed parts of a legal philosophy which viewed law as operating on many social levels. Many actions which were not usually considered as "legal" in common speech would be embodied within such a theory. The existence of a multiplicity of "communities", within which sovereignty was exercised, will be referred to as the "plurality of sovereignty". The next two sections discuss in more detail the relative and plural nature of sovereignty.

Nevertheless, it was important for Bentham to account for how the relative and the plural nature of sovereignty related to one another. He would maintain that it would not be sufficient for a socially sensitive legal theory to focus solely on the various social manifestations of legal operations (as manifested in the plural nature of sovereignty). Legal sociologists who call for a more extended view of what may be considered "law"[4] have tended not to focus on what ties together such a multiplicity of legal manifestations into a whole - into a united legal enterprise. Again, for Bentham, the relativity of sovereignty was a means of reconciling an underlying unity of legal phenomena with legal pluralism. On the

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[4] Such as E. Ehrlich, *Fundamental Principles of the Sociology of Law*, Cambridge, Mass., 1936, pp. 9-48, 71, 198-203, 346-9; see also R. Cotterrell, *The Sociology of Law*, London, 1992, pp. 25-8; see further G. Gurvitch, *Sociology of Law*, London, 1947, pp. 156-81, and his discussion of Ehrlich, ibid., pp. 116-22; see finally K.N. Llewellyn, 'The Normative, The Legal and The Law Jobs: the Problem of Juristic Method', Yale Law Journal, 49 (1940) 1355-400, at 1374-9.

one hand, there was the need to account for the diversification of legal practice. For example, legal operations took place at the levels of family, school and state. Further, regulations which characterised a particular ethnic group within the state, could be seen as "law" despite their having very little connection to state-based law. On the other hand, a socially sensitive account of how these various spheres of legal operation were united in a legal order was an essential part of the concept of law.

It is not easy to combine in a single theory accounts of both the unity and the plurality of legal operations. To focus solely on unity as the main subject of analysis (as Kelsen did in his idea of law as a coercive *order*, or Hart in his conception of the idea of law as a *system* of rules, or even Dworkin in his account of law as "integrity", which has at its core a personification of communities) is to risk losing sight of the diversity of legal operations, as reflected in the diversity of the relationships of superiority and subordination between and within groups.[5] For example, when describing law in a given society, it could be argued that sovereignty was exercised by many agents at the same time, rather than by the monolithic, ultimately validating, state. A universal theory of law that placed the emphasis on the dichotomy of officials and citizens would risk describing law in too simplistic a fashion. The final section of this chapter will examine the relationship between the plurality and unity of legal operations.

This ideas of "relativity" and "plurality" of sovereignty should not be confused with the two-dimensional nature of the concept of sovereignty. Relativity and plurality are social conditions which manifest themselves in a unique way in different groups. The conceptual split of sovereignty reappears at each level of the operation of sovereignty. However, it will

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[5] On the issue of unity, see P.M.S. Hacker, 'Hart's Philosophy of Law', in P.M.S. Hacker and J. Raz (ed.), *Law, Morality and Society*, pp. 1-25, at 22-5.

also be argued in the final section that the different spheres in which sovereignty operates, or the different spheres in which a relationship of superiority and subordination exists, can influence one another. This influence might contribute to self-reflection in each sphere with regard to its scope qua sphere. In other words, mutual influences might give rise to critical reflection about the terms of the trust which constituted sovereignty, reflection which would take place within every social framework in which such a trust was in operation.

II

In *Fragment,* Bentham related the existence of a political society to the habit of obedience of the population to a common superior.[6] A "natural" society would not have this feature of the "habit of obedience". However, in *Fragment,* Bentham went on to advance the following arguments.[7] First, there was a strict correspondence between the existence of "political" and "natural" qualities in a group, and the way in which the social group was structured. It would be too simplistic to conceive a "political" society purely in terms of an institutional centralised coercive authority, which would be habitually obeyed by a second body, generalised under the name of "people". Some relationship in a group could involve a habit of obedience to a centralised coercive mechanism, but no group could, in its entirety, be spoken about as being totally "political", or totally "natural".

Diversification within groups varied from one society to another. Anthropological observations would reveal every society to be a hybrid of the "natural" and the "political", according to the social manifestations in different frameworks of a "habit of obedience". Bentham discussed explicitly the variety of manifestations of a "political society". The query

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[6] *Fragment*, p. 428.

[7] Ibid., pp. 429-34.

whether a society was "natural" or "political" could only be answered in relation to a given person, and as such could have many answers, depending on the specific relationship the person in question bore to other persons. A person could be conceived to habitually obey and *at the same time* not to obey with respect to different persons. Hence, the idea of "political" society was relative to the object of habitual obedience. The same person could be, at one and the same time, in both "natural" and "political" society, depending on the "object of obedience". This was important, because it hinted at the potential complexity of Bentham's conception of a political society, a complexity which he might not yet have fully appreciated at the time of writing *Fragment*. Any discussion of the concept of society, and a fortiori of political society, would be necessarily problematic. In short, it made no theoretical sense to make general statements about "society", though such statements were commonly made.

Second, Bentham's account in *Fragment* concerned the nature of this "habit of obedience". Bentham argued that a habit of obedience could have a variety of manifestations. It could exist, for instance, within a family. However, Bentham also argued that in order to qualify as a defining characteristic of political society, the habit of obedience would have to be of a continuous nature, and be capable of persisting indefinitely. A family, when looked upon in isolation, could cease to exist, when the parents died for example, and so it would be improper to characterise it as a "political society".

It is important to note, in this context, that Bentham said neither that the "habit" needed to be homogeneous, so as to be practised by all people within the group in question, nor that the body obeyed must have the same characteristics all the time (for example be a certain type of institution). No actual institutional framework, such as a the "state", was mentioned. Not even an analysis of what "political" might mean was offered, except that it was related to an act of a person who governed. It was a very abstract discussion, which explained the

minimal defining characteristic of a "political" society as a persistent "habit of obedience".[8]

The third point arises from the previous two. In *Fragment*, Bentham developed the idea of the relativity of sovereignty. He showed the importance of grasping the relative nature of political society, as opposed to the mere division of a certain organisation. There was no point in speaking about a family as a "political society" unless family activities could be carried out in the context of some other social activity which would be more persistent.[9] The *context* of an act was crucial. A context of persistent social activity which was followed by a group of people gave a unity to many diverse, even private, manifestations of obedience, and embodied them in a *unified* legal discourse. Bentham was well aware of the inadequacy of common discourse, which was guilty of offering oversimplified statements about "society".

More particularly, social activity would give rise to diverse relationships of superiority and subordination. For sovereignty to be understood, the possibility of a habit of obedience which occurred simultaneously between numerous parties on different levels of generality had to be accounted for. Social descriptions were complex, so if one wanted to assess whether a certain relationship between two parties ought to be characterised as "natural" or "political", the question would have to be asked, "in relation to which other relationship do the parties in question stand?" These other persons? The rest of humankind? In the presently discussed passages from *Fragment*, the relativity of sovereignty can be seen to be central to Bentham's understanding of social processes in general, and of authoritative relationships within a social group in particular. At any given point of time, one could see many individual situations as having the same normative status by virtue of their being performed within a wider social

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[8] Ibid., p. 429, note o.

[9] See chapter 2, pp. 56-8 above (including Burns's discussion of the issue, referred to in note 64 therein).

context of a power/habit of obedience relationship. For example, an individual's relationship of obedience in a family could have the same normative status as another's relationship of obedience at school. Their similarity of status would come about because both were manifested within a wider social context of habit of obedience such as a local authority. One can see the dynamism of his account - an ever-changing relationship of superiority and subordination - which would embrace diversification as well as unity. The extent to which a person lived in a "political society" could change over time. A person might enter into a whole variety of social relations in relation to his group, or other groups. These relations might be of "natural" or "political" nature. A person could be in a state of either "political", or "natural", society, in relation to his family, or indeed, in relation to other groups or communities, depending on the social context and the particular act in question.

Bentham completed this abstract discussion with an illuminating remark. On the basis of his abstract description of a political society, and its many manifestations within a social group, Bentham warned of the danger of oversimplification in talking about a "corporate action". He warned of the pitfalls of any simplistic model (the "social contract" might have been his target here) in speaking about general "consent" as a characterisation of a "political society". At this point he acknowledged the need to extend the discussion, but indicated that it would go beyond the design of *Fragment* to do so.[10]

Bentham again returned to the idea of the complexity of a social group in the context of his discussion of the relativity of sovereignty. He gave the example of the Dutch Provinces, where Spain was sovereign, to illustrate the possible varieties of sovereignty.[11] Further, he claimed that a "political society" might consist of a number of states, and include more

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[10] *Fragment*, p. 433.

[11] Ibid., p. 435.

general political unions, such as the German Empire. Sovereignty would be limited in any given state in cases where jurisdiction belonged to more extensive political bodies. Therefore, a person might belong to various political communities *at the same time*. To take a current example, the question is not whether a person in the United Kingdom is subject either to "the sovereignty" of the UK or to that of the European Union. Rather, the question can only be answered precisely in relation to a certain matter, and in relation to certain persons. But if a generalised answer is sought, people are subject to the sovereignty of both communities *at the same time*.

The degree of relativity, and hence limitability and divisibility, of sovereignty in relation to a given people in each particular community would be determined by social observation.[12] There could be no universal jurisprudential account of a socially static and absolute sovereignty. People might regard themselves as being in a state of "political society" in relation to a state, but simultaneously, in regard to certain subject-matters, as also being in a state of "political society" in relation to larger or smaller political unions.

III

In *OLG* Bentham developed further the general idea presented in *Fragment* of the complexity of "sovereignty" and "community". He discussed the parties by whom a mandate might be issued:

> according to the definition, the word *law* should be applicable to any the most trivial order supposing it to be not illegal, which a man may have occasion to give for any of the most inconsiderable purposes of life: to any order which a master may have occasion to give to his servant, a parent to his child, or of a husband to his wife.[13]

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[12] Ibid., pp. 488-9.

[13] *OLG*, p. 4.

The field of legality was not confined to the general level of centralised institutions vis a vis a people. Law could be exercised in the private domain. Bentham argued that the idea of a *mandate*, understood as "some expression of volition of a constitutional nature", would be general enough to capture all the manifestations of legal activity. It would capture the complex social and inter-cultural activity with which legal discourse was associated. It conveyed a sense of the various *sources of law.*[14]

Bentham distinguished between legal and illegal mandates, in that the former had to emanate from a sovereign. Any mandate was capable of being acknowledged as a species of legal activity (in which case, the mandate would become a *legal* mandate). A *context* consisting in a *unified* pattern of superiority and subordination might transform specific mandates into "legal" ones. An example could be the mandate of a parent issued to his child, which, in itself, would amount to an exercise of natural authority. However, this parental mandate could, if issued in the context of a wider mandate which authorised its exercise (what Bentham termed "adoption" or "pre-adoption"), become a legal mandate. A particular act of superiority must be understood within such a context.

The idea of "adoption" conveyed the relative nature of sovereignty, and hence the concept of "validity". "Validity" was a term of relation. In order for an act to be valid, some authority would have to permit, or to "adopt" it. A socially sensitive analysis of the idea of validity would acknowledge, on all occasions but one, at least two systems of superiority and subordination with regard to a single action. The exception was the ultimate link in a chain of validity. The relationship between these two spheres of superiority and subordination was *volitional* in nature.[15] As such, an act of adoption was an imperative power of a constitutive

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[14] Ibid., p. 15.

[15] See chapter 7, pp. 308-12 below.

nature. The unity between various particular mandates, which were created by the more general permitting, or adopting, context, might embody a natural parental mandate in a wider scheme of social activity.[16]

Bentham discussed the various ways in which law and hence "sovereignty" could manifest themselves in a social group. At this point, the distinction between vertical relativity and horizontal plurality of the social manifestation of sovereignty should be introduced.

In *Fragment*, Bentham concentrated mainly on what may be termed the vertical relativity of sovereignty. The first feature of this relativity was its *hierarchical* nature. It consisted in a series of hierarchical relationships of superiority and subordination, each serving as an "adopting context" to another. The examples given in *Fragment* were, as has been mentioned, of federations. Bentham resorted to similar examples in *OLG*.[17] However, sovereignty could be exercised, and hence legal mandates issued, by subordinate power-holders, whether they belonged to the administration, or whether they were merely heads of families.[18] This hierarchy might begin with a parent, and move up through to a local authority, a state, a federation, and ultimately a world government. The vertical hierarchy of sovereignty was dealt with by Bentham when he discussed "adoption". All, even the most trivial transactions, might be adopted by a wider socially recognised and justified context of superiority and subordination, and would thereby become legally valid in a unified way for all the people who acknowledged this adopting social context. This vertical relativity might include states as well. States, though sovereign in a certain way, might be limited through

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[16] Bentham explicitly related the idea of adoption to the idea of "legal validity". He did so with respect to covenants, and explicitly said that such an adoption would be what made a collection of particular exercises of power into a system of law: *OLG*, pp. 23, 25.

[17] Ibid., p. 29.

[18] Ibid., pp. 22-3, 27, 28.

belonging to a federation, which might or might not adopt their actions. One might belong to a number of political communities each at a different level in the hierarchy of sovereignty - the level of family, local authority, state, federation or the whole world.[19]

The second feature of the vertical relativity of sovereignty was *artificiality*. Each level of the hierarchy would be artificial in that it would be subject to the investment of power for instrumental utilitarian reasons such as security, by a group of people who might be of various cultures and orientation. Thus, vertical relativity could be conceived in terms of a united *order* which was artificially established. This order would be united because each level of it would be validated by another artificially established but more general level.

The final feature of the vertical relativity of sovereignty was its *centralisation*. The need to co-ordinate moral beliefs would point towards the desirability of investing authority in centralised institutions.

It has just been argued that the notion of "adoption", which characterised the vertical relativity of sovereignty, conveyed the notion of "validity". However, relativity was only one aspect of validity. A further aspect of validity was related to the two-dimensional (or "split") nature of sovereignty. This "split" was, as has been argued in the preceding chapter, essential to an understanding of the concept of sovereignty.

In most instances, for the idea of validity to make sense, each person who took part in reflecting upon the social justification of coercion would have to participate in at least two levels of the hierarchy. For example, people in a state could acknowledge the adopting context of a federation. Yet, the same group of people would participate, together with the

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[19] In chapter 9 of *OLG*, Bentham dealt with sovereignty and constitutional law in terms of the *generality* of the exercise of the powers of imperation. A universal theory which embodied the relative nature of sovereignty would claim that a doctrine of sovereignty manifested an aspect of such generality. An individual law could be seen as such only in relation to a more general context of imperation.

people of the other states in the federation, in determining the sovereignty of the federation. They would participate in both levels *at the same time* in critically assessing the social justification of the coercion exercised over them. Under Bentham's theory of sovereignty, the united order constituted by the hierarchy would be achieved when coercion was seen to be justified at every level of its operation.

In this context, the "split" nature of sovereignty would be most apparent at the top of a hierarchy. Here, the two-dimensional nature of sovereignty would supply the only criterion by which to assess legal validity. Ultimately, any "adopting" relationship depended on a certain group of people, who formed a judgement with regard to a body which exercised coercion. Even the recognition of a level as being at the summit of the hierarchy would itself be a result of a social judgement. Legal validity would then amount to an assertion that, in relation to a certain matter, the people in a given group did not acknowledge any other superior, more general, adopting context. For example, if people in a state, for some reason, saw the state as the ultimate social group, sovereignty would not be related to any adopted context, because the people of that state would not participate in a more general social, and hence legal, activity. Thus the people in that state would be the only relevant reference point in resolving problems of sovereignty.

However, Bentham's theory of sovereignty allowed for greater complexity than the manifestation of this vertical relativity. In his view, it was crudely reductionist to describe a "political society" solely in this vertical sense. Bentham differed from Kelsen and Hart, who saw law as a unity of norms which all had the same ultimate reason for their validity.[20] Bentham's socially sensitive approach led him to see the operation of law in a much more diverse way than this purely hierarchical idea of validation. Vertical relativity of sovereignty

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[20] See H. Kelsen, *Pure Theory of Law,* Berkeley, 1970, pp. 31-3.

could not account for the plurality of allegiances existing at each level of the hierarchy.

Bentham recognised the potential difficulty of describing a "community", and the resulting difficulty of successfully portraying a "political society". A community was manifested in more than this hierarchical chain of validation, although, as has been argued, this chain did create unity within a community, so that such a community could be crudely referred to as a "legal" community. However, people could belong to several communities *at the same time*, not necessarily in this hierarchical, vertical sense. "Community" was a problematic concept in the same way that "people" was problematic. For example, it would be misleading to use the term "people" to refer exclusively to people subject to the same state. A "people" might be bonded together by other means, for instance religion or cultural orientation. The bond which created a "people" might possibly go beyond, or be contained within, what is considered to be a "legal" community with its established artificial, centralised hierarchy.

This difficulty of defining what constituted a "people" had implications for what Bentham meant by a "political society". Law could manifest itself *within* this hierarchical, artificially established vertical domain of social validation in a complex way. Therefore, a person might belong to different communities not only in the vertical sense, that is to a local community, a state, and a federation, but also, *at the same time*, to different political communities with regard to a given subject matter. This multiplicity of hierarchies could exist widely across each of these levels of the artificial, centralised and vertical one. Bentham discussed this manifestation of communities in *OLG*.[21] To follow Bentham's example, a Jew could be a citizen of the United States of America, but belong also to his religious "political community", which habitually paid obedience to another persistent superior, say a given

[21] *OLG*, pp. 18-9, note b.

Rabi, as far as eating pork was concerned. The separate co-existence of "religion" and "state" could be accounted for in this way. A Jew would belong to several political communities, and in each could be a political superior in relation to some matters and some people and inferior in relation to other matters and other people *at the same time*.

This multiple manifestation of hierarchies, or multiple "sovereignties" across each level of the artificially, centralised and vertical hierarchy, will be referred to as the "horizontal" plurality of sovereignty. The manifestation of this plurality meant that there was a multiplicity of hierarchies cutting *horizontally across* each level of the vertical hierarchy. In a state, for example, one would observe a number of relationships of superiority and subordination within that state level, which mirrored the diversity in orientation of the people of that state. This would be the case despite the fact that all of them belonged to a united level of a given artificial, centralised and vertical hierarchy, namely that state. Further, all these various groups would relate to the collectivity (in this case, the "state" community), despite the relationship *between them* being more akin to a "natural" relationship rather then to a "political" one. The reason was that the engagement between these groups would be based solely on communication which did not necessarily establish any kind of a persistent "habit of obedience".[22]

It would be too simplistic to understand sovereignty and law as operating solely within a network bounded by the state, or any other form of artificially established, centralised authority. To treat any one group in the vertical hierarchy in isolation from any other group would be to ignore the plurality of social groups, as well as the potential complexity of their

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[22] It goes without saying that the relationship between groups in a state, for example, involved superiority and subordination. The issue of authoritative utterances which could took shape between people in the course of their communication belongs to the analysis of consensus formation, and will be discussed in detail in chapter 6, pp. 235-78 below.

interaction. Social interaction might give rise to hierarchies of validation which would extend horizontally within, as well as between, communities, and which in turn might give rise to a plurality of relationships of superiority and subordination. A universal definition of law and sovereignty must account for this horizontal plurality, and hence sovereignty has to be conceived as complex in this respect, as well as in the respect of vertical relativity.

The artificial, centralised and vertical hierarchy which gave rise to the relativity of sovereignty would impose *some* unity of identity in certain areas. On the other hand, the horizontal plurality would emphasise the complex nature of identity and "belonging", and would represent pluralism - pluralism at each level of the hierarchy. Thus, to capture fully the social dynamism which the concept of sovereignty connotes, it is necessary to account for the tensions between unity and pluralism in a society.

Bentham tried to account for this tension between unity and plurality. Although unity and plurality could coexist in many situations, there were inevitable conflicts between them. *Some* account had to be provided to signify the demarcation between, on the one hand, sovereignty as a hierarchical validation process by a body of people who would be disposed to obey a given centralised person or body of persons, and, on the other hand, pluralism within any level of this hierarchy, be it the local community, the state, or the world.

IV

The implications of the tension between hierarchical unity, as manifested by the vertical relativity of sovereignty, and horizontal plurality of allegiances across each level of such a hierarchy, are far-reaching for the analysis of law. It would be an oversimplification in terms of microsociology and forms of sociality, and even in terms of "descriptive sociology", to

employ Hart's terminology,[23] to speak about "a law" purely in Kelsenian, Austinian (both of whose accounts incorporate the idea of superiority and subordination), or even in Hartian (whose account incorporates a unified recognition of the validity of rules) terms. The artificial, centralised, unified, grouping of people must, as a matter of social fact, accommodate to some extent the cultural fact that people may belong to various "political" societies. The unifying characteristics of this grouping would have to function *together with social diversity*. I say "together" because one might otherwise have the impression that the utilitarian reasons for establishing the artificial, centralised community would imply the necessity of eliminating diversity in order to provide a homogenous context for this beneficial social activity. The potential for conflict between a certain group's instrumental acceptance of centralised authority, and its particular cultural beliefs might, but need not, result in the suppression of those beliefs. It is true that some groups, for instance some religious groups, may, in fact, not be tolerant at all towards other groups. Nevertheless, Bentham would insist that, if law has to be accounted for, *some* congruity would have to exist between the manifestations of the various cultures (including *their own* special manner of evolution), and the instrumental demand for unity brought about through some artificial, centralised, hierarchical structure. Bentham spoke about horizontal plurality as a matter of fact. Thus, the utilitarian, instrumental need for coordination in certain agreed areas must be made compatible with horizontal plurality, the existence of which would *in fact* limit the disposition of people to build these hierarchies in the first place. *Some* kind of solidarity which was effectuated by the constitution of a centralised authority would therefore have to account for differences in cultural identity. The only exceptions would involve a naturally highly

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[23] See chapter 1, p. 7, note 7 above.

homogenous society, or a highly oppressed one. An account of sovereignty should account for the socially dynamic process which would determine the borderline between actual cultural pluralism and unity, as manifested in the vertical relativity of sovereignty.

The nature of the harmony between cultural diversity and the unified, artificial, centralised hierarchy is the issue with regard to which the role of constitutional law should be discussed. Constitutional law, as will be argued, was determined as a result of communication in the public sphere.[24] "Constitutional" signified two things. First, it signified the determination of the *locus* of the source of obligations in a community. Constitutional law determined whether obligations emanated from the community, or were dictated by the coercive action of a centralised institution.

The second signification of constitutional law was more substantive in nature, and would therefore be ideology-dependent. Constitutional law would signify the *extent* to which people were recognised, in regard to certain subject matters, as belonging to an altogether different hierarchy from, say, that which constituted a particular state. They would be exempted from state coercion in relation to certain matters. Constitutional law would result from a judgement which signified limits to the exercise of coercion. These limits, in turn, demarcated the extent to which neutrality between different identities was to be maintained.

These two significations of constitutional law were, of course, interdependent. The second, concerned, for instance, with the containment of the plurality of hierarchies, would itself be an expression of unified will to the effect that certain differences should be respected. Further, this expression of unity, or expression of communal obligation, would constitute an area in which the locus of obligation would ultimately lie within the community, and not be

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[24] Constitutional law will be discussed in chapter 6, pp. 293-4, and chapter 7, pp. 299-306 below.

contingent upon the decrees of a centralised institution.

Constitutional law must be viewed as emanating from the hierarchical artificial order. However, expressions of law, made by an artificially united, centralised "community", might bear reference to, and even constitute, other "political communities" within the artificial, centralised community. Hence, a major role of constitutional law (which could be fulfilled differently in different communities) was to determine the exact relationship between the vertical relative manifestation of sovereignty, and the horizontal plurality of sovereignties - between the centralised, artificial sense of "community", and a differentiation of "communities" - *at any point in time*. In short, the tension between unity and differentiation would be addressed by general communal propositions which would be the basis for constitutional law. There had to be some points regarding which different groups would have to interact in order to form a unified will, which in turn would give rise to a political expression, an expression of an artificial, centralised unity.[25]

A degree of despotism and violence would be the characteristic mark of a society in which constitutional law stood totally at odds with social facts which pulled towards differentiation. For example, if Jews considered themselves, as a matter of fact, not bound by the state's intervention in relation to some issues, while constitutional law, as a collective expression of the will of the state, ignored this differentiation, and refused to allow them to govern themselves in relation to these issues, then persecution would arise.

In the previous chapter it was argued that the relationship between the two bodies which constituted "sovereignty" was one of reciprocal influence.[26] Applying the idea of influence to the question of the relativity and plurality of sovereignty, it seems that a relationship of

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[25] The nature of that interaction will be discussed in chapter 6, pp. 243-78 below.

[26] The idea of "influence" will be discussed in detail in chapter 6, pp. 244-55 below.

superiority and subordination within any one level of hierarchy, or system of allegiance, might influence the interaction between coercer and coerced within any other such level or system. Self-reflection exercised by a "community" might be influenced, both horizontally and vertically, by any other "community". The vertical hierarchies of a community, and the multiplicity of possible communal alignments within each level of a hierarchy, could mutually influence each other, to the extent that new propositions of constitutional law could be arrived at in each one of the hierarchies. A proposition of constitutional law could, for instance, determine that in a given area the state was the ultimate, validating level in the vertical, relative hierarchy.

Both vertical and horizontal influences would involve some authority, although only the former would involve influence by a political authority. For example, the people in a state community could be influenced by sympathy towards an ethnic minority. This would involve horizonal influence, which, as will be argued in chapter 6, would work through an obligatory medium. However, the group which constituted a state, being part of an international community (another manifestation of artificial, centralised community), could also be influenced by international norms to the extent that it would feel sympathy towards how people in other communities in the world were treated. Both types of influence would operate to determine the extent of sovereignty within the level of the vertical hierarchy in question, namely the state, with regard to constitutional limits regarding the securities of minorities against excessive coercion.[27] Constitutional law, as a manifestation of the two-

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[27] Bentham provided an example of how influence might operate on each and every state in his writings on international law. The object of international law was to subject sovereignty in every state to the influence of "a citizen of the world". In his analysis of "dominion", or "sovereignty", in these writings, Bentham suggested that adjudication by international institutions could generate an *international* public opinion which, in turn, could mobilise public opinion within states, to the extent that the limits of sovereignty in them would thereby be determined.

dimensional nature of sovereignty in that state, *could* be crystallised into a binding proposition which forbad the persecution of minorities. In this sense it *would* reflect a communal view that centralised coercion should not produce laws which persecuted minorities.

In *OLG*, Bentham made another statement of his universal theory, intended to be true irrespective of time and place:[28]

> Why might not [this diversification of sovereignty in relation to different subject matters],(in point of practicability I mean) be **settled by law,**[29] as well as by an **inward determination** which bids defiance to the law?.... Let it be observed once more I consider here not what is most eligible, but only what is possible.[30]
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> One great difficulty is to draw the boundary line betwixt act and act, betwixt such **classes of acts as the sovereign may, and such as he may not, take for the objects of his law, and to distinguish it by marks so clear as not to be in danger of being mistaken:** The plainest marks are those which are made by *place* and *time.*

He claimed that the degree to which communication on a world scale could influence what went on within each state would be dependent upon the degree of the freedom of communication between ruler and ruled within each state. The perfection of each state in this sense could effectuate the establishment of a world system of superiority and subordination, one which would produce worldwide norms. Globalization and statehood were expressions of unity on the part of the community of the globe and of the state respectively. The role of constitutional law as determined by an expression of unity, which in turn determined the borderline between unity and differentiation, also applied in international law: see Bowring, ii. 537-54; and also *First Principles*, p. 295 where he wrote: "But as nations are now connected, information to any one nation is information to every other, applying poison or obstruction to any one press is applying it to every other. Carrying on hostility in any one nation, and thereby against that one nation, is carrying on hostility against every other. The mischief produced by the suppression of information on the one side, on the side of the victims of misrule, while false and delusive information in support of misrule is let through, may spread itself over all nations, and continue in all times."
See further, ibid., p. 57, and *SAM*, p. 66. Finally, see *Deontology*, pp. 230-1, where Bentham discussed the operation of private ethics in the international domain.

[28] See chapter 1, pp. 14-17 above.

[29] In *Essays on Bentham*, p. 233, Hart treated this expression as enigmatic. However, owing to his limited perspective, he failed to account for the role for constitutional law in Bentham's thought. For general criticisms of Hart's approach, see chapter 5, pp. 204-7, and chapter 7, pp. 306-12 below.

[30] Note that Bentham had already used this expression in *OLG* in relation to his analysis of sovereignty: see chapter 2, pp. 49 above. This statement affirms that he saw his analysis here as part of a universal theory.

> By place: for this is all that there is to distinguish the power of any one sovereign from that of another. By time: accordingly at Rome, even in a rude age, a man would be absolute for six months without any hope or chance of protracting his power a day longer, so in regencies, as we see every day, though the minority be ever so long. As to *place*, where that circumstance is the mark, the line is the stronger, in as much as the physical power terminates in great measure with the political. **But to examine these matters in detail belongs to the particular head of constitutional law.**[31]

This is the appropriate point to summarize the argument. For Bentham, a theory of law and sovereignty had to account for the diversification which characterised legal operations. The concept of sovereignty, as manifested in constitutional limits and law, had to explain the nature of, and to account for the tension between, two features. The first was the vertical relativity of sovereignty. This relativity represented communal expressions of unity. This unity was manifested by an artificial, centralised, publicly accessible coercive order. Such unity was needed for the achievement and promotion of utilitarian values, namely subsistence, abundance, security and equality. A second feature for which a theory of sovereignty had to explain was horizonal plurality. This plurality was a characteristic mark of many social groups. Apart from determining the ambit of an artificial, centralised, unified hierarchy, sovereignty, and hence constitutional limits and law, reflected the areas where unity was imposed upon cultural plurality by institutional authority, according to some general communal conception of harm (or in Bentham's word, mischief). The mutual influence of the various communities rendered this communal judgement which determined "harm" a dynamic activity. Thus, constitutional law would be a temporal incarnation of how the community saw itself. The extent to which the values of tolerance and pluralism were appreciated by the members of a community would be mirrored in its constitutional law. By contrast, constitutional law might reflect the aspirations of a community which preferred to

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[31] *OLG*, p. 19.

eliminate differentiation and create a strong sense of identity. Bentham was not suggesting what he considered to be preferable: as he said, he considered merely what was possible.[32]

[32] See N. MacCormick, 'Beyond the Sovereign State', Modern Law Review, 56 (1993) 1-18. MacCormick holds the view that one can account for a multiplicity of legal orders without reference to an ultimate single centralised authority. He further maintains that the formal idea of "recognition" can account for a plurality of legal domains, and that, therefore, the idea of "sovereignty", which is so often used in political debates, need not be relied upon. MacCormick seems to advocate a middle way between legal monocentrism and legal pluralism in this respect (p. 17).

However, a test of authenticity, or "recognition" is static. It will not account for the *socially dynamic determination* of those points of conflict which can arise between competing claims for validity. As has been argued, constitutional law, the basis of which is a communal obligation within each level of the vertical hierarchy, comes in to resolve these conflicts. Bentham's insight into the relativity and plurality of sovereignty, as well as the potential influences between spheres of superiority and subordination, goes some way towards accounting for the problem of how an expression of unity within each hierarchy can contain differentiation with regard to claims of validity. The borderline between unity and plurality of sovereignty can encompass the dynamic relationship between individual groups and states, between private and public domains, and between individual states, political unions and the world domain.

This paradigm of constitutional law, as manifested in the split, relative and plural nature of sovereignty, would, in its most abstract form be a demarcation of the boundary between unity (or "systems of law") and differentiation. Further, the idea of formal legal validity, as will be claimed in chapter 7, pp. 306-12 below, can not fully replace the ideas of superiority and subordination, or "sovereignty". Therefore, it is argued that we can not do without the concept of sovereignty as understood as a "split", relative, plurally-manifested and, above all, socially dynamic concept.

CHAPTER 4 - THE ROLE OF THE PEOPLE IN DETERMINING CONSTITUTIONAL LIMITS I - A DEMOCRATIC READING OF A FRAGMENT ON GOVERNMENT

> Here we touch upon the most difficult of questions. If the law is not what it ought to be: if it openly combats the principle of utility; ought we to obey it? Ought we to violate it? Ought we to remain neuter between the law which commands an evil, and morality which forbids it?
>
> *Theory of Legislation*, p. 65

I

This chapter aims to provide a fresh reading of a well known Bentham text. Together with the next four chapters it seeks also to develop, for the first time, a united, harmonious interpretation of Bentham's account of constitutional limits. Using the arguments about sovereignty developed in previous chapters as a foundation, these chapters will examine in detail the relationship between the two bodies whose interaction constitutes sovereignty. The present chapter investigates the central role which Bentham assigned to the people as the "judging body", and who determined and effectuated constitutional limits by inter-acting with governmental institutions.

In chapter 2 it has been argued that sovereignty involved a trust. In every political society there was a delegated, and at the same time limited, political authority. This chapter will argue that whatever the institutional structure of a society and legal system, constitutional limits were ultimately a product of the relationship between the body of the people and their

government.[1] Popular judgement was an inherent part of sovereignty understood as a socially dynamic concept. *Any* plausible constitutional theory has to give an account of the relationship between two forces - the government and the community. It will be argued that in *Fragment*, Bentham discussed two broad themes in conjunction. First, he discussed the limits of sovereignty and socially acceptable coercion as part of an analysis of the nature and persistence of political society. Second, and more particularly, he discussed the conditions for, and the signification of, obedience to law, a "habit of obedience" being the fundamental feature of every political society. Hence, in reading *Fragment*, the analysis of obedience to law is the key to understanding the relationship between the popular determination of constitutional limits and the effectuation of such determination through popular action.

In discussing obedience to law, the present chapter discusses the meaning of the phrase "a moral duty to obey the law" in the light of Bentham's epistemology and arguments in *Fragment*. In doing so, the chapter adds another dimension to the formal analysis of sovereignty offered in chapter 2. This chapter discusses in much more detail the conditions for, and signification of, the activity of the "entrusting body", the activity of which was one of the two dimensions which characterised the "split" concept of sovereignty. However, it does not give a formal analysis of the communication which enables such an "entrusting body" to take shape. Such an analysis is reserved for chapter 6. Although the connection between the idea of legitimate authority and the duty to obey has not always been asserted,[2] it is my claim that there is a connection between the limits of the social justification for

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[1] It is important to note that "government" here has a broader meaning than the common conception of government as an institutionally-based coercive mechanism. It also includes communally-based coercion, or self-government. More will be said about this in chapter 6 below.

[2] See K. Greenawalt, *Conflicts of Law and Morality*, Oxford, 1989, pp. 56-7.

political authority (matters of sovereignty) and popular reflection and action. Since Bentham tied together the idea of sovereignty and the habit of obedience, constitutional limits and the duty to obey the law were intimately linked in his theory. In a nutshell, the argument is that, in *Fragment,* "the duty to obey *the* law" related to the social justification for the existence of law. Such a duty might be termed "the duty socially to justify the sovereign *as sovereign*".

II

Bentham's theory of obligations.

What, for Bentham, was the precise nature of a moral duty to obey the law?[3] It is proposed firstly to analyze the phrase "a duty to obey the law" according to Bentham's epistemology, that is according to his theory of fictions. The reason for so doing is to discuss criticisms that the principle of utility is an incoherent basis for obligation in general and political obligation in particular.[4] It will be argued that Bentham in fact contended that the principle of utility could not serve as a basis for *any* particular moral obligation, and further, that the principle of utility could account only for the *expediency of obedience*, in particular historical circumstances.

The resort to Bentham's epistemological theory supports the contention that Bentham provided, in *Fragment*, a flexible *social* account of how coercion could be exercised in a political society. This reading takes for its foundation Bentham's epistemological attack on abstract moral rights. Bentham's epistemological understanding of rights and obligations

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[3] Postema mentions the issue only to say that the principle of utility would determine whether one should obey the law. He does not explain the nature of this utilitarian quandary: see *Bentham and The Common Law Tradition*, p. 248.

[4] See B. Zwiebach, *Civility and Disobedience*, Cambridge, 1975, pp. 31-7.

allowed him to present as dogmatic, and to refute on utilitarian grounds, *any* generally accepted justification of the ways in which a given political society was organised. Moreover, Bentham's epistemology enabled him to assume the position of an observer of the historical process of communal development, and to make generalisations about the universal nature of political society. *Fragment* was arguably written from such a speculative observational standpoint. Bentham could infer that one could never speak about a general moral duty to obey the law, despite the historical utilitarian expediency of such obedience at certain stages in the social development of a given community. It will be argued that the expression "a moral duty to obey the law" would be as incomprehensible to Bentham as the alleged existence of any other a-priori moral duty. Bentham's epistemology enabled him to give an account of political society in *Fragment* which supposed no moral duty to obey the law.

What did the word "duty" or "obligation" mean for Bentham? How could the idea of a "duty" or an "obligation" be defined in such a way that two people would know that it existed in the same way? The concept of a duty was discussed in Bentham's *Theory of Fictions*.[5] According to Bentham's theory, which anticipated many late Wittgensteinian features, fictitious entities (as opposed to "real" entities which could be physical or mental) like "duties" and "obligations" could be defined for the purpose of an inter-subjective communicative discourse *only* as long as they were paraphrased, and given a context in a sentence in such a way as to relate them to real entities. In other words, mutual comprehension of the persons communicating depended on the translation of fictitious entities into terms describing real entities. When an obligation was spoken of as *existing*, it meant

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[5] For a version of Bentham's text, see C.K. Ogden, *Bentham's Theory of Fictions*, London, 1932, pp. 7-52, 86-91. For an illuminating exposition of the theory, see Harrison, *Bentham*, chapters 2-4; see also Hart, *Essays on Bentham*, pp. 128-130.

that people saw some action as obligatory. They would feel some commitment to the content of the obligation. One of the "real" entities involved in the paraphrased definition of an obligation - pain - meant that *some kind* of a sanction would have to form a part of its definition.[6]

Bentham insisted that the distinction between the existence of rights (or obligations) and arguments about rights had to be maintained. An explanation of rights and obligations had to be kept distinct from their justification. "Hunger is not bread", he wrote in *Anarchical Fallacies*.[7] Doctrines of natural rights could not maintain this distinction, and their subject matter, the substance of those rights, could not be meaningfully defined and thus made the topic of communication. Nobody could fully understand them, let alone censor them. Any one particular understanding of those natural rights was as good as any other.

Hart acknowledged the point of Bentham's account in separating the existence of rights from their justification. He argued that Bentham, unlike Mill, had been logically consistent. Mill's account recognised some higher rights and obligations which stemmed directly from higher pleasures. His account led to utilitarian entitlements. The result of Mill's account was a non-utilitarian proposition, namely that there could be circumstances in which no conflict would be generated between utility and rights.[8]

The implication of Bentham's analysis of fictions in general, and of duties and obligations

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[6] Modern thinkers have also considered the role of sanctions. Raz presents an effective objection to too rigid a connection between the idea of a threat of a sanction and the existence of law. He claims that evidence is scarce for such a strong connection between the two: *Practical Reasons and Norms*, pp. 154-7. However, Raz approaches the idea of a sanction very narrowly. For him a "sanction" would amount only to what Bentham regarded as the political sanction. Raz does not speak about other types of sanctions, all of which can form part of an analysis of the obligatory status of a law.

[7] Bowring, ii. 501.

[8] Hart, *Essays on Bentham*, pp. 94, 97, 103.

in particular, was that there could not be obligations which emanated directly from a moral principle. A moral principle, although a precondition of an obligation, could not be the direct source of that obligation. A moral principle and an obligation (a manifestation of will expressed through the propositional medium backed up by a sanction) did not stand in relation to one another as cause and effect. There had to be a proposition, or a rule, which existed at an intermediate level, that is between the moral principle and the person who inferred an obligation.

Not only were *natural* rights "non-existent", "fabulous" entities, but so were any direct *moral,* including utilitarian, entitlements. Moral obligations, for Bentham, were derived from popular conventions which supplied the propositional medium backed by the moral, or (as will be argued below in chapter 6) the sympathetic sanction. Obligations, on the above analysis, could be subjective or inter-subjective, that is communicable in a group of persons, but only the latter would function as social norms. A social norm entailed an obligation which would bind the members of a group by the normative force it possessed. A normative force would operate where there existed a source from which pain *of some kind* could be anticipated. This pain would be inflicted where there occurred a transgression of the content of a prescriptive proposition. Such anticipation of pain could, for example, be a result of expectations regarding the recurrence of a certain practice,[9] or could be an anticipation of the pain of disappointment on the part of other members of the group in question, and, in consequence of the pain arising in any individual's mind as a result of his anticipation of

[9] Or more precisely, it could result from a proposition inferred by people who would both participate in a practice and observe it. They would have to participate in it, but in order to abstract a proposition with prescriptive force they would have to put themselves in the hypothetical position of observers of themselves participating in it. They could not just "do things". There would have to be some degree of self-reflection in order to infer an obligation or a rule.

criticisms likely to be made in the event of deviation from the practice.

Now, apart from explaining the idea of obligation, the above analysis is helpful in understanding what Bentham meant by the idea of a *moral* obligation. The mere fact that a prescriptive proposition was inferred constituted some part of its "morality". Our criticism of existing practices is influenced to some degree by the cultural "baggage" that we carry. It is also influenced by our imagination of possible future pains and pleasures, which could, for instance, be a product of our empathy towards other people.[10] The mere existence of the obligation, whatever its source, would form part of the utilitarian calculation in assessing its morality. Statements like "there is a legal obligation to pay tax", or "there is a convention that everybody should go to church on Sundays", are inferences of prescriptive propositions which are supported by sanctions arising from different sources. However, both propositions would generate expectations, and, as such, their mere existence, or "the fact of their inference", would give them moral weight.[11] This argument implies that the traditional distinction which is made between conventional and critical morality is artificial, because the mere existence of a convention functions *as part* of a critical moral discourse.

The epistemological status of a moral duty to obey the law.

With this analysis in mind, we may discuss how Bentham would understand "a *moral* duty to obey the law". This expression could be interpreted as having two different meanings. First, it could mean that there was an obligation not to refrain from doing what the content of a given legal prescriptive proposition specified. Second, it could mean that we have a

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[10] Empathy will be discussed in chapter 6, pp. 255-66 below.

[11] In this sense, every legal obligation would also be a moral one. Any attempt to separate completely formal legal validity and moral worth would therefore be doomed to failure. The existence of a legal obligation would itself form part of its moral weight.

direct moral obligation to "obey the law". This meaning differs from the first in so far as it refers to the law globally, with a more remote and indirect reference to the content of its specific provisions. In this latter sense, there would be an obligation to obey because of the prescriptive proposition which formed a justification for having law. The reasoning in this more global sense relates to the existence of law, or to the question "what do we need law for?" It goes without saying that even the second, global obligation to obey the law might be influenced by the content of this or that specific measure that a legal system produced. In such a case, the argument about the content of law would be utilised at a different level of reasoning.[12]

The first interpretation would imply that the force of the moral duty to obey was related to a calculation determined by the threat of punishment attached to a volitional utterance. This would constitute an "immediate" obligatory medium which would, on most occasions, produce a duty to obey. If a person was asked: "why do you obey?", the answer would be: "because if I am caught not obeying, I will have to bear the punishment". This is a banal statement of the duty to obey. It is plausible, but unhelpful in cases where a person has personal reasons (or convictions) for not obeying.

The second interpretation, however, would imply that there was an obligation to obey the law for reasons which were ulterior to a person's own reasoning with regard to the law's content. These may be reasons to obey which stem directly from the social utility of law as an institution, for example its function in creating an artificial identification of duty and

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[12] This more global level of reasoning is explained by Raz in terms of "second order reasons", which may operate as "exclusionary reasons" for action. Exclusionary reasons operate to preclude a person from acting for any reason. To put it another way, they suspend the reasoning process, disallowing ordinary calculation as to the balance of reason or advantages. For example, I may have a personal reason for disobedience, but the exclusionary nature of the second order reasons forbids me to consider it: see *Practical Reasons and Norms*, p. 41; and also *The Authority of Law*, pp. 16-26, 235-6.

interest, or in the co-ordination of moral beliefs. On this understanding, a more global concept of the duty to obey would stem from a prescriptive proposition formed by reasoning which was not conceptually related to the content of the legal provision in question. There would be a rule of conventional morality which recognised this ulterior purpose of the institution of law.

However, the connection to the content of a provision need not be underestimated in the more global understanding of the duty to obey. Arguments which are related to the function of law as an institution could be weighed against, and on occasion be overridden by, other rules of conventional morality, which might themselves relate to the content of law.[13]

In the case of the first, banal type of reasoning, Bentham would insist that the question of the existence of an obligation to obey should be kept distinct from that of its justification. But on the premise of the impossibility of universal rights, where there was no obligatory medium, even on the second, more global understanding, where there might be a conventional duty to obey because of social advantages related to the existence of the institution of law as such, confusion between the question of the existence of a conventional obligation to "obey *the* law", and that of its justification, ought to be avoided.

Bentham would argue that no duty could stem purely from a utilitarian calculation, but only from a prescriptive proposition backed up by a sanction. The expression "a moral duty to obey the law" would be nonsense and incomprehensible *even if it related to the institution of law*, in the same way that any proposition of natural law would be nonsense. There could

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[13] This would mean that the question of whether certain reasons functioned as second order reasons or not would itself depend on the content of the provision and the first order reasons which stemmed from it. For example, there could be a law generally regarded as pernicious, either because it had transgressed a deeply rooted social convention, or because of its very harmful consequences. In such a case, its content would serve as a second order reason. The case for disobeying the law would amount to saying: "My reasons for objecting to that measure are so strong that they overcome its presumptive exclusionary status."

be no universal utilitarian consideration which would give rise to a utilitarian duty to obey the law. To assert the existence of such a duty would be to commit the error later made by Mill.

According to Bentham's analysis of the impossibility of utilitarian entitlements, there could be no moral duty to obey the law, or more precisely, there could only be a popular convention (a popular rather than a legal obligation) which effected a duty to obey the law. This convention would be based on a specific reflection which consisted of the most general social utilitarian assessment and justification of law as a social institution. The convention would constitute a propositional medium, a proposition of conventional morality, to which expectations would be attached. A fear of popular resentment in the case of disobedience, or a hope of popular sympathy in the case of obedience, would constitute the sanction.

Yet, the fact that A reflection about the expediency of obeying gives rise to a convention which advocates obedience to the law, does not mean that there is a moral duty to obey the law. One could argue for the existence of a convention to the effect that: "the duty to obey exists providing that certain conditions are met". However, this would render the duty to obey the law tautological in so far as "there is a duty to obey if it is expedient so to obey". Again, the fact that on many occasions it would be expedient to obey, and that, in consequence, a conventional moral rule to that effect would develop, does not imply that it is plausible to talk about "a moral duty to obey the law".[14] Bentham would recognise that a commitment, such as an obligation to obey the law, could be formed at various levels of

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[14] The fact that a speculative opinion would conclude that under certain circumstances people OUGHT to obey, does not imply the existence of a global moral duty to obey the law. R.E. Flathman acknowledges that the answer to the question "should I obey the law" depends on the circumstances of the particular situation. It is very difficult to assess each situation, and so it is difficult to answer the question in universal terms. The answer to the general question is culturally contingent, or, as Flathman says, it depends on time and place: *Political Obligation,* New York, 1972, p. 245.

abstraction, for instance at the legal level (the "banal" sense of such a duty), or at the moral. However, no such commitment could give rise to the existence of a moral duty to obey the law.

This argument leads to what I term *utilitarian-based anarchism*. It implies that a moral obligation to obey the law can not be understood and justified in the abstract. The existence of a centralised coercive mechanism can not be justified a-priori, but only on utilitarian considerations, which are, of course, however global they might be, capable of modification. Even general obligations based on a "habit", or "disposition", which can mean a conventional, or popular, obligation to obey for reasons which relate to the institution of law as such must always be understood in a particular social context.[15] People can generally justify obedience to the institution of law, for instance on the grounds of co-ordination and protection, but such justification is entirely compatible with a philosophical claim that there is no moral duty to obey the law.[16] Bentham would warn against the acceptance of notions like "legitimacy", or "the duty to obey the law", all of which would be symptomatic of a stagnant society.

Utilitarian-based anarchism claims that under no circumstances can there be any global utilitarian justification for totally surrendering one's moral autonomy in the face of coercive

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[15] I should not be understood as advocating the existence of a prima facie duty to obey the law. The statement "there *is* a prima facie duty to obey the law" is a global statement to that effect and would make no sense in utilitarian terms. This is because it would be equally valid to say that there is a prima facie duty not to obey. The assertion of such a global statement, however, is different from saying that any formulation of the duty to obey would only have a prima facie status, a position which would be fully shared by any utilitarian. See also M.B.E. Smith, 'Is there a Prima Facie Obligation to Obey the Law?', Yale Law Journal, 82 (1973) 950-76.

[16] The existence of an argument at a level of utilitarian reasoning which relates to the law as an institution may help to answer Greenawalt's query as to why utilitarians regard disobedience to law as a more severe violation of the general welfare than any other violation: *Conflicts of Law and Morality*, p. 116.

volitional utterances, whatever the source of these utterances. This argument is anarchical because it precludes, even at the level of reasoning which relates to the law as a social institution, any a-priori understanding and a-priori justification of political obligation.[17]

From which standpoint is this *utilitarian-based anarchism* developed? The assertion of the absence of a moral duty to obey the law would have to be made from the speculative viewpoint a philosopher/observer, whose enterprise it was to try to discover the universal features of all political societies. The empirical fact that distinct historical social processes observable in different communities corroborated the inference of the non-existence, or rather only the transient belief in the existence, of a moral duty to obey the law, conjoined the

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[17] This anarchism is autonomy-based, and is philosophical in the same sense as R.P. Wolff's "autonomy based anarchism". Wolff's argument assumes that political authority must necessarily curtail moral autonomy, and therefore one must choose between the two. (*In Defence of Anarchism,* New York, 1976, p. 71). However, Wolff admits that on some occasions it is expedient to obey the orders of government. What he objects to is obedience to law because it is law (Ibid., p. 14). He accepts that even without coercive centralised institutions, an all-embracing direct democracy might plausibly emerge in a human society of free autonomous individuals. In such a society, individuality, understood as some combination of freedom and responsibility, would be interdependent in an optimal way.

For Bentham too, as this thesis will argue, disobedience could be facilitated and would form part of the political aspect of a free society. However, while Wolff sees autonomy as an ideal, Bentham conceived a free society as one in which such autonomy could be realised on the balance of utilities, that is when the existence of state government would be more of an evil than the absence of it. Bentham's utilitarian anarchism enabled him to contemplate a society in which self-government would predominate. He could contemplate such a society despite the fact that political obligation could be justified, on utilitarian grounds, in manifestations of political society which were characterised by a great deal of institutional power. For Wolff, a just state, and therefore a justified political obligation, is a logical contradiction. For Bentham, by contrast, political obligation could be justified, but could always be questioned *as such* when the social situation demanded it. For Wolff, autonomy is an unattainable ideal. For Bentham, like Mill after him, it was a matter of social evolution, and, as will be argued in chapter 6, a matter for communal reflection. "OUGHT" therefore could have meaning only within the realm of "CAN". An unrealisable "OUGHT" was simply a contradiction. A vision of autonomy in a group without reference to potential social circumstances, or to a stage in the group's development, was too implausible to be taken seriously. Bentham would concede that autonomy was in itself good, whereas authority was in itself evil. However, for instrumental reasons such as security, enhanced autonomy would not be an ideal worth pursuing in a social group not mature enough to make any good use of it. See also p. 119, note 19 below.

philosophical speculative insight of utilitarian-based anarchism.

From this point of view, utilitarian-based anarchism, as a theoretical position, would be entirely compatible with the transient expediency of centralised coercion. If one adopted the point of view of this philosophical anarchism, derived from the epistemological basis of obligation, one might also say that although in certain stages of the historical development of a social group, a duty to obey the law was understood to exist because of its current expediency, this duty could not form a universal feature of the description of that society. Indeed, the absence of such a duty would be an essential characteristic of it. Over time, therefore, the philosopher/observer would say there was no such duty.

The utilitarian-based anarchistic claim would not take the form "under no circumstances should authority be justified", or "the only form of good society is that which does not have a centralised coercive authority". Further, it should not be associated with the chaotic social state potentially arrived at by the application of natural law theories. These theories posited that the authoritative status of utterances should be acknowledged *only* as long as they adhered to natural law, of which any one interpretation would be as good as the other. Bentham would criticise both these interpretations of anarchism. Utilitarian-based anarchism would rather be arrived at after observation of the historical evolution of a social group, and derived from the epistemological basis of obligation which denied the existence of utilitarian entitlements.[18]

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[18] Sartorius argued that in a *stable* polity people would presume that the laws were generally just. However, he maintained that this fact should not lead to the use of the terminology of a moral duty to obey the law. Once appeal is made to such terminology, the political union would be in the process of disintegrating: *Individual Conduct and Social Norms: a Utilitarian Account of Social Union and The Rule of Law*, California, 1975, p. 108. Sartorius described the nature of a relatively just political society. He therefore spoke about the particular, and not about the universal, as far as the nature of political obligation was concerned; see also chapter 1, pp. 14-17 above, where universality in Bentham's thought is discussed.

In short, utilitarian-based anarchism can be seen as a speculative attitude about the transient nature of any justification of a particular manifestation of political society. As such, it should not be confused with the popular understanding of anarchism as simply a chaotic social state arrived at either from extravagant claims to moral autonomy, or from a reliance on natural law.

However, utilitarian-based anarchism should also be distinguished from another sense of anarchism. This other sense of anarchism would have a critical or empirical orientation. Utilitarian-based anarchism would form the theoretical basis upon which critical or empirical anarchism would be arrived at by a social group. This critical anarchism would be an account of an anarchistic society critically justified under a utilitarian theory. In other words, utilitarian-based anarchism would be the rationale which could help to exhaust the potential of a utilitarian social and political theory, enabling it to accommodate an actual anarchistic society, which would embrace an anarchistic ideology. The speculative notion of utilitarian-based anarchism could propel global reflection on, and, in turn, evolution of, every political society, to the degree that it could eventually justify and embrace an anarchistic ideology.[19]

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[19] The social, or empirical application of a philosophical anarchistic attitude within the framework of a utilitarian legal and political theory might be twofold:

First, as will be argued in chapter 6, Bentham, in a similar fashion to J.S. Mill, reflected extensively upon the histories of communities. Bentham advocated a continuous questioning of the global justification of political obligation. The realm in which this kind of questioning would arise was that of constitutional limits.

Second, an anarchistic ideology might form part of Bentham's utilitarian political theory. Such an anarchistic theory would be based on a political ideology, at the core of which would be harmony between individuality and communal censure. The gist of such a theory would amount, on the one hand, to a communal context of censure according to which individuality is created. On the other hand, this communal censure would give meaning to the *enhancement of individuality*, by being sensitive to individual criticisms and pleas. Such a communal context would be sensitive to individual contributions, even to the extent that these contributions concerned the modification of the collectivity. What constitutes "harm" in such a community would be determined as a result of interaction between individuals and some communal entity, the latter being a product of communication: see chapter 6, sections II-IV below. Utilitarian political theory did not necessarily imply that "harm" would be

In short, utilitarian-based anarchism is a philosophical attitude which should not be confused with the possible actual *result* of the social evolution of a group, namely the existence of an anarchistic society.

Only the perspective of philosophical utilitarian-based anarchism would equip a social theorist with a sufficiently flexible apparatus to observe social processes to the degree that an anarchistic society could be contemplated, and indeed justified on utilitarian grounds. This flexibility would imply that even in a near-perfect government, one which produced generally just measures, there would be no duty to obey the law. The perspective of utilitarian-based anarchism enables the diverse manifestations of political society to be connected by a number

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"determined" by centrally-based state institutions. This idea of mutually-enforcing community and individuality would imply that only in the context of a community is it possible for individuals to communicate as well as to modify this context. Anarchism as "communal individualism" is developed in A. Ritter's *Anarchism: a Theoretical Analysis*, Cambridge, 1980, pp. 4, 29, 32-7. For a general account of Anarchism, see D. Miller, *Anarchism*, London, 1984, pp. 2-29.

Bentham's methodology meant that in order to arrive at this philosophical and social communal individualism, he did not have to resort to over-optimistic assumptions about human nature of the sort usually made by theoretical anarchists. For Godwin, the capacity for individual utilitarian reasoning, which would be based on a capacity for understanding other people's similar reasoning, formed the foundation for a right of private judgement, around which, in turn, his case for anarchism revolved. For Bakunin, the capacity of individuals to "internalize" communal decrees, without institutional coercion, was the foundation for anarchism. For Kropotkin, the capacity for benevolence, and hence general reciprocity, was the key factor in the success of the anarchistic enterprise. All these thinkers can be criticised for the lack of realism in these assumptions. For Bentham, human nature was neither virtuous nor evil, but would be the product of, and hence would be modified by, social circumstances (law being one of them), which could change as the collective identity of a social group developed.

Further, as will be argued in chapter 6, anarchists have typically been mistaken in claiming that in anarchistic communities virtues like "internalization" or "benevolence" could function regardless of the manifestation of the existence of obligations, and hence of sanctions, be those sanctions institutional or communal in nature: see A. Ritter, *Anarchism, a Theoretical Analysis,* p. 21. For Bentham, as will be argued in chapter 6, anarchistic communities would have different *kinds* of sanctions and obligations.

It is beyond the scope of this thesis to offer a detailed study of anarchism. It merely points towards the possibility of connecting the notion of constitutional limits as a social phenomena to a philosophical anarchistic attitude.

of universal features, one of which is the absence of a duty to obey the law.

Finally, to stress the point again, it goes without saying that Bentham's theory could accommodate a conventional, customary duty to obey the law. This duty would stem from existing propositions, which could be inferred among members of a social group, and would be enforced by the moral sanction. Yet this would be different from saying that there was a moral duty to obey the law. It will be argued in the next section that Bentham's statements concerning the universal features of political society, including the absence of a moral duty to obey the law, are to be discovered in *Fragment*.

III

It is now appropriate to present a new reading of *A Fragment on Government*. This section aims to construct arguments based on close reading of *Fragment*. These arguments clarify the connections Bentham saw between the public sphere, constitutional limits, and the foundations of political society.

Fragment was a polemic against Blackstone's account of the origin of society and the nature and limitation of law-making powers. Bentham, however, meant also to offer his own account of how political authority, and the limits of political power, should be understood. The work contained many ideas which were not fully developed. Nevertheless, these themes were developed later by Bentham into a more complete legal and constitutional theory, remarkable for its consistency.

Bentham attacked Blackstone's explanation of the origin and persistence of government. Blackstone rooted his explanation in the concepts of a social contract and natural law. Bentham argued that the power of government, and with it what he called "political society", was characterised *by* a "habit of obedience" on the part of the people. The opposite state to

obedience, Bentham called "resistance", "disobedience", or "revolt". He mentioned, untypically briefly, the idea of revolt, and distinguished between disobedience in *law* and in *fact,* and between *unconscious* and *conscious* disobedience. The most relevant category for the discussion which follows was conscious disobedience to the law. This type of disobedience could be either *secret* (fraudulent) or *open* (forcible). Bentham recognised that the most difficult form of disobedience to undertake would be *forcible conscious legal disobedience*, but he declined to elaborate, since he thought the length of the discussion would require a separate work.[20] The only remark he made on this occasion was:

> This disobedience, it should seem, is to be determined neither by *numbers* altogether (that is of the persons supposed to be disobedient) nor by *acts*, nor by *intentions*: all three may be fit to be taken into consideration.[21]

This shows that Bentham assigned the same importance to the issue of disobedience as to obedience. If obedience was related in his thought to the social justification of authority, so was disobedience in marking the limits of this social justification. Bentham also attached importance to the *people*, who were to fulfil the role of a continuous judging body, which checked, that is determined, the limits of the social justification of authority. Further, in assigning the idea of intention to the subject-matter of disobedience, Bentham saw the act of the people as an act of will, which must have followed an act of understanding of some kind.

Bentham criticised the doctrine of the original contract as an inadequate justification for political obligation. He relied here on Hume.[22] Hume, however, was a conservative in the

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[20] *Fragment*, pp. 435-7.

[21] Ibid., p. 436.

[22] See in this context, D. Hume, *A Treatise of Human Nature*, P.H. Nidditch (ed.), Oxford, 1978, p. 539 (*Of the Source of Allegiance*); See also Hume's essay 'Of the Original Contract', in *Essays Moral, Political and Literary*, E. Miller (ed.), Indianapolis, 1985, pp. 465-87.

sense that reform based on utilitarian considerations was for him secondary in importance to the utility which arose out of stable, established conventions. Bentham, by contrast, put much more emphasis on the principle of utility as a critical standard for justifying reform in general, and, as will be argued, disobedience to government in particular.

Because the principle of utility was the sole source of justification for political obligation, Bentham questioned the role of promises as the basis for political obligation. He denied that people were bound by compacts based on promises. A Lockean social contract was not capable of improvement, since it required society's dissolution before it could be renegotiated. Bentham attacked this stagnant, and hence potentially decadent,[23] feature of contractrianism. He argued that, "It is manifest, on a very little consideration, that nothing was gained by [the contract] after all: no difficulty removed by it".[24] The dilemma as to whether to obey or not would remain unresolved.

Bentham's attack on the social contract theory was founded not on an epistemological basis, but on a social, empirical one. A "one-off" contract would be incapable of meeting the new demands generated by the development of any social group. Only a government susceptible to continuous assessment of utilities would be worth advocating. Even if one tried to reformulate the substance of the original contract so that government undertook to be subjected to the law, Bentham enumerated *four* situations in which a government ought not to be obeyed on utilitarian grounds.

The first situation would arise under a bad government, in which the whole rationale of the law would run counter to the happiness of the community. The second would occur where a government impaired the happiness of the people without violating any single law.

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[23] *Fragment*, p. 446.

[24] Ibid., p. 442.

Third, Bentham argued that circumstances might change, in which case the greatest happiness might call for resistance to the law. Finally, Bentham made the important distinction between the expediency of obeying a law, and the expediency of obedience to "the law". No single law, even if it operated to diminish happiness, could render the people so unhappy as to make inexpedient the maintenance of the whole social arrangement based on the contract. One unjust law would not operate to outweigh the whole utilitarian justification of the political system. Some more comprehensive unhappiness would be required in order to justify the conclusion that there was no utilitarian justification for obedience to *any* of the measures promulgated by government.[25]

The question remains as to what role promises played in Bentham's theory of the origin and persistence of government (or political authority). In giving his account of the subject, Bentham based the persistence of government on the utilitarian calculation made by *the people* concerning whether to obey or not. Bentham repeated the same formulation many times throughout the essay. Bentham's style becomes an important issue here in reading the text.[26] The answer to the question of obedience was encapsulated in a short formulation. A nearly identical formulation was repeated *in a number of different contexts*. Each time the formulation appeared, it cast light on a different problem. Instead of introducing the formulation once and then explaining its nuances, Bentham repeated it over and over again. This procedure arguably helps to clarify his general understanding regarding the connection between popular resistance and constitutional limits, or the limits of sovereignty.

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[25] Ibid., p. 443.

[26] Style is important because some modern writers criticise Bentham's account in *Fragment* as being an oversimplification. They argue that Bentham had very little to say about the basis for political obligation: see A.J. Simmons, *Moral Principles and Political Obligation,* Princeton, 1979, pp. 47-52, and J. Horton, *Political Obligation,* London, 1992, pp. 56-60.

In his general formulation of the principle of resistance, Bentham referred to the "juncture of resistance" (hereafter referred to as "the formulation"):

> This then, and no other, being the *reason* why men should be made to keep their promises, viz. that it is for the advantage of society that they should, is a reason that may as well be given at once; ... Why they should obey in short *so long as the probable mischiefs of obedience are less than the probable mischiefs of resistance:* why, in a word, **taking the whole body together**, it is their *duty* to obey, just so long as it is their *interest,* and no longer. This being the case, what need of saying of the one, that *he* PROMISED so to *govern*; of the other, that they PROMISED so to *obey*, when the fact is otherwise?[27]

This passage in which the formulation is first introduced discusses the formation of a popular *collective* judgement, which presupposes a standard upon which people could agree.[28] Bentham argued that, at a theoretical level, the principle of utility was the only standard upon which people could agree. It was not that people had some infallible means of calculating utility, but that the principle of utility would be the only standard with reference to which communication could take place. Communication might produce a utilitarian consensus regarding the possibility of resistance. The consensus so produced had to be conceived as a popular communal critical judgement, which, once formed, would be acted upon. Individuals would communicate with one another, with the subject of their communication being a joint communal judgement: "The people, no matter on what occasion, begin to murmur, and **concert** measures of resistance."[29]

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[27] Bentham had already mentioned the juncture of resistance in *A Comment on the Commentaries*, written in 1774-5: see *Comment*, pp. 444-5.

[28] In *Fragment*, p. 481, Bentham attacked Blackstone for arguing that in every state there must be an unlimited power. Such an argument, Bentham contended, would serve as a justification for rulers demanding absolute obedience from the people. However, for the people themselves, such an argument would be no more than an abstract proposition in jurisprudence. Bentham looked for a principle which would also constitute a standard by which the people would be prepared to judge the action of rulers.

[29] Ibid., p. 483.

Bentham conceived the power of the people to form a consensus and to resist as the very foundation of political authority in their society. He asserted that people were able to think in terms of communal utility. This would not involve a calculation of individual interests as such. Instead every member of the community would think in communal terms about the consequences of resistance. This point appears in a second version of the general formulation:

> when, according to the best calculation he is able to make, *the probable mischiefs of resistance* **(speaking with respect to the community in general)** *appear less to* ***him*** *than the probable mischiefs of submission.* This then is **to him**, that is to each man in particular, *the juncture of resistance.*

The following passage explains the point further:

> A natural question here is - by what *sign* shall this juncture be known? By what *common* signal alike conspicuous and perceptible to all? A question which is readily enough started, but to which, I hope, it will be almost as readily perceived that it is impossible to find an answer. *Common* sign for such a purpose, I, for my part, know of none: he must be more than a prophet, I think, that can shew us one. For that which shall serve as a particular sign to each particular person, I have already given one - his own internal persuasion of a balance of *utility* on the side of resistance.[30]

This passage makes some important points. First, there could be no ultimate common signal for resistance other than considerations of utility, and any signal that could be conceived, such as "express conventions" or "constitutional laws in principem", would be of prima facie status only. These, and any other types of convention, would be common signals not for resistance, but only for individuals to begin to calculate on the basis of the principle of utility. Bentham recognised the usefulness of such common signals, but, very significantly, added that a transgression of them would sometimes lead to disobedience, and sometimes would not.[31]

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[30] Ibid., p. 484.

[31] Ibid., p. 490.

The second point which arises in this passage might be said to expose an apparent incoherence in Bentham's argument. On the one hand, he argued for a *collective* (communal) judgement as to the possibility of resistance. He therefore relied on the capacity of the people to disobey when the time was ripe. On the other hand, he put the onus of the judgement on the *individual*. The judgement ultimately consisted in the internal persuasion of the individual when thinking communally. Communal judgement was derived from each individual's subjective internal persuasion.[32]

Yet the incoherence is more apparent than real. Bentham's account relies on the communicative possibility that individuals might be able to form an inter-subjective consensus with regard to the utility of resistance. This inter-subjective consensus, achievable in a situation of free communication, would be facilitated by express conventions and other constitutional measures, which would stimulate the communicative process. Beyond having an express convention to co-ordinate inter-subjective communication, Bentham seemed to believe that the people might co-ordinate themselves by communicating about the probable consequences of resistance. Their calculation would naturally be influenced by their existing expectations.[33] The important point to emphasise is that the communicative activity aiming at consensus formation would occur after the recognition of common signals, such as the breach of constitutional laws.

Another feature of the juncture of resistance was that it should offer theoretical guidance in resolving the dilemma of liberty and authority. If the people were to retain some moral autonomy to judge the acceptability of the limits imposed on the exercise of coercive power

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[32] This point will be discussed in detail in chapter 6, pp. 235-78 below.

[33] In the previous chapter it was argued that people need not be solely influenced by the express conventions existing within their own group, but might also be influenced by those existing within other political societies: see chapter 3, pp. 102-3, note 27 above.

over them - if liberty to resist the unjustified exercise of authority was to be preserved - there would have to be a guiding principle pointing out the reasons why and the time when resistance was to be undertaken. This guidance, Bentham maintained, could not be furnished by Blackstone's contradictory account of an absolute authority on the one hand, and a freedom to transgress human laws which violated rules of natural law on the other. Such guidance could only be sought from the "principle of *utility*, accurately apprehended and steadily applied".[34]

The next occasion on which Bentham presented the formulation was in relation to the establishment of constitutional limits, which could never, for him, be solely institutional but were also necessarily popular in nature.[35] Constitutional limits were based on moral arguments and the crystallisation of popular, or moral, propositions about what these limits *ought* to be:

> Grant that there *are* certain bounds to the *authority* of the legislature: - of what use is it to say so, when these bounds are what nobody has ever attempted to mark out to any useful purpose; that is, in any such manner whereby it might be known beforehand what description a law must be of to fall *within*, and what to fall *beyond* them? Grant that there *are* things which the legislature *can*not do; - grant that there *are* laws which exceed the *power* of the legislature to establish. What rule does this sort of discourse furnish us for determining whether any one that is in question is, or is not of the number?[36]

Bentham was dealing here with the limits of sovereignty, or the limits to the justification of authority. A mere statement that the legislature was limited, argued Bentham, would be unhelpful in assisting one in ascertaining whether a given measure was within or outside these limits. The meaning of a void law was, therefore, not simply that the power to make this

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[34] *Fragment*, pp. 482-3.

[35] See chapter 7, pp. 299-302 below.

[36] *Fragment*, p. 486.

law and every other law was forfeited. Bentham wrote:

> had [the people] arrived at the same practical conclusion through the principle of utility, they would have spoken of the law as being **to such a degree pernicious**, as that, were the bulk of the community **to see it in its true light**, *the probable mischief of resisting it would be less than the probable mischief of submitting to it.*[37]

There was no point in speaking about law as legally void, irrespective of its social effects. These social effects would be the subject of a communal utilitarian calculation in relation to a future proposed coercive measure. Bentham emphasised that, beyond a certain point, a given measure might be seen to be so evil as to justify disobedience to it.

This passage shows Bentham not as a lawyer, but as a sociologist of law who advocated social dynamism and popular judgement as the only foundations for justifying the authority of law. No constitutional limitation could exist, independent of a communal judgement, and of an action which might follow this judgement. Bentham shifted the argument from the legal to the social sphere - from a simple view of power exercised by a coercive institution which was conceived or "recognised" as authentic, to a view of power resulting from an interaction between social forces and government.

The last passage raises another important point, one to which Bentham gave much more attention in his mature constitutional writings, namely whether the people were capable of seeing the issue "in its true light". For present purposes, the important point is that Bentham would not have spoken in the conditional tense had he not foreseen the possibility that some obstacles might exist to the people's seeing a coercive measure "in its true light". He acknowledged the damaging influence of fallacy. He recognised the possibility of false consciousness.[38]

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[37] Ibid., p. 487.

[38] See chapter 6, pp. 275-6, note 69, and p. 288 below, for a discussion of the obstacles which prevented people from seeing coercive measures in their true light.

This passage is illuminating in relation to the type of disobedience which is dealt with in *Fragment*. Bentham was not concerned with an act of individual disobedience stemming from an individual's calculation with regard to the likelihood of punishment, a threat of which would be attached to a given authoritative measure. Further, he did not discuss civil disobedience in the Tureauean and Rawlsian sense, which would arise when a group of people, usually a minority, felt a deep sense of injustice in what Rawls called a "near just society". The aim of such civil disobedience, carried out by an aggrieved group, would be to persuade the obedient part of the population of an injustice produced by the near-just system. The disobedient group would accept the consequences of their actions and endure the attached punishment.[39]

Bentham did not focus on these two forms of disobedience in *Fragment,* because neither would, in effect, challenge the existence of a legal system, or the validity of a measure that the system had produced, however unjust they might be. Neither of these types of disobedience in fact necessarily challenged the social justification of the authority to enact the measure in question. Neither type of disobedience concerned sovereignty. In these cases, the legal system was either ignored or censured, but the basic social justification for its measures remained untouched. However, Bentham did make remarks pertinent to civil disobedience in *Fragment*. He referred to the censuring of coercive measures, although merely censuring would not go far enough to establish a constitutional or social limitation on the authority in question. Civil disobedience might provide stimulation to all-out disobedience, but did not amount to the general collective disobedience which concerned Bentham. Civil disobedience might develop into something more fundamental, something

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[39] See J. Rawls, *A Theory of Justice*, Cambridge, Mass., 1971, pp. 363-8; see also H.D. Tureau, 'On the Duty of Civil Disobedience', in *Walden or, Life in the Woods and On the Duty of Civil Disobedience*, New York, 1965, pp. 251-71.

which might reduce the social justification of an authority either in regard to all matters, or in regard to a single promulgation. Bentham's account in *Fragment* concerned the people, as the entrusting body, collectively challenging the social justification of the authority in their society.[40]

In *Fragment,* as a practical consequence of his utilitarian-based anarchism, Bentham did not identify a moral duty to obey the law as a central feature of political society. The expediency of obeying did not imply a duty to obey the law.[41]

The final context in which the juncture of resistance was mentioned addressed its precise content. To recapitulate, the utilitarian judgement concerned a communal calculation with regard to the possible outcome of resistance. Additionally, the juncture would be arrived at when an individual measure was so pernicious as to tip the balance of utilities in favour of resistance.

It has been argued above that the transgression of conventions already established, whether expressed in writing or not, would only be a prima facie ground for disobedience. In a revealing passage Bentham went on to add a consequential ingredient to the communal judgement:

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[40] Legal positivism has been defended on the sound grounds that the identification of the "authentic" with the "valid" would actually facilitate disobedience of any kind without risking the degeneration of society into chaos. However, the version of legal positivism which identifies legal validity entirely by a test of authenticity can not fully account for constitutional limits, or for the popular determination and effectuation of constitutional limits which signify limits to legal validity. Such disobedience can take place, as will be seen, without demolishing the whole basis of the political society in question; see also chapter 2, pp. 68-81 above.

[41] Bentham discussed the basis of political obligation in *SAM*, pp. 126-7, editorial note 2. Bentham condoned the idea of a "contract", but, and this is a crucial qualification, the contract had to be understood as socially dynamic, the terms of which might, *by mutual consent of both parties*, be changed *at any time*. This approach would answer many of the objections to "one-off consent" theories as the basis for political obligation: see Horton, *Political Obligation*, pp. 38-9.

> The footing on which [the principle of utility] rests every dispute, is that of matter of fact; that is, future fact - the probability of certain future contingencies. Were the **debate** then conducted under the auspices of this principle, one of two things would happen: either men would come to an **agreement** concerning that probability, or they would see at length, **after due discussion** of the **real** grounds of the dispute, that no agreement was to be hoped for. They would at any rate see clearly and explicitly, the point on which the *dis*agreement turned. The discontented party would then take their resolution to resist or to submit, upon just grounds, according as it should appear to them worth their while - according to what should appear to them, the importance of the matter in dispute - according to what would appear to them the probability or improbability of success - *according*, in short, *as the mischiefs of submission should appear to bear a less, or a greater ratio to the mischiefs of resistance.* But the door to **reconcilement** would be much more open, when they saw that it might be not a **mere affair of passion**, but a difference of judgment, and that, for any thing they could know to the contrary, a sincere one, that was the ground of quarrel.[42]

This passage is perhaps the clearest in showing that the whole idea of limitations to the exercise of authority would be a matter of communal consensus, arrived at after free inter-subjective communication. The aim was to achieve *some* "reconciliation" (consensus), and then to resist or accept the measure with one voice. Bentham's philosophical assumption was that *real* conflict between people would be quite rare. Often, due to various obstacles to communication, people would think in terms of conflict, even though no *real* conflict existed. False consciousness was therefore to be guarded against if people were to form a utilitarian consensus.[43]

Two possible outcomes of a free and uninterrupted exchange of views were related to the issue of resistance. One was that a consensus would be arrived at concerning the probable evils resulting from resistance. The other was resistance by a part of the community, analogous to what in contemporary terminology is termed civil disobedience, with regard to the social justification of the authority which promulgated the measure in question. The

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[42] *Fragment*, p. 491.

[43] In this respect, see chapter 6, pp. 275-6, note 69 below.

juncture of resistance at the heart of these two scenarios was of the same nature.[44]

What becomes apparent in studying these formulations of the junction of resistance is the social use made of the principle of utility. Bentham described the dynamics at the foundation of every political society. People would apply utilitarian considerations once there was a free exchange of views and information among themselves, and between themselves and the government. Bentham seemed to believe that despite the fact that the authority in question was entrusted with indefinite power (and to the extent of this power, its actions would tend to exclude independent reasoning on the part of the governed), there would be a sphere in which people would retain some degree of moral autonomy.

Bentham's account had real social significance, and as such was not plausible only as a theoretical premise. The extent to which a communal judgement could function effectively would depend on the degree of development of the social group in question.

Bentham did not attempt to specify any more detailed substantive content pertinent to the utilitarian calculation which would fit a given social group. It was not the occasion for him to do that, because the purpose of *Fragment* was only to discern the main universal features of political societies.[45]

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[44] By acknowledging both possible diversity and concurrence between people, Bentham avoided explaining political obligations, or the limits of such obligations, by means of the artificial doctrine of a social contract. He arguably showed sensitivity to the fact that the minds of people have different complexions, and he would reject an approach which aspired to deduce certain metaphysically based principles of justice without sensitivity to the social context that made them: see Horton, *Political Obligation*, pp. 47-8.

[45] It is arguable that, beyond stating the general parameters in evaluating the dilemma of obedience, the question of why people ought to obey is not reducible to a single answer. A single foundation for political obligation such as consent or gratitude would not be general enough to capture most social situations. Thus, a general substantive justification for political obligation would be too inflexible and so unhelpful: see T. Macpherson, *Political Obligation*, London, 1967, pp. 62-5, 84-5. The utilitarian dilemma, on the other hand, could utilise noun-substantives such as consent, promise, or gratitude, all of which would signify certain cultural sources of pain and pleasure; see further pp. 137-8, note 52 below.

A sketch will be given of the application of the juncture in a society in which communication in the public sphere is quite advanced. This sketch should not be treated as exhaustive and may not fit other stages of the development of a group.[46] Considerations of utility would be of such a nature that they would determine the extent to which *communal* benefit would be increased as a result of resistance. An assessment of the communal benefit of resisting would be arrived at *despite* individual agreements or disagreements.

Suppose a new coercive measure introduced by the centralised authority. This measure transgresses the expectations of a dominant group, causing them to experience the pain of disappointment. The transgression constitutes an apparent breach of constitutional limits. Once such an apparent breach has been identified, the process of communal judgement would be that which Bentham discussed in *Fragment.* From this moment onwards the measure would not be an authoritative measure (i.e. an expression of will that operated to exclude independent immediate reasoning), but would amount to a recommendation, or a proposal. Possible arrival at the juncture of resistance now depends upon two processes. The first consists in an evaluation of the measure, and thus involves a critical discussion, that is an attempt mutually to influence opinions, carried on among members of the community, and between the government and the community.[47] This discussion takes into account considerations of "original utility", that is assessments of potential consequences which concern the distributive choices suggested by the measure in question (considering the

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[46] Bentham did not, in *Fragment*, discuss the conditions for free communication. In a case where these conditions were hampered, the juncture of resistance would remain the same, but it would be inefficient in operation, and socially realisable only through violent revolution which would involve a total loss of security. In the absence of free communication, oppression would remain unchecked for a long period, not only in terms of the quality of centralised regulation, but also in terms of the degree of its exercise.

[47] The idea of influence will be extensively discussed in chapter 6, pp. 244-55 below.

measure in its own right), and those of "expectation utility" which would relate to consequences stemming from the effects of the measure on existing social relations.[48] The outcome of this process is a critical opinion as manifested in the internal persuasion of each person. The second process is a "formal" one; "formal" because it does not relate to the evaluation of the measure's substance. The question instead concerns an *estimation of the degree of consensus* which exists with regard to the goodness or badness of the measure in question.

The utilitarian calculation takes these two processes into account and weighs them against one another. The communal benefits and burdens of submission to the measure are seen in the global context of obedience - that is not in terms of the measure taken singly, but in terms of the social justification of the institution of law as a whole. Two elements therefore have to be weighed against each another: the burden of the measure as seen by the community on the one hand, and the degree to which a consensus has been formed, as seen by each member of the community, on the other. The latter element involves an assessment of the prospective damage to the law as an institution.

In this context, the distinction between civil disobedience and the type of disobedience currently under consideration should be stressed. Once the people encounter a co-ordination problem, and to the extent that they understand that in this concrete case they have such a problem, the only form of disobedience possible is civil disobedience in the Rawlsian sense, because the *communal* utilitarian consensus would not be in favour of resistance. Civil disobedience occurs when a group reaches the conclusion of its own utilitarian calculation, *despite the fact* that there has been as yet no co-ordination of moral beliefs in the community regarding the particular issue in question. As Rawls argues, the undertakers of such an action

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[48] See chapter 2, p. 62, note 74 above.

rely on a presumption of an abstract shared conception of justice in the community, the relevance of which to the concrete case in question might not yet have become apparent. Nevertheless, it is important to note that civil disobedience might still be carried out, despite the fact that there exists a general justification for authority. A smaller group would resist if, on their calculation of the balance of utilities, there was a case so to do, that is, if the issue was of fundamental importance for them.[49]

What is important to note again is that for the full realisation of all these social processes, their operation should not be obstructed by communicative obstacles. Social/communal actions, and consensus formation, will *naturally* occur once there exists an opportunity for free communication around a common theoretical standard of pain and pleasure, or, in this case, the mischiefs of submission and resistance. It is also important to notice the significance of the role which Bentham gave, at such an early stage of his career, to the people, and to the public sphere (or communal collective thought), in determining the extent of their political society *as such.* Bentham firmly believed that people could agree on constitutional matters. People were able form a consensus on the basis of the principle of utility, providing they were able to exchange views, and thus make an assessment of the probable consequences of coercive measures. They would be able to correct each other's past observations on similar questions: "Men, let them but once clearly understand one another, will not be long ere they agree."[50]

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[49] Rawls discusses situations in which, although all the conditions are ripe for civil disobedience, people ought not to resist. He contemplates such a situation where damage will occur to the institution of law itself because of, say, the simultaneous effectuation of civil disobedience by some other groups: see *A Theory of Justice*, pp. 373-6. It seems that Rawls in effect considers here the juncture of resistance of a given small group in deciding whether to obey or resist.

[50] *Fragment*, p. 292.

In a society where free communication was facilitated, this description of the juncture of resistance would account both for a situation in which a common agreement between the people emerged, and one in which an agreement was made between them to differ. As Bentham argued, even an agreement to differ would have some substance. People would discern the exact nature of the conflict between them. Even pluralism requires agreement that people are entitled to uphold different values (communication having had the effect that, to a greater or lesser extent, difference is not to be interpreted as causing "harm"). A consensus on pluralism could be entrenched and function as a constitutional limit.[51]

Bentham's understanding of the basis of political obligation has now been sketched, as has his understanding of the way in which power is limited through an application of the principle of utility by means of a communal judgement. Once the people have a focus of expectation, once there is some convention, this convention can operate as the basis for a successful communal critical utilitarian reflection. Thus, Bentham understood "sovereignty", and the limits of sovereignty, in popular terms. It was the people who would determine and effectuate constitutional limits. There was no plausible, socially dynamic way of understanding the limits of political authority, or constitutional limits, other than by connecting them directly to a popular utilitarian moral judgement.

There have been modern attempts to construct a formal duty to obey the law. This duty has been understood as binding, irrespective of the substantive values that a given community holds.[52] For instance, Gans' thesis is arguably a restatement of the Benthamic juncture of

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[51] See chapter 5, pp. 224-31 below.

[52] Various foundations for a moral duty to obey the law have been laid. These have included the idea of gratitude (as argued for in Plato's 'Crito': see *Plato - The Trial and Death of Socrates*, London, 1963, pp. 78-9), and the principle of reciprocal fairness (as developed in Hart's 'Are There any Natural Rights?', Philosophical Review 64 (1955) 175-91, at 185, and in Rawls' *Theory of Justice*, pp. 342-50). Another foundation for the duty

resistance, only involving a more complex terminology which is itself of dubious value. His formulation oscillates between what he calls the *limited obedience* thesis, and its logical complementary - the *near absolute obedience* thesis.

He explains the limited obedience thesis as involving the following considerations of expediency:

> On the one hand [the decision whether to obey or not] depends on the **intensity** of the **damage** to the functioning of the legal system by the disobedience, **modified** by the factor of the level of enforcement that the system supplies the political morality and the **probability** that such **damage** will occur.
> On the other hand, it depends on the **intensity** of the damage facing the value due to which the law is objectionable, modified by the **factor of this value's importance** and the probability that such damage will occur.

The *near absolute obedience thesis* means simply that in regard to matters where there is no ultimate value which mandates disobedience, disobedience can not be justified.[53]

This would mean that if there was no shared political morality in a given social group, there would exist a justification for the surrender of moral autonomy because the inherent

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to obey was the duty to support reasonably just institutions as a part of a general duty to justice, also argued for by Rawls (*A Theory of Justice*, p. 334). Soper based the duty on the notion of respect to the interest of people who would be hurt in the case of disobedience ('The Obligation to Obey the Law', in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy*, pp. 127-55, at 134, 150). Dworkin founded the duty to obey on what he called "communal obligations", a notion which related to his idea of integrity as a distinct political ideal, an ideal which was based on an interpretive process in which arguments about personified "communities" were constructed and justified (*Law's Empire*, pp. 196-9).

All these grounds are appropriate in certain social situations. However, none of them provides a plausible criterion which would be sufficiently general to capture all social situations. For example, when new circumstances produce change in the most general pattern of communal values it would be absurd to interpret a pre-existing communal obligation on the issue in question. Similarly, when a generally just system produces an unjust measure it would be absurd to invoke an abstract duty to justice. In short, all these grounds of obedience can fully function *as part* of a utilitarian calculation but arguably can not withstand the objection to the existence of a duty to obey derived from utilitarian-based anarchism. They may develop certain parameters for obedience to law, but they will never be able to provide an epistemologically sound global moral duty to obey the law.

[53] C. Gans, *Philosophical Anarchism and Political Disobedience*, Cambridge, 1992, p. 125.

value of the institution of law would be more important. If a political morality were shared, the protection of more concrete entitlements *might* outweigh the co-ordinative rationale for the binding force of law as an institution.[54]

Utilitarianism, which has been explored in the reading of *Fragment* presented here, is at the centre of the moral thinking of individuals in Gans's scheme. His argument has all the consequentialist properties, as well as the elements of indeterminacy, which are found in the formulation of the juncture of resistance in its various contexts in *Fragment.* No formal construction of the considerations of obedience, some of which would transcend any particular group's (or generally, any cultural) view of justice and morality can sensibly pre-determine the outcome of the utilitarian calculation. Gans, in formulating the duty to obey, needs to address the epistemological objections to the *existence* of *a utilitarian duty* to obey the law. It would seem that his claim is not only entirely compatible with utilitarian-based anarchism, but must be overshadowed by it. Gans seems to be a utilitarian, and as such he ought not to accept a moral duty to obey the law.

IV

The argument in this section concerns the censorial aspect in which the "ought" enters Bentham's thought.[55] Although this function of the "ought" will be discussed in the next chapter, it is appropriate in the context of this reading of *Fragment* to introduce it in order to argue that already, in this diverse and essentially incomplete essay, Bentham went much further than engaging in a mere polemical dispute with Blackstone. He made a number of incursions into constitutional theory, an area that he developed much more fully in his later

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[54] Gans, *Philosophical Anarchism and Political Disobedience*, p. 127.

[55] See the discussion of the "ought" in Bentham's thought at chapter 1, pp. 13-20 above.

thought.[56]

As early as *Fragment*, Bentham developed a connection between the operation of the juncture of resistance (which was a communal utilitarian judgement), the idea of a free government, and a democracy. Further, if, as has been argued, the underlying philosophy of the arguments in *Fragment* can be characterised as *utilitarian-based anarchism*, the account provided there must be compatible with an anarchistic community, or a community based on communal individualism.[57] This would imply that the concept of a free government, and perhaps of democracy, was wider than that of representative democracy, which would still rely, at its heart, on the existence of centralised institutions. An individualistic community was, of course, not something that Bentham overtly discussed in *Fragment*.

Bentham's mature constitutional writings centred on the workings of a representative democracy. However, to indulge in some Benthamic constructivism, it could be argued that Bentham viewed representative democracy as a necessary stage of social and political development, a stage which, in his lifetime, no political society, with the possible exception of the United States, had reached. In so far as Bentham, observing social development from a particular historical vantage point, was sensitive to the dynamic nature of social interaction, it is not inconceivable that, in his view, the accumulated communal experience of a mature, stable democracy, might lead to the development of a communal consensus and, in turn, to the disintegration of formal, centrally coercive, state institutions.

Bentham argued that the criterion on which a public utilitarian judgement would be based could only meaningfully be described at a highly abstract level. This criterion would *be* the same, he argued, in a despotic and in a free government. Assuming then that the criterion

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[56] See chapter 1, p. 8, and note 12 therein above.

[57] See p. 119, note 19 above.

for constitutional limits was the same, what, queried Bentham, constituted the difference between a despotic and a free government? In order to answer this question, he suspended discussion of the universal features of political society, and moved from a universal sense of the "ought" to a censorial normative type of "ought" - from a descriptive to a prescriptive sense.

The next passage is of crucial importance, and is therefore quoted in full. Bentham maintained that the difference between free and despotic government depended on:

> the *manner* in which that whole mass of power, which, taken **together**, is supreme, is, in a free state, *distributed* among the several ranks of persons that are sharers in it: - on the *source* from whence their titles to it are successively derived: - on the frequent and easy *changes* of condition between gover*nors* and governe*d*; whereby the interests of the one class are more or less indistinguishably blended with those of the other: - on the *responsibility* of the governors; or the right which a subject has of having the reasons publicly assigned and canvassed of every act of power that is exerted over him: - on the *liberty of the press*; or the security with which every man, be he of the one class or the other, may make known his complaints and remonstrances to the whole community: - on the *liberty of public association;* or the security with which malcontents may **communicate their sentiments, concert their plans,** and **practise every mode of opposition short of actual revolt**, before the executive power can be legally justified in disturbing them.
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> True then, it may be, that owing to this last circumstance in particular, in a state thus circumstanced, the road to a revolution, **if a revolution be necessary**, is to appearance shorter; certainly more smooth and easy. More likelihood, certainly there is of its being such a revolution as shall be the work of a number; and in which, therefore, **the interest of the number are likely to be consulted. Grant then, that by reason of these facilitating circumstances, the juncture itself may arrive sooner, and upon less provocation, under what is called a *free* government, than under what is called an *absolute* one**: grant this; - yet till it *be* arrived, resistance is as much too soon under one of them as under the other.[58]

This passage is remarkable for, generally speaking, it discloses, albeit in an undeveloped way, Bentham's rationale for constitutional liberty. More particularly, this passage brings the following points to light: first, it shows that freedom did not depend on any a-priori bounds to power. The formal extent of a government's power was not the factor on which

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[58] *Fragment*, p. 485.

the freedom of the constitution depended. This claim, however, should be distinguished from the claim that sovereignty, or the power to make laws, was inherently socially limited. Bentham showed that the limitability of sovereignty was related to the idea of constitutional freedom. In order to establish a government which was free, yet also, of course, socially limited (as *all* governments were), Bentham distinguished between "infinite" and "definite" limitations to power.[59] This distinction mirrors what will be referred to in the next chapter as the "enabling rationale" for government.[60] Briefly, a distinction could be drawn between two ways of portraying limitations on power. On the one hand, such limitations could be portrayed as a-priori, expressed by "you can or cannot do this" (a definite limitation of power, which Bentham criticised). On the other hand, limitations could be portrayed as inherent *social* limitations on sovereignty. "Corrective" or "checking", a posteriori limitations on power could exist by virtue of which sovereign power would never be infinite (a limitation of power approved by Bentham). The latter category of limitations would amount to an implied statement to the power-holder, embodying the concept of a "trust": "do as you wish but you must know that the body of the people retains some moral autonomy to assess the global social necessity of your powers". This was the kind of check on sovereign power which Bentham recognised.

This category of limitations on power *emanated from its exercise* and constituted an *enabling* rationale for the exercise of coercive powers, as opposed to a *disabling* one. A disabling rationale would lead to decadence, stagnation, and the inefficient regulation of an everchanging social reality. The place of this passage, in the midst of Bentham's discussion of the utilitarian communal calculation, shows that he believed that freedom of

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[59] Ibid., p. 484.

[60] See chapter 5, pp. 177-9 below.

communication - communication which would in fact promote the efficacy of collective opinion and action - would lead to the most effective, a posteriori, limitations of powers. This point is significant, because it implies that the dichotomy usually drawn between an "unlimited" and a "legally limited" government is neither accurate nor exhaustive.

The second insight contained in this passage is that the degree of freedom would depend on the way in which the powers of government were divided and interacted with one another. This appears to be Bentham's earliest definition of constitutional liberty. Now much has been said about Bentham's idea of liberty.[61] Bentham has been interpreted as understanding the idea of liberty purely in terms of the "absence of coercion". On this understanding, "liberty" was a misleading idea in explaining the rationale of political coercive activity, such an activity being exactly the opposite from an "absence of coercion". For example, the protection of individuals by coercive measures was traditionally discussed under the heading of "civil liberty". Further, protection against bad government was traditionally discussed under the heading of "political liberty". Bentham preferred the term "security", which was for him the main noun-substantive to be used in relation to the justification of political power. He wrote about the idea of security in several forms, including security *of* property and *of* expectations (instead of "civil liberty") and security *against* misrule (instead of "political liberty").[62]

Despite his refusal to use the term liberty, there is in this passage what might be seen at first as an incoherent fusion of terms like "liberty" (liberty of the press, liberty of public association), and "free" (free government, free state) on the one hand, and "security"

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[61] Bentham's idea of liberty and security has been extensively discussed by F. Rosen, in his 'Thinking about Liberty', University College London, 1990, 'Bentham and Mill on Liberty and Justice', in G. Feaver and F. Rosen (ed.), *Lives, Liberty and the Public Good*, London, 1987, pp. 121-38, at 121-6, and *Bentham, Byron and Greece*, Oxford, 1992, pp. 33-38; see also Long, *Bentham on Liberty*.

[62] See chapter 6, pp. 292-4 below.

(security for the expression of complaint - used to explain the liberty of the press, security of communication - used to explain the liberty of public association) on the other.

The point here is that if the term liberty were to be paraphrased in this context, it would mean that a free government was "a government in which there existed some 'absence of coercion'". However, using "security" rather than "liberty" to characterise a free government would be much more consistent with Bentham's point of view. In terms of "security", such a free government, in which there was some "absence of coercion", would be regarded as "a government which would provide security for the people against misrule". In other words, people would have security against their being prevented from reflecting on how much security by rule (or law) they thought they needed. In this way, security and liberty, both of which are mentioned in the quoted passage, would signify the same state of affairs. Both would mean "an absence, or a guarantee of such an absence, of obstacles in the way of people's ability to determine the extent to which coercion should be exercised over them in the name of security by law". Where coercion was used, it would hamper the ability of the people to exchange their views, and collectively to act upon these views. The provision of free communication was thus an essential element of a free government.[63]

Thirdly, in this passage, Bentham argued that the freedom of the constitution would depend on the smooth formation of a communal judgement. Means for people to discuss their discontents and aspirations, and to engage in any form of opposition short of revolution, would have to be secured in a free government. Again, emphasis is placed in this passage on the absence of restraint on any communication which might lead to the formation of a utilitarian consensus, and successful collective action.

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[63] This thought may be the embryo of Bentham's more extensive discussions of the idea of a free government in his mature writings: see chapter 5, pp. 191-202 below.

Fourthly, this passage shows a close affinity in Bentham's mind between a free government and a democratic form of government. Bentham explicitly made the connection between a free government and democracy when he said that in a free government the interests of *the number* are likely to be consulted. Although he did not speak about sinister interests explicitly here,[64] the possible antagonism between the interest of rulers and that of ruled was clearly contemplated. Further, by speaking about the change of condition between governor and governed, and about the responsibility of the governors, and by highlighting the importance of the necessity of providing information for people in order to bring about accountability, Bentham demonstrated that he had in mind a clear connection between a free government and democracy.

A free government was certainly compatible with democracy. Democracy was certainly a desirable normative application of the popular element in sovereignty. Yet, it seems that Bentham was democratic in a wider sense than devising a democratic form of government. As a part of the universal description of political society, he saw that an inherently popular element in the exercise of sovereignty would exist in all political societies. Thus, the term "free government" was not only an evaluative but a relative term. "Freedom in government" could exist to some extent in a mixed monarchy. However, taking into account both the enormous participatory role assigned to the people, and Bentham's characterisation of a free government, the degree of freedom available under a government which was undemocratic would be very small indeed. In short, although the popular, and hence democratic element of sovereignty was a necessary part of the description of what might exist in every government, a democracy appeared to be, logically, a *desirable* form of government.

The final point of interest in this passage concerns the difference in the operation of the

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[64] The term sinister interest is explained at chapter 5, p. 167 below.

juncture of resistance in despotic and free governments. Bentham argued that under a free government the juncture of resistance would be arrived at with ease, and that even minor provocations could precipitate it. The freer the government, the more easily would people be brought to consider the utilitarian dilemma regarding the ambit of authority in their society. Conversely, an actual revolution would, to all intents and purposes, be unnecessary in a free government.

This apparent inconsistency can be accounted for. Bentham distinguished between a "political" revolution and a "legal" one. Both types of revolution would operate according to the same juncture of resistance. However, there would be a difference between the two concerning the manner in which this juncture was effected. A political revolution undermined *all* fundamental constitutional rules which gave at least prima facie authority to the machinery of government.[65] It would involve a loss of all order, and with it, security. Such a state of affairs was extremely undesirable. A legal revolution, by contrast, would be just as fundamental, but would leave security untouched. A legal revolution would mean that at the core of *every* alteration to the constitution would be a utilitarian argument about what ought to be the extent of the power of government. Such a legal revolution was fundamental because it would involve a contest in which the extent and limits of authority, *including the form of government itself* (assuming that radical institutional change could be brought about at one stroke), was challenged under the existing form of government. For example, any establishment of constitutional limits which signified a transfer of authority from representative institutions to the community would be seen as a legal revolution. Under a

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[65] Bentham gave the following example of a situation which could lead to a political revolution. Where the government was so bad in its inception that it fundamentally and flagrantly opposed any adherence to the universal interest of the community, the people might join forces and get rid of "the nuisance": see *First Principles*, p. 128

legal revolution, any change would be carried by the framework of the old constitutional rule, which had established the old form of government. Further, the social justification of the authority of every *individual* measure of the government could be questioned in this fundamental, revolutionary way, without also destroying the social justification of the whole order. Thus, every political revolution would be a legal revolution, but not vice versa.

The relation of obedience to validity was given serious consideration by Bentham. An objection to the legal validity of legislative activity would consist of a social judgement, even if it related only to a single measure. It goes without saying that even the basic convention which prima facie governed the distribution of power in a free government would itself be susceptible to the same utilitarian test. Indeed, in this passage Bentham admitted that it was so susceptible. Yet, he would think it highly inexpedient and self-defeating, on most occasions, to oppose the constitution of a free government, whatever it might be.

Leaving this basic law aside, the execution of any legal, as opposed to political, revolution would be made not only possible, but easier in a free government. The application of any utilitarian consensus which had been formed, and which would determine constitutional limits, would be better facilitated in a free government. In a free government, the dilemma regarding whether to resist could arise very easily, although the actuality of resistance, that is the development of circumstances so bad as to provoke actual resistance, would be a highly remote possibility. Reconciliation both among the people and between the people and government could lead to the production of self-limitations on the part of the government. Such reconciliation would be the hallmark of a free government. Resistance would be less frequent in a free government, but could be arrived at very easily should the agents of the government suddenly produce a very pernicious law. In a free government, the threat of resistance would be maximized although the prospect of its actual realisation would be

remote. The government would be more likely to listen to the public, or other institutions which interacted with it, and pursue reconciliation.[66]

The distinction between a legal and a political revolution would be highlighted in a free government, while in an absolute government, because resistance would take so long, and require so much provocation, any legal revolution would be likely to coincide with a political one.[67] In an absolute government any revolution would entail a loss of security and, therefore, the utilitarian consensus, *even when the people had a sense of their true interests*, would usually incline towards passive obedience.[68] This would be the case until the situation became so unbearable that, under the influence of opinion within the community, and possibly from other political societies, a collective act of resistance would be violently effectuated.

V

In this section the implication of the interpretation presented above of the duty to obey is discussed in relation to the debate about how the principle of utility would be used both by a central regulative mechanism and by those subject to its regulations.

In the preface to *Fragment* Bentham said: "Under a government of Laws, what is the motto

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[66] The imposition and then withdrawal of the "Poll Tax" may serve as a good example of such a process of reconciliation.

[67] There does not appear to be a great deal of textual evidence to support this claim. However, in Bowring, ix. 38, Bentham seemed to imply that under a representative democracy, although there might be some violence and disagreement, tranquillity and security would be promptly restored.

[68] See chapter 6, pp. 275-6, note 69, and pp. 282-3 (especially note 82) below.

of a good citizen? *To obey punctually; to censure freely.*"[69]

In the light of the analysis of the nature of the duty "to obey the law", or lack of such a duty, and the popular nature of constitutional disobedience, there appears to remain a puzzle. The puzzle concerns the manner in which, thanks to this short motto, it seems that Bentham viewed disobedience as disagreeable. A good citizen would obey all the time. He must first obey, *whatever he thinks, and whatever he thinks others would think in relation to him,* even if the matter concerns the social justification of coercion (a justification which may relate to any given coercive measure). Disobedience seems something distinct from merely criticising the government. There appears then no possibility that at some point such disobedience could emanate from fundamental criticism of a government which produced a pernicious coercive measure.

What then was the point of Bentham's elaborating at length in *Fragment* about the irresolute ultimate theoretical basis for political obligation, while on the other hand advising citizens to obey punctually? What would be the point of conducting a sophisticated discussion of the irreducible moral autonomy of the people in deciding whether to obey or not, and then summarily dismissing such moral autonomy with a simple motto? It is argued above that the disobedience discussed in *Fragment* differed from mere censuring. Surely, where the conditions for collective resistance existed, *no* obedience would follow, and the existence of such conditions would be, as Bentham argued, facilitated in a free government.

An immediate response might be that Bentham was simply inconsistent on this point. It is a remote possibility, however, that a systematic thinker of Bentham's stature would commit

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[69] *Fragment*, p. 399. It is interesting that Kant wrote something similar in 'What is Enlightenment', in *Foundations of the Metaphysics of Morals*, London, 1990, p. 89: "But only he who, himself enlightened, is not afraid of shadows, and who has a numerous and well-disciplined army to assure public peace, can say: 'Argue as much as you will, and about what you will, only obey!'".

such an obvious error within the framework of such a relatively short work, even allowing for the fact that *Fragment* contained several underdeveloped arguments.[70]

A simple solution would be to read Bentham literally, and to say that he confined his motto of a good citizen to a situation "under the government of laws". This would imply that there *would be* many situations in which the citizen should firstly obey, and then censure. These would comprise situations in which the government did something worthy of criticism, but within the bounds of socially acceptable coercive measures. However, under this interpretation the motto would not hold in a constitutional dispute, where the social justification for an authentic expression of will was contested. Literally read, the motto would not hold in a situation where the government transgressed some convention *as well as* a communal moral view with regard to the consequences of such a transgression.[71] In short, this literal interpretation is inadequate in debating the status of laws qua laws, that is in debating the limits of sovereignty.

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[70] Long, referring to Bentham's passage on free government quoted above, claims that a free government would be characterised by a "perfect balance between punctual obedience and free censure": *Bentham on Liberty*, pp. 94-5. It is difficult to make sense of Long's argument. Punctual obedience and free censorship can exist perfectly together. Long puts it as if there needs to be a balance between them. But if punctual obedience were *balanced* against free censorship, it would no longer be punctual. The real dilemma is how to reconcile this motto with cases in which punctual obedience was undesirable.

[71] There is also the question of how the motto can be squared with utilitarianism, and with Bentham's epistemology. A utilitarian direction to obey punctually would be a contradiction. Hare tries to give an account of such a utilitarian obligation. He argues that there is a utilitarian general duty to obey the law. It would be useful, he maintains, to have such an "unbreakable" general principle. This general principle would derive from each person's thinking in terms of all other persons affected by his action, and not solely in terms of his own benefit: see R.M. Hare, 'Political obligation', in T. Holderich (ed.), *Social Ends and Political Means*, London, 1976, pp. 1-12. Hare's view can be criticised on the ground that he falls into the trap of recognising utilitarian entitlements which, by the supposition, can not be utilitarian. In consequence, he fails to conceive a social situation in which people could question, and if necessary reject, on utilitarian grounds, the necessity of the law as an institution.

However, the attempt to provide an adequate explanation goes to the very heart of the operation of the principle of utility as a moral principle. The operation of the principle has been the subject of a subtle debate in Bentham scholarship.[72]

Kelly describes two extreme ways in which the operation of the principle of utility may be explained. The first is direct utilitarianism, in which an "individual ought to do what in each case results in the greatest happiness". The second is indirect utilitarianism, which holds that, although the principle remains the standard for judging right and wrong, "These judgements (of utility) are not the direct source of obligation, or authoritative reasons for action."[73] I shall call these two extreme characterisations of the operation of the principle of utility "pure characterisations".

The most recent interpretation of Bentham's theory as direct utilitarianism was offered by Postema. Postema analyzes the operation of the principle of utility in the context of Bentham's theory of legislation and law. He shows that Bentham did not argue for an extreme act utilitarian theory, whereby everybody would be left to make their own calculation regarding the maximization of social well-being. One of the most important components of social well-being was, for Bentham, security of expectations, and this security could not be provided for under a doctrine of extreme act-utilitarianism.[74]

The task of law, Postema argues, was to provide a regulative mechanism which co-ordinated moral beliefs, and hence provide security both for expectations and against bad government. Through law, a sphere was determined within which individuals could conduct

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[72] See especially, Postema, *Bentham and The Common Law Tradition*, and Kelly, *Utilitarianism and Distributive Justice*.

[73] P.J. Kelly, *Utilitarianism and Distributive Justice*, p. 60.

[74] Postema, *Bentham and The Common Law Tradition*, pp. 160-1.

their plans of life.[75]

Postema argues that the basis of political obligation was indeterminate, *despite the necessity for co-ordination*. Obligations did not operate wholly as exclusionary authoritative reasons for action, but would always be conditional upon an application of the principle of utility. This indeterminacy was the corollary of Bentham's attempt to combine security and flexibility, and was a considerable improvement on the stagnant Humean notion of political obligation.[76]

Accepting many of Postema's arguments, Kelly claims that the principle of utility did not specify individuals' obligations. He goes on to argue that had the principle done so, it would have undermined the instruction to "obey punctually" in the motto of a good citizen, as it appeared in *Fragment*. Had the principle been the direct source of obligation, notes Kelly, surely there were conceivable circumstances in which obedience would not be warranted.[77]

Further, direct-act utilitarianism could result in the impossibility of central regulation to protect some very basic rights, such as the right to life.[78] In this context, Kelly refers to Rawls' criticism that in such a pure, direct utilitarian theory a convergence is presumed between what is "good" and what is "right", with the assumption that individual entitlements

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[75] Ibid., pp. 164, 174-5.

[76] Ibid., pp. 323-4. Elsewhere Postema discusses Bentham's insight into the public character of law. Law, for Bentham, created a sphere in which individuals could exchange/communicate views for the purpose of evaluating the law: see 'Bentham on the Public Character of Law', Utilitas 1 (1989) 41-61, at 46. The central question which the judge asked was, "What rule can I expect, through my decision and my reasoning for it, to attract recognition by my colleagues and the people in general?" Any authentic "legal" proposition could serve as a co-ordinating measure which would enable individuals to focus on it and hence ask themselves the above question. Law, in short, would enable collective action: ibid., pp. 46-8.

[77] Kelly, *Utilitarianism and Distributive Justice*, p. 50.

[78] Ibid., pp. 60-1.

will give way to utilitarian calculation when these calculations are proved to promote greater good.

Kelly agrees with Postema on the need for co-ordination. However, because he interprets Postema as also viewing the principle of utility as the "ultimate decision principle", Kelly disagrees with what he takes to be Postema's more moderate version of an unacceptable direct utilitarianism. Kelly criticises what seems to him to be internal inconsistencies in Postema's account. The inconsistencies are revealed by comparing Postema's recognition of the need for co-ordinative measures on the one hand, with his questioning of their unequivocal obligatory status by portraying them as subject to utility on the other. Kelly concludes that Postema can not account for the obligatory status of co-ordinative measures, while simultaneously repudiating their obligatory status by allowing the individual agent to be guided in his conduct by direct utilitarian calculation.

However, Kelly also objects to the pure characterisation of an indirect theory of obligation. He criticises Hart's pure indirect model. According to Hart's argument, Bentham would distinguish between an unacceptable conception of the principle of utility as a direct source of moral guidance for individual conduct, and an acceptable conception of it as a standard for the critical evaluation of such conduct. In addition, Kelly relies on Hart's interpretation of Bentham's epistemology, which has already been referred to at the beginning this chapter. Hart's claim was that an obligation could not emanate directly from a moral principle. The understanding of an obligation was conditional upon the medium of a proposition which signified an expression of will backed by a sanction.[79] Hart could not, Kelly argues, be entirely right in his formulation of a purely indirect explanation of the operation of the principle because Bentham recognised circumstances in which individuals ought to guide their

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[79] Ibid., pp. 66-7, referring to Hart's introduction to *IPML*, p. xlviii.

conduct in a manner which would be beneficial to the whole community.[80]

Kelly then proceeds to offer his own, subtle conception of the operation of the principle of utility.[81] Kelly's explanation runs as follows: because Bentham had a sanction theory of duties, that is to say, because the principle of utility could not constitute the direct source of an obligation, one should differentiate between two "ought" statements. One sense of "ought" derived from a prescriptive proposition, and hence would only be directly influenced by consideration of the pleasures and pains provided for by sanctions. Another sense derived directly from the principle of utility, and would amount to a general moral "ought" - an attitude of self-reflection that one ought to behave in a communally beneficial way. Kelly terms the latter a "weak", non- conclusive ought, which could function alongside the former "strong" and "conclusive" ought, or obligation.

For Kelly, Bentham's moral theory functions as a hybrid theory, employing the principle of utility both directly and indirectly. Indirectly, utility was promoted by adherence to co-ordinative measures, but what turned these measures into conclusive obligations was that they were backed by sanctions. The direct pursuit of utility could never become obligatory in this sense, but remained a general critical attitude, which would be arrived at by self-reflection that one ought to behave in a way which would promote the maximum happiness of one's community. So, differing from Postema, Kelly argues that obligations become conclusive only when they exclude moral autonomy by means of some sanction. The non-conclusive moral attitude would be the foundation from which people *commented on*, or censured, the co-ordinative measure. However, this critical attitude, and the degree of moral autonomy implied by it, would exist alongside unquestionable obedience to law, however bad a

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[80] Ibid., p. 67.

[81] Kelly, *Utilitarianism and Distributive Justice*, pp. 67-9.

particular law might be. In this way, Kelly explains the motto of a good citizen in the preface to *Fragment*.[82]

Both Kelly's and Postema's interpretations are subtle and illuminating. However, it will be argued that both interpretations contain incoherences, the resolution of which would diminish the differences between them. I will first give my account of the function of the principle of utility, and then argue that the distinction between the views of Hart and Postema which Kelly discerns does not, in fact, exist. Further, I will argue that Kelly fails to provide an account which differs significantly from either that of Hart or Postema.

A functional distinction which has been identified in the current reading of *Fragment* relates to sovereignty as a "split" concept.[83] On the basis of the earlier analysis of the concept of sovereignty, it is now possible to discuss "obedience to a prescriptive proposition", which may be termed the *straightforward* or *immediate* level of obligation. This is to be distinguished from " an obligation to have an obligation" to which obedience is related, which is more global in nature, and which may be termed the *categorical* or *constitutional* level of obligation. This is the level at which, according to my interpretation, *Fragment* was written. This level may be regarded as a global, self-referential, level of "an obligation to have an obligation", because the utilitarian considerations involved at this level require an exercise of moral autonomy relating to the limits of the social justification of authority. The principle of utility might be appealed to not only in criticising the content of a prescriptive communication, but also in questioning the very status of this communication as

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[82] Ibid., p. 69.

[83] See chapter 2, pp. 43-55 above.

"prescriptive".[84]

At the constitutional sphere of operation, as has been argued, any obligation to recognise an obligation would operate on a prima facie basis, and would be rebuttable by a direct application of the principle of utility. There would be a point where criticism was so strong as to throw in doubt the existence of the obligation in the first place. An obligation would function as an exclusionary reason only in the immediate moral sphere, in which the obligation would not be questioned as such. But at the categorical level, the existence of an obligation at the immediate level would be no more than *a fact* whose desirability would be subject to higher, or second-order, utilitarian reasoning. In short, all obligations would operate as exclusionary reasons at the immediate level. However, obligation at this level would be in some sense dependent upon a more global utilitarian context, which would condition their status as obligations. The exclusionary status of rules would therefore exist only up to a point, either at the immediate level where they might be censored *despite* being obeyed, or at the constitutional, categorical level where they might be censored in terms of

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[84] If one accepts the existence of different levels of reasoning, or utilitarian calculation, one must emphatically reject the distinction between what is commonly referred to as "act" and "rule" utilitarianism. A general criticism against this distinction is that rule utilitarianism either collapses into act utilitarianism, in circumstances in which the violation of a rule would be more beneficial, or that it ceases to be distinctively utilitarian if obedience to rules is required in circumstances where the result is not beneficial: see D. Lyons, *Forms and Limits of Utilitarianism*, Oxford, 1965, pp. 143-60, and N. Simmonds, *Contemporary Issues in Jurisprudence,* London, 1987, pp. 35-6. This criticism is most evident at the constitutional level, where the utilitarian merit of rules qua obligatory prescriptions is questioned.

The criticism would also present a similar difficulty for Kelly's direct/indirect account of the operation of the principle of utility, under which the principle of utility allegedly does not require the direct actual maximisation of well-being by rulers. Kelly's argument can not resolve the utilitarian dilemma with regard to the global justification of rules made by the utilitarian legislature qua rules. It is not plausible to discuss solely an indirect approach, confining a direct approach only to the process of "improvement" of rules. This dilemma, and with it, the difficulty for Kelly's account become very acute in regard to constitutional problems, for which see chapter 5, pp. 224-31 below.

their presumed obligatory status.[85] Such "non-recognition", or categorical censorship, would involve the *non-recognition* of rules as rules. Constitutional reflection would result in a judgement of "non-recognition". The transition to this categorical level of self-reflection would be similar to a situation where a man understands in his dream that he dreams and then he wakes up because he reflects upon his experience *as* a dream.[86]

It would be absurd to suggest, on this reading of *Fragment*, that Bentham wished people to obey regardless of the consensus they came to regarding the limits to authority. The general task of co-ordination would not be impaired if people refused to recognise the authoritative status of an individual measure. Kelly's interpretation implies a notion of passive obedience, which, as will be argued in the next chapter, Bentham condemned in his later constitutional theory.

What are the implications of this analysis for the debate under consideration? It seems that the dichotomy Kelly introduces between Hart's view and Postema's is more apparent than real. The principle of utility can not, *on epistemological grounds,* serve as a direct source of obligation. This would not preclude its direct application by subjects to justify disobedience at the categorical level, a level at which doubt might be cast on the status of an obligation *as such*. Postema would probably concede the epistemic point. He would not argue that the principle of utility could serve as a direct source of obligation. Rather, he would argue that the principle of utility could function at two levels of abstraction, as

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[85] The categorical level is recognised in Flathman, *Political Obligation*, pp. 107-8. Flathman finds it impossible to reconcile "must be performed" and "free not to do". However, distinguishing between levels of reasoning goes some way towards resolving this problem.

[86] The social process which leads to the transition from the immediate to the categorical levels of the operation of the principle of utility is discussed at chapter 6, pp. 250-55 below.

suggested by his pathbreaking interpretation of Bentham's theory of sovereignty.[87] He could argue that there would always be some sphere which would allow for a residuary moral autonomy, in which moral obligations could be formed. These obligations would have prima facie status. This status could be ascribed to any sort of obligation, be it a legal obligation (a prescriptive proposition contained in a code of laws), or a moral obligation (a convergence of inferences of prescriptive propositions as a result of communication between people and observation of social practices). Certain further communal beliefs could be formed which, as has been argued, would bear reference to these prima facie obligations.

It is my argument that the adjective "direct" should not be taken to mean that the principle of utility would coincide with the *existence* of an obligation. It would mean that there would always be spheres of moral autonomy which might generate a prescriptive proposition which would, and ought to, override an existing one. To the extent that an obligation operated to exclude subjective reasoning, people would obey, and would use the more general sphere of autonomy to censor the immediate one. But in any case of disobedience, either at the immediate level (individual or civil disobedience), or at the categorical level (constitutional collective disobedience), the obligation which overrode the existing one would stem simply from the formation of a prescriptive proposition arising from a source other than the institution in question. This source could be an individual, a group, or the community.

Postema's vagueness is accounted for by his statement that the advantage of Bentham's theory was the manner in which obligations were not understood automatically as exclusionary reasons for actions. With regard to this point, Postema's account is unable to determine whether an obligation operated to exclude subjective reasoning or not. Postema could be interpreted as recognising the principle of utility as a direct source of obligation, but

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[87] See chapter 2, p. 37 above.

this would be incorrect. He simply recognises that the principle of utility might have implications for actual behaviour, *despite the existence of legal obligations*, and that as such it might retain its status as an ultimate decision-making principle. Postema does not provide an analysis of the way in which the two levels at which the principle operates relate to each other. For him, it is only when individual calculation indicates that disobedience would result in the maximization of social well-being that the political obligation is not seen to be binding.

Postema goes astray when he claims, equivocally, that legal rules merely add new reasons for the subject to follow the rules.[88] There need not be new reasons. Instead, two levels of reasoning are involved, one at which the legal or political sanction, punishment, enters as part of the utilitarian calculation, and a second, moral, categorical, level, at which inter-subjective social communication leads to more global utilitarian reasoning. It is important to note that even at the immediate level, "disobedience" also requires a utilitarian calculation which leads to the formation of a prescriptive proposition different from the one prescribed by the institution in question.

Kelly claims that Postema overstates his case, in that he allows individual utilitarian calculations to override institutional co-ordinating obligations. However, Postema can not be criticised for overstatement here, because the justification of any obligation could be evaluated by the direct application of utility at all levels of argumentation. Disobedience which followed criticisms in the categorical sphere would be totally compatible with the co-ordinative nature of the social enterprise. The existence of an institutional co-ordinating measure would not *annul* the possible application of the principle utility by citizens, in order to form a different prescriptive proposition, again at the level of the individual, group or community. Again, the fact that a direct application of the utility principle does not make

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[88] Postema, *Bentham and The Common Law Tradition*, p. 324.

that principle the *creator* of an obligation, but only an evaluative principle which gives rise to an alternative prescriptive proposition, should not be overlooked.

To address Kelly's own hybrid argument: it is very difficult to understand the exact nature of the *ought* which Kelly describes as resulting from the obligatory-inconclusive, direct operation of the principle of utility. It may mean that the principle ought to be used as a critical standard in censoring a prescriptive proposition, that is an act of the understanding corresponding to the statement "this obligation is bad" or "this obligation is good". Alternatively, it may mean that the principle ought to be used directly in order to create an alternative prescriptive proposition, that is an act of the understanding corresponding to the statement: "this new obligation increases the happiness of the community", or "this new obligation reduces the happiness of the community". It is not clear that Kelly succeeds in establishing a non-conclusive normative medium, which is not the equivalent of one or other of these two alternatives. If an allegedly inconclusive normative statement like "one ought to promote the greatest happiness of the community" represents a requirement for the possession of a critical attitude, then its inconclusiveness amounts to no more than saying that the attitude of censorship ought to exist although this attitude has not yet crystallised into an obligation. The inconclusiveness in such a case would merely emphasise that to censor and to be obligated are not the same thing. The difference between the banal statement "the principle of utility is the standard of right and wrong" (the fact that utility is a critical standard), and the statement of the non-conclusive ought, namely that "one ought to promote the greatest happiness of the community", would be negligible indeed. Likewise, the difference between the statement "this new obligation is better" and the *obligatory* statement that "I ought to act in a manner which promotes social well-being" would also be negligible. A global obligation to promote utility is not a significant addition to the uses already made

of the principle of utility.

If such is the case, and assuming Kelly has failed to create a third normative medium, it does not appear that his position differs significantly from that of either Hart or Postema, whose interpretations of Bentham, it has been claimed, are not the opposed "pure characterisations" which Kelly portrays them to be. Both Hart and Postema argue that a propositional medium backed by a sanction must occupy the space between a moral principle and the existence of an obligation. This propositional medium might be supplied by a convention or a written rule in a code, and could appear at various levels of abstraction. This is an *explanation* of an obligation. However, the sphere of *justification* always includes utility, and does not amount merely to the existence of the proposition in question. All Bentham insisted on was that the distinction between the explanation of the existence of an obligation and its justification be maintained.

Why should it be assumed that where institutional direction was absent there would be no obligation in the fullest sense of the word? After all, a convention (a prescriptive proposition which is backed up by the moral sanction) could give rise to a popularly conceived obligation. Kelly argues:

> Bentham provides for the possibility of moral obligations within his theory, by relying on the moral sanction as a means of giving effect to these obligations. However, there is no necessary connection between the requirement of the moral sanction and the requirement of utility unless the conventional morality is also an explicitly utilitarian morality, whereby the moral and social pressures which create moral obligations are informed by the principle of utility.[89]

It can be argued that there was some functional connection in Bentham's thought between the quality of communication which gave rise to public opinion and what was right. However, Kelly is correct to stress the divergence between conventional and utilitarian morality. It

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[89] Kelly, *Utilitarianism and Distributive Justice*, p. 66.

would only be in a democratic government, where free communication was established, that what was considered popular would start to converge with what was right. From a participant in the practice's point of view, conventional morality *would be* prima facie the requirement of utility. However, Kelly's argument in this respect is *entirely* compatible with the existence of a constitutional sphere in which moral obligations which determined constitutional limits would operate.

In sum, Kelly fails to distinguish between the operation of the principle of utility at the immediate level and at the constitutional level, and hence fails to provide for the direct application of the principle in the development of an obligation which may justify constitutional disobedience. The operation of the constitutional level means that a prescriptive proposition, and hence an obligation, would be inferred without any reference to an intermediate institutional agency, such as a parliament or court. Its source would be communication within the public sphere.

Also, on Kelly's interpretation of the motto of a good citizen, the idea of constitutional limits, or limited sovereignty, is difficult to explain. Kelly discusses the operation of the principle of utility as if there already existed a legislature's constraining act in this or that way. In other words, he assumes the necessity of the existence of some "law". He explains neither the nature, nor the limitations, of the foundation of this law. As it stands, Kelly's argument fails to make sense of Bentham's legal writings.

The utility which stems from co-ordination would always, under Kelly's interpretation, justify obedience. This is plainly incorrect, because in the name of co-ordination any communal opinion might be suppressed without provoking disobedience. So, although Kelly's argument is subtle in that it offers an interpretation in which Bentham's moral theory operates in a hybrid (direct/indirect) way, his interpretation of Bentham's constitutional theory

is socially dynamic only in respect of constitutional and legal *improvement*. As far as constitutional *limits* being determined and effectuated by the community are concerned, however, Kelly's account is disappointingly static. Under the interpretation suggested here the motto of a good citizen, in fact, only has a prima facie status and is only applicable to the immediate level of utilitarian reasoning. This is the central point of the argument in *Fragment*.

This direct/indirect hybrid interpretation leads Kelly to what is arguably a serious misinterpretation of Bentham's argument. He writes:

> the individual agent is required to act in accordance with rights and duties because of the imposition of sanctions, *irrespective of his judgement of the utility of such obedience*.[90]

This creates a general difficulty for fully accommodating Bentham as a liberal. If Kelly is correct, Bentham might as well have torn up *Fragment*. Kelly's interpretation sees Bentham as intent on providing individuals with security, and ready to invade their constitutional moral autonomy to the maximal extent possible in the name of security.[91] This is because the only moral autonomy which Kelly allows individuals is at the immediate level, in areas where there is no institutional or regulative, bureaucratic intervention. There is no further sphere where individuals can question the very necessity for an obligation to be imposed on them.

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[90] Ibid., p. 69.

[91] Criticisms of Kelly's largely indirect approach will continue on a more general level in chapter 5, pp. 224-31 below, where the importance of the argument advanced in this thesis is discussed in relation to Rawls.

CHAPTER 5 - THE ROLE OF THE PEOPLE IN DETERMINING CONSTITUTIONAL LIMITS II - MATURE CONSTITUTIONAL THEORY

> This then in a word is the perfection of government: that all rulers should be subjects: rulers only to certain purposes, subjects to all others: in that case subjects can not suffer but they must suffer with them. But if there are any rulers who are not on any occasion subjects, then all suffering is on the side of subjects, no suffering, in so far as it is in their power to prevent it, on the side of rulers.
>
> *First Principles*, p. 136.

> All power depends upon opinion. Any kind of limitation is as capable of being set to it as any other. All that is requisite is that the limitation be intelligible.
>
> *On The Efficient Cause and Measure of Constitutional Liberty*, UC cxxvi. 10.

> What good effect is it that the contrivers could have had in view? Giving stability to the constitution? - vain pretence. On what depends the stability of the constitution? Upon a form of words? Upon the acquiescence of the nation under a pretension equally pernicious, groundless, presumptuous and absurd? Upon the surrender of all feeling on the part of the people and of all claim to common sense on the part of their pretended rulers? No: but upon the approbation of the people continually bestowed upon the constitution, upon the general sense and spirit of it.
>
> *Necessity of Omnipotent Legislature, UC cxlvi*. 29.

I

This chapter continues the examination of the role of the people in Bentham's legal and constitutional theory. It discusses constitutional limits in Bentham's mature constitutional writings, and shows that Bentham's legal and political enterprise provided for a constitutionally limited government. It argues that Bentham's mature constitutional writings are consistent with his earlier legal and political ones in their analysis of constitutional limits.

Bentham scholarship has tended to take a limited, partial view of his endeavours, entertaining the view that there were two "Benthams".[1] Arguably, however, there was, from a theoretical point of view, only one "Bentham". On this view, Bentham merely changed the perspective from which he considered the same problem, namely the construction of social arrangements capable of achieving the greatest happiness of the greatest number in the group concerned. There is no theoretical point in making a conceptual distinction between "*legal* sovereignty" - that is the nature of, and limitations on, the power to make law - and "political sovereignty" - that is the power of the people in a representative democracy to "locate" and "dislocate" officials.[2] Both these "types" of sovereignty, involving concepts in legal and constitutional theory respectively, converged within Bentham's theory of legislation, and within his analysis of an individual law, especially a constitutional law. It is the argument of this thesis that Bentham showed remarkable consistency in his utilitarian enterprise, and that scholarly divisions have led to the development of certain preconceptions which misrepresent his theory.

II

In this section, the least controversial points of Bentham's constitutional theory are sketched. There is no need to give an elaborate exposition of the subject because it has been

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[1] See chapter 1, pp. 8-10 above.

[2] Bentham used the terms "location" and "dislocation", and not "appointment" and "dismissal". He thought that the word appointment could be misleading in cases where the opposite would be "disappointment": see Rosen, *Jeremy Bentham and Representative Democracy*, pp. 76-8. On subordination as a central constitutional principle, see ibid., pp. 8-12.

thoroughly done on a number of occasions.[3]

The ultimate end of Bentham's constitutional theory was to establish and to maintain a good government, and to prevent the formation and persistence of a bad one. The goodness or badness of all the laws, civil and penal, including laws imposing constitutional limits, depended on the quality of the government. A bad government would have the propensity to institute a penal code which would tend to increase the wealth of rulers at the expense of the community.[4]

The intimate relationship between the quality of the constitution and the end of the laws appeared in Bentham's writings as early as *OLG*. There, Bentham devoted a chapter, albeit a short one, to the subject of "the end which a law might have in view". He argued that the intended, as opposed to the eventual or actual, end of a law was a matter of design. Adherence to the proper end of a law could be considered both in relation to a subordinate law-making body, or in relation to the sovereign itself. Further, Bentham already recognised that ensuring that the persons in power would adhere to the interest of the community was problematic. The badness or goodness of a law would depend on whether the conflict of interest which would inevitably exist in the rulers' minds, between their own and the community's benefit, could be resolved.[5] Maintaining the goodness of law was a task,

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[3] A detailed account of Bentham's constitutional code can be found in Rosen, *Jeremy Bentham and Representative Democracy*, chapters 2, 4, pp. 83-92, 93-101, 106-10; see also his *Bentham, Byron, and Greece*, pp. 40-92. For an exposition of some aspects of his theory, see P. Schofield, 'The Constitutional Code of Jeremy Bentham', King's College Law Journal, 2 (1991) 40-62, and 'Bentham on Public Opinion and the Press', in D. Kingsford-Smith and D. Oliver (ed.), *Economical with the Truth, the Law and the Media in Modern Society*, Oxford, 1990, pp. 95-108. See further, Harrison, *Bentham*, chapter 7, and Hume, *Bentham and Bureaucracy*, chapter 4.

[4] On the relationship between penal law and constitutional law, see chapter 7, pp. 302-6 below.

[5] *OLG*, p. 31; see also Bowring, ix. 2.

indeed the paramount task, that Bentham set for a form of government to achieve.

Bentham first had to define what it meant for a government to be "good". The proper end of government was the promotion of the "universal interest" - the interest of the greatest part of the community in question. The actual end of government was the promotion of the government's own interest, which would amount to the self-regarding interest of the rulers.[6]

The aim of a constitution was to make these two ends, the proper and the actual, coincide. This would be achieved by the means-prescribing, or junction-of-interest prescribing, principle.[7] If they did not coincide, and the actual end predominated over the proper one, the result would be a government which would promote its self-interest, at the expense of the universal interest. The interest of rulers *in such circumstances* was termed by Bentham a "sinister interest".[8] Misrule would result from the predominance of a sinister interest.[9] Instead of the idea of "constitutional rights", Bentham provided for constitutional "securities against misrule". These securities were designed to prevent the formation of sinister interests, and to ensure the promotion and perpetuation of the universal interest.

The subordinate ends through which the identification of the interests of rulers and subjects was to be achieved were firstly, the maximization of official aptitude, and secondly, the minimization of expense. The discussion of expense in this respect was an original

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[6] See *First Principles*, p. 232. Bentham saw self-preference as a predominant property of human nature. He conceived it as *necessary* for the survival of the species. The precise nature of the "universal interest" will be extensively discussed in the next chapter.

[7] Ibid., p. 235. For a further account of a "good" and a "bad" government, see ibid., p. 245.

[8] Ibid., p. 270.

[9] Ibid., p. 151. On the subject of "interest", see Rosen, *Jeremy Bentham and Representative Democracy*, pp. 29-33. The distinction between the "universal" interest and a "sinister" interest turned upon the number of persons, or the proportion of the community, to whom the interest belonged: see *First Principles*, pp. 235, 246-7.

contribution by Bentham to constitutional theory.[10] However, aptitude will be the main area of focus in this chapter, as Bentham's analysis of aptitude was directly connected to the way in which Bentham conceived constitutional limits.

In order to achieve security against misrule, that is security against the formation and persistence of a sinister interest, Bentham devised securities for the appropriate aptitude of officials. His most general assumption was that if morally apt and intelligent people were put in government and maintained these qualities during their time of office, a good government would be the result. Bentham believed that as long as officials possessed appropriate aptitude, they would not develop a sinister interest, and would administer a government which would adhere to the universal interest.[11]

Bentham divided aptitude into three branches. The first and the most important one was moral aptitude, which referred to the tendency, or the inclination, of the possessor of power to adhere to the universal interest. This would mean that as far as the official was concerned:

> the end to the accomplishment of which his endeavours are directed is the promotion of the universal interest, whatsoever may be the effect with regard to his own personal or any other particular interest.[12]

As has been argued, Bentham believed that the predominant motivation of each human being was self-interest - indeed this was the basis for his psychological theory. Bentham assumed that self-interest, or self-regarding interest, was predominant in human nature. This assumption would apply also to officials.[13] Bentham thought that the interest of officials

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[10] Rosen, *Jeremy Bentham and Representative Democracy*, pp. 93-7.

[11] For Bentham's summary of his understanding of aptitude, see *First Principles*, pp. 4-5, 151.

[12] *First Principles*, p. 16.

[13] Ibid., p. 13.

was bound to become sinister, unless they were prevented from pursuing their own interests except through their share in the universal interest. The only way moral aptitude could be maintained was to enforce a variety of sanctions which would make officials inclined to direct their self-regarding interest toward the service and maintenance of the universal interest. In short, the only way to identify the actual and the proper interests of officials was through the threat of sanctions. The coincidence of interests could only be achieved by making adherence to the universal interest *obligatory* for them.

However, in order for the sanctions to operate effectively, two general conditions would have to be fulfilled. First, the official's actions had to be made accountable. Second, institutional means for administering sanctions had to be created and made efficient. Only then would securities for appropriate moral aptitude be effective. These two conditions, and in turn, security for moral aptitude, could be achieved by various methods.[14] Firstly, in order to achieve accountability, single-seatedness, whereby each official's responsibilities and actions would be clearly defined and known, was necessary. Single-seatedness would make it possible for a superordinate official, or a member of the public, to judge the quality of an official's performance, and to form an opinion with regard to it.

The second method for attaining accountability depended on the principle of subordination. Every functionary would be subordinate to another functionary, who would be able to punish him. Every official would be watched by his superior and be liable to immediate dislocation. Accountability to the public at large would be achieved through total freedom of speech and association, publicity and the elimination of official secrecy within the machinery of government.

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[14] For Bentham's account of the securities for appropriate moral aptitude, see *First Principles*, pp. 30-59, 276-288.

The third, and most important, method for securing appropriate moral aptitude was the establishment of legal and moral responsibility. The efficient operation of these responsibilities lay at the heart of Bentham's broad aim of good constitutional design. Legal responsibility referred to what we would call today the rule of law. Officials' actions would be subject to the substantive law, that is penal, civil, and constitutional law. Officials, like anyone else, would be subject to legal procedure which aimed to give execution and effect to any provision of substantive law.

Popular or moral responsibility was directly connected to the form of government itself. Its effective operation implied a democratic government as a starting point. There would have to be an efficient means for the public to form an opinion, and to exert what Bentham called the "moral or popular" sanction. This sanction ultimately relied upon the public's ability to remove the functionary in question. Bentham's code provided for annual parliaments, and for the possibility of the immediate dislocation of officials by popular petitions.[15] It also relied upon the fact that the reputation of an official might be damaged, and thus his prospect of re-election. Thus democracy was the precondition for a good government, because it was the only way of identifying the official's interest with that of the community.

The fourth security for appropriate moral aptitude was to be brought about by the minimization of the money available to officials. This would deny them the means either to carry out sinister tasks or to corrupt others. In this way, officials would be denied the means to tempt others to succumb to sinister interest.

The final security for the attainment of moral aptitude was the exclusion of factitious dignity. Factitious dignity was an award (such as titles of honour) given to the functionary,

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[15] Ibid., pp. 57, 137.

but divorced from any real merit.

The second kind of aptitude which officials should possess was intellectual aptitude, which consisted of appropriate knowledge and judgement. This aptitude was secured, inter alia, by the examination of prospective officials.[16] The beneficial effects of intellectual aptitude depended on the official's possession of moral aptitude. However intellectually apt an official might be, it would have no useful consequences if he did not have the propensity to use his intellect in a way which promoted the universal interest.[17]

Thirdly, and lastly, active aptitude required the physical presence of officials in their place of work (such as Parliament) during their working hours. Officials' presence was an obvious condition for the performance of their duties, and was to be secured by attendance-related pay.[18]

The principles of single-seatedness, subordination, moral and legal responsibility, and other securities for appropriate aptitude were to be incorporated into the institutional design. I shall focus on the main institutions of government, as it is in regard to them that important patterns of continuity can be identified between Bentham's earlier legal and political writings and his mature constitutional theory.

As has been shown, Bentham argued in his earlier writings that the basic feature of political society was interaction between people and government. In his constitutional writings, Bentham continued to recognise a central distinction within political society, namely between supreme constitutive power and supreme operative power. The relationship between them was one of subordination, in that the supreme operative power was subject to the

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[16] Ibid., pp. 77-86.

[17] Ibid., p. 179.

[18] Ibid., pp. 87-94.

supreme constitutive:

> Considered in respect of the nature of its functions, all power in a Government is either *operative* or *constitutive*.
>
> *Operative power* is that in the exercise of which the business [is] done: *Constitutive power* is that by the exercise of which it is determined who the person or persons are by whom the operative power shall be exercised. Constitutive is therefore such with relation to the operative.[19]

The people were to have two institutional roles. The first role would be to exercise a power of location and dislocation in relation to officials. This could be done by elections and, in periods between them, by popular petitions.[20] In this capacity, the people would function as members of the supreme authority in a political community - the constitutive authority. The prime object of this authority, to recount, was to exercise an act of will - to locate and dislocate officials. This act of location and dislocation would be an exercise of the "moral" or "popular" sanction.

However, there was a second role for the people in their capacity as members of what Bentham called the *Public Opinion Tribunal* (POT). Some of the features of this institution should be mentioned here.[21] In *Constitutional Code*, the POT had judicial powers,[22] and

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[19] Ibid., p. 6. The meaning of the word "government" in *Fragment* was arguably broader than in *Constitutional Code*. In *Constitutional Code*, Bentham elaborated on the various powers of government, including the **legislative and the executive**, the latter consisting of the judiciary and the administrative authorities. The administrative and the legislative would constitute the **"government"**. The executive and the legislative made up the "operative" power. The executive would be subordinate to the legislative (*Constitutional Code*, p. 27). According to this exposition, it would seem that judicial powers were, strictly speaking, not considered a part of the "government". In *Fragment*, by contrast, Bentham wrote about the government and the people. The essential division there was between official (governmental) and popular powers. It seems that because Bentham spoke globally about "political authority" when he referred to a government, the account in *Fragment* assumed that the judicial power belonged to government.

[20] If one fourth of the population signed a petition for the removal of a functionary, he would be dislocated: see *Constitutional Code*, p. 33.

[21] The next chapter will analyze in detail Bentham's account of this institution.

was the means by which the constitutive authority could exercise its supreme constitutional powers to locate and dislocate officials. This tribunal was a "fictitious entity". By "fictitious entity", Bentham meant that there was no formal institution which could be seen to be working under such a name. In other words, such a fictitious institution was conceived by Bentham in contradistinction to real entities like a "parliament" or a "court", whose jurisdiction, personnel, place of meeting, and procedure were established by law and could be perceived as such. The term "Public Opinion Tribunal" was invented by Bentham to convey the idea that the public could arrive at a collective opinion through communicating upon governmental business. This body consisted of people who had an interest in a given subject-matter.[23] It was described by Bentham as having a structure of "sub-committees", which were formed by any group of interested citizens in relation to some particular subject-matter of public concern. A necessary precondition for its effective operation was the removal of any restriction on publicity, and in particular the removal of the cloak of secrecy from official activity. The POT resembled in many ways an official judiciary. It gathered evidence in the place where a public event took place, for example a court's gallery. On the basis of the evidence, it formed an opinion and a judgement.[24] The theatre of this tribunal was the public domain, and among the most important sources for its supply of information and comment were newspapers.[25]

The tribunal's main aim was to assess whether transgressions of the universal interest of the community had taken place, and by doing so to detect potential misrule. It was the

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[22] *Constitutional Code*, p. 35 (section 4, Art 1).

[23] *SAM*, p. 28.

[24] Ibid., p. 56.

[25] Ibid., pp. 62-3.

source of the moral sanction, which would manifest itself, inter alia, by a sharp decline in the popularity of the government, with the threat that if the government did not change its ways, it would be replaced.[26] It will be argued below that the POT also had a crucial role in determining and effectuating constitutional limits.

Bentham saw all the powers of government, that is both the power to make laws and to execute them, as ultimately constrained by popular judgement. The supreme power in the state would be "judicial" rather than legislative or administrative in nature, and would communicate its judgements to the supreme constitutive power. In fact, one might see the public as a large court in which the operative power would be no more than one party. The constitutive authority could use the ultimate weapon (the dislocation of officials) where any transgression of a constitutional limit took place. However, it was the continuous role played by the POT, rather than the regular but abrupt interventions of the constitutive authority, which determined and effectuated constitutional limits between elections. The relationship between the POT and the government would mostly be one of persuasion and argument, as in a real court. Members of the POT would act as judges between two parties as far as constitutional limits were concerned. The POT would judge between the public interest as presented by the operative power on the one hand, and another public interest on the other.

Public opinion would act as a continuous "check" against abuse of power. If necessary, public opinion would culminate in an act of will and in a manifestation of collective disobedience. Indeed, the connection between an abuse of power and an act of collective disobedience marked a significant element of continuity between Bentham's earlier and later writings. However, public opinion might be altered and modified by arguments put forward by government, so that instead of resorting to an act of will, involving disobedience, or

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[26] Ibid., p. 29.

dislocation of officials, it accepted the government's action. By providing for continuous interaction between the government and the people, Bentham was able to reconcile *limited sovereignty* with *an omnicompetent legislative power* on which there would be no a-priori limits.

Arguably, the nature of the relationship between the supreme constitutive and the supreme operative was crucial to the maintenance of the proper end of government. I shall, therefore, concentrate in the next section on this relationship, and not on all the complex relationships of subordination between functionaries at other levels of the administration.

As far as the supreme constitutive was concerned, Bentham saw no problem in making its interest coincide with the universal interest of the community. As long as all the individuals who constituted the political community in question reflected on the best means to promote their own interest, the result of their interaction would inevitably be in accordance with the universal interest.[27] However, the predicament would be different with regard to the supreme operative power. In its case, the task of constitutional design was to ensure that its interest would coincide with the universal interest. As will be seen, no a-priori limitations to power could curb the tendency of the operative power to try to promote its own interest. The operative power would be subject to public checks, but not to definite limitations. In Bentham's words:

> [operative power] requires to be applied to it the strictest limits which in any direction can be applied to it, consistently with its retaining amplitude sufficient for its giving accomplishment to that same end.[28]

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[27] A more detailed discussion about the nature and formation of the universal interest will be undertaken in the next chapter. In the last section of the next chapter it is argued that if free communication is facilitated and conducted, the collective judgement of the people would always be in accordance with the universal interest.

[28] *First Principles,* p. 134.

Finally, it should be mentioned that Bentham objected to the doctrine of the separation of powers.[29] The details of his criticism must be reserved for another occasion.[30] However, the gist of his criticism was that such a doctrine could not prevent the formation and persistence of a bad government. Such a doctrine did not allow for the dynamic, direct involvement of the public in constantly checking the government. It relied on a complicated, and, in effect, inactive, self-paralysing bureaucracy, to prevent any one interest in society becoming dominant. It placed very little faith in direct democracy to resolve any conflict of interests. Based on inaction as well as on promoting waste of time and resources, the doctrine enabled corruption to flourish behind a complex web of institutions. Ultimately, a government based on this doctrine would become non-transparent to the public. However, Bentham might be understood as advocating the establishment of mutually-checking powers, although not one which entailed "checks and balances within the bureaucracy". He often referred to the popular or moral sanction, administered by the POT, as a *counterforce* to that of the government.[31] Bentham's idea of mutually-checking forces was socially dynamic. This idea should be distinguished from checks and balances designed to provide institutional equality of power, which was socially static and involved inaction, and therefore the

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[29] For a general discussion of the meaning and the end of this doctrine, see M. Vile, *Constitutionalism and Separation of Powers,* Oxford, 1967, chapters 2, 3, esp. pp. 13, 115; see also J.L. De Lolme, *The Constitution of England*, New York, 1792, pp. 62-3, 149-165, Baron De Montesquieu, *The Spirit Of The Laws,* London, 1949, books XI, XII, esp. pp. 75-80, 151-9, A. Hamilton, J. Madison, J. Jay, *The Federalist*, Oxford, 1948, no. 10, pp. 266-7, Marbury V. Madison, 5 U.S. (1803) 1 cranch., 137 (the theoretical rationale for this case appeared in *The Federalist,* No. 28, p. 392).

[30] For Bentham's objections to the doctrine of the separation of powers, see *The Book of Fallacies*, from unfinished paper, by a friend, London, 1824, pp. 24, 248-50, *On the Efficient Cause and Measure of Constitutional Liberty*, UC cxxvi. 8-18; cxxvii. 4, 5.; clxx. 168, *SAM*, pp. 121, 231-3, *First Principles*, pp. 22-5, 101-7, 138-9, 193-5, 208-9.

[31] See, for instance, *First Principles*, p. 279.

destruction of government.

III

The role of the people in Bentham's thought unites his early legal and political theory and his mature constitutional writings. This section will focus on their role in *determining*, and *giving effect* through an act of will, to their own resolutions about constitutional limits. Several "patterns" of continuity between Bentham's early and mature thought will be discussed, all of which are related to the question of constitutional limits. These "patterns", which all involve themes found in *Fragment*, are as follows: the enabling rationale for government; the conceptual fusion between the quality and the quantity of the exercise of powers; the relationship between constitutional limits and securities against misrule; the determination of constitutional limits by popular judgement, and if necessary, by an act of collective disobedience; and the recognition of collective judgement, and if necessary, disobedience, as a prime value in a free government.

The first point of continuity between Bentham's earlier and later writings is his endorsement of an enabling rationale for government. This rationale was identified in *Fragment.*[32] The enabling rationale meant that government could be a-priori unlimited yet be constantly subject to public inspection. The reflection arrived at as a result of this inspection would constitute a social constraint on the government's powers. It is necessary to grasp this enabling rationale in order fully to appreciate how a presumptively unlimited government could still be constrained by the collective attitude of the population. Bentham's statement in *Constitutional Code* that to the powers of the legislature there were no limits but

[32] See chapter 4, pp. 142-3 above.

only checks,[33] should be understood in the light of this enabling rationale for government.

In his writings at the time of the French Revolution, which prefigured his mature writings on constitutional theory, Bentham saw the enabling rationale for government as the heart of any good constitutional design. His account in these writings followed that in *Fragment*, in arguing that a-priori limitations on legislative power did not adequately characterise a free government. The enabling rationale for government is summarised in this passage:

> If there were a proposition in government more self-evident than any other, one should think it would be that at every period there should be some one authority competent to do every thing that may require to be done by government, and that authority should extend to every case whatsoever.[34]

Clauses of invalidity would be detrimental as they could encourage a hostile attitude on the part of the people. Such clauses could serve as the pretext for rebellion.[35] The legislature should be left to work out its policies under the direct influence exerted by the people. The "enabling rationale" suggested that the relationship between government and people would be based mainly on influence and persuasion by reason, rather than by an exertion of will over will.[36] Although ultimately disobedience (a decisive and explicit act of will) might be exercised, constitutional limits were founded on a reasoned communication between people and government. Governmental power should be presumed to exist in every field of action, subject to discussion, and the formation of the ever-dynamic social constraint - public

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[33] *Constitutional Code*, pp. 41-2.

[34] *Necessity of an Omnipotent Legislature*, UC cxlvi. 19; see further T.P. Peardon, 'Bentham's Ideal Republic', in B. Parekh (ed.), *Jeremy Bentham - Ten Critical Essays*, London, 1974, pp. 120-44, at 127.

[35] Ibid., UC cxlvi. 45-6.

[36] This is an overgeneralisation. A more detailed account of "influence" will be given in the next chapter.

opinion.[37]

The following passage illustrates the "enabling rationale" as presented in Bentham's later constitutional theory, although he admitted that it was too crude a description of the relationship between the two main forces in the constitution - the operative and constitutive powers:

> In regard to the possessors of the supreme operative power, the general description of their power must be that their power extends to every thing - is all-comprehensive - that in virtue of it they are at liberty and have been empowered on all occasions to do whatever they please in relation to all persons and all things appertaining to the community in question. But on the other hand, to confine the exercise of this power within the limits corresponding to the universal end, an adequate counter-power or counterforce must be established: this is the power reserved or given to the creators of their power, the possessors of the supreme constitutive power, to be the annihilators of it whenever they please.[38]

The second pattern of continuity to be considered relates to the meaning of the phrase "abuse of power". As far as etymology was concerned, Bentham, in his writings at the time of the French Revolution, pointed out that Arbitrium meant "decision" or "will". Therefore, he said:

> The meaning of the phrase as soon as it comes to have any can therefore be no other than this: viz: that where arbitrary power subsists the decision of questions relative to the exercise of all power depends on the will of those invested with it not only in the first instance but definitively, howsoever it be with the will of the body of the people.- What follows? That it is on the opportunities possessed by the people of manifesting their will that the freedom of a constitution in reality and immediately depends, and not upon any other circumstance such as that of the division of the general mass of power into three independent branches.[39]

It would seem that Arbitrium was involved in the exercise of any sovereign power. However, on the basis of this literal and trivial understanding of sovereign power, Bentham

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[37] *Necessity of an Omnipotent Legislature*, UC cxlvi. 47.

[38] *First Principles*, p. 134.

[39] *On the Efficient Cause and Measure of Constitutional Liberty*, UC cxxvi. 10-11.

maintained that if the phrase "arbitrary power" was to have any meaning, a distinction had to be made between a government whose powers were limited by popular will, and one whose powers were not so limited. Hence, Bentham went on to define "arbitrary power" as power exercised without any reference to *popular* will. His response to the threat of such power was to recommend all measures which could facilitate the formation and expression of that popular will. Defence against oppressive government depended not on the division of governmental power but on the enhancement of opportunities for public communication, discussion and action.

This passage is reminiscent of the long footnote in *OLG* discussing the "split" nature of sovereignty.[40] As a matter of universal theory, *any* exercise of sovereign power involved interaction between two wills, that of the government and that of the people. Thus, *to some degree*, no sovereign power would be totally arbitrary. However, in terms of the normative application of this universal theory, power would be exercised arbitrarily in a government under which there were hardly any formal opportunities for the expression of popular will.[41]

How did Bentham conceive of "abuse of power"? Bentham identified within the notion of abuse of power the two ideas of the "quantity" of a power and the "quality" of its use. Abuse of power, in the sense of the exercise of *too much* power, merged into the question of *how* power was exercised. In short, the question of "how much power is used?" could not be divorced from the goodness or badness of its use. Because Bentham saw constitutional limits in social terms, that is as a concretization of communal judgement, he did not accept the notion that there were a-priori limits to what the legislature might do, at least as long as

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[40] See chapter 2, pp. 48-9 above. The passage quoted on the previous page about the enabling rationale for government also echoes the "split" nature of sovereignty.

[41] For a discussion of the distinction in Bentham's writings between a universal theory and the normative application of such a theory, see chapter 1, pp. 13-20 above.

the public were able to pass judgement on its (proposed) actions. An abuse of power would therefore amount to a bad measure, whether produced by a generally good or bad government.

Bentham would acknowledge that the question of the quality of a government was more wide-ranging than one concerned merely with the quantity of its powers. Therefore, "quality" would encompass the question of whether a government had used too much power (or had "abused" its powers). In other words, an abuse of power would consist in the production of a bad measure under a particular government. It would follow that a judgement that an abuse of power had taken place would amount to censorship or criticism of the government.

There were many channels through which a government might be censored. The quality of its measures might be criticised by the public through the press, while members of the legislature could be faced with the prospect of not being re-elected, or even of facing dislocation by petition and majority vote between elections. But criticisms of a measure might be so great and so widespread as to raise not only the issue of quality as such, but also the issue of the *ability or disability* of the legislature to deal with certain matters. In this case censorship (of the quality of the use of power) might signify constitutional limits (limits to the extent or quantity of power which government might properly use).[42] Censorship with regard to the quantity of power would be consistent with the enabling rationale for

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[42] The relationship between the "quality" and "quantity" of the exercise of power is directly related to the discussion of both Bentham's theory of sovereignty and his legal positivism: see chapter 2, pp. 68-81 above. The point there was that any attempt to divorce conceptually the idea of the justification of law (the quality of it which might lead to censorship) from the limits of legal validity (which related to the quantity of power used, the ability or disability of the power-holder, and constitutional limits) would make sense only at the price of an unacceptable reductionism. Such a divorce would imply a failure to give a conceptual, yet socially dynamic, account of law.

government discussed above, because it implied no a-priori limits to government, but only constant "checking".[43]

So, constitutional *limits*, which concerned the quantity or extent of governmental power, were related to the notion of the goodness or badness of government. Further, constitutional limits were compatible with the enabling rationale. However, because Bentham explicitly discussed "unlimited" powers for government, and because he did not specifically discuss constitutional limits in his constitutional writings, most scholars have wrongly assumed that his preferred form of democracy would not include such limits.

The third pattern of continuity to be discussed here is the relationship between constitutional limits and securities against misrule. This pattern of continuity is a logical implication of the two previous patterns. This pattern is built around the following argument. Bentham's agenda in his constitutional writings was to provide for securities against misrule. In providing for securities against misrule, Bentham returned to an issue with which he had been preoccupied in *OLG,* namely the character of laws which amounted to self-limitations on the part of a legislature. In the context of such limitations he stressed the importance of people being familiar with governmental business. The laws which contained self-limitations would be prompted by a collective judgement of the people, itself made possible by the notoriety of governmental measures. In a word, in his mature constitutional writings, Bentham continued to develop his analysis of constitutional limits based on a popular collective judgement.

In *SAM* Bentham proposed substantive constitutional securities for Tripoli. He called them, "Securities, given by the Sovereign, to the people of [Tripoli] *Against Abuse of Power and*

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[43] The fusion of the quality and quantity of the exercise of governmental power is also connected to an element of "permissibility" which is inherent in an account of "validity": see chapter 7, pp. 306-12 below.

Forever".[44] In an important passage, Bentham suggested that a declaration of natural rights be replaced with a declaration of securities against misrule.[45] The language of natural rights would call into question, in a hostile way, the legal sovereignty of the government, whenever there arose a fresh claim that a right had been violated. This language of hostility, and the prospect of chaos between subjects and government, would obscure the real issue, namely whether a particular constitutional arrangement gave the members of a political society some security against misrule (security against bad government).

Bentham argued that a declaration of rights would tend to suggest that only the question of the quantitative exercise of power was at issue, whereas what such a declaration *ought* to do was something radically different, namely to prevent bad government. Once again, Bentham rejected the notion that the questions of the quantity of the power exercised, and the quality of its exercise, could sensibly be divorced.

Further, Bentham made his familiar criticism of natural rights. This argument, derived from his epistemology, was that there could exist no rights which were not related to a real instrument of coercion: "To any such word as *right* no clear conception can ever be attached, but through the medium of a law, **or something to which the force of law is given**".[46]

It is noticeable that Bentham did not object to the idea of constitutional rights derived from constitutional law. Constitutional law, although it might be described as "law" would, as will be argued in chapter 7, also have an extra-institutional dimension. In fact, Bentham argued

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[44] *SAM*, p. 74.

[45] Ibid., pp. 23-4 and note a; in this context, see Rosen, *Jeremy Bentham and Representative Democracy*, pp. 56-58.

[46] *SAM*, p. 23; see also J. Waldron, *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, London, 1987, pp. 29-46.

that the gravest instance of misrule was that carried out in the absence of the knowledge that some kind of a law was being violated.

Reading these passages together it seems that, for Bentham, constitutional rights received their force from coercive measures in which they were declared. However, constitutional rights should be understood *as* securities against misrule, and not as a-priori limitations on the powers of government.

Bentham went on to make a move which at first sight looks like a change of agenda. This move highlights a puzzle which embraces the whole of his legal and political enterprise. Despite Bentham's lengthy discussions in his early legal and political theory of sovereignty and constitutional limits, he composed this footnote in *SAM* in order to avoid a discussion of constitutional limits. Bentham was objecting to a constitutional arrangement, the value of which would be explained in terms of natural rights and predetermined limits to sovereignty.[47] A proper interpretation of this passage is therefore crucial for understanding the extent to which Bentham's legal theory served as the context for his mature constitutional enterprise generally, and more particularly for his mature doctrine of constitutional limits. Two main interpretations might be put forward. In the first place, it might be argued that, in his later constitutional writings, Bentham embarked on a quite different project from the one he had pursued in his legal theory. This would mean that in this passage Bentham abandoned, or left undeveloped, his account of limited sovereignty found in chapters 2, 6 and 9 of *OLG*, and in *Fragment*.

However, there is a second, constructive, interpretation, arguably a more plausible one, which makes sense of Bentham's enterprise as a whole. According to this interpretation, Bentham did not abandon his earlier analysis of limited sovereignty or constitutional limits.

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[47] *SAM*, p. 24.

The reason for Bentham's change of terminology was not at all a change of agenda. Limits of sovereignty, or constitutional limits, carried exactly the same meaning in this discussion of securities against misrule as they had in his earlier writings. It would be wrong to assume that because he replaced the terminology of "limited sovereignty" with "securities against misrule", he abandoned his concern for constitutional limits, or the establishment of a legally limited government. Bentham merely thought that it would confuse the issue to speak of constitutional arrangements as being concerned with the protection of natural imprescriptible rights, which implied some abstract and incoherent limitations on sovereignty. The point of this passage is to emphasise that the only way to maintain a plausible, socially orientated, discussion of constitutional limits, was through the language of securities against misrule. The idea of constitutional arrangements in the shape of "securities against misrule" was much more intelligible, and therefore more conducive to a proper understanding of constitutionally limited government. Thinking in terms of securities against misrule would convey the notion of a sanction - some fear of evil by which self-imposed obligations (constitutional laws in principem) might be enforced.

Here lies a continuity of objective. In *OLG*, when discussing constitutional laws in principem, Bentham wondered whether it would be plausible to conceive of a government limiting its own powers by imposing on itself this type of law. Why would a legislature tie its own hands? Bentham recognised that self-limitations could be fully effective only in a good government. They might be partially effective in a bad government which was responsive to some aspects of the universal interest. This would be the case, for example, in a mixed monarchy. In order to reach a situation where government began to be responsive, the constitutional design would have to give some effect to securities against misrule. Bentham ended this passage saying precisely this:

> That, otherwise than by fear of evil, a Sovereign can be **brought to consent knowingly to tie up his own hands** is generally speaking too much to expect. But what without such fear he may perhaps consent to do, with less reluctance at least, is to tie up in the way in question the hands of his Agents: in which case matters may be so managed, as that without knowing it he may thus be made to throw obstacles in the way of his own steps in so far as they proceed in a sinister direction.[48]

It was through the establishment of securities that a coercive authority might tie its own hands. This argument was yet another manifestation of the enabling rationale for government. This rationale was entirely compatible with a constitutionally limited government. It was apparent that a-priori principles which tied the hands of the government would have no place in any constitutional arrangement entitled to the description "free".

Elsewhere in *SAM*, Bentham discussed constitutional promises made by the sovereign, or what Bentham called "concessions of the sovereign".[49] As has been argued, Bentham believed that the rationale for a constitutional arrangement should be an enabling one. Hence, constitutional limits should emerge from an understanding on the part of the law-making authority that it ought to limit itself. Constitutional limits should emerge from dynamic social activity. As has been argued in previous chapters, and will be further argued in chapter 7, although a constitutional law could be instrumentally described as an act of will of the law-making authority to limit itself, the nature of constitutional law encompassed a public will, the recognition of which would prompt the legislature to impose limits on itself.

Bentham linked *limitations* of legislative power not to a-priori limitations, but to a continuous check made by a collective public judgement, or public opinion. The efficiency with which the check on power operated would depend on "the spirit, the intelligence, the vigilance, the alertness, the intrepidity, the energy, the perseverance, of those of whose

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[48] *SAM*, p. 24.

[49] Although Bentham referred here specifically to the Pasha of Tripoli, it is clear that he understood "sovereignty" to have a wider meaning, namely the power to legislate.

opinions Public Opinion is composed".[50]

Concessions of power would take the form of promises.[51] It is noticeable that here there was a continuation in terminology from *OLG,* in which Bentham also talked about constitutional "promises" as self-limitations of legislative power: "Every thing that he can do on his part amounts, I say, to the giving of a promise, nothing more".[52] Even a constitutional arrangement providing for the election of representatives would amount to no more than one of these promises.

In a properly constructed constitutional arrangement, acts of oppression would be immediately *notorious*. They would be *detected* and *understood* as oppressive by the public. Constitutional laws in principem would be signs which would aid public judgement on the matter, but which would, by no means, be decisive. Only under such circumstances was there any possibility that the legislature would be disposed to impose self-limitations. Notoriety might lead to eventual dislocation.

The concept of notoriety requires explanation. Notoriety referred both to what the public knew about governmental operations, and to what the government knew about what the people thought of its operations. Notoriety was the precondition for any interaction between public opinion and the government; and that interaction was central to the understanding of the idea of "sovereign powers". Notoriety was thus related to the intellectual aptitude of the public, not only to that of officials.[53] Notoriety had two aspects. First, there had to be some knowledge of the ordinance in question, in this case the constitutional promise, or

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[50] *SAM*, p. 139.

[51] Ibid., p. 138.

[52] Ibid; see also chapter 2, p. 41 above.

[53] *First Principles*, pp. 142-5.

constitutional law in principem. Knowledge of the ordinance would be a point of focus for the public.[54] The second aspect related to the conditions in the public domain affecting reflection upon a given measure. For notoriety to exist in this sense, it had to be possible for the public to form a prompt judgement with regard to the effect of the ordinance in question. The public would have to be in a position to consider whether any action had taken place which was unacceptable given prevailing opinion.[55]

The absence of notoriety in the latter sense would imply the presence of obstacles to communication in the public domain. In consequence, the public would not be able to co-ordinate measures for resistance, because each person would not know and appreciate what other individuals thought about the measure in question, and about the possibility of resistance. Further, obstacles to communication could lead to false consciousness. Thus, as a result of such obstacles, each individual, and hence the public, could lack the will to resist, despite their knowledge of the content of the measure in question. In such a situation people might passively obey despite a measure's being pernicious. The status quo would be perpetuated.

Notoriety would not be enhanced in a constitution which had as its foundation a-priori limitations on law-making powers. Such a constitution would be socially static because there would be no requirement for the public to be involved in determining the ambit of these limitations. For example, in constitutions which adopted the doctrine of the separation of powers as an a-priori limitation, there would be no reason for the people to debate and, if necessary, modify, other a-priori limitations. When people were not allowed to, or could

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[54] *SAM*, pp. 27-9.

[55] See chapter 6, pp. 275-6, note 69 below, in which obstacles preventing the public from arriving at such a judgement are discussed.

not, for various reasons, form a judgement on constitutional limits, abuse of power would be the result. In the following passage Bentham objected to a constitutional arrangement which included an a-priori principle demanding obedience to the laws. Such a principle, in effect, would remove the most effective remedy against the violation of constitutional promises - a prompt and effective collective judgement which could be followed by acts of disobedience:

> every one would in the first instance, and unless taught to the contrary by experience, entertain the expectation and hope of seeing it [the promise implied in the ordinance which incurred self-limitation] observed: and in pursuance of such hope, individuals **might** rise up **with one accord and concur** in opposing effectual resistance: individuals into whose conceptions, **but for such ordinance**, no idea but that of unreserved obedience, active or at least passive, would have ever entered.[56]

The point of this passage is that promises would promote resistance in suitable cases. These promises would also focus expectations. The reverse however would also be true. The crystallisation of certain rules by the public would prompt the sovereign to promise adherence to constitutional self-limitation.

A final point might be made with regard to this aspect of the continuity of rationale. Many of the securities which Bentham thought might be introduced in Tripoli took the form of promises made by the sovereign not to disregard certain liberties of the subjects. These securities resembled constitutional laws in principem. Bentham, in effect, gave a list of constitutional limits which he thought it desirable for a liberal constitution to contain. These securities included, for example: "Security against National gagging: or Security for appeal to Public Opinion and the power of the law on the conduct of all persons whatsoever",[57]

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[56] *SAM*, p. 140.

[57] Ibid., p. 80.

Habeas Corpus measures,[58] securities against illegal imprisonment, as well as many other personal securities.[59]

However, the most important feature of these securities was that they were to be understood in a socially dynamic way, despite entrenched social attitudes which acknowledged their fundamental nature and importance. These securities always acknowledged a "counter-security". This counter-security was a rule of interpretation which would comprise some circumstances in which the main security could not be maintained. For example, if some infringement of security was necessary in order to give "execution and effect to the law", the infringement would not "be made beyond what such necessity requires".[60] The underlying rationale of all these securities was some proportionality which was based on utilitarian calculation. However, it was assumed by Bentham that once certain self-limitations had been conceded and an expectation generated that these would be respected, it would be difficult for a legislature to transgress them. The very existence as well as the concrete application of these self-limitations would be subject to a utilitarian threshold, however general this calculation might be, and however deeply these self-limitations were rooted in the community concerned. However, their utilitarian rationale did not preclude their being fundamentally rooted in a given society. This fundamental "rooting" would raise the threshold for the social justification of any attempt to transgress them.

Having shown the continuity in Bentham's thought in relation to constitutional limits, let me go into more detail in relation to a fourth pattern of continuity - the means by which constitutional limits were determined and effectuated.

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[58] Ibid., p. 84.

[59] Ibid., pp. 88-102.

[60] Ibid., p. 85.

In previous chapters, three main ideas concerning Bentham's universal theory of sovereignty and constitutional limits have been discussed. One idea concerned the limits of sovereignty, or the social limits for the justification of authority. The second idea, found in *Fragment*, concerned the way in which the limits of sovereignty were determined and effectuated by a collective judgement made by the people. The people's collective judgement, with reference to the social justification of authority, could operate in relation to a single measure undertaken by a generally good government (this has been termed a legal revolution). A third idea, also in *Fragment* concerned the normative application of the second one. This idea concerned the extent to which a government could be called "free". It was here that the democratic tendencies in Bentham's largely otherwise descriptive account emerged. In *Fragment*, it has been argued, Bentham made a connection between the goodness of government and the ease with which disobedience to a socially unjustified, and therefore unconstitutional, measure could be effected. In a free government it would be easy for the people to arrive at the juncture of resistance. Such resistance would not necessarily entail an undermining of the whole institution of government.

It is in the connection between these two ideas, namely that sovereignty is determined and effectuated by popular judgement and, if necessary, disobedience, on the one hand, and that such judgement and disobedience were facilitated in a free government, on the other, that the continuity between Bentham's early work and his mature constitutional writings consists. In all of his mature constitutional writings, Bentham continued, in various contexts, to relate the idea of constitutional limits to a collective judgement of the people with regard to a given legislative measure. If necessary, disobedience to that measure would follow. Further, he even spoke about the ease with which these processes were carried out as the characteristic sign of a free government.

In *SAM* Bentham wrote about "ordinances". An "ordinance" was an entity akin to "a law". Popular opinion in a free government was embodied in the suffrage, in which Bentham saw the means to remedy the transgression of ordinances committed by the legislative authorities. However, in *SAM* there are several passages in which Bentham identified the transgression of ordinances which signify limits to authority with misrule. Such ordinances were general in nature, and concerned the very nature and extent of the power exercised by officials:

> Note that in the number of the members of this same tribunal [POT] is included the number of all those on whose obedience [depends] as well the effect of the several general ordinances by which vexation is prohibited, as also of any particular acts or particular ordinances in consequence of which any acts of vexation and oppression are exercised in violation and transgression of those same general and salutary ordinances.[61]

This passage illuminates two main points. The first is that there were assumed to be in existence "general" and "salutary" ordinances which had the general aim of preventing vexation. Second, Bentham attributed the persistence of such ordinances to continuous obedience on the part of the members of the POT. The pattern of continuity between Bentham's early and mature thought which related obedience to the limits of authority occurred repeatedly in his discussion of the operation of the POT. This pattern was another context for the operation of the POT which was generally designated merely as the chief "informer" of the constitutive authority, that is the people, in their capacity to locate and dislocate officials. Thus, because of his aversion to language which encouraged hostility and which, as has been seen, caused Bentham to reject the terminology of natural rights, he came back again and again to the terminology of his earlier legal and political writings. Collective judgement, and, if necessary, resistance and disobedience, were the means to determine and effectuate limits to the powers of government.

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[61] Ibid., p. 30.

In his writings at the time of the French Revolution, Bentham again wrote about the relationship between constitutional limits and the obedience of the people. He qualified his objections to the doctrine of the separation of powers by stressing that the separation of governmental functions was a guarantee of accountability. Yet this statement was true only as long as this separation did not lead to an institutional balance of power. Such an institutional balance would be divorced from a direct reliance on the *obedience* of the people. The separation of powers only had any value so long as the official authorities interacted directly with the people, or competed for the obedience of the people.[62] Such a competition might exist, for example, between judicial and legislative authorities. Indeed, as will be argued in chapter 7 below, Bentham provided for an institutional design which would facilitate just such a competition. Only under such circumstances would any constitutional liberty worth the name exist.

These passages do not necessarily demonstrate that Bentham intended the people to use disobedience as a constitutional tool. They can still be interpreted to mean that he intended the POT to utilise disobedience only in the extreme case of an all-out revolution. However, in subsequent passages, he seemed not only to be sympathetic to the possibility of disobedience, but also to see its facilitation as a prime constitutional and democratic value in a free government.

It is important to emphasise again the relevance which Bentham placed on the subordination of government to the body of the people. This subordination persisted not only in terms of the location or dislocation of officials, but also in the context of the very obedience of the people to the government, obedience which reflected a collective popular judgement about the proper extent of governmental power:

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[62] *On the Efficient Cause and Measure of Constitutional Liberty*, UC cxxvi. 11.

> The degree of inclination [of officials to promote the universal interest] will be in exact proportion to the **dependence** of the governors on the governed: to the **dependence** of the persons intrusted with the power, on the persons by whose obedience the power is constituted: to the **dependence** of men in power on the body of the people.[63]

Subordination might be effected, inter alia, by means of a collective judgement which would have as its object the very creation of the powers of government.[64] In addition to their fundamental power to locate and dislocate officials, Bentham allocated to the people a continuous, participatory role. The link with the early political writings consists in this continuing reference to popular judgement which was the feature by which constitutional limits to obedience were effectuated. At this point of his argument however, the facilitation of constitutional disobedience was presented as a virtue of constitutional design. Communal participation was of inherent value in relation to any constitution, whether it occurred among the people or between the people and the government. It would be wrong to assume that once officials were elected they would be given a blank cheque. Again, an enabled government would not mean a constitutionally unchecked one.

In *SAM* Bentham continued to use the language of *Fragment* and *OLG*:

> Power on the one part [the power to promulgate ordinances] is **constituted by** and **is greater or less in proportion to** obedience on the other. It is in the direct ratio of the obedience, and in the inverse ratio of resistance.[65]

This shows that the ability or disability of the government to promulgate certain laws, as determined by popular opinion, and the potentially general disobedience which might follow from such opinion, was explicitly envisaged by Bentham, and was seen by him as an important element in the attainment of securities against misrule, or of the guarantee of good

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[63] Ibid., UC cxxvi. 12.

[64] Ibid., UC cxxvii. 5.

[65] *SAM*, p. 30.

government.

The idea of constitutional limits, or limits on sovereignty, and the determination and effectuation of them through participation, and, if necessary, resistance, continued to play a major role in Bentham's rationale for his constitutional code. In an essay entitled "Constitutional Code Rationale", in discussing the moral sanction as the "counterforce" which could bring rulers to book, Bentham referred again to the power of rulers as directly proportional to the degree of *obedience*. It is the argument of this thesis that the moral sanction should not only be understood in terms of popular discontent which might result in the non-reelection of officials, but also in terms of the determination of limits on the power of government *between* elections. Bentham said in this context:

> What for the present may suffice for bringing [the force of the moral sanction] to view is the phrase *public opinion*: ...In the opinion thus denominated stand included all those by whose obedience the power of the Monarch, be he who he may, or of the rulers, be they who they may, is constituted. Let this opinion take a certain turn, obedience ceases on the one part, and with it all power on the other. Accordingly in every government but a Representative Democracy, the idea of this sanction is of all ideas that are capable of presenting themselves to a ruling mind the most disagreeable, the most hateful and afflictive.[66]

This passage shows, moreover, that Bentham did not merely understand constitutional limits as directly correlated to collective judgement and disobedience. He also expressed his belief in the practical possibility of a prompt social reaction on the part of the collective body of the people to a ruler's activity. Bentham saw in democracy more than just the institution of elections, frequent as they might be, and of censoring the government between elections. He saw as an advantage of democracy the possibility of establishing constitutional limits by prompt, popular collective action.

Bentham's whole conception of constitutional limits is shown once again to be based on

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[66] *First Principles*, p. 279.

a socially interactive activity. People in power would be made to respond to socially dynamic forces rather than to acknowledge a-priori limits to their power. Popular determination and effectuation of constitutional limits would be hampered by,

> schism in the power of public opinion, and by means of a party formed for the purpose partly to corrupt and misdirect, partly to debilitate, the force of that original most efficient, or rather only, security against misrule.[67]

Such a schism might involve an attempt on the part of rulers to debilitate the public by preventing it from detecting an attempt to transgress constitutional limits. A good constitutional arrangement would prevent such schisms.

Bentham called on the public to resist public mischiefs. He acknowledged that despite provisions for ensuring appropriate aptitude on the part of officials at the time of their location, it was still possible for an article of the *Constitutional Code* to be disregarded, whether explicitly or by what he called "forced interpretation" by the legislature. In such a case, the people could either resist the act of the legislature, or they could accept it. In the latter case, the mischief would not be averted, and the process of enlightening the community would be retarded. Were the people to accept evil measures, the existence of unnecessary subjection might take years and years to detect, let alone to resist successfully. Even frequent elections might fail to bring to attention examples of unnecessary subjection, as long as the public did not possess sufficient intellectual independence.

The whole institution of government would become mischievous if the people were unable to resist it quickly. If the people accepted an apology by the legislature, despite the maintenance of the mischievous measure, they would reveal themselves to have become indifferent to its content. It would mean that their judgement was clouded by prejudices. Bentham clearly showed a connection between the state of the public's intelligence and the

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[67] Ibid., p. 280.

protection afforded by constitutional law against the abuse of power by government. In constant public observation and reaction, Bentham saw the heart of what we call today the rule of law:

> in a word as no security can be afforded by the laws any farther than the words of which they consist are faithfully interpreted and observed, by perverting the importance of words [people's acceptance of an apology on the part of the legislature] undermines and destroys whatever security can be afforded by the laws. ...a people struggling with the diseases inseparable from the infancy of a constitution, and struggling without a remedy without a hand to help them: an only physician appointed, and he without power to prescribe.[68]

Bentham argued that in a representative government there could be hostility between the two main forces in the constitution - the government and the people. This hostility he termed fundamental constitutional disagreement, and characterised it as civil war. He mentioned again the relationship between the constitutive power and the obedience of the people. Security against misrule achieved through resistance would result from the collective application of the moral or popular sanction.[69]

In a number of passages in the Bowring edition of the first book of *Constitutional Code*,[70] Bentham spelled out what he meant by the different branches of law - the penal, the civil, and the constitutional. Here, Bentham gave the clearest evidence for the continuance of the rationale of the determination and effectuation of constitutional limits through a collective public judgement and, if necessary, disobedience.

Bentham clearly saw the possibility of abuse of power despite the democratic location and dislocation of the functionaries of government. However, it would not be easy for the legislature to ignore the whole body of the people. He argued:

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[68] *Necessity of an Omnipotent Legislature*, UC cxlvi. 24, 25.

[69] *First Principles*, pp. 281-2.

[70] Bowring, ix.

> With power thus unlimited, might not the legislative body exercise their power upon the members of the constitutive body, individually taken, in such sort as to prevent the exercise of the dislocative power in question over the members of the legislative body?
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> No: for in the case here supposed, the members of the constitutive body, on whose co-operation the giving execution and effect to the supposed ordinances of the legislative body depend, would forbear to give it: if some used their endeavours on that side, a greater number would use theirs on the opposite side.
>
> Upon their compliance or non-compliance, all power, as has been seen, necessarily depends. **On any occasion towards producing, on their part, non-compliance, all that can be done by a constitutional code, is to give them the invitation.** If by such invitation, power is not limited, by nothing else can it be limited.[71]

The context of this extraordinary passage is clearly a discussion of abuse of power. In this passage Bentham explicitly welcomed the possibility of disobedience, or non-compliance with ordinances, viewing it as a prime constitutional value. The aim of a free constitution would be to give the people the capacity, the cognitive and the instrumental means, of resisting pernicious measures undertaken by their government.

Can this passage be interpreted as suggesting that Bentham identified disobedience solely with an all-out revolution, with an overthrow of the government? Does the "invitation" spoken of in this passage refer exclusively to the dissolution of the government? The answer surely is no. Bentham acknowledged non-compliance to a single "ordinance" as an important constitutional value. Moreover, he continued:

> In any case in which it appears likely that, by the proposed ordinance in question, the members of the supreme constitutive will, in any considerable number, be likely to **regard it as a violation of their rights - rights naturally so valuable in their eyes,** the great probability seems to be that a majority of the legislature will not hazard the enterprise.[72]

Here Bentham puts the seal on his understanding of how constitutional limits should be determined and effectuated. The whole point of having a responsive legislature was to

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[71] Bowring, ix. 120.

[72] Ibid., p. 121.

encourage it to anticipate the limits of acceptable social coercion.[73] The legislature would have to reflect on what, in the opinion of the public, would be an unacceptable exercise of coercion. The legislature would have to think about the potential reaction of the public to the proposed measure. This passage is crucial in revealing Bentham's understanding of the establishment of constitutional limits. It shows the central role of communication between

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[73] This passage shows that Bentham found no difficulty in discussing constitutional limits in terms of fundamental rights (as opposed to natural imprescriptible ones), which placed boundaries on law-making powers in any form of government, and a-fortiori in a democratic one. The argument here shows that the idea of fundamental rights is consistent *both* with Bentham's epistemology, and with his theory of law. His only caveat would be that the idea of "fundamental" should always be understood within a communal context, the most general characteristics of which could change. (This should not be understood as a claim that Bentham was a moral relativist). Understood as such, discussion of issues arising from any concrete application of such a fundamental right could be undertaken by the people and the government without detracting from its fundamental nature.

Postema is inaccurate in portraying Bentham as having some principled hostility to the idea of fundamental rights for the reason that they are not based on "genuine public justification". In this context, Postema attributes to Bentham the argument that rights can not be demonstrated to be determinate, and hence they conflict with the principle of publicity which was a necessary condition for the efficient operation of a democratic government: see G.J. Postema, "In Defence of 'French Nonsense': Fundamental Rights in Constitutional Jurisprudence", in N. MacCormick and Z. Bankowski (ed.), *Enlightenment, Rights and Revolution*, Aberdeen, 1989, pp. 107-33, at 115-125. Such a criticism of Bentham is proper only to the trivial extent that Bentham's argument would be that no democracy could be established unless some general propositions, based upon *some* commensurability between people's views, were allowed (which was precisely why Bentham would claim that a democracy could not be based on Natural Law theories). Once this trivial condition is met, it is arguable that a utilitarian theory can easily accommodate fundamental rights in a democratic government. As soon as some general communal principles were established by communication, fundamental rights would come into being.

This thesis has attempted to shown why fundamental rights must be seen as part of a communicative activity, which would make them determinate at some general communal level. Their general determinate nature is entirely compatible with the fact that their concrete application in individual cases may not be so determinate. Bentham recognised the fact that certain limitations on law-making power could be entrenched within a code of law. The full expression of such limitations might be detailed and complex, as might the enumeration of the possible applications of any other law. He therefore recognised the possibility of rights, as well as the reasons why certain cultures might judge them to be necessary for their general well-being. Bentham indeed saw public debate over rights as democratically valuable, even allowing for the ultimate modification of some of them. Such a modification could be exemplified in a transition from rights which were based on a rationale of neutrality, into ones based on some common substantive conception of good, and vice versa.

government and people, and among the people themselves. Only as a last resort would disobedience in the sense of actual hostility be employed.

In summary, it may be seen that Bentham continued to conceive of constitutional limits in his mature constitutional writings in the same way as in his early legal and political ones. He saw limits as determined by a collective judgement of the people which could be effectuated, if necessary, by disobedience. Further, he conceived that such disobedience might be of prime constitutional importance. The role of the people in determining and effectuating constitutional limits was one of the most important parts of his theory of securities against misrule.

Bentham's concept of sovereignty, properly understood in social terms, was consistent throughout his legal and political writings. Sovereignty implied an oscillation, an influential interaction between the people and their government, or between the POT and the Supreme Operative. Conceptually, Bentham saw no distinction between legal and popular sovereignty. Popular sovereignty would be exercised all the time in order to determine the limits on law-making powers. In a democratic government, this exercise of popular sovereignty would of course include the most important constitutional limit of all, that of giving to the people the constitutive power of the location and dislocation of officials - what is usually referred to as "political sovereignty". Thus "political sovereignty" was itself an expression of constitutional limits, that is a particular application of the popular element involved in any exercise of sovereignty in its "legal" sense.

Therefore to portray his theory as developing in the direction of popular political sovereignty, in the sense of the people merely locating and dislocating officials, though a valid interpretation of Bentham's view, would be to miss the point. Instead, his theory of limited sovereignty, or constitutional limits, should be understood in terms of the dynamic

relationship between officialdom and popular opinion. Popular participation was, from the very start, included in his conception of political authority.

This dynamism was to be accommodated in his vision of democracy. For Bentham, democracy did not merely mean the election of the most apt people, morally and intellectually, to office. Further, it meant more than the existence of procedures for dislocation if officials became deficient in point of aptitude. Although such democratic procedures were a precondition for any further improvement, by no means did they mark the limit of his democratic vision. Bentham realised that a legislature could transgress constitutional limits despite, and even because of, its commitment to reform. The popular constraint upon such transgression was provided through the determination and effectuation of constitutional limits by the members of the POT.

Bentham provided for a "panoptic democracy".[74] His whole aim in establishing constitutional limits was to facilitate the operation of the panoptic principle as effectively as possible. The gaze of the potential inflictor of the popular sanction - the potential disobeyer and dislocator - was fixed on every official in the most intensive way possible. The watching body of the people could act promptly and, if necessary, disobey what it considered to be an unconstitutional measure. However, it could also act as a censor, informing the constitutive authority, which in turn could exercise its power of location and dislocation.

Instead of advocating a socially static view based on an assumption that neither the public nor the political process, as a matter of social fact, could discriminate between calculations of maximizing general welfare and adherence to fundamental entitlements (an assumption on which the rationale of natural rights was based), Bentham argued two points. First, he claimed that a utilitarian theory could accommodate fundamental entitlements which would

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[74] This term will be fully discussed in the next chapter.

function as constitutional limits. Second, he advocated a system of government at the heart of which was social dynamism. He wanted to provide the conditions for free communication in the public sphere, as well as for a responsive government. The quality of interaction between the people and officials in such a socially dynamic system of government would be such as to discriminate between proposals involving the transgression of basic communal beliefs which would operate to diminish the general well-being of the community, and proposals for the maximization of well-being which did not transgress against such beliefs.

Bentham was a political and constitutional thinker who believed in the value of an independent public. The only effective way to maintain constitutional limits was through a vibrant and independent public opinion. An analysis of consensus formation by the people will be the subject of the next chapter.

IV

The argument advanced up to this point provides a unified understanding of Bentham's legal and political project. This section will discuss critically the failure of Bentham scholarship to detect the continuity in Bentham's writings in relation to constitutional limits. As a result of this failure to recognise the continuity between Bentham's legal theory and his constitutionalism, Bentham's constitutional thinking has been exposed to criticisms by constitutional lawyers on the grounds that his theory did not have a strong enough conception, if indeed it had any conception at all, of constitutional limits.

The influence of Hart's criticisms of Bentham, despite their lack of overall perspective, has been considerable. They have led people who are not specialist Bentham's scholars,[75] such

[75] For a discussion of scholars who could be seen as "non-readers", see Twining, *Reading Bentham*, pp. 121-5.

as Robert Moffat, totally to misinterpret Bentham's constitutional theory in general, and his theory of constitutional limits in particular. In an article comparing Bentham and Dicey, Moffat writes:

> in his early writing at least, Bentham found very little basis for distinguishing free from despotic government. He makes no distinction in the quantity of power held by either. ...There is clearly no room for separation of powers let alone checks and balances....

Moffat also argues that Bentham envisaged judicial power as dependent on the executive, and as possessing essentially only what Moffat calls a "negative power over legislation". He added that Bentham believed neither in an independent judiciary nor in judicial activism generally. The truth, Moffat argues, was that:

> Bentham had never conceived of judges exercising such affirmative powers. He did not even imagine them in so active a role as enforcing constitutional limitations upon the exercise of other government powers. ...Bentham overlooked such problems and, consequently, saw constitutional limitations as being normally meaningless."[76]

As has been argued, there is no theoretical reason for such a non-unified approach to Bentham's enterprise. It makes no sense to treat Bentham's legal theory, including the notion of constitutional limits, apart from his constitutional theory. Bentham did not alter his views on the nature of political society. He was consistently loyal to the greatest happiness principle, and sought to construct a society which would operate to promote the greatest happiness of all its members. The relationship between constitutional limits (in law) and constitutional theory should, in general terms, be stated as follows. For the greatest happiness to be achieved, there must exist constitutional limits, and there must be an institutional structure which ensured adherence to such limitations. This *theoretical* claim should then be translated into institutions. This is the light, it is argued, in which the

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[76] R.C.L. Moffat, 'Two English Views of Constitutionalism: A Bicentennial Retrospective', Oklahoma City University Law Review, 12 (1987) 849-62, at 849-52.

theoretical basis for Bentham's radical mature constitutional writings should be approached and analyzed. In short, this is the light in which the theoretical principles and the practical reforms he proposed in his constitutional code should be evaluated. Bentham's constitutional theory should be approached as continuous with, not as separate from, his theory of law and sovereignty.

Hart's position has already been criticised in chapter 2. There it was argued that Hart's interpretation of Bentham's theory of sovereignty as based on the "habit" or "disposition" to obey was misguided. At the present juncture, it may be added that Hart did not capture the comprehensive nature of Bentham's account. As has been shown, Bentham envisaged an active participatory role for the people as early as *Comment* and *Fragment*. Bentham's description of sovereignty was not a dry assertion of a social fact that "what makes sovereignty is a habit of obedience on the part of the people", although the minimalistic style in which this description was presented might well have given this impression. Rather, this statement contained a commitment to an active role by the people for determining and effectuating constitutional limits on the government. This was the heart of Bentham's theoretical position on sovereignty and constitutional limits, and it did not change significantly throughout his career.

As has been argued in chapter 2, Hart failed to see that although Bentham had a command theory of "a law", he did not advocate a command theory of "law", but a utilitarian social theory of law. This mistake led Hart to overlook the symmetry of Bentham's theory. This symmetry carefully created a utilitarian balance between security achieved through a rule and security against misrule. In fact, Bentham's constitutional theory might be described as *IPML* in reverse. Whereas in *IPML* the subjects were to be made to promote the universal interest

by sanctions, in *Constitutional Code* the sanctions were applied to officials.[77] Bentham's constitutional theory was a theory of legislation for constitutional law, in relation to which officials would be subjects.

Hart did not appreciate the role of the people in *Fragment,* and further omitted to consider Bentham's constitutional theory in his critical discussion of Bentham's theory of sovereignty. He did not produce convincing reasons for so doing. The only point he made was that Bentham's constitutional theory constituted a different **theory of law**, because constitutional law was no longer regarded by Bentham as a command of the sovereign but as a customary rule which happened to be in force.[78] As has been argued, Bentham's theory of law and sovereignty remained basically unchanged throughout his career.

As a result of his considering only Bentham's legal theory, Hart's view of Bentham was very limited. His relatively minor and technical points about the inadequacy of the nature of a "habit" and a "disposition", either of the courts or of the people,[79] and of "command", as a full explanation of sovereignty, constitutional law, and the normativity of law, overlooked the broad scope of Bentham's argument. Hart did not capture the full meaning of Bentham's theory of sovereignty, constitutional limits and the normativity of law. The central point missed by Hart was that constitutional limits had to be accounted for in a socially dynamic way. As will be shown in chapter 7, this approach led Hart to

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[77] See *Colonies*, pp. 35-6.

[78] Hart, *Essays on Bentham*, pp. 228-9. Postema was the first to comment on Hart's mistake on this point claiming that Bentham's constitutional theory was a normative application of his legal theory of sovereignty: see, chapter 2, p. 43, note 37 above. However, Postema did not look in detail at Bentham's constitutional theory, and as a result overlooked the continuity of the role of the people in determining and effectuating constitutional limitations.

[79] See chapter 2, p. 28 above.

misunderstand Bentham's position in relation to the constitutional role of judges.[80]

Arguably, Hart was preoccupied with his general objective in *Essays on Bentham*, namely to produce a more sophisticated defence of *The Concept of Law*, which attacked Austin's command theory of law, by considering instead Bentham's *OLG*. In doing so, Hart used Bentham as a means of defending his interpretation of law as a system of primary and secondary rules. He refused to admit either that Bentham's theory of law and sovereignty might involve anything more than just "a fact of a command", or that such a theory conceived sovereignty as more than just a habit of obedience or a disposition to obey.

Hart criticised Bentham's enterprise according to his own methodology of discussing *legal* concepts in the context of their social use. In doing so, he in fact explicitly borrowed his methodology from Bentham's epistemology (that is Bentham's theory of fictions). Ironically, the social context in which Hart described legal phenomena was a narrow one, namely a legal theory built on the common understanding of the concept of a rule. Because the terms "validity" and "authoritative" were, for Hart, confined to popular authenticity, by reference to a master rule of recognition, and an extra-normative acceptance of such authority with such a rule by officials, he failed to give a socially dynamic conceptual account of authority or sovereignty. He also failed to see the inherent connections between the popular determination and effectuation of constitutional limits, and the limits of legal validity. Hart's methodology of "descriptive sociology" was sound, but the social context in which this methodology was applied was far narrower than Bentham's one.

It is not enough to advance a practical argument against Bentham's socially-dynamic understanding of sovereignty. For instance, one might argue it would make more sense to lawyers to say that constitutional limits, as well as the concrete interpretation of them, could

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[80] See chapter 7, pp. 324-32 below.

exist regardless of what the population actually thought about them. However this does not mean that it would not make sense for a social theorist to insist that the ultimate basis for law and authority must somehow be related to the collective popular critical attitude of a social group. Hart's theory has indeed been subjected to criticism on these grounds by Postema[81] and Fuller.[82] The core of these criticisms is that Hart's theory did not account for the role of the people in establishing and maintaining political authority.

As has been argued, Bentham had a much broader philosophical view than Hart in understanding the foundation and limitation of political authority. Bentham claimed the position of an observer, a point of view which enabled him to give a universal account of the everchanging relationship between rulers and ruled under the dictates of utility. Bentham had a general critical attitude to authority, and provided for a constant, sharp, social policing of its limits. Bentham understood authority primarily in its psychological and social context. In so doing, Bentham was more of a social than a legal theorist. His understanding of political authority and its limitations always reverted to popular critical justification and action. He wanted to implement the popular, interpretive and critical dimension of his understanding of the justification of political authority in his mature constitutional writings. As a result, his legal and political writings give a more comprehensive view of sovereignty and constitutional law than does Hart's account.

The main focus of this section is another partial reading of Bentham, this time with regard to Bentham's constitutional theory. This reading is "partial" for two reasons. In the first place, it treats Bentham as being either a legal "reformer" or a political "radical". In the

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[81] Postema, *Bentham and The Common Law Tradition*, pp. 256-7. For a critique of Postema's own account, see chapter 2, pp. 76-81 above.

[82] Fuller, *The Morality of Law*, pp. 139-41.

second, it excludes consideration of his legal theory from an interpretation of his constitutional theory, that is it treats Bentham's legal and constitutional theories as distinct and unconnected.

The most comprehensive work on Bentham's *Constitutional Code* is Rosen's.[83] In very much the same way that Hart overlooked Bentham's constitutional theory, Rosen ignores Bentham's legal theory. Rosen examines *Constitutional Code* in relation to Bentham's early political thought, and with regard to the moral aim of his legal theory, namely the production of a complete code of law.[84] However, although he mentions *IPML* and *Fragment*, Rosen does not attempt a comprehensive reading of Bentham's constitutional and legal theory as developed and elaborated in *OLG*. Rosen does not make a connection between the limitation of legal sovereignty, that is limitations of the power to legislate, and the existence of a democratic government.

In his chapter on sovereignty, Rosen does not address the issue of legally, or more accurately, constitutionally, limited government, and its relation to Bentham's constitutional theory. There is no discussion as to how constitutional laws in principem or constitutional promises, concepts which Bentham discussed extensively in *OLG*, relate to Bentham's mature writings. Rosen's only treatment of this issue arises in a discussion of Hart's account of Bentham's provision for a divided and limited sovereign.[85]

A major problem with Rosen's account is that he fuses the issue of the locus of sovereignty in Bentham's thought with the nature of it. By "locus" is meant the determination of where

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[83] Rosen, *Jeremy Bentham and Representative Democracy*.

[84] Ibid., p. 2.

[85] Rosen relies on H.L.A. Hart, 'Bentham on Sovereignty', in B. Parekh (ed.), *Jeremy Bentham, Ten Critical Essays*, London, 1974, pp. 145-53, at 147.

sovereignty resides. By "nature" is meant a conceptual understanding of sovereignty. Rosen argues that Bentham saw the locus of sovereignty as changing depending on the form of government. Bentham understood that in absolute governments all power would be located in the hands of one man. The locus would change in a democratic government from the legislature to the people. Therefore, Rosen argues, "Bentham's commitment to democracy requires him to separate sovereign power from the power to legislate".[86] And also, "For the most part sovereignty means for Bentham the authority to make laws. However, once Bentham in the *Code* places sovereignty in the people, he can no longer see sovereignty in this light".[87]

Rosen bases his argument on two passages in Bentham's *Constitutional Code*. In the first, Bentham clearly located sovereignty in the people: "The Sovereignty is in *the people*. It is reserved by and to them. It is exercised, by the exercise of the Constitutive authority."[88] The other passage Rosen relies on concerns the powers of the supreme legislative:

> The Supreme Legislature is omnicompetent. ... To its power, there are no limits. In place of limits, it has checks. These checks are applied, by the securities, provided for good conduct on the part of the several members.... The power thus unlimited is that of the Legislature *for the time being*. To no anterior Legislature belongs any power, otherwise than by confirmation given to it by the Legislature for the time being.[89]

The argument which Rosen seems to advance here is that the locus of sovereignty, whether residing in the government or the people, and the nature of it, whether legal sovereignty, that

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[86] Rosen, *Jeremy Bentham and Representative Democracy*, p. 41.

[87] Ibid., p. 44; see also p. 47 where Rosen writes: "It was perhaps inevitable that once Bentham favoured representative democracy, he would have difficulty combining the association of sovereignty both with the power to legislate and with a supreme directing power in the state."

[88] *Constitutional Code*, p. 25.

[89] Ibid., pp. 41-2.

is "power and the limits of power to legislate", or political sovereignty, that is "power of location and dislocation of officials", are interdependent.[90] A change from sovereignty residing in the government to sovereignty residing in the people requires that "sovereignty" changes its *meaning* completely, from being a power to legislate, into a power of locating and dislocating officials. A change in locus would involve a change in nature. This implies a fusion between locus and nature: a change in one would entail a change in the other. From the connection which Rosen makes between the locus and nature of sovereignty, it follows that once Bentham changed his position, by locating sovereignty in the people, he *could no longer* mean by sovereignty a power to legislate.

This is a misinterpretation on Rosen's part. It is true that Bentham might be charged with speaking inconsistently about the term "sovereignty", but this should not rule out an interpretation which makes the best sense of his theory, despite the inconsistency. Rosen fails to see that popular and legal sovereignty were *both* essential parts of the concept of sovereignty. Once Rosen is committed to the view that the nature of the concept changed from the legal to the political (from legislative to constitutive power), because of the change of its locus, he sees no need for any further discussion of legal sovereignty. For Bentham, constitutional limits operated at the level of legal sovereignty, but because Rosen effectively ignores legal sovereignty, he has no means of explaining constitutional limits. Rosen's interpretation, therefore, excludes the possibility of accommodating within Bentham's theory constitutional limits on the powers of government. In this identification of locus and nature, Rosen in fact neglects the discussion of the limitation of sovereignty and constitutional limits found in Bentham's legal writings.

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[90] The distinction between legal and political sovereignty was drawn by Dicey in *An Introduction to the Study of the Law of the Constitution*, pp. 285-6; see also chapter 2, p. 42 above for a discussion for the different senses in which Bentham discussed "sovereignty".

Rosen treats Bentham's constitutional writings as if Bentham wished to avoid discussing the issue of sovereignty in the sense of power to legislate. Rosen does not confront the problem: if Bentham saw sovereignty (in the sense of power to legislate) as potentially limited and divided, as Rosen himself recognises,[91] how was it that he provided for an unlimited legislature in *Constitutional Code*? According to Rosen, Bentham solved this problem by adopting the term "omnicompetent", which replaced the term "sovereign" as far as power to legislate was concerned. However, this does not resolve the problem about the limitation of the power to legislate. Whatever words Bentham used to signify the power to legislate, the problematic fact remains, that he provided in his legal writings for limited sovereignty in the sense of the power to legislate. The term "omnicompetent", if substituted for the idea of legal sovereignty, must still account for the limitations imposed by the social justification of authority, which formed a subject of considerable importance in Bentham's legal writings. So, either Bentham was inconsistent in his use of the word "sovereignty" (meaning sometimes power to legislate, sometimes constitutive power), or Rosen has failed to make sense of his legal and political writings. In view of the argument presented in the preceding chapters, it is submitted that Rosen's explanation of Bentham's theory of sovereignty in general, and in the *Code* in particular, is incomplete, because it takes into account only what Bentham wrote in the *Code*, while passing over the earlier discussions of the concept.

Sovereignty, for Bentham, was the product of an interactive activity between the people and the legislature. This account holds good for the *Code*. By locating sovereignty in the people and by introducing the term "omnicompetent", Bentham simply implemented his enabling rationale for governmental power, according to which the sovereign would not be subject to a-priori limits, although by the very fact of being "sovereign" it would be limited.

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[91] Rosen, *Jeremy Bentham and Representative Democracy*, p. 44.

Rosen's failure to incorporate Bentham's legal theory into his constitutional theory has implications for the accuracy and ambit of his subsequent discussion of related themes, both in *Representative Democracy,* and in his later book, *Bentham, Byron and Greece*. In the first place, as a result of the confusion of the locus and nature of sovereignty, Rosen clearly fails to grasp the centrality of the people in Bentham's enterprise in the determination and effectuation of constitutional limits. When Rosen writes, "The people are not making legislative decisions, reading some higher consensus, or expressing a general will", he is correct, since Bentham recognised that there had to be delegation to some authority.[92] However, Rosen continues:

> [The people's] task is **simply** to choose their governors and remove them if they are not satisfied with them. The role is a limited one and must be understood in terms of the relationship between agents or representatives and the people.[93]

Despite his extensive discussion of the continuous role of the people as members of the POT,[94] as far as the exercise of popular sovereignty was concerned, Rosen interprets Bentham as allowing the people only this simple elective role. Even the role of the POT is seen by him as wholly subservient to the function of the people as the constitutive authority. This view is an over-simplification. As has been argued above, the people could exercise sovereignty between elections in determining and effectuating constitutional limits. This was

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[92] Bentham argued that power had to be delegated, or to use his word "deputed", because people would have difficulty in governing. He argued that people would not have sufficient time to make all the enquiries necessary for arriving at a proper judgement. Most of the people would have to labour for their own subsistence and hence would not be able to find sufficient time for investigation: see Bowring, ix. 95, 117. The people would also lack intellectual aptitude in relation to certain functions: see *First Principles*, pp. 119, 144. Further, it would be impossible for the whole electorate to act in concert, as one would expect from a decision-making body: see ibid., p. 238.

[93] Rosen, *Jeremy Bentham and Representative Democracy*, p. 50.

[94] Ibid., chapter 2, pp. 24-40.

a checking or negative power, of a judicial nature, over the extent of legislative power in a political community.

The second implication of Rosen's failure to consider the unified nature of sovereignty in Bentham's legal and political thought, arises in relation to the minimization of power. In *Bentham, Byron and Greece*, Rosen claims that Bentham did not advocate the minimization of power. Bentham could very easily become committed to minimization of power, Rosen argues, because as a utilitarian he thought that all authority was inherently evil. This presumption would incline towards minimal authority. However, Rosen contends, Bentham did not pursue this line of argument. Rosen relies on a note Bentham wrote in 1827 claiming that "power maximized so as securities against abuse be so too".[95] First, minimization of power in the hands of officials would be bad for the public interest because the authority in question would be constrained in what it could do to further the public interest; and second, there would be no point in arguing for the efficacy of a popular check over such minimal power.[96]

Although the criticism of the minimization of power appears correct, this argument remains incompatible with the attitude of general scepticism to authority which Bentham wanted to cultivate in the population. The fact that, from a utilitarian perspective, an authority was regarded as a potential source of evil, meant that checks were required not only on *how* power was exercised, but on whether the power was needed in the first place. On the interpretation put forward in this thesis, what Rosen refers to as Bentham's objection to the

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[95] Rosen, *Bentham, Byron, and Greece*, p. 74.

[96] On the subject of minimization of power, see *First Principles*, pp. 30-5. In this context, "minimization" meant not enabling government to do more than those functions required for the attainment of the universal interest. Further, it meant making the operative power subordinate to the constitutive. These senses of "minimization" are entirely compatible with the enabling rationale for government; see also Bowring, ix. 119.

minimization of power was simply the restatement of the enabling rationale for government, namely that government ought not to be a-priori limited. Minimization of power meant, for Bentham, a-priori limitations on legislative power. However, Bentham's position with regard to a-priori limitations was entirely compatible with his critical attitude towards legislative power - namely continuous checking as to whether a certain power was needed in a given instance. This was the only way in which Bentham could provide for efficient government, which would also be checked efficiently by the people, without being accused of maintaining an authoritarian theory.

The third, and most important, difficulty which stems from Rosen's non-unified view of the concept of sovereignty is that he understands "omnicompetence" as a synonym for "unlimited power to legislate". Relying on the passage quoted above[97] with regard to the supreme legislature, Rosen reads it literally, at the expense of not making sense of the unity of purpose between Bentham's legal and constitutional theory. This reading leads him to the same conclusion that Hart reached, namely that Bentham did not provide for a constitutionally limited government.[98] Indeed it is not clear from Rosen's account to what extent *Constitutional Code* encompassed the idea of the rule of law as a constitutional principle. He writes:

> Within the one-year period of office, the legislature may enact any law. If the legislature passes a law severely restricting, for example, freedom of speech and the right of assembly of citizens, there is no Supreme Court to declare such a law unconstitutional and no President to veto it as is the case with the American constitution.[99]

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[97] See p. 209 above.

[98] However, his failure to consider constitutional **law** does not prevent Rosen from attaching the word "legal" to constitutional concepts; for example "the *legally established* Public Opinion Tribunal", in *Jeremy Bentham and Representative Democracy*, p. 56.

[99] Rosen, *Jeremy Bentham and Representative Democracy*, p. 61.

Rosen goes on to argue that there would be no constitutional limits on the power of a legislature even with respect to a law which would abolish the constitution. As will be argued in the remainder of this thesis, Rosen's statement that there were no constitutional limits as such, as well as no court to enforce them, is not only a mistaken interpretation of Bentham's theory, but is factually incorrect as far as actual institutions were concerned.

The checks on sovereign power which Rosen does discuss - annual elections, promises in the legislator's inaugural declaration, and the institution of the Legislation Penal Judicatory - are attempts to provide securities against bad government.[100] However, these attempts were all minor and in any case insufficient, because none of them fundamentally address "constitutional limits" in their true sense. Nowhere does Rosen discuss the *legal* status of *Constitutional Code.*

Rosen's non-consideration of Bentham's theory of law results in a further misinterpretation. He argues that under Bentham's system security against misrule was only effectuated if the majority of the people joined together in establishing certain opinions with regard to the government. Any Bill of Rights would have to be seen as a collection of principles agreed by the majority. There was no protection for individuals or minorities in the sense that they could initiate a legal process to protect their rights.[101] As has been argued, Bentham saw public judgement as the means of providing for a utilitarian consensus with regard to constitutional limits. Under Bentham's theory, the concessions made by the legislature would be obtained as a result of fundamental norms established in the community.

Rosen's disregard of Bentham's idea of constitutional limits continues to be a feature of

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[100] Ibid.

[101] Ibid., p. 64. Rosen's has recently modified his interpretation of Bentham's view on minorities: see chapter 6, p. 289, note 96 below.

his arguments in *Bentham, Byron and Greece*. Here again, Rosen fails to account for the manner in which Bentham's understanding of constitutional arrangements incorporated law-making power and limits to it. His explanation of Bentham's constitutional theory can not accommodate constitutional limits, or constitutionally limited government. Relying on a passage in *First Principles,*[102] Rosen argues that,

> The relationship between operative and constitutive power was a complex one. On the one hand, the holders of operative power **might easily destroy** constitutive power and thereby destroy **constitutional rule** in the process. On the other hand, constitutive power could only be enhanced by variations in the arrangements of operative power. In principle, operative power, the power of government, **was unlimited**. But it was **necessarily limited** by a constitution and the way it was organized as, for example, in the distinct arrangements for a legislature, executive, and judiciary.[103]

It is difficult to understand how operative power could be unlimited and limited by a constitution at the same time. Further, it is difficult to see how could it be possible to limit operative power on the one hand, but easy to destroy this limitation on the other.

Rosen refers to the metaphor used by Bentham in *First Principles* in which the relationship between the constitutive and operative powers was compared to that between a spring and a regulator in a watch. Each part needs the other to work in a properly controlled way, and only together can the spring and the regulator perform the required operation. If the spring stands for the operative power, and the regulator for the constitutive power, what would the regulation consist of? Rosen is aware of this problem because it seems to him unclear that the act of regulation by the constitutive power would only consist in electing and dismissing officials.[104] Rosen does not furnish any explanation of what this regulating force might

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[102] *First Principles*, p. 135

[103] Rosen, *Bentham, Byron, and Greece*, p. 66.

[104] Ibid.

consist in, although he recognises the need for such an explanation.

The crucial question becomes, as Rosen acknowledges, who was the "watchmaker"? And Rosen answers - the legislature.[105] However, adhering to Bentham's metaphor for a moment, the interaction between the regulator and the spring would be governed by the principles of physics which would exist independently of the particular configuration of the regulator and the spring. The application of the principles of physics to the common operation of a specific regulator and spring would take place in some context which might be referred to as their "mutual operation". This context, which would give rise to the particular watch in question, would be the "watchmaker". Yet, according to Rosen's argument, one part of the "spring", namely the legislature, which was part of the operative power, would also *determine* (rather than influence) the prime parameters of the regulator. This must be wrong. The basic "principle of physics" in the instance of the government would be none other than the principle of utility, which would be the basis for communication and influence between the two main bodies of the constitution - the people and the government. The nature of this "watchmaker" would depend on some consensus achieved among the people, and between them and the government. This consensus would serve as a negative check on an empowered government. Hence the parameters of regulation would *depend* on this consensus, and would not be *determined* by the legislature. The effectiveness of the "watchmaker" would depend on the degree to which the constitution allowed freedom for the principle of utility to determine the interdependent operation of the constitutive and operative powers.

Rosen assigns too much importance to the legislature, and sees it as the ultimate power in a political society. He writes:

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[105] Ibid., p. 67.

> Bentham **did not** believe that any interaction between constitutive and operative power advanced the public interest. The **enlightened** legislator **should** see the object of a constitution as identifying the interests of operative power with the universal interest via a constitutional democracy.[106]

Again, *everything* is entrusted to the enlightened legislator. It is true that Bentham wanted to ensure, as far as possible, the enlightenment of the legislature, and indeed saw it as necessary for a good government that the right people serve in it. However, the fact of securing good people in government could hardly explain what constitutions were all about. Rosen does not emphasise the crucial point that there could be no such thing as an "enlightened" legislature which existed independently of the universal interest. Rosen's dismissal of interaction as a means of advancing the public interest amounts to a crucial misinterpretation of Bentham's account. It was precisely the interaction between the legislature and the people which would create the universal interest, and would continuously help to determine what its ambit would be. The universal interest would not be promoted without interaction among the people themselves, and between the people and the government.

To stress the point again, there would be no such a thing as an automatically enlightened legislature. There was instead a legislature consisting of officials who might potentially possess the characteristics (appropriate aptitude) which enable them to be enlightened. So the quality of interaction, or communication, between the legislature and the people would advance understanding of what the universal interest with regard to any given matter actually was. Enlightenment of the legislature would result from social interaction between it and the people.

Rosen then proceeds to the final part of his argument, in which he makes an excursion into

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[106] Ibid., p. 68.

legal theory. Rosen admits that the relationship between rulers and ruled was not of a simple "vertical" nature, but does not elaborate. He argues that in Bentham's theory, the holders of operative power could place themselves "above" the law. This is a further mistake on Rosen's part, because clearly, both in Bentham's legal theory, where constitutional laws in principem and constitutional promises could exist, and in his constitutional theory, where rulers could be brought to court and punished, there were constitutional limits on government which had the characteristics of law. *Some* part of Bentham's constitutional theory must therefore overlap with his legal theory. Rosen argues:

> The interaction of constitutive and operative power is based on rules and generates further rules as to the arrangements for appointing and dismissing holders of operative power. Bentham's account not only provides for the continuity of sovereign power **but also for continuing change and variation in the exercise of that power.**[107]

Rosen's argument here becomes incoherent, and his excursion into Bentham's legal theory is incomplete. On the one hand, he seems to feel, rightly, that the regulating force of the people involves something more than rules regarding the location and dislocation of officials. Yet, on the other hand, he does not look beyond location and dislocation in discussing Bentham's theory of law.[108]

Next comes a passage in which Rosen's argument becomes extremely confused, as he struggles with the difficulties of his own interpretation:

> It is of interest that Bentham did not identify the exercise of constitutive power with

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[107] Ibid.

[108] In comparing Bentham's constitutional theory with what Hart said about constitutions in *The Concept of Law*, Rosen equates the interaction between the constitutive and the operative power with Hart's idea of the rule of recognition. He argues (rightly) that the rule of recognition stood for legal validity, but goes on to argue (wrongly) that Hart had equated the rule of recognition with constitutions. This was clearly not true, because the rule operated as a customary social rule which validated even the constitution and hence could not be identical to it. It was an ultimate rule of validity which could also be seen as a social fact about the legal system, including its constitution: see *The Concept of Law*, pp. 102-4.

> a constitution. He did not do so partly because he was attempting to answer a different question, that is, one about the nature of a constitutional system rather than one about a legal system. Bentham was sufficiently realistic not to argue that it was the constitution itself which defined the constitutional system. While not denying that a constitution provided answers to questions about the validity of laws, Bentham would argue that this was neither its most important function nor its most characteristic one. Constitutions, for Bentham, were concerned primarily with offices and power and with the principles which governed their distribution. In the interaction between constitutive and operative power one sees the dynamic operation of a constitutional system.[109]

This passage is incoherent. It is not clear whether the status of constitutions in general, and the *Constitutional Code* in particular, is in any respect "legal". What is a "constitutional system" in this context, and in what way does it differ from a legal system? Is it true that Bentham had not been interested in the question of legal validity in the *Constitutional Code*? If a constitution were concerned with "offices and power", how could it be divorced from questions which were peculiar to the *legal* system? A given distribution of offices and power was no more than the substance of a given constitutional law, which marked the limits of legal validity. Rosen attributes to Bentham's thought a divorce between issues which are conceptually linked. All these ideas - a constitution, a constitutional system, a distribution of offices and power, the limits of legal validity - are conceptually connected issues. That which is presented by Rosen to be a different entity, the constitutional system or constitution, *was* meant to circumscribe the limits of legal validity, or the limits of sovereignty, or the limit of the power to legislate. Any constitution which provided for a given distribution of power must include a constitutional law in principem to that effect. *Constitutional Code,* as

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[109] Rosen, *Bentham, Byron and Greece*, p. 68. This passage echoes another in *Jeremy Bentham and Representative Democracy*, p. 24, in which Rosen treats the issue of constitutional limits separately from legal theory. Relying on a passage from *Constitutional Code*, p. 36 (Chapter V, S.4, Art. 4), Rosen comes to the following conclusion: "Bentham does not say that **law, the rule of law, and constitutions** are the main checks to the pernicious exercise of power. Public Opinion **and not law** plays this role." In this passage Rosen in effect does away with constitutional law.

has been argued above, was no more than a grand, detailed law, which specified the limits of legal validity. In Bentham's language, *Constitutional Code* was no more than an all-encompassing constitutional law in principem. *Constitutional Code* was an extensive self-imposed limitation on the part of the legislature, which would serve as a recommendation to future legislatures.

Hence, there remained a conceptual link between what a constitution was, and the limits of legal validity. It is true that Bentham did not emphasise this link in his constitutional writings, but it was very much there. *Constitutional Code* was an instrument of limitation to the power to make law. It was a detailed expression of volition, a self-limiting volition by the legislature to the effect that if laws were to be made constitutionally, they would have to be made in accordance with the distribution of offices and power as specified in the code. The interaction between the operative and the constitutive power was part of what Rosen calls "the constitutional system", which not only ensured that good people were in government, but determined who would be considered a good official, or even "an official". Institutions were only one aspect or dimension of this constitutional arrangement. A scheme of institutions was a subject-matter with regard to which interaction between the government and the people could be conducted, having for its object the determination of the limits of law-making power. An argument over legal validity necessarily involved an argument which embraced questions about the constitutional system. In short, the object of arguing about constitutional systems and constitutions was to understand them as specific provisions for constitutional limits, or the limits of socially justified coercion. Constitutional systems were simply particular applications of the limits to legal validity.

The common denominator between the legal side of constitutional law and constitutional theory was that both were concerned with securing the greatest happiness in the community.

They were only two different *aspects* of the same problem, namely the way in which a political society *ought* to be organised. Each assumed the existence of the other - neither was possible without the other. Constitutional limits were related to the general happiness in the sense that to coerce the population beyond what was socially acceptable would operate to diminish the general happiness, *both* because it would have a devastating effect on expectations, and also because it would be widely unpopular. This understanding of constitutional limits may be regarded as the substantive moral assumption from which the general happiness of a political society, even in the most basic form of such a society, should be accounted for. Constitutional theory might give rise to a particular constitutional arrangement which made provisions for constitutional limits to a greater or lesser extent.

However, such a morally-based theory of constitutional limits would be meaningless if the society did not adopt a constitutional system which was designed primarily to secure the non-transgression of the limits of acceptable coercion. Constitutional theory should provide the specific institutions through which the substantive idea would be realised, and that was precisely what Bentham tried to do in his writings at the time of the French Revolution, in *SAM*, and in *First Principles* and *Constitutional Code*. All of these works included both a description of institutional forms *and* a normative grounding of such forms.

In sum, the gist of this critique of Bentham scholarship is that it has so far failed to perceive the unity between Bentham's political and legal thought, as well as between his early and late political thought.[110] The only exception in this respect is Postema, who clearly saw some connection between Bentham's early and later writings, but who did not develop his

[110] Another scholar who fails to appreciate the fact that Bentham provided for legally limited government is R. Harrison: see *Democracy*, London, 1993, pp. 109-112.

insights fully.[111] Bentham's *Constitutional Code* did not imply a rejection of the command theory of "a law". Further, his *Constitutional Code* did not neglect the question of the limits of legal validity or the limits of sovereignty. The common denominator between his legal and political theory was the people, through whom constitutional limits, of which *Constitutional Code* was an example, were determined and effectuated. There is no doubt that in Bentham's mind democracy, characterised by the capacity of the ruled to get rid of their rulers, *and by the limits of legal validity which such a democracy would create to this end*, was a precondition for achieving many other features of a free government and society. However, in order to achieve a free government, it was necessary to allow the people to form a consensus on the question of constitutional limits, and to encourage disobedience to the law in cases where an individual or group felt that some fundamental communal sentiment was transgressed by a proposed coercive measure. Democracy should also operate between elections, by allowing the people a direct participatory role in determining and effectuating constitutional limits. Once determined, these limits could, but would not have to, persist beyond a given government. Constitutional law would be socially entrenched by focused expectations, *whoever might be in power.* However, Bentham always saw constitutional signs, such as constitutional laws in principem, as ultimately contingent upon utility, for the reason that the community might always change its most abstract distributive patterns as a result of certain contingencies. Therefore, even basic communal beliefs would be subject to the dynamism of social change. Constitutional law was, for Bentham, a mirror of a community's basic understanding of itself. The description of constitutional law was part of Bentham's universal jurisprudence.[112] The manner in which a community saw itself

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[111] See chapter 8, pp. 343-5 below.

[112] See chapter 1, pp. 14-17 above.

depended on its stage of development, its cultural heritage, and its ideology, at a given moment in time. Constitutional limits were a temporal reflection of a group's basic communal beliefs. In this sense, the concept of sovereignty would remain, first and foremost, popular.

V

What are the implications of not incorporating constitutional limits into Bentham's thought? According to Kelly's recent revisionist interpretation, Bentham's writings contain a theory of distributive justice.[113] Bentham's theory is said to accommodate liberal values. A sphere of individual inviolability exists within a realm of secured expectations. These expectations are secured by a regulative mechanism. Within this sphere, each person is able to pursue his or her own conception of the good. The common theme of the work of Kelly and Postema[114] is that by providing for security through publicly accessible rules, Bentham has laid the foundation for each individual to live his or her life according to his or her own preferences.

However, neither theory discusses the most general sense in which antagonism exists between liberty and authority, namely between security achieved by the enforcement of rules and security against too much rule, or misrule. In other words, these theories do not address the antagonism which exists between individual security, and the invasion of individual spheres in the name of security. Such an antagonism, to which Bentham referred as early as *Fragment*,[115] can be understood only if Bentham's enterprise is considered as a whole, that

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[113] Kelly, *Utilitarianism and Distributive Justice*.

[114] Postema, *Bentham and the Common Law Tradition*.

[115] *Fragment*, p. 480.

is in both its legal and constitutional aspects. The ultimate resolution of this antagonism within utilitarian theory involves the social process of formulating a conception of harm in the context of the group in question. This antagonism is the context in which Mill's "Harm Principle" should be understood.[116] *The whole point* of seeing constitutional limits as a socially dynamic concept is to develop a social, culturally-based conception of harm. Any definition of harm is to be understood as culturally contingent, both arising out of, and feeding back into, the ongoing global utilitarian calculation concerning the limits of justifiable coercion. For example, in a relatively undeveloped group, "harm" could simply refer to threats to individual survival, and the avoidance of such harm could be achieved by a provision for the security of persons. As has been argued above, discussion of harm might enter in relation either to the substance of a proposed coercive measure, or to the estimated degree of co-ordination of moral beliefs in the community, as far as judging a coercive measure was concerned.[117] A conception of harm would have to function as an element of the utilitarian calculation about the limits of the social justification of authority.

In order to defend a utilitarian theory which can accommodate this method of justification for coercion, one has to answer one of Rawls's criticisms of the principle of utility. Rawls criticised the principle of utility for treating a social body, a community, in the same manner as an individual. Rawls claimed that the principle of utility had to operate by assuming an allegedly "impartial spectator", who would decide on a dominant conception of the good to which all individual conceptions of the good would have to be aligned. Once a conception of what would maximize social well-being was determined, "society" would have to be

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[116] See, 'On Liberty', in *The Collected Works of J.S. Mill,* J.M. Robson (ed.), vol. 18, Toronto, 1977, p. 223.

[117] See chapter 4, pp. 133-5 above.

organised in such a way as would maximize that well-being. Such an approach would be potentially insensitive to a just distribution of rights, for example. It would lack commitment to any particular type of distribution. Its only commitment would be to decide a communal conception of the good to be maximized, and then go on to maximize it. An imposition of the majority's opinion could be justified in such a way.

In other words, in attempting to discover a *collective* conception of well-being, utility would have to presume an *allegedly* "impartial spectator", because, in fact, any "spectator" would necessarily be a partial one, and would dictate a dominant conception of the good to a social group, which, according to *his* intellectual and sympathetic power, would represent something the maximization of which would further well-being in that community. In short, Rawls's point is that a utilitarian would adopt for society as a whole what was the principle of rational choice for a single individual.[118]

Kelly has forcefully argued that on Bentham's account, the legislature would operate indirectly, in so far as it would not be concerned with a direct provision of individual well-being. Kelly overcomes convincingly a significant part of the charge that utilitarianism must assume an alleged "impartial spectator". By providing a realm of security, or a given distribution of property or rights, within which individuals could pursue their own conception of the good, Kelly provides an account which is sensitive to the existence of spheres of individual inviolability, under the law. In this manner, neutrality is accommodated within the operation of a utilitarian scheme of government. According to Bentham's theory of justice, if a more egalitarian distribution were required, it could be made if full compensation were given for the disappointment which would be caused by violating expectations existing under the prevailing realm of security. This was the only way in which security, which was

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[118] J. Rawls, *A Theory of Justice*, pp. 26-7.

a prime utilitarian value, could be reconciled with equality.

No criticism of Kelly's portrayal of Bentham's theory of justice is intended here. Rather, the arguments which follow are the implications of an earlier criticism of Kelly's portrayal of the operation of the principle of utility.[119] My point is that it is very difficult to detect in Kelly's account the source of substantive limits on what the allegedly impartial utilitarian legislator *is able to do* in the name of "providing a secure pattern of expectations".

Two states of affairs would be entirely compatible with Kelly's account. First, the use of coercion by centralised institutions might be justified regardless of what interest or distribution these institutions promoted. In utilitarian terms, a realm of security would be achieved and enforced. The "partiality" of the spectator would, in this context, amount to what Bentham called a sinister interest. Abuses of power would be common in a government based on a sinister distributive conception, although in terms solely of promoting security of expectation such a government could be justified. Kelly's formal, instrumental account of the relationship between security and equality plays into Rawls's hands. Kelly's account is not sensitive to the potential limitations which might constrain a legislature when devising a realm of security. The necessary partiality of institutions, under the global utilitarian goal of achieving security, could easily lead to the use of an excessive amount of coercion, in order to achieve a realm of security through publicly accessible rules of action. Kelly's account is unable to accommodate limits imposed upon the legislature when devising a realm of security.

Second, institutions might remain "partial" in that they might enforce a conception of the good on a community in the face of its transcendence by social development. They would not be responsive to communal change which might endorse a more egalitarian distribution,

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[119] See chapter 4, pp. 148-63 above.

or to changes in social attitudes which might endorse the accommodation of certain minorities' conceptions of the good. Bentham's account of constitutional *limits* allows for such changes to be recognised, and for their entrenchment in new limits to the latitude allowed to the legislature. Such entrenchment will be the result of the interest which the legislature has in responding to a new communal consensus concerning the conception of harm, and the proper limits to coercion. On Kelly's account, such entrenchment of constitutional limits, that is *disabilities* which reflect the ongoing crystallisation of communal sentiments in relation to a given distribution, can not be accounted for. Even if a distributive change should come about as government reacts to a changed consensus, there is no way, according to Kelly's account, in which the new distribution could be entrenched *as* a constitutional limit. Kelly's account, in short, is not sensitive to that aspect of security against misrule which connotes constitutional limits.

Thus, on Kelly's account, there is no means of limiting the power of the allegedly "impartial spectator" attributed to utility by Rawls. What can Kelly mean by the "indirect" operation of the legislature other than the acceptance of an alleged "impartial spectator"? The acts of the legislature in Kelly's account are taken as "given", and as necessarily maximizing utility by virtue of their conduciveness to security. Despite these acts being susceptible to gradual reform through changes in social attitudes, Kelly's account does not show how the powers of legislation in themselves could *already be limited* by such social attitudes. His account fails to show how the parameters of a realm of individual security could be modified, and its ambit limited, by basic communal beliefs. His largely indirect account marginalises the way in which utilitarian calculations can directly limit the potentially arbitrary conception of the good which would be imposed under the indirect approach. The people, in entrenching constitutional limits, can ensure that the authoritative (and hence partial) spectator will not

legislate beyond what is absolutely socially justifiable, and, in particular, will not be able successfully to commit *undue suppression of spheres of individual inviolability*.

Because, as has been seen in chapter 4, Kelly assumes that actions of resistance have an automatically harmful effect in terms of utility - an assumption resulting from his narrow interpretation of Bentham's theory of obligation - he can not fully answer Rawls's criticisms. Kelly fails to recognise that the maximization of utility by an indirect, regulative mechanism was itself to operate within a more categorical utilitarian context.[120] Kelly's allowance for the direct operation of the principle of utility only in the context of "reform" overlooks the new limitations upon legislative power which were the potential social result of each reform.

My argument, which is close to Postema's, is that in determining who the "spectator" might be, Bentham's constitutional theory tried to make the legislature or "spectator" not only ask what conception of the good would best characterise the community (which it had to do were it to provide a means of co-ordination, for example), but also to reflect upon what actions would be regarded by the community as amounting to an excessive use of coercion, and thus condemned as misrule. This self-questioning by the legislature could only be grounded on a utility calculation which related directly to obligations imposed on the legislature by the community. The legislature must be capable of forming a judgement regarding the limits of acceptable coercion.

Both the immediate and the categorical sphere of the operation of the principle of utility were important for Bentham. The character of the former was indirect. It would produce a dominant conception of the good, but one subject to reform. This would provide security by rule. The other sphere, the categorical, determined the ambit of the first one. It was the

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[120] With regard to the immediate and the categorical (constitutional) sphere of the operation of the principle of utility, see chapter 4, pp. 155-7 above.

sphere of constitutional limits. It would produce a communal utilitarian calculation which would determine and effectuate social limits to the justification of coercion. In short, a direct utilitarian calculation would govern the ambit of the area in which indirect utilitarian calculations could be used.

A full answer to Rawls's criticism would admit that there existed a partial spectator (the legislature), but that its field of operation would be no more extensive than necessary. The legislature's field of action could *be limited* to a certain distribution of rights, but a distribution susceptible to change as the community changed. The role of constitutional law in Bentham's theory was to make sure that the legislature (or the immediately observed spectator) would not be allegedly "impartial", but would *actually be impartial*, by mirroring a communal judgement about the social justification for such coercion. Constitutional law would determine who the spectator would *be*, and in what manner, as well as to what extent, his power should be exercised to reinforce, or to diminish, neutrality between individual conceptions of the good. Constitutional law, for Bentham, was aimed precisely at providing for the social dynamism which avoided the need to posit a merely *presumed* impartiality on the part of the legislature. This was the message hammered home by Bentham in the third chapter of *OLG* - that constitutional law determined the **end** of all the other laws. The real and ultimate spectator was the people. They could become, as society changed, more and more genuinely impartial, more and more neutral. The important point is that Rawls's approach to justice could itself be accommodated into a utilitarian scheme. However, the *allegedly* "impartial" spectator which Rawls attributed, justly, to a socially static, largely indirect utilitarian strategy, would be replaced by a *truly* impartial one. The spectator, what Bentham would refer to as "the watchmaker",[121] would be some set of constitutional

[121] See pp. 216-7 above.

laws,[122] the result of a reflection which would follow an ongoing dynamic social process. The heart of this process would be a determination of the balance between the utility of authority and the utility of imposing limitations on it. Under a universal utilitarian account, Rawls's criticism does not operate to curtail the proper operation of the principle of utility. His own conception of distributive justice could become an entrenched ideology, which would limit the operation of the legislature. Rawls's description of the methodology of utility is correct. However, his inference from it regarding utility's inevitable curtailment of a just distribution of entitlements is incorrect. Rawls, in effect, advocates a certain ideological application of utility. His theoretical preoccupations are very different from Bentham's. Bentham aimed at a universal explanation of what was possible. Rawls aims at an ideological justification of what is desirable.

[122] The nature of these laws is discussed in chapter 7, pp. 297-306 below.

CHAPTER 6 - THE PUBLIC OPINION TRIBUNAL - AN ANALYSIS OF CONSENSUS FORMATION AND THE EVOLUTION OF COMMUNITIES

> Rights corresponding to and derived from correspondent obligations of the perfect kind are not derivable from any other source than law.
>
> Of these legal rights shall they, and in what manner, on the several occasions in question, make exercise? Such are the questions for which it belongs to deontology to find the solution.
>
> *Deontology*, pp. 171-2.

> Suppose not only no extravasated factitious honour, but no superiority by power, no superiority by opulence, to have place, sympathy and esteem, thence free and spontaneous service in all its shapes, would attach itself to superiority in the scale of genuine moral virtue: of effective benevolence in harmony and alliance with self-regarding prudence: and thus it is that these same instruments of felicity, attaching themselves in the character of reward to that same moral virtue, operate towards the encrease of it, by furnishing inducements to the practice of it. This order is disturbed by power....
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> *First Principles*, p. 321.

I

This chapter analyses in detail the theme of a utilitarian consensus which, as has been argued in chapters 4 and 5, dominated Bentham's *A Fragment on Government,* and persisted in his mature constitutional writings.

Bentham believed that people could arrive at a collective judgement, approving or disapproving of a given coercive measure. More specifically, it has been argued that, in *Fragment* as well as in his mature constitutional writings, Bentham understood constitutional

limits as determined and effectuated by a popular collective judgement. In this chapter, the nature of, and the conditions for, the formation of public opinion will be considered in much more detail. The nature of a utilitarian consensus will be discussed, and particular attention paid to Bentham's understanding of the ideas of influence, or "interaction", and human motivation. The main purpose is to show that Bentham saw the formation of an independent public sphere as beneficial.[1] The efficient formation and execution of public opinion needed to be facilitated if it were to act as an effective check on the legislature.

It might be objected that constitutional limits can not properly be understood in terms of a consensus formed by the public. Constitutional limits might exist regardless of public attitudes or expectations.[2] Thus, to equate constitutional limits with what the public *actually* thought or expected would be a mistake. However, as a social theorist, Bentham would not accept this objection. He would explain constitutional wrongs, and evil-doings on the part of government generally, in terms of a "functional deficiency", arising, for example, from the false consciousness of the public. Notions such as "constitutional limits", and "public opinion", had to be explained on the basis of the general parameters of the functioning of societies, whatever the quality of the actual conditions for this functioning might be.

For Bentham, there would always be some degree of public involvement in any comprehensible account of constitutional limits. In oppressive regimes, communal judgement would be distorted, but would still operate. For Bentham, oppression did not mean a discourse *without* public judgement, but a discourse in conditions which prevented the public from forming a proper judgement, or prevented the people from making effective any proper

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[1] The meaning of "independent" in this context is explained at pp. 275-6, note 69 below.

[2] In *Essays on Bentham*, pp. 233-4, Hart argued that constitutional limits existed whether a law was popularly obeyed or not.

judgement once formed. An analysis, such as Hart's, which conceptually divorced what the people critically thought about legal validity from a formal account of such validity, would *itself* be a result of a communicative misconception on the part of various agencies which participated in the formation of public judgement.

This chapter consists of four parts. The first examines the main features of the Public Opinion Tribunal in Bentham's mature constitutional writings. It discusses the independent nature of public opinion, or the collectivity, and the manner in which public opinion facilitates what has above been termed a "panoptic democracy".[3] The second examines the nature of what Bentham calls the "universal interest". A detailed discussion of the way in which a consensus might be formed in society is undertaken. The notions of "influence" and "sympathy" are analyzed, relying substantially on *Deontology,*[4] and the unpublished writings written at the time of the French Revolution.

These two sections overlap in that they analyze the same theme, namely the way in which the relationship between an individual and the collectivity might lead to the formation of a consensus. The two sections are structured so as to move from the general to the particular. "Public opinion" is initially discussed at a general, abstract level, then more concretely through the idea of "influence", and finally through a detailed exposition of consensus formation on the basis of the characterisation of human motives and the application of various sanctions.

In the third section, an account of the relationship between Bentham's accounts of universal

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[3] See chapter 5, p. 201 above.

[4] *Deontology* was Bentham's mature work on ethics. He distinguished between political deontology, which involved law and politics, and private deontology, which involved moral instruction between individuals - an extra-political activity. He presented a less developed version of deontology in chapter 17 of *IPML*, especially at pp. 282-3.

theory and history is suggested.[5] It will be argued that notwithstanding the unchanging nature of the universal concepts utilised in his legal and political theory, such as pain and pleasure, law, and sympathy, Bentham envisioned a significant change of emphasis in their operation within a social group as this group advanced in its history. The fourth and final section will summarise the argument of the chapter, and will give the broadest account of constitutional limits defended in this thesis. This account will portray constitutional limits as a critical reflection which implies a possible change of locus of certain obligatory spheres, from central institutions to the community at large.

II

The Public Opinion Tribunal (hereafter POT) was a public court.[6] It was a fictitious entity.[7] Bentham had to use the language of fiction because the POT was not an institution whose membership was known in advance. The POT was a committee composed of all the citizens who took an interest in a given matter. The effect of the tribunal's judgement would be real, despite its fictitious nature,[8] and the fluctuation of its members. The tribunal's judgement could be discerned "as if" it really existed. It was by publicity, and hence notification, or "notoriety", that the POT's operation was enabled.[9]

Bentham constantly portrayed the POT as an *independent body*. The POT could form a

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[5] See chapter 1, pp. 13-20 above.

[6] For a description of the main features of this tribunal in Bentham's democratic institutional scheme, see chapter 5, pp. 172-5 above.

[7] With regard to the meaning of fictitious entities and Bentham's theory of fictions, see chapter 4, p. 109, and note 5 therein above.

[8] *SAM*, pp. 28, 54.

[9] Ibid., p. 29. On "notoriety", see chapter 5, pp. 187-9 above.

judgement and attach a correspondent *will* to it. The judgement and its execution could be applied in relation to the determination and effectuation of constitutional limits. Unlike a typical court, the POT would not be limited to a given code of law for its subjects of reference (or sources). It could take notice of all public matters, and would consider all sources of information it regarded as relevant in discussing any single matter.[10] Its ability to consider issues of public interest would be much more flexible than that of any official machinery. It would also have the potential to arrive at an establishment-independent judgement, based on communication between people, before its deliberations were communicated to central institutions.

However, Bentham did not only conceive the POT as a court,[11] but also as a legislature which would create moral obligations.[12] He argued that one of the advantages of the POT over a normal legislative chamber would be that in the deliberations of the latter, because of the rigidity of procedure, there would be no immediate opportunity to point out contradictions in the deliberations. By contrast, while public opinion was forming, public deliberations would not be subject to rigid procedures which might hamper the flow of debate. Further, deliberations would be carried on without being influenced by considerations of power, which could hamper proper evaluation.

But what did Bentham mean by the term "public opinion"? By the idea of a "public", Bentham understood a group of people who happened to be interested in an issue, and hence

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[10] *SAM*, p. 67.

[11] See chapter 5, pp. 172-3 above.

[12] See *Deontology*, p. 72, where Bentham wrote: "The legislator *creates*, of himself, new interests. To the deontologist it belongs, of himself, to bring to view existing interests, and even, in proportion to the influence of his authority, to apply the force of the moral or popular sanction to the creation of new interests."

would communicate about it with one another. The people who were interested in the matter would exchange opinions with one another.[13]

On many occasions during his career, Bentham seemed to refer to the impossibility of speaking about a community as an independent entity. The idea of community was only comprehensible as an aggregate of persons.[14] However, with reference to the POT, "aggregate" seemed to take on a particular signification, although it goes without saying that it would not be possible to talk about the POT without presuming the independent existence of the individuals who composed it.

The idea that public opinion arose from "summing up" individual opinions, though not entirely wrong, fails to capture the complexity of the social operations involved in its formation. Summing up individual opinions implies treating every person as an autonomous, already opinionated, being. The majority of such autonomous people who hold an opinion about a given matter are taken to represent "public opinion".

Such a description of the social process of "adding up" (although what is done in elections can be described in this way), can not account for the complex communicative social process which would arguably take place prior to the stage at which such opinions were "added up", a process which may be quite distinct from such addition.

According to Bentham's theory of fictions, a fictitious entity like the POT is understood by means of connecting it to real entities - to people who communicate with one another, and, as it will be argued, to pain and pleasure. Although the POT as a whole was fictitious, it was comprehensible as a product of communication which would result in a real social

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[13] For Bentham's idea of "communication", see *Chrestomathia* (CW), M.J. Smith and W.H. Burston (ed.), Oxford, 1983, p. 165.

[14] See, for instance, *IPML*, p. 11.

effect. As has been mentioned, Bentham referred to it as a committee. This committee was the group of people who took an interest in a given matter, and so would communicate on it. Bentham used paraphrasis in order to give a communicable and real meaning to the fictitious entity:

> The best course therefore will be to consider it as acting by a Committee - in this case all fiction **may** be excluded. That which is real being thus explained, the explanation may afterwards be applied with advantage to the **mixture of the real and the fictitious.**[15]

The most important feature of the POT was its *operational autonomy* - its independence from the individuals in the community. Although its judgement could be *influenced* by individual opinions, it consisted of a collectivity of opinions. This collectivity would be the result of communication, and *as such* would be able to influence each individual member's opinion. The question was, to what extent could a distinct collective judgement function in the mind of each member of the social group, when he made up his own judgement?

When Bentham discussed situations in which "an official shall do/refrain from doing something because doing otherwise would result in a moral sanction imposed by the POT",[16] or when he wrote "this is what the public thinks", what did he mean? How could a public "have an opinion"?

Although, technically speaking, the POT had no existence outside the individuals communicating upon a given issue, its judgement would be operationally independent, in that it could direct and limit individual preferences in a given direction. This collectivity, once formed, could alter individual judgements, in that individuals would be able to imagine what its judgement might be (to construct future possibilities), and this view of its possible future

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[15] *First Principles*, p. 70; see also Bowring, ix. 41.

[16] See, for instance, *First Principles*, pp. 56-9.

judgements might in turn influence their own judgements. The relationship between the "real" (individuals, committees) and the fictitious (communicative fictitious entity) would not be based on "aggregation" in the simple sense of "adding up".

This imagined collective judgement of the POT would function on a temporal basis in the mind of each individual. By "temporal", I mean that the individual in question would *remember* what past judgements of the collectivity had been, and would *foresee*, or *imagine*, possible future judgements, when he came to form his own opinion. It will be argued below that the moral and the sympathetic sanctions were the means by which the collectivity might exercise its influence over the individual. The process of forming public opinion was much more complex than adding up individual opinions. The fictitious POT would form the background to, and would operate prior to, any "adding up" process. Bentham envisaged a *separate and independent tribunal*, which would act on its own, and would gather independence and momentum once a channel of communication on a given issue had been opened up. The POT would be independent from individuals, in the sense that a construct of its judgement might influence their own judgement. It would function as a distinct moral agency in each individual mind. In short, although its existence would depend on individuals, its judgement could become operationally independent from the individuals who constituted it.

It is very important to be clear on this point. The tribunal did not exist "out there". It was generated by individuals. As a result of communication it could be constructed by each individual's imagination and memory. As such, the judgements of the tribunal, although able to influence an individual judgement with regard to a given matter, were not identical to it.[17]

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[17] For a discussion of Bentham's understanding of the temporal function, see p. 260, note 49 below.

The opinion of the POT, though fictitious, nevertheless had real consequences, since it would influence the thinking of each individual. In Bentham's words, the judgement would be a "conscience", formed in the mind of all the members of the community who took part in communication on the matter. It might be that the judgement would be given explicit expression in a newspaper, but

> by others in an incalculable number by whom no judgment is expressed, a judgment on the subject - the like judgment suppose - is in mere conscience formed. But the judgment being formed, though no expression is ever given to it, a correspondent will, as above, is naturally formed.[18]

Public opinion would exist in the mind of each individual. It could not be given concrete expression, but everybody would be able to come to some conclusion as to what its judgement might be, despite the absence of any formal expression of that judgement. Not only citizens, but also officials, would be able to make an assessment of its content. It would be a communicative product, with regard to which everybody could know what it had contained in the past, and assess what it might contain in the future. Public opinion would be formed by the participation of each person, but each person would also be influenced by whatever generalisation he made on the basis of information which other individuals presented to him.

The POT was a communicative enterprise which literally "watched" every citizen and official who participated in its proceedings. This was the only way in which Bentham could speak sensibly about a threat of punishment "at the hand of the POT", in the case of an official performing some action or other. There would be a social context, constituted by the POT, in which each individual's mind operated. The judgement of the POT would enter the calculation of each individual/official within a social group.

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[18] *SAM*, p. 63.

It is in the light of this idea of "conscience", which would be "formed" in the minds of individuals, but to which it was possible that no explicit expression was given, that Bentham's democracy can sensibly be referred to as "panoptic", since a similar "watching entity" would operate in Bentham's prison house - the panopticon. "Conscience" would act like an inner voice within each individual, which on the one hand would watch him, but on the other hand would be constructed by him. An official would never see a real public tribunal actually watching and checking him. He would have to imagine this "observer". Because this "observer" could not be seen, only imagined, it would be constructed out of communication between people concerning what its judgement might be. This communication would have to be generalised, by imagination and memory, creating a would-be or hypothetical "ordinance" of the "observer" in the mind of the official. The full power of the POT stemmed from the very fact that although it was a communicative product of which each person could conceive, it could never be said really to exist in terms of the possibility of perceiving it. Its only existence, *real* existence, would be in the mind of a real person, be they an official or a citizen. The official would imagine a public judgement upon what he did. The individual citizen would imagine what his fellow citizens might think about what he did. *The official* would imagine an all-embracing collective public opinion, an ongoing public inspection of his activities, and hence the imagined would *become real,* in the sense of exercising a direct influence on those activities. The official or citizen would generate his own observer. Everyone would create their own mentor. The power of the invisibility of this "observer" would be such that each official would, via communication, "make up" the public conscience in relation to a given matter.[19] In this way, public conscience would be

[19] For the general discussion of an observer's "gaze" in Bentham's panopticon, see Bosovic's introduction, *The Panopticon Writings*, M. Bosovic (ed.), London, 1995, pp. 1-27.

in effect real *for the official,* despite its fictitious nature.

It would in fact be detrimental to the effectiveness of this tribunal if its judgements could be really ascertained by all people and officials, in the same way that a judgement of a court might be ascertained. A real entity would not produce an effective sanction because once its operations were fully known, they could easily be evaded.[20] Were the POT to be formally constituted, its flexibility, its independence, its operational efficiency, and thus its capacity to serve as a tool for popular self-reflection and enlightenment, would all be lost. This was the essence of the POT: its judgements arose from the random exchange of individual sentiments and opinions, yet were regarded as the judgements of a collectivity.

In short, the POT was a communicative entity which could not be perceived by the senses, but could be inferred and shaped by people, whether they were citizens communicating on governmental measures with their fellow citizens, or officials pondering a collective public judgement on a given matter. It was independent, in that its judgements could follow a certain discernable pattern which would develop in a given society at a certain moment in time. This pattern was not identical with, and could be to a considerable degree autonomous from, the development of the individuals who constructed it. However, as will be argued below, the attachment of sanctions to the tribunal's decrees could very much influence individuals' psyche. Thus, this communicative pattern which constituted the tribunal could play a role in the construction of individual judgements. It would serve as an influential *obligatory context* for individual deliberations. The POT could be seen as a "person" in its own right, deliberating on a given matter, *despite* the fact that its *existence* was entirely

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[20] On the other hand, the POT's judgement could be interpreted as being weak, because it did not have the full characteristics of a judicial tribunal. However, the POT would have a real effect, because each individual would be afraid of a force that he himself constructed in his own mind. Arguably in this sense, the POT's effectiveness might be stronger since it penetrated further into the psyche of individuals than those of real, formal institutions.

dependent on the existence of real communicating individuals.

III

Bentham argued on many occasions that the judgement arrived at by the POT would give expression to the "universal interest" of the community.[21] The aim of this section is to explain how the universal interest was formed as part of a continuous communal enlightening process. In other words, it analyzes the idea of consensus formation.

A consensus should not be understood, especially in the writing of so radical a thinker as Bentham, as being associated with the maintenance of the status quo. *Some* status quo was, for Bentham, always a starting point, hence his belief in the importance of the security of expectations. There could be no alternative substantive starting point as far as any given group was concerned. This explained why the notion of the static social contract was not functionally relevant. The agreement between the people and the government would be subject to constant change. An agreement would be shaped by constant interactive activity involving a coercive mechanism which would influence, and be influenced by, public opinion.[22]

What did Bentham mean when he said in *Fragment* that he believed that once people were left to discuss matters under the auspices of the principle of utility, it would not be long before they agreed?[23] How was the universal interest formed? The nature of the

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[21] *On the Influence of the Administrative Power over the Legislative*, UC cxxvi. 3.

[22] See chapter 4, p. 131, note 41 above, which points to Bentham's explanation of "political societies" as a continuous, socially dynamic contract between the people and the government.

[23] See *Fragment*, p. 492: "Men, let them but once clearly understand one another, will not be long ere they agree", and p. 483: "It is the principle of *utility*, accurately apprehended and steadily applied, that affords the only clue to guide a man [in his judgement whether to

calculations which people would have to make has been discussed in chapter 4 above. An analysis of the social process which would bring about such a consensus will now be made.

The idea of influence

This subsection attempts to explain the activity which has thus far been termed "interaction". It does so through an analysis of Bentham's concept of influence. Bentham distinguished between two types of influence. The first was that of will over will; the second was that of understanding over understanding. The former was concerned with an expression of will, the latter with forming a judgement, or an opinion, on a given matter. The former implied a relationship of superiority and subordination, that is of authority, as opposed to advice and recommendation. Influence of understanding over understanding, on the other hand, assumed a relationship of equality, and implied discussion and persuasion.[24] This initial distinction requires elaboration, and, as we shall see, some reinterpretation. Although the faculties involved are the understanding and the will, the relationship between them is more complex than is implied by this simple distinction.

"Influence" was defined by Bentham as "a result produced by power applied indirectly and to a purpose collateral to the obvious end of its institution".[25] This definition might easily lead to confusion. First, it is not clear what Bentham meant by "collateral". The definition might be applied, for example, to a law, the obvious end of which was to prevent mischief,

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obey or not]. It is for that, if any, and for that alone to furnish a decision which neither party shall dare in *theory* to disavow. It is something to reconcile men even in theory. They are at least, *something* nearer to an effectual union, than when at variance as well in respect of theory as of practice".

[24] See *Deontology*, p. 111; see also Raz, *The Authority of Law*, pp. 14-6.

[25] *On the Influence of the Administrative Power over the Legislative*, UC cxxvi. 1.

but the collateral purpose of which was to induce people to act in a certain way. Alternatively, the definition might be interpreted to encompass the use of power allegedly in order to promote the universal interest, while in fact promoting a sinister one. Second, this definition does not account for the many manifestations of influence which do not involve power. In short, this definition of "influence" does not cover the common understanding of influence, namely as "an application of power or argument (be the application of power of argument sincere or pretended) in a way which operates to modify a judgement".

The phenomenon of influence forms an inevitable part of the social activity within a group. Bentham thought that a proposition made by a few influential people must eventually influence the understanding of the many. Although an improvement in material conditions might lead to more leisure time, the natural differences between people in terms of intelligence, or what Bentham called in his constitutional writings intellectual aptitude, would necessarily lead to a temporary domination of the ideas of a minority within a social group.[26]

The relationship of influence could arise in two ways. First, a person could be influenced by another, because the influencing act would communicate information which would cause the recipient to see that to pursue a given act would be in his interest. This would be "passive influence", because all that was exchanged was an argument, communicated by the influencing party. This mode of influence would be akin to influence of understanding over understanding. If some people discussed and exchanged views, the mere hearing of a view by one person, whether this view was directed to him or not, might cause him to see the situation in a different light. This might occur through the receipt of new information which had not been known before the exchange, or by the application of new arguments to

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[26] Ibid., UC cxxvi. 2.

information already known. Such a manifestation of influence would have the effect of "adding considerations", rather than being a form of manipulation towards a certain outcome. Such influence would result in the consideration of a wider range of outcomes for each party to the exchange, that is in better "coverage" of the situation:

> When one man acts for many it may be justly required of him that he pursue as well as comprehend the interest of the whole. But when all act each for himself all that can be wished for is that each man pursue his own interest and either comprehend it himself or act by the judgment of one who understanding better what is for his interest, is not in pursuit of any which clashes with that of his consulter.[27]

Here, it is the "information" which influences the judgement. Such an influence would lead to a judgement generated *solely by* the internal persuasion of the influenced party. There is no inducement involved. There is no obligation to arrive at a certain outcome.[28]

Second, influence could be "active". Here there would be some external inducement to make the influenced party act in a certain way. Some degree of force would be involved, with or without the utterance of an argument. This inducement could be the threat of a sanction (or the promise of a reward).[29] This mode of influence would be akin to the influence of will over will. The influence of will over will operated where a benefit could be conferred, or cost imposed, upon the influenced party, according to the pleasure or the interest of the influencing party.[30] It would signify a relationship of power, in which the interest of the party which had greater power would dominate the exchange.

However, this general distinction is insufficient fully to characterise influence. A further distinction can be made here between the pure influence of will over will, and the influence

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[27] Ibid., UC cxxvi. 3.

[28] See also Bowring, ii. 439.

[29] *Deontology*, p. 175.

[30] *On the Influence of the Administrative Power over the Legislative*, UC cxxvi. 5.

of will over will through the medium of the understanding. The former operates to the exclusion of the understanding, amounting to pure conformism, or unreserved obedience, on the part of the influenced. If G said to J "do this", the influence might be such that J would follow that utterance, adopting *both* the state of the understanding of G, which led G to utter the volition, and G's will. The cognitive chain on J's part in this case would be: You understand, you will, *therefore I have an obligation* to understand what you understand, and then to will what you will. The crucial factor is that there is only *one understanding* in operation. The addressee's understanding is passive in that it unreflectively imitates the addressor's:

> As my will is necessarily governed in preference by the prospect of my advantage so is your will by the prospect of your advantage: if therefore in opposition to the dictates of my own will I follow those of yours, my interest is sacrificed to yours. If I conform to your will only because it is conformable to mine the case does not come within the supposition: it is then only your understanding that I conform myself to and take for my guide. The influence of will on will necessarily supposes the sacrifice of one man's interest, of what that man supposes at least to be his interest, to that of another.[31]

This type of influence can be characterised as a relationship of absolute authority, in which an obligation operates fully to exclude *independent reasoning* on the part of the addressee.

However, influence of will over will did not have to operate this way. It could operate merely as a dominant, not an exclusionary, reason for conformity. The conformity would be achieved by inducement, and hence could serve as authoritative on most occasions. Yet, despite the obligatory medium, there would be a residual moral autonomy whereby the addressee could reflect not only on whether conforming in the instance was in his interest, but whether the *very existence* of the obligation was so. This is to say the addressee could reflect on second-order reasons, some of which might well relate to a more general

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[31] Ibid., UC cxxvi. 3. Note *The Book of Fallacies*, p. 405.

justification for the authoritative utterance. Influence of this type would amount to the exercise of a "justified" (as opposed to "legitimate" - a term that Bentham deplored) authority. There would be inducement, but this inducement would not preclude independent reasoning. The cognitive sequence on the part of the addressee here would be: You understand, you will, therefore I have an obligation, I understand the existence of this obligation to be in my interest all things considered, therefore I will. This mode would be the influence of will over will through the medium of the understanding. A first order obligation is involved, but a second order obligation might be arrived at as a result of a global reflection, which would question the status of the first order obligation *as such.* Under such influence, the addressee might respond: "I know that I am under an obligation, but nevertheless I criticise its obligatory status", or even "I am not going to fulfil it".

The main feature of this third characterisation of influence is that although a relationship of will over will is involved, which is to say that some obligation is involved, the ultimate superiority is that of understanding over understanding. The will operates "in the shadow" of the understanding. In an instance of pure influence of will over will, the utterance operates as what Raz calls an "exclusionary reason". In this third category, that is influence of will over will through the medium of the understanding, the authoritative utterance operates as a dominant, but not as an exclusionary, reason.

There is some room, which will be elaborated upon below, for a further distinction in relation to an influential act. An act of authority might be explicit, or implicit. An example of an explicit act of authority is a straightforward, expressive imperative, familiar in the field of law. An implicit act of authority is related to an inducement, that is a sanction, which does not necessarily arise from an explicit act of will. An implicit act of authority might easily be confused with the influence of understanding over understanding, since there is no

actual imperative utterance in either case. An explicit act of authority could be seen in law, where some expression was uttered by a sovereign. An implicit act of authority could be seen where the process of communication between people led to a crystallisation of prescriptive propositions backed up by the moral or sympathetic sanctions.[32]

In his writings at the time of the French Revolution, Bentham discussed the application of these distinctions. He saw the operation of the influence of understanding over understanding as salutary, and thought that public discussion would more easily find itself on the right track when the influence of will over will was suspended. Notification of public measures would lead every man to consider for himself in what the public interest might consist, and this consideration would be the basis for public discussion. Bentham argued that only when the influence of understanding over understanding was freed from that of will over will would public opinion be properly formed. Influence of will over will was potentially destructive of free public communication. Bentham aimed to liberate the public sphere from the influence of will over will. An external will injected into public discussion would serve as an obstacle to free public dialogue, and hamper independent consensus formation.[33]

However, Bentham's position appears, at first glance, to be incoherent here. It does not make sense to exclude completely the idea of influence of will over will. The total exclusion of will over will was surely neither essential, nor socially possible. It did not make sense to exclude obligations, or propositions enforced by sanctions, from public discussion. It was ridiculous to assume that only "understanding" would be involved in people's interaction with one another.

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[32] A sympathetic obligation was, as will be argued below, a proposition specifying behaviour to which the sympathetic sanction could be attached.

[33] *On the Influence of the Administrative Power over the Legislative*, UC cxxvi. 1-2.

So what did Bentham mean when he said that the best government would be that based on the influence of understanding over understanding? The answer, in a nutshell, is that Bentham wanted to prevent the domination of public discussion by certain general patterns of official institutional influence of will over will (whether involving the understanding or not).[34] He did not object to the influence of will over will which would crystallise during the process of public communication. Further, he did not object to the influence of pure understanding over understanding, even where the source of that influence was official or institutional. In short, he wanted to made sure that the influence of will over will, exercised by centralised institutions, would be confined to an immediate obligatory sphere. This meant that such influence would not hamper public censorship in general, and public reflection in the constitutional sphere in particular.

This answer requires a detailed explanation. As has been seen, there were three essential modes of influence: one of pure understanding, another excluding independent understanding, and a third combining understanding and will. This analysis of influence continues an argument advanced in chapter 4, regarding the cognitive division of the faculty of the understanding of a people in a political society, between the immediate, and the categorical or constitutional spheres.[35]

Bentham's confidence in the success of the process of co-ordinating moral beliefs by law was based on the effectiveness of the legal sanction in manipulating people's motives. There would be an "immediate" medium, in which the law would operate to exclude independent reasoning on the part of the population. However, as far as the understanding was

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[34] For example, corruptive influence, delusion and intimidation: see pp. 275-6, note 69 below.

[35] See chapter 4, pp. 155-7 above.

concerned, the exercise of coercion, and hence the existence of legal obligation, could never preclude a judgement concerning the legal obligation *qua a legal obligation*. Every legal obligation had to be justified as such. Individuals should be able and prepared to question that justification.

Now, the question is, socially speaking, at what moment would the transition from the "immediate" sphere, of acting under a legal obligation, into the "categorical" sphere, of questioning the social justification of such legal obligation *as such*, occur? In terms of social interaction, or influence, how did self-reflection, or enlightenment, take place? There had to be a moment at which reflection took place, consisting in the critical examination by the understanding of the justification for a pattern of obligation. There had to be a possibility of reflection, involving the memory and imagination of each person, stimulated by the exchange of ideas between people, on the extent of the benefit resulting from the existence of an obligatory pattern. Such a reflection, of course, would not be possible under the second type of influence, that is of pure will over will.

The social process of influence that is the focus of this section worked through both the first mode, that of pure understanding over understanding, and the third, that of will over will through the medium of the understanding. In terms of the third mode of influence, a social situation which could bring about a transition from the immediate to the categorical sphere would involve the generation of obligations in the community. Communal obligations would both be moral and, as will be argued, sympathetic. The social process which created these moral and sympathetic obligations would make it possible for the people critically to reflect upon, say, the primacy of the legal obligation.

This process would lead to enlightenment by means of a conflict of obligations. People would have competing sources of obligation. Such a conflict would result in an enlightened

intellectual state, in which peoples' thinking would move into the constitutional sphere. People could come to question their acceptance of legal obligations as such, obligations which they had traditionally obeyed. This process would begin with public discussion. It would then evolve, perhaps, into a judgement of the POT, which might then be enforced by the moral sanction. Moral obligations within the community, generated by such a discussion, would be brought into conflict with other, legal, obligations. Reflection would therefore take place in the constitutional sphere.

Let us now consider this shift of obligation, and the way in which obligations might be generated by the community, in more detail. The influence which would bring about this shift would arise from people's discussion and exchange of ideas, in other words from relationships of pure understanding over understanding. In the first instance, people would learn what other people thought, perhaps becoming convinced by their views. Such mutual discussion could, in turn, crystallise into an obligation, sympathetic or moral, in such a way that would make each individual in the community reflect on his previously "coerced" understanding, whether in regard to legal obligations, or to previously crystallised communal obligations.

The oscillating process between influence of pure understanding over understanding and the crystallisation of understanding into communal or interpersonal obligations, would enable people to reflect on legally based obligations *as such,* and even to reflect upon new communal obligations as they were formed. This social process could take place regardless of whether a prima facie socially unjustified ordinance had already been promulgated. The people of the community could be influenced by other members of their community, or by members of other communities.

In other words, influence, within the public, and between the people and the government,

would consist of a mixture of the first mode of influence - of pure understanding over understanding - and the third one - of will over will through the medium of the understanding. The former would predominate, since through the exchange of ideas between the government and the people, and among the people themselves, there would exist the possibility both of creating sympathetic and moral obligations, and of contesting the primacy of existing obligations (for example, legal ones).

This was what Bentham meant when he said in his writings at the time of the French Revolution that the dominant influence was that of the understanding over understanding. Although there would already exist a pattern of obligations, there would always remain some possibility for the free exchange of views, either simply to censor the existing content of an obligation (involving a separation between the acknowledgment of the validity of the obligation and the moral approbation of it), *or* to censor the social justification for the existence of an obligation, that is its validity *as an obligation* (involving a unification of validity and approbation). It is the latter with which we are mainly concerned here. The free exchange of views could emancipate the imagination, so that reflection at the constitutional level would become possible. As far as a political society was concerned, influence would operate *in the constitutional sphere* both among the people, and between the government and the collective body of the people.

As far as influence among the people was concerned, the domain of influence would be affected according to existing patterns of superiority and subordination between themselves. These patterns could vary from one social group to another. Bentham argued:

> Thus far, as between suffrage and suffrage, it makes no difference which was the result of a self-formed opinion, which of them the result of an opinion derived from the influence exercised on the mind in question by that of some other member,

exercised whether on will or on understanding, or on both together.[36]

As between the government and the collective body of the people, influence might also be exercised by understanding over understanding, but to the extent that a relationship of will over will was involved, the ultimate superiority lay with the collective body of the people. In the final analysis, it was the people who could resort to an explicit act of will - disobedience - in order to divest the government of its power, whether globally, or in relation to a single measure.

A word may now be appropriate with regard to the transformation of acts of understanding into acts of will. The significant domain, as has been argued, in which the POT functioned, was that of the *understanding*, a domain which involved judgements and opinions. However, Bentham conceived of a transformation of these opinions, in certain instances, into acts of will, of disobedience, in cases where government had infringed certain fundamental securities.[37] Bentham described a state of the mind which he called "valleity". He understood this term as a fusion of will and understanding. Valleity was the stage at which an opinion concerning the balance of pain and pleasure with regard to a particular question became so determinate, that it became a volition, of which an action would be the immediate consequence. The length of time required for this to happen could vary from one instance to another.[38] The role of the POT should be understood as *determining* (by the crystallisation of opinion involving will and understanding in the manner described above) and *effectuating* (by an act of will executing the judgement) constitutional limits.

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[36] *SAM*, p. 31.

[37] See chapter 2, pp. 55-63 above, where it has been argued that the trusting body's opinion might be transformed into an act of divestitive power.

[38] *Deontology*, p. 94.

In sum, elements of both understanding and will joined together in the formation of public opinion. It should be emphasized that, notwithstanding the influential activities which took place within the public domain, it was also the influence of understanding over understanding (a free exchange of ideas) exercised between the government and the collective body of the people, which would enable the people to determine when unjustified obligatory patterns were being imposed on them. The extent to which the exchange of ideas was facilitated would signify the degree to which a political society could be characterised as being under a free government.[39] Hence, the medium of understanding would ultimately be the mode of influence under a free government. In a political society under a free government the exchange of arguments would lead to an enlightened reflection concerning the justification of obligations, whether legal, sympathetic, or moral. The next subsection will look in more depth at the volitional obligative element, which operated between members of a social group, and between the group and the government.

The sympathetic sanction, probity and consensus formation

This subsection discusses in detail how Bentham envisaged the process of consensus formation, or the formulation of public opinion, on the basis of his theory of human motivation, and his understanding of the moral and sympathetic sanctions. It therefore constitutes a detailed analysis of the notion of influence in respect of both motives and sanctions. It will discuss the creation of moral and sympathetic obligations. A consensus about censoring the government, and about checking the social justification of authority, could be formed both among the people who made up a social group, and between the government and the people, or in other words, between the supreme operative and the

[39] See chapter 4, pp. 139-48 above.

POT.[40] The manner in which the POT would operate vis a vis any member of a social group will also be explicated.

I shall begin by discussing consensus formation among the people, although, as will be seen, the account of consensus formation between the body of the people and the government does not differ in kind. It will be argued that a consensus could be formed by the operation of the sympathetic sanction, which would generate extra-regarding motives among the members of the political community. This consensus could lead to the determination and effectuation of constitutional limits. Bentham saw a lot of potential in the idea of communal sympathy, which would determine what people regarded as their best interest.[41] This subsection proposes a new interpretation of Bentham's conception of the relationship between individual and community, as well as of his view of the relationship between private ethics and legislation.

Bentham saw in sympathy a force capable of generating certain communal beliefs, adherence to which would operate as a common object of desire.[42] Further, once sympathy had crystallised to a certain extent, it would operate in a very similar fashion to the moral sanction. In a well-developed community, people would take into account in their utilitarian calculation what other people might think with regard to their pursuit of a given action. In the following passage, Bentham spelled out the levels of interaction both among the people, and between the people and government. The end of this interaction would be the maintenance of the universal interest. Bentham argued that,

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[40] See chapter 5, pp. 172-5 above.

[41] *SAM*, p. 30 and p. 31, editorial note 1.

[42] *Deontology*, pp. 92-3. Bentham related the idea of will to the idea of desire. Once there was an object of desire, there would be a motive and, as a result, a will to achieve it.

> For the accomplishment of the universal end in the case of the possessors of the supreme constitutive power, the provision made can not be well-adapted otherwise than **in so far as facility** is left or given to each individual to make what in his eyes is **the best provision possible for his own individual interest**: in the case of the possessors of the supreme operative power, unless **in so far as the utmost difficulty is opposed to his endeavours to make what in his eyes is the best provision possible for his own individual interest, to the detriment of the interest of the other individuals of that same community**, that is to say **in so far as mutual incompatibility and competition have place**, making provision for his own interests to the detriment of theirs.[43]

This passage forms the rationale for Bentham's general view of consensus formation as part of his constitutional theory. First, the universal interest could be regarded as the aggregate of every person's own interest. The predominance of self-regard in each individual's mind was the precondition for consensus formation.[44] The second feature of consensus formation was that each individual should, in calculating his own course of action, think about how his action would affect others. The first part of the passage describes the way in which the universal interest could be attained. The context in which individuals formed their own opinions as to what would be the best course of action *for them* would involve social considerations. This social context was the sphere in which influence would operate. This social context would involve freedom to exchange opinions, which would lead to the formation of communal obligations. The degree of freedom to exchange opinions within the community would vary from society to society. It was very important for Bentham to ensure that this social context, in which individuals formed their self-regarding judgements, was

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[43] *First Principles*, pp. 133-4.

[44] *Deontology*, p. 196; see also Bowring, ix. 63, where Bentham related the formation of a consensus to the mutual understanding of people of both their own self-interest and the self-interest of others. A communication based on the predominance of self-preference would lead to a consensus, because under the conditions of free communication people could see the importance to their own interest of accommodating other people's self-preferences. Functionally speaking, if a person opposed every other interest, then no one would join with him. This "joining" together, and the facilitation of free communication, were cardinal features of a free society.

formed *independently* of any dictated context (free from coercion, which would cause fear, or delusive arguments promoted by a government, for example).[45] Only where there was no dictated context could people reflect upon the true nature of the interest of their community. The existence of deficiencies in public judgement, whether arising from the actions of centralised authority, or from the preconceptions of the people, would hinder that open-mindedness which was so essential to a successful exchange of opinions. The quality of the social context, that is the degree of freedom of communication, and the nature of the self-regarding calculation by individuals, were interdependent. Governments, or operative powers, could put obstacles in the way of communication which would amount to a dictated context for the interdependent relationship between the social and the self-regarding interests. As a result, the self-regarding and the social interests would not be able to influence one another in a free way.

For Bentham, social interests were embodied within self-regard:

> But the pleasure I feel at the prospect of bestowing pleasure on my friend, whose pleasure is it but mine? The pain which I feel at the sight or under the apprehension of seeing my friend oppressed with pain, whose pain is it but mine?. [The agent's] own well-being ought **on every occasion** to be the **sole** object of pursuit to every man, what I mean by it is that the conduct of him who on every occasion takes his own well-being for the object of his pursuit is approved by me: approved by me in so much that, if it depended upon me, his pursuit should not on any occasion have any other object.[46]

An objection might be made here. A contradiction would arise in that either individual interests embody existing, possibly pernicious, social interests, or they are independent of, and may seek to change pernicious communal beliefs. An individuality conducive to utility must be supposed to be independent of a context that is unacceptable from a utilitarian

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[45] See pp. 275-6, note 69 below.

[46] *Deontology*, pp. 148-9.

viewpoint. However, if existing social interests are embodied in individual self-regarding interests, the latter can not be independent of such context.

This objection does not go as far as it seems to. The existence of evil tendencies in governments and society was commonplace. However, as long as members of the public were able to exchange their views, there would be an asymmetry between the attempt to place obstacles in the way of communication (to create a dictated context which hampered the formation of an independent consensus), or an attempt to transgress basic communal beliefs, and public opinion. From this asymmetry an enlightening process with regard to a given political society could emerge. Social dynamism and the independence of public opinion would lead to the formation of new social interests, and hence of new communal obligations. In short, the objection is answered because a dynamic, random relationship between individuality and community could lead to the exposure of fallacious and pernicious social contexts.

But how could consensus formation be explained on the basis of human motivation? How could people have motives which would result in collective action? The explanation of consensus formation, or "public opinion", and hence the formation of constitutional limits, is to be found in the apolitical realm of private deontology. A collective public opinion would be formed by extra-political activity. This did not mean that there was no role for sanctions in helping the public to form such opinion. It meant only that in the context of consensus formation, sanctions would be of an apolitical nature. There would be a shift in locus, from a centralised coercive mechanism to communal-generated coercion, by means of communication between people:

> Where the sanction is non-political, the pain or the pleasure may be considered as resulting or apprehended from the action of the human being in question considered as a member of a community of human beings having mutual intercourse and judging and acting, though without political power, with community of opinion and action;

or as separately from, and without intercourse on the subject with, any other.[47]

Sanctions would facilitate the creation of collectivities. In *IPML*, Bentham discussed four kinds of sanctions, namely (1) the physical, (2) the legal and political, (3) the moral/popular and (4) the religious.[48] The moral sanction would operate to enforce any obligation promulgated by the POT.

However, there were two sanctions additional to the four discussed in *IPML*, namely the retributive and the sympathetic (or its opposite, the antipathetic) - which, it will be argued, would facilitate the operation of an effective moral sanction. The source of the retributive and the sympathetic sanctions was the individual, and hence Bentham called them "individually-operating" sanctions. The sanction was "retributive" if its source in an individual was the consideration of actual pain which had already been inflicted on another individual. If no such consideration existed - if a source of the sanction was the individual's own view with regard to future pain or pleasure - the sanction would be sympathetic (if pleasurable), or an antipathetic (if painful).[49] In the discussion which follows, both what Bentham called "sympathetic" and "antipathetic" sanctions will be referred to as the "sympathetic" sanction.

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[47] Ibid., p. 176.

[48] See *IPML*, chapter 3.

[49] Ibid., pp. 176-7. The source of pain and pleasure could be immediate by them being instantaneously experienced physically or mentally. However, to a large degree pains and pleasures were derived from memory and imagination. In fact it would be hard to interpret any immediate experience not of a physical nature as "painful" or "pleasurable" without reference to other pains and pleasures which would derive from memory or imagination. Therefore, it would not be the immediate pain or pleasure which would be the most important, but expected pains or pleasures derived from the culture that the person lived in: ibid., p. 90. Further, Bentham argued that an idea could attach itself to the mind only in a temporal way. The idea would have to relate to a past event (some memory function), or to a future event (the imagination of possibilities): ibid., p. 258.

Bentham argued that sanctions could be distinguished according to their nature, or to their source. In a letter to Dumont, Bentham confined the discussion of the nature of a sanction to the question of whether the sanction bestowed pleasures or pains.[50] Sanctions could also differ in terms of their source. For example, the moral sanction would originate in the community, the sympathetic in the mind of the individual who carried out an action which warranted the sanction. This distinction will be further developed in order to make Bentham's account of sanctions consistent with his account of motives in *Deontology*.

The sanction of sympathy was similar in *nature* to the moral sanction. Both would operate on the mind of individuals as a result of some already existing prescriptive context which would be external to the individual in question. This in fact was true of all sanctions. In this respect, the difference between the operation of the moral and the sympathetic sanctions was one of degree only. A moral sanction would be wider, in that its context might be a prescriptive proposition arrived at by a whole group. A sympathetic sanction could be seen as operating in the context of a prescriptive proposition arrived at between individuals, or between two individual communities.

A second point follows from the first. The *source* of the sympathetic sanction was not merely the individual in question, despite its original definition. A person could feel sympathy, could expect to feel pleasure (or pain), only when his action was carried out in the context of some social whole, or in the face of the operation of some other agency external to himself.

Thus, *in a group*, the sympathetic sanction which operated between individuals consisted of an application of the moral sanction to what was taking place between those individuals. In other words, the moral sanction, attached to a proposition, would precede the feeling of

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[50] *Correspondence* vol. x., p. 444; see also *Deontology*, pp. 175-6.

sympathy in the mind of an individual towards another. The existence of a moral sanction would make it possible for the individual to interpret the potential consequences of his actions *as* bearing the pleasure or pain associated with sympathy.

These two arguments can be summarised as follows: the similarity in nature of the sanctions' operation implied that a full description of their respective sources would include both the individual who inflicted pain or pleasure by his actions, and an external agency which served as a prescriptive context for it. Thus, it would be too compartmentalised and incomplete a view (though not entirely a *wrong* one) to see the sanctions' sources as entirely discrete. I say "not entirely wrong", because there was a functional distinction between the final source of the two sanctions. This distinction was that in the case of the sympathetic sanction, there would be an additional application by an individual of a proposition, backed up by the moral sanction, to the specific situation between himself and another individual. In this limited sense the individual can still be seen as the final source of the sympathetic sanction. However, in both the moral and the sympathetic sanctions, the operation of an external agency and the individual upon whom the sanction would be inflicted would be interdependent.

To repeat, this analysis of the similarities between the two sanctions asserts that their operation was interdependent. A change in propositions backed up by the moral sanction could change propositions backed up by the sympathetic sanction. Conversely, interaction between individuals could lead to the establishment of new general patterns of "sympathies", which could operate to modify existing propositions backed by the moral sanction.[51] In other words, an evolution of social relationships which gave rise to an operation of the

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[51] In terms of their social function, these patterns and their crystallisation into moral obligations would function as fundamental rights in the minds of individuals: see chapter 5, p. 199, note 73 above.

sympathetic sanction, could extend the operation of that sanction across more and more people. This extension could lead to the development and crystallisation of new propositions by a collectivity (or to the modification of existing ones) which would be backed up by the moral sanction. Both the sympathetic and the moral sanctions were cultural phenomena, in the context of which some pain or pleasure could be felt in the mind of the individual. The sanctions' similarity in *nature* might lead to a social situation in which the prescriptive context of the sympathetic sanction (which might consist in a rule which was originally established between two individuals) was embraced by the whole social group.

The implication of this argument is that any proper account of either of these sanctions might well refer to the other. Further, the strengthening and broadening of both would signify the concretisation of a community. The more concrete the community, the tighter the functional interdependence of these two sanctions would be. The more developed a society, the more apparent the bond between the operation of these two sanctions would be. In a less developed society, the functional connection between the two would be less apparent, with the result that sympathy would be much more limited. In such less developed societies, actions sanctioned by sympathy would involve only small local groups. Sympathy would still have some force in less developed communities, because of the existence of at least some collectivity, which could operate a "collective" moral sanction with regard to the individuals who composed it.[52] As will be argued in the next section, the more that sympathy is generated between individuals, as they develop collective norms in the course of their communication, the more force the general collectivity will have. To put it another way, as sympathy grows between certain individuals or groups, so does the force of the collective

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[52] This argument relates to the issue of the flexible manifestation of "community" as discussed in chapter 3, pp. 95-8 above.

moral sanction, which in turn homogenises potential patterns of sympathy in the minds of the individuals in the community.[53]

Let me spell out in more detail this argument concerning the affinity between these sanctions. It is important to grasp that the sympathetic sanction would arise purely as a result of an interactive process among people. Further, sympathy would grow in force as the force of the moral sanction between members of a social group grew. A person could interpret other's pain as "painful" to himself, only to the extent that he reacted to potential actions by some kind of external agency, or, more specifically, to potential actions by a person or a group of persons.

The fact that a person feels pain as a result of considering his prospective actions can only be the result of an effort made by him to understand the repercussions of his actions for other people. He must make an empathic effort. The sympathetic sanction would rely on an understanding that the consequences of a person's actions would be "painful" to others. In other words, Bentham maintained that the sympathetic sanction depended on the possibility of an empathic effort, or, as Bentham called it, an "affection" or a "desire for amity" among the members of a social group. Each individual could conceive (memorise and imagine) for himself what others might have thought or might think in relation to a given action. This he would do on the basis of communication with them. This empathic effort would be the first stage at which the social context conditioned the state of mind of each individual. This empathic effort implied that individual minds could "meet" (*as opposed to being the same*), which meant that one person was able to imagine, to empathise with, the pain which would be caused to another by his own actions or inactions.

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[53] Although this is not equivalent to a process of homogenising the community: see p. 289, note 95 below.

But why should affection cause a person to alter his motives? Sympathy would be the result of a further stage in the contextualisation of individual actions. On the assumption that empathy was possible, the pain of sympathy might be produced in the mind of an individual as a result of contemplating the effect of his actions or inactions on another individual. Sympathy would be the interpretation as "painful" or "pleasurable" for the agent of the consequence of carrying out his action, an interpretation arrived at *as a result of* an empathic effort by him.

What was the nature of this pain of sympathy? The sanction manifested itself as bad conscience in the agent's mind, or what we might refer to as guilt. Bentham noted that getting drunk might generate pain for a parent or a partner of the drunk, and even in the mind of the drunk himself, resulting from contemplating the disapprobation of his fellow men.[54] "Bad conscience", however, required more than the expectation of disapprobation, in order to account for the full manifestation of the sympathetic "sanction". A person needed also to recognise the disapprobation by an external agency as "painful" to himself in the specific situation at hand, and as producing sufficient pain to cause him to alter his behaviour. The main point is, however, that for sympathy to exist, there would have to exist an external agency, the approbation of which would function as an object of desire for the individual agent. The moment his actions failed to conform to the actual or potential standards of the external agency, "bad conscience" could result. At its core, "bad conscience" (or guilt) was a cultural phenomenon, created when individuals exchanged their views on a subject over a certain period, with the effect that each person could, in his memory and imagination, generate a prescriptive proposition in relation to which he could feel "bad conscience". "Bad conscience" was a feeling of pain generated by the recognition that by his action the

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[54] *Deontology*, p. 199; see also ibid., pp. 84-5.

individual would cause pain to another person. The pain caused to that other person would give rise to some disapprobation of an external agency against the individual undertaking the action in question. This disapprobation could be applied by the agent to the specific situation at hand.

In short, the sympathetic sanction was effectuated through a process in which causing pain to others was interpreted by the agent as painful to himself. This interpretation could only be accounted for in the context of the disapprobation of some external agency. Thus, in most situations, the moral sanction would generate the context in which any "individually-operated" sanction would be manifested.[55]

Between the people and the government, communication would be of exactly the same kind as among the people themselves. This communication would be based on the mutually operating sympathetic and moral sanctions.

The moral and the sympathetic sanctions would influence which motives determined individual interests and dispositions, and accordingly, the way in which each individual would see the interest of his fellow men as part of his self-regarding interest.

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[55] Ibid., pp. 206-7.

A counter-argument against Hart's criticisms of the command theory of law, and the distinction he draws between "being obliged" and "having an obligation", in *The Concept of Law,* pp. 18-25, might be advanced here.

The two phrases would be treated by Bentham as signifying obligations which arise from different *sources*. The expression "having an obligation" is a semantic artefact, signifying no more than what Bentham would see as a feeling on the part of the individual concerning the potential threat of the "moral sanction". This threat would be created by the normative force of expectations, and the potential pain of disappointment. Pain of disappointment may lead to the sanction being inflicted on this individual. Hart exploits the general hostile sentiments against a bank robber to conclude that one is not under an obligation in that situation. However, he does so at the price of mystifying the concept of obligation and narrowing it to the specific context of its manifestation in a social group. See in this context R. Moles, *Definition and Rule in Legal Theory: a Reassessment of H.L.A. Hart and the Positivist Tradition*, Oxford, 1987, pp. 53-5, who argues that Hart did not elaborate on his own idea of "obeying", or complying with, a social rule.

The sanction of sympathy would affect a whole range of motives. Bentham understood "virtue" through the idea of motives. The idea of Virtue related to an object with regard to which a judgement of consequences would be made. Motives could relate either to the moral agent in question, in which case they were self-regarding ones, or to other moral agents, in which case they were extra-regarding.[56] An action was rendered virtuous if it was undertaken with the aim of promoting the welfare of others, rather than simply that of the agent undertaking it.

The first motive connected with the sympathetic and the moral sanctions was *self-regarding prudence*. Prudence meant for Bentham a choice about which course of action to take. Prudence involved a calculation concerning the happiness of the agent and was thus self-regarding.[57] It was a motive to perform an action which would benefit the agent himself. This motive was the predominant one in the human mind. As will be argued, while this motive played a major role in Bentham's understanding of virtuous acts, it could not provide a full account of them.[58] There had to be other motives, which would incorporate themselves into the self-regarding, before virtue could be said to exist.

The other two motives were benevolence and probity. These two were extra-regarding and virtue could be understood in relation to them. Benevolence was the motive arising from the desire to contribute to the well-being of other people. An action which resulted from such a motive was termed "beneficent". Beneficence, and therefore benevolence, could be either positive or negative. Positive beneficence described an action based on a disposition to do good to other people; negative beneficence, on a disposition to abstain from doing evil to

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[56] *Deontology*, p. 191; see also ibid., pp. 122-6.

[57] Ibid., pp. 210-11.

[58] Ibid., p. 178.

them.[59]

Probity, however, is of most importance in the explanation of consensus formation. In *IPML* Bentham described negative beneficence as resulting from actions based on the motive of probity.[60] However, in *Deontology*, Bentham distinguished between beneficence and probity, the latter being an act of beneficence carried out under an obligation. By obligation, Bentham meant here a prescriptive proposition which would be enforced by any one of the legal, moral, or sympathetic sanctions.[61] The distinction between benevolence and probity was important because it implied that beneficent action was not, *theoretically speaking*, in conflict with acts based on self-regarding prudence, and in cases where such a conflict was absent, no obligation, and no sanction, would be necessary to effect a benevolent action.[62] However, as will be argued below, Bentham believed that it would hardly be possible, socially speaking, to account for a case where a beneficent action would be effected without any sanction and, in turn, without any obligation. To speak about purely social motives would be theoretically plausible, but socially meaningless.

The account in *IPML* is perfectly compatible with the meaning of probity in *Deontology*. On such a construction, probity would imply an obligation not to do evil to other people. However, it is clear that the meaning that Bentham gave to probity in *Deontology* was broader than that given to it in *IPML*. In the former, he recognised circumstances in which positive beneficence stemmed from an obligation. An example could be any specific

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[59] Ibid., pp. 183-6. For a similar view, see *Correspondence*, vol. x., pp. 443-4.

[60] *IPML*, p. 284.

[61] *Deontology*, p. 211.

[62] See in this context ibid., p. 185, where Bentham discussed the distinction between benevolent actions which could be exercised with no need for self-sacrifice, and those which could not.

communal obligation the fulfilment of which had the effect of contributing to the well-being of others. Virtuous motives might be enforced by sanctions such as the sympathetic and the moral. Probity with regard to a positive beneficent act would require a specific obligation (a proposition enforced by the sympathetic and/or the moral sanction), which would have the effect of contributing to the well-being of others. The recognition of such an obligation on the part of individuals, as argued in the previous subsection, was a cultural phenomenon. As such to disregard, it would give rise to the pain of "bad conscience" in the mind of the individual who caused pain to others. It was in the motive of probity that self-regarding prudence and extra-regarding benevolence were united into a single action of moral judgement.

The world of self-regarding motives, that is of *pure* self-regarding prudence, represented a hypothetical "atomistic" world of the individual. It would hardly make sense to speak about *obligations* of any kind, were only this atomistic world to be considered. Any meaning attached to the idea of "obligation" would have to presume an external source of pain and pleasure, that is a source *other than a purely self-regarding source*, which could enter into the calculation of any agent. The idea of obligation assumed some agency other than an individual which would influence the calculations of that individual. Because of the necessity for a sanction, an element of will was required, which would introduce the idea of obligatory influence. Such influence could have for its basis any of the three sanctions, in so far as some *social context* is assumed.

Probity was related to the idea of "obligation". As such, it was entirely compatible with, and indeed complemented, self-regarding prudence. What made prudence possible, socially speaking, was a group context, as opposed to the hypothetical, purely atomistic context of prudence. Were the individual alone in the world, prudence would only need to be exercised

in relation to the physical sanction. This would be purely a matter of survival. However, once ideas of benevolence and negative beneficence came in, prudence could be exercised only in the context of some obligation imposed by an external agency with some cultural affiliation, that is by the legal, the moral or the sympathetic sanction.[63] The group generated a sanction, and hence an obligation, be it a legal, moral, or sympathetic obligation. In the absence of some sanction, and hence obligation, there would be *no point* in talking about prudence, that is self-regarding prudence, at all. Prudence had meaning only in the context of something that would make one act prudently - either with regard to the physical world, where one would say that there was an obligation to be careful - under threat of the physical sanction - or the social world, where one would say there was an obligation to act legally, morally or sympathetically. Arguably for Bentham, apart from "natural obligations", there was no self-regarding prudence worth the name without a social context to supply some obligatory medium. In order to give meaning to the idea of prudential choice of action, or prudence, there would have to be some obligatory medium (legal, moral, or sympathetic) which would supply the necessary context for prudence. It was through probity, a motive brought about through an obligatory medium, that self-regarding prudence would embody extra-regarding considerations.[64] Indeed, it was precisely because of the predominance of self-interest, that any obligatory medium would have any effect on the individual mind. More specifically, in terms of consensus formation which might come about *purely as a result*

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[63] The religious sanction would be included here as well.

[64] It is important to stress again, however, that "probity" did not refer merely to the legal sanction. Probity on the part of rulers could be secured by moral obligation, that is a prescriptive proposition backed by the threat of the moral sanction. Bentham wrote: "To this same denomination - viz. bringing the less principal interest into accordance with the more principal interest - is referable whatsoever in private trusts is done in the view of securing probity on the part of trustees": *First Principles,* p. 242.

of transparent communication between people, an obligatory medium based on the moral and sympathetic sanctions would perturb self-interested considerations in such a manner that a benevolent judgement might be contemplated.

This analysis bears reference to the explanation of the idea of pure influence of understanding over understanding, because self-regarding prudence must be accounted for before influence can be accounted for. The influence of pure understanding over understanding, i.e. an exchange of arguments which leads to an understanding of what one thinks it would be in one's own interest to do, would also involve some enlightenment, in that the exchange would influence one's already existing prudential considerations. As has been seen, prudence implied some idea of obligation. Thus, it could not make complete sense to claim that a person was suddenly convinced by an exchange of ideas that something was in his own interest. In addition to the fact of his being informed of some argument, there would have to be some prescriptive propositions which were crystallised as a result of the exchange, and which would operate to alter his previously existing prudential calculations. All that pure influence of understanding over understanding could do would be to give a different perspective to one's prudential considerations. In short, the notion of individuality, including individual contributions to the exchanges of ideas, would make little sense in the absence of a culturally-orientated obligatory medium as its context. The obligatory element could not be excluded by prudence, although prudence could challenge an obligation's content, for example through the refusal to follow some traditional obligatory patterns.

Here lies the gist of the argument. A relationship of influence which was based purely on argument, as in the case of pure understanding over understanding, could operate only within an already existing community, which already had some obligations at its core, whatever the sanctions on which these obligations were based. The operation of the influence of

understanding over understanding must therefore be preceded by the influence of will over will through the medium of the understanding. Probity gave a social meaning to prudence, which in turn preceded, and indeed enabled the influence of understanding over understanding. Some obligatory context would have to exist before one could be influenced in whatever direction. There would have to be some communal norms, which would limit the ambit of these discussions, and would provide prudence with some grist for its mill. As will be argued in the next section, the nature of ultimate obligations in a community would differ according to the stage of its historical development.

In short, the extra-regarding motive of benevolence would be socially meaningful only if it related to self-regarding prudence via the idea of obligation, or probity. What "appeared" to be free-standing extra-regarding motives were in fact incorporated into the most basic motive of all - self-regarding prudence, either through an artificial legal obligation, or through a communal obligation (a phenomenon which would be regarded by any member the community as "natural"), that is through a moral or sympathetic obligation. Some prescriptive proposition was necessary, whether prescribed by law or by communal culture, which would supply the motive for self-regarding prudence to produce a beneficent action. Only the *source* of obligation could vary as prudential calculations were influenced either by the realm of legislation (political deontology), or by the realm of private deontology. The operative principle was identical. All obligations were backed up by either the legal, the moral or the sympathetic sanction.

The following statement by Bentham should be understood in the light of the above interpretation:

> The field which by its actual exercise the virtue of beneficence is capable of occupying and filling with efficient services rendered to the whole of humankind taken together is, even when taken at its simplest, extremely narrow: much more narrow must be that part of it which can apply and confine itself to the demands of any single

individual or particular assemblage of individuals.

Self-regarding prudence concurs, therefore, with probity and indeed suffices of itself, within the field of its dominion, to set limits, and those comparatively very narrow ones, to the exercise of the virtue of beneficence.[65]

Both self-regarding and extra-regarding motives could join together in the faculties of prudential judgement and volition in the context of an obligatory medium, or, generally, probity.[66] It was a matter of an individual judgement what it would be in one's interest to do.[67] Yet it was the medium of obligation, whether legal, moral, or sympathetic, which

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[65] *Deontology*, p. 226. Rosen claims that for Bentham self-regarding prudence was compatible with effective benevolence, but offers no detailed analysis of the relationship between them: *Bentham, Byron and Greece*, pp. 84-9.

[66] In Bowring, ii. 537, in discussing international law, Bentham argued that probity could exist between nations in the same way that it could exist between individuals: see in this respect the argument about the relativity of sovereignty, chapter 3, pp. 102-3, note 27 above.

[67] This might lead to a reconciliation between what seem to be the different positions taken by D. Lyons, (*In the interest of the Governed: A Study of Bentham's Philosophy of Utility and Law*, Oxford, 1973), and J. Dinwiddy ('Bentham's Ethics and the Principle of Utility', Revue Internationale de Philosophy, 36 (1982) 271-309). The crux of the debate concerned the degree of integration between private and public ethics. Further they differed on the extent to which this division mirrored another division in an individual's mind, namely that between pursuing their own interest and that of the community.

In his interpretation of *IPML*, Lyons claimed that individuals were required by public ethics to pursue the communal interest, and that this eventually would be united with their private interest. The self- and the extra-regarding would become, in the long run, united. The role of legal punishment was to correct apparent conflict between communal and individual interest.

Dinwiddy, on the other hand, claimed that self- and extra-regarding motives remained distinct in Bentham's thought, and that punishment was needed precisely because they were in conflict. The self-regarding (without punishment) would be in permanent conflict with the extra-regarding. The self-regarding and the extra-regarding were two distinct classes of motives.

On the current interpretation, Bentham argued that any utilitarian calculations, whether of self- or extra-regarding orientation, would be governed by self-regarding prudence. Further, it has been argued that their unification was explained by probity. In probity, self-regarding prudence becomes united with extra-regarding benevolence. Probity does not relate necessarily only to private deontology, but also to political deontology, or law. In the case of law, the extra-regard would, on many occasions, have to be worked out indirectly by a delegated authority. Thus, the unification of the self- and the extra-regarding in the mind was achieved by obligations backed by any of the five sanctions.

On the analysis offered here, there is no real conflict between Lyons and Dinwiddy. There

would lead to the formation of the will needed to produce a virtuous action. Benevolence, and especially positive benevolence, involved acts of will requiring a special effort - the effort to cause pain to oneself. If one bought a loaf of bread in order to have it for dinner, the motive would be pure prudence - the prudence of survival - but,

> Suppose, when I have got the loaf, observing a man who, being in a famished state, has more need of it, I give him the loaf and so go without my dinner: here too is usefulness. But besides usefulness, here is virtue: for to subject a man's self to pain in any shape, as I by the supposition have subjected myself to it in the shape of hunger, requires an effort, and this effort I have made.[68]

The analysis offered here of the way self- and extra-regard joined together in probity has a temporal implication. A beneficent action cannot occur prior to a prudential judgement. There can never be an act of will, a special volition involving an "effort", which is not based on one's own judgement. This means that the understanding must first judge an action to be in one's own interest, and then and only then would it be possible to form a will, based on this understanding, to confer benefit on, or abstain from doing evil to, one's fellow men - to perform, that is, an action which was also beneficent. However, this understanding, based on prudential reasoning, could never precede an obligatory context, whatever its source might be.

This analysis reveals the structure of the ongoing activity which produces consensus formation backed by the sympathetic and the moral sanctions, and, in turn, gives rise to the motive of probity. This structure is as follows:

1. Discussion.

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are indeed two kinds of motives which operate on the human mind. But the cognitive act is solely based on self-regarding prudence. Lyons seemed to talk about the way these two functioned in the mind, while Dinwiddy seemed to emphasise their different nature.
See also in this respect J.B. Stearns, 'Bentham on Public and Private Ethics', Canadian Journal of Philosophy 5 (1975) 583-94.

[68] *Deontology*, p. 179.

This stage involves both influence of understanding over understanding, and of will over will through the medium of the understanding, which have been analyzed above. As a result of exhausting communicative possibilities people would arrive at new conceptions of what might or might not be in their interest. This communication would be facilitated and enlightened by virtue of its being conducted in some more general and obligatory context. This context could be created by positive centralised coercion which might take the form of a code of laws, or by any other sort of habitual normative behaviour established under existing moral and sympathetic obligations. Such obligations, as has been argued, would have to precede any exchange of ideas. However, they could also be modified by it. The obligatory context would enable a meaningful exchange of ideas, that is the influence of pure understanding over understanding, which would also be facilitated by the satisfaction of conditions for free communication. Therefore, for such a process to occur there is a negative requirement, namely the absence of obstacles to the exchange of ideas.[69]

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[69] Free communication was crucial to the operation of Bentham's categorical, or constitutional, sphere. In order to be able to ascend to such a sphere of reflection the POT had to be independent. By stressing the importance of the *independence* of the POT, Bentham wanted to establish a system which generated disagreements among the people and between the people and the government. Any obstacles to communication would hamper inter-subjective communication. The virtue of Bentham's system lay in its asymmetrical nature. The moment there was symmetry in the system, that is the moment there was no antagonism between the public and the government, all motion in the constitution would stop. Stagnation in public attitudes was a social phenomenon which Bentham associated with the use of arguments, whose justification was based on ideas such as "legitimacy", "customary rules" and "men of principle". The acceptance of such ideas would infer intellectual weakness and indolence on the part of the public, which could allow a government to pursue its sinister interest, and to go on pursuing it without fear of censure.

Bentham was alive to the difficulties which the POT might face in functioning effectively and independently. He recognised that it might have to function in the face of divided interests, existing from the social division between the opulent few and the subject many (*First Principles*, pp. 69-70). Physical distance would also hamper proper communication. However, Bentham also pointed to "factitious" obstacles to communication. These factitious obstacles originated in government. *Independent* public opinion was only made possible by freedom of communication, which is to say, by the absence of factitious obstacles to communication. Such factitious obstacles could lead the people to support a bad government

In short, the obligatory context enabled the operation of influence, whereby the individual would both be subject to all sorts of obligations, and also informed about the existence of other interests through the arguments of other persons. The general obligatory context, involving the influence of will over will via the medium of the understanding was both the condition for, and could be modified as a result of, this discussional stage. At this stage of "discussion", self-regarding prudence and extra-regarding benevolence could join together in probity. The operation of "influence", or the "interaction" of sanctions and motives, represented the "public" or communal stage of consensus formation.

2. Effect on interest.

This was the individual stage (or individual context) of consensus formation. Here, the

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by not questioning existing obligations (*First Principles*, pp. 72, 154-5, *SAM*, pp. 26-7, 43, 67-72, 116-7). In short, a bad government would throw obstacles in the way of the POT.

The obstacles to communication were diverse. They included secret government, where procedures and dealings were not accessible to the public gaze (*SAM*, pp. 41-2).

A further obstacle to communication was *corruption*. Corrupt people conspired to advance their sinister interest. A corrupted member of the public would be uncritical, while a corrupted official would be unresponsive to public criticism (*First Principles*, pp. 17-25, 252-61, 187, 196). In short, corruption would have a disastrous effect on empathy, bad conscience, and sympathy.

A third obstacle to communication was *delusion*. Delusion was, in effect, "false consciousness", an erroneous conception or opinion. The government might engage in deceptive activities which would produce fallacies in the public's mind (*First Principles*, pp. 261-8). Delusion could be manifested in many ways. One of those manifestations was *prejudice*, especially a form of it which Bentham called *interest-begotten prejudice*. Such a prejudice meant that people would convince themselves that their own interest must also be the universal interest. They would fail to conceive any other interest *but their own as* the universal interest. This type of prejudice would lead to the preservation of bad governments. It would be debilitating in that, being under the influence of a false "conviction" with regard to the public interest, the people would, in effect, passively accept any government which promoted their immediate interest (*Deontology*, pp. 173-4, *First Principles*, pp. 151, 176-82). An example of a manifestation of corruption and delusion was *factitious dignity*. Individuals could become corrupted as a result of expecting to receive honour providing they played some role in an enterprise. Yet the public could also be deluded in fallaciously judging the person honoured by his title and not according to his deeds (*First Principles*, pp. 299-305, 315-6, 322-3, 311).

A fourth obstacle was *intimidation*. By generating fear, a government could prevent people from seeing their true interest (*First Principles*, p. 250).

individual calculated how his own well-being would be affected by those ideas crystallised in the first stage. The individual formed some kind of a decisive opinion, as a result of calculations based on the communication of new information, as well as on some existing or modified conceptions in his own mind of the obligatory opinions of the community.

3. Will to act.

This stage involved a volition on the part of each individual which was based on the desire to bring about consequences calculated on the basis of prudence. This stage involved the formulation of a will by individuals, correspondent to their judgement, to undertake what could well turn out to be a collective action of the POT. Such a collective action could have a benevolent effect, namely one which promoted the well-being of fellow men. The collectivity of the action, and hence the greater probability of the benevolent effect, would derive from the motive of probity, involving a proposition backed by the moral sanction.

To summarise this section, consensus formation is facilitated by communication between people, and by reference to existing standards in a group, such as laws and communal obligations, be they sympathetic or moral. The memory and imagination of each individual is further enhanced by the free exchange of views. It is submitted that, in the light of the continuous role which the people played in Bentham's legal and political theory, this interpretation makes the best sense of Bentham's statements in *Fragment*, with which this enquiry was begun.[70] The sympathetic and the moral sanction operate to reinforce one another, and so create the possibility for communal integration under the auspices of the principle of utility. The interdependent operation of the external agency and the individual, in both the sympathetic and the moral sanctions, is at the heart of what has been described above as the "panoptic principle". I have argued for an admittedly formal, but distinctly

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[70] See p. 243, and pp. 243-4, note 23 above.

utilitarian, way of understanding "culture", and, as will be argued in the next section, of the process of cultural enlightenment. People would be able to "meet" each other's minds in the context of some obligatory culture which would unite them, but one which would be sensitive to, and even modified by, their individual contributions to communication. These individuals could, within the context of this "culture", reflect upon it, with a good chance that they would be understood by others. While participating in such an activity in a free manner, people would be able both to memorise and to imagine different conceptions or propositions to which painful or pleasurable consequences were attached.

The discussion of consensus formation in the public sphere so far has taken place at the level of universal theory, and has not referred to historical manifestations of it in different social groups. It is to this historical theme, which is important for an account of the broadest meaning of constitutional limits, that I will now turn.

IV

Deontology was that branch of morality which people arrived at through inter-subjective communication. As such it related to consensus formation, and in turn to the related operation of motives and sanctions. This section argues that by the operation of the sympathetic and moral sanctions, a social group could transform itself into what Bentham called a "community of sympathy".[71]

In a community of sympathy, at some level, there would be a common conception of what

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[71] *First Principles*, p. 71. Bentham grounded the idea of a community of sympathy in the more basic idea of a "community of interest". However, the former will be focused upon because a community of interest, being broader than a community of sympathy, could encompass a community of law as well. A community of interest, whether achieved artificially or naturally, would be the utilitarian's end in terms of universal theory. A community of sympathy would be a particular historical manifestation of such a universal theory.

was allowed and forbidden. No one would be able to disengage himself from communicative activity.[72] The task of deontology was to account for consensus formation between people. In other words:

> In every instance to **bring out of their obscurity**, out of the neglect in which they have hitherto in so large a proportion been buried, **the points of coincidence** to the extent of which extra-regarding interest is connected and has by the hands of nature been identified with self-regarding interest: and this in such sort and with such effect that by the alliance thus formed, by this conjunct kind of interest, the force of self-regarding interest in those shapes in which it is purely self-regarding is commonly already in use, and by apt means may be rendered more and more in use, to be outweighed and overpowered.[73]

Communication between the public and governmental institutions was the crux of Bentham's constitutional's theory. His constitutional theory was extra-legal in nature. It was rooted in sympathy, which was based on an empathic effort and the pain of bad conscience (or guilt). Through the capacity of each individual to imagine the pain of his fellow men, as well as his being influenced by communal obligations, he would begin to merge his pure self-regarding prudence with extra-regarding benevolence. This merging of self-regarding prudence and benevolence in the individual psyche would enhance the possibility of people arriving at a consensus. Sympathy was the most important factor in keeping a community together. Sympathetic affection, or the "desire for amity", would enable people to reconcile their opinions. As has been argued above, the operation of the moral and the sympathetic sanctions would allow for some degree of "harmony", a harmony which would set the parameters for further individual, and in turn, communal reflection. In a vibrant community, many individuals could come to believe that by harming other people's interests they would

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[72] Ibid., p. 72.

[73] *Deontology*, p. 193; see also ibid., pp. 196-7.

ultimately harm their own.[74] In a well-developed community of sympathy, *pure* self-regard would merge into extra-regard in many respects. In turn, within the parameters of the extra-regarding, individual imagination and the exchange of ideas could lead to the modification of the communal consensus. This process of formation and self-reflection of communities would be the story of cultural evolution, and would constitute a civilizing process: "In proportion as the field of a man's particular connection enlarges itself, it approaches to a coincidence with that of the public at large".[75] The argument here is that self-regard embodied the notion of sympathy, and, in a well-developed community, it would be hard to distinguish the purely self-regarding from the sympathetic or moral-orientated self-regarding interest.

This point has an implication for Bentham's theory as a whole. The social possibility of a self-reflective community, or a community of utilitarians, depended on a given group's historical evolution. To speak about a society of utilitarians *without* reference to the state of the social group would not make sense for Bentham. As has been argued above, there would have to be interdependence between individuals so that they would make the effort to consider the interest of their fellow men. This social stage would be difficult to attain, and hence law would be historically necessary to enable a people to move towards the formation of a "community of sympathy". Centralised coercive institutional authority would establish the initial collectivity by means of law and legal sanctions. However, the role of the state might gradually be supplanted by communal obligations, and eventually the need for security provided by the state might be reduced to a minimum. Legal intervention by the state, therefore, would be, if one takes an evolutionary view of Bentham's enterprise, only

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[74] Ibid., p. 195.

[75] Ibid.

secondary in importance. Viewed from the historical point of view of a given group, law would be merely an instrument while enabled a community of sympathy to develop. For Bentham, the real goal was a community in which the self and the extra-regarding would be united - a perfect society of utilitarians.[76] Law, the coercive power of government, legal punishment - all these would *make possible* the process of public enlightenment.

Law would bring together the self and the extra-regarding motives. The law would be, according to Bentham, the subject-matter of *political deontology*.[77] The moral and the sympathetic sanctions, whose function was interdependent, would do everything which could not be done by the physical and the political sanction.[78] However, the balance between legislation and private ethics would change as the group evolved.

Bentham assumed, from the position of an historical observer, that there need not be real conflict between people, although at most stages of history such conflict would seem real enough. He described the way in which people would be enlightened as to their true interest:

> **To bring to view** these comparatively latent ties - this, in so far as concerns the competition between *purely* self-regarding and social or say extra-regarding interest; this, in so far as concerns the competition between probity and the self-regarding branch of prudence - this is what belongs to the field of deontology.[79]

Once the moral sanction was operating in a community, that community could take collective action according to what it thought to be in its best interest. Such collective action would imply that each individual (or at least the most influential individuals), were able to think in terms of the identification of the self-regarding and the extra-regarding. This capacity on the

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[76] See the quote at the head of the chapter from *First Principles*, p. 321.

[77] *Deontology*, p. 198.

[78] Ibid.

[79] Ibid., p. 195.

part of individuals would amount to an enlightenment of the community. This enlightenment, as has been argued, would result from influence which involved elements of both understanding and will. As far as the latter element was concerned, people would be able to detect an unjustified pattern of obligations, whether established by the centralised authority, or among themselves. The sympathy which was crystallised into the moral sanction, or "public opinion", constituted the only proper basis on which the community might form a consensus with regard to the social justification of coercion.[80]

As far as the universal theoretical dimension of Bentham's enterprise was concerned, no goal or end was presumed. However, as far as the *historical* dimension of his enterprise, which involved an evolution of communities, was concerned, there would be a gap between the state of society as it WAS and as it OUGHT to be. Bentham's own social historical goal, his own historical "ought", was "a community of sympathy".[81] This was the case despite the fact that in his institutional design Bentham did not go beyond the establishment of a representative democracy.

As far as the universal *theoretical* dimension of Bentham's enterprise was concerned, the force of the sanction of sympathy, and hence the force of the moral sanction and public opinion, would depend on the state of society. In no social group would the force of the sympathetic sanction be totally eliminated. Further, in no social group would it be possible completely to eliminate the exchange of ideas, that is the influence of the understanding over the understanding. Otherwise, it would be very difficult to explain how society could become enlightened, and move from the stage of brutal existence into a community of law and order, and then into a "community of sympathy":

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[80] *Deontology*, p. 197.

[81] See chapter 1, pp. 17-20 above.

> In no state of society, which with the view of giving direction to human conduct [by] a work such as this I have in contemplation, can that social affection be wholly without place or wholly without the power of exercising in the direction here in question its influence on human conduct. In some states of society it is indeed in the whole extremely weak, and in every state the strength of it is susceptible of great variation as between individual and individual: in both which particulars it agrees in a considerable degree with the popular or moral sanction.[82]

To recapitulate, in terms of Bentham's universal *theory*, both empathy (the capacity of perceiving or imagining the pain suffered by another person), and sympathy (the interpretation of an empathic understanding), were of utmost importance for consensus formation. They would facilitate the formation of a consensus to some degree in *any* society. Empathy and sympathy would restrain an individual from doing something which appeared to the individual in question as likely to cause harm to another.[83] This required that each person was able to employ some "idea" of a likely pain, that is potential harm, in his own calculations, whether this pain would be suffered by another individual directly, or by the collectivity (in Bentham's language causing "private" or "public" mischief respectively).

As an individual gained more experience he would become more adept at foreseeing certain sorts of pain which outweighed immediately tempting pleasures. A person could then acquire the ability to reflect generally upon the danger of being seduced by the immediately pleasurable.[84] In other words, when the moral and the sympathetic sanctions were well-rooted, a person would be able to reflect that hurting a fellow man would be to hurt himself

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[82] *Deontology*, p. 201. Because one could not totally suppress the influence of understanding over understanding, one could not, even in a pure monarchy, stop the independent formation of sympathetic and moral obligations, which could, in turn, lead to the exercise of divestitive powers in some form. Thus, it is defensible to claim that sovereignty can be conceived as a split concept even where no split is apparent, for instance, in a pure monarchy: see chapter 2, pp. 54-5 above.

[83] *Deontology*, p. 201.

[84] Ibid., pp. 155-6.

in the long run.

Bentham produced a fascinating statement of social anthropology, envisaging an evolution from a society containing individuals with the propensity to act in a selfish manner, which would typically be subject to a mischievous and authoritarian form of rule, into a community of sympathy, in which authority was responsive to, indeed emanated from, the community, and operated only in those domains in which a social justification for such operations existed. The passage which contains this statement is remarkable, and illuminates many historical/anthropological aspects of Bentham's lifelong enterprise.[85] It reflects Bentham's lifelong insistence on portraying constitutional limits as socially dynamic in nature.

First, the passage shows that Bentham saw legislation and private ethics as interdependent. Society might develop from an aggregate of individuals, into a state under a code of law, and thereafter into a "community of sympathy". Legislation and private ethics were parts of the same utilitarian enterprise. Constitutional reflection was the medium which would determine the balance of the respective operations of a "community of law" and a "community of sympathy", a balance which would in turn be mirrored in the demarcation between legislation and private ethics. The relationship between the realms of private and political deontology, or law, and the extent to which each left a mark on a given society, would depend on the historical stage in the civilising process which the society had reached.

It is important to notice in this passage the relation between the individual and society. Individuals felt sympathy through their imagining some moral sanction already in operation. This is why Bentham wrote in this passage about the "tutelary force" of sympathy - a term

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[85] The passage is at *Deontology*, pp. 201-5. It is rather long and therefore is not quoted in full; see also ibid., pp. 73, 228.

that he usually reserved for the moral sanction.[86] The degree of sympathy in each individual mind would depend on the strength of the moral sanction already existing as a collective norm in society. It goes without saying that, as has been argued in the previous section, an exchange of views between individuals could transform the mutual "sympathies" so as to create another social norm which would be backed by another moral sanction. The relationship between the interdependent moral and sympathetic sanctions would change as society changed in the course of civilisation. An uncivilised society would contain mainly self-regarding, beast-like people, who would have little empathy, and so would lack any understanding of the effects of their actions on other people, or of the longer term implications for themselves. It would be a society with hardly any sympathy. There would be little guilt and little compassion.[87] As society grew, and the economy developed, and labour became more divided, people would become more dependent on the labour of other people, reciprocal relations of dependence would begin to form,[88] and people would begin to feel "bad conscience" about anti-social acts. A feeling of sympathy would begin to tie individuals together, so that communication between them would give rise first to sympathetic sanctions, and then to a collective moral sanction aimed against the co-ordinating agency in the community (the government). The fields of human action, and the persons whose actions were the object of the sympathetic and moral sanctions, would become more diverse, and the sanctions themselves would extend to more people. They would embrace various groups of

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[86] Ibid., p. 201.

[87] Such a state of society might provide a utilitarian justification for Hobbesian political theory.

[88] Bentham wrote: "[influence] extends itself successively, or at the same time, to other such individuals respectively connected with the individual in question by the ties of profession, class, town, province, political state".

society, from the family to the world-wide community. The idea that sympathy was the "backbone" of society would gain greater and greater credence, at the expense of political deontology, which assumed a lack of sympathetic capacities in people. As free inter-subjective communication became a dominant feature of society, the public sphere would gain cohesion, and sympathy would become its main characteristic. Bentham argued that each individual would gain the capacity to feel sympathy or "bad conscience" by observing other people. Through generalisations based on, and the observation of, the exchange of arguments, people would learn to conceive, that is memorise and imagine, other people's sentiments, and to feel a sense of obligation to take them into account.

People would be able to make signals, to communicate their sentiments, to their fellow citizens. In Bentham's language, they would learn how to develop "external expressions of their sentiments". With inter-subjective activity, the conditions for collective action would come into being. The force of the collectivity, backed by the threat of the moral sanction, could be applied against each member of the *group*, and against officials. What one can see here, in short, is a summing up by Bentham of the main thesis of his utilitarian enterprise, according to which the applications of universal theory are sensitive to the historical development of a society.[89] This passage arguably has application beyond Bentham's own

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[89] In 'Bentham on the Public Character of Law', Utilitas, 1 (1989) 41-61 at 60-1, Postema argues that under Bentham's system the role of law was to put affairs beyond public debate after the law's appearance. Such a role, Postema argues, obscures another role law has, not discussed by Bentham, namely the *structuring* of public debate which continues after the law's appearance. Bentham's main aim was to achieve co-ordination, Postema insists, and not to use law as a means of facilitating continuous public debate once co-ordination was achieved.

This argument portrays Bentham as a philosopher who advocated a socially static theory of law. Postema captures neither the manner in which an emphasis on law, though important, would be only a part, albeit a necessary one, of the historical development of a social group, nor that it was in the area of constitutional theory that the border line between attaining co-ordination though law (legislation), and through communal and sympathetic obligations (private ethics), would be determined.

historical experience, since the basic scheme of motives that he provided for here could remain operative in a society far more differentiated than a liberal, representative democratic one, as well as being compatible with an account of society not derived from the ontology with which Bentham operated.[90]

This idea of the historical development of the public sphere, involving the shifting borderline between political and private deontology, was arguably what Bentham had in mind, albeit in an undeveloped way, when he wrote the largely polemical *Fragment.* One can see in the universal account of political society offered there the embryo of the idea of the evolution of political society, developing from a society based on law and a centralised institutional scheme, into a community with only minimal spheres of legal obligation and coercion, having as its basis communal obligation originating within the community. This shift in the manifestation, or "locus", of obligation - from legislation to private ethics - would be determined, as has been argued in chapter 4, by utilitarian calculations. This shift would imply that the unification of duty and interest in individual minds could be, to a large extent, embodied in culture. In such a social state there would be no need for law artificially to unify duty and interest. A community of law and punishment would be transformed into a community of sympathy. The idea of "enlightenment" in this context meant that sources of pains and pleasures, propositions backed by sanctions, manipulated motives, and interest formation, all changed their social manifestations as a result of communal, and hence individual, evolution. This passage, together with the argument advanced in chapter 4 above, regarding political society and free government,[91] provides the basis for the broadest possible account of the social operation of the principle of utility, and the socially dynamic,

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[90] This point will be discussed in chapter 8, pp. 350-1 below.

[91] See chapter 4, pp. 139-48 above.

historically sensitive, idea of the social justification of authority. Thus, this account in *Deontology* portrays the broadest meaning, socially speaking, of constitutional limits in the context of historical evolution.

The second issue which is highlighted by this remarkable passage is that of false consciousness.[92] Bentham explicitly referred to a point in the history of a given community, the "community" itself being a product of sympathy, or inter-subjective communication, at which people could come to see that the judgements which they had previously made, and the principles that they had previously adopted, had, in the light of experience, turned out to be erroneous. The greater extent to which free communication was conducted in the community, the more instructive would be the community's calculation of consequences, and in turn the consensus it would reach.[93] Bentham would insist that the inter-subjective process of self-evaluation take place continuously. But, and this is crucial, he would deny that any particular substantive solutions to social problems were wholly enlightened solutions, incapable of amelioration.

A third issue which arises from reading this passage relates to minorities. A community of sympathy would be one in which, as has been argued, everyone would be a utilitarian, and would understand that by harming a fellow individual he would harm himself as well.[94] This would imply that there could exist on the part of the individual some sensitivity to other conceptions of the good, that is some capacity to endorse pluralism; and further, that this

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[92] See in this context chapter 4, pp. 129-30 above, where it has been argued that Bentham had written in *Fragment* about the possibility of people not being able to conceive of states of affairs in their true light.

[93] See *IPML,* chapter 4, for these parameters (intensity, propinquity, etc.).

[94] In *First Principles*, p. 39, Bentham claimed that between groups there would be clashes of opinion, but that such a clash would not mean a clash of interest.

pluralism could well be the subject of a consensus. Again, it must be emphasized that although Bentham can be understood as seeing a liberal pluralist society as the historical goal of communal development, it remains the case that no particular pattern of communal development, pluralist or otherwise, was assumed by his universal theory.[95]

In a community of sympathy, minority problems would be overcome by the social embodiment of a "sympathetic pattern", and hence a communal obligation, endorsing respect for the minority in question and its conception of the good. Such a sympathetic pattern embodied in a moral obligation would supply a prescriptive context for a great deal of prudential consideration by individuals in that community with regard to minorities. Constitutional limits on centralised coercion would point towards some neutrality or toleration with regard to different conceptions of the good. These constitutional limits would mirror an already cultivated sympathy in this regard amongst the people who composed the community.[96] Whether the "universal interest" of a community could contain the minority's interest or not would depend upon the quality of communication between individuals in this community, and, in turn, the stage of historical development of that community. In a society where sympathy predominated the quality of the universal interest would be such that it would embody different interest groups.[97]

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[95] It is important to avoid associating the idea of a "community of sympathy" with stagnation in public debate. A community of sympathy implied that some consensus existed, which would enable a free exchange of ideas to operate and to modify its central tenets. Stagnation would imply a passive and uncritical public.

[96] In *Bentham, Byron and Greece*, pp. 84-9, Rosen acknowledges that in *Deontology* Bentham made progress towards solving the problem of minorities.

[97] It is a pity that J.S. Mill did not read Bentham's *Deontology,* but only J. Bowring's edition of "Deontology". The result was that Bentham's remarks on Deontology, as contained in these notes, suffered heavy criticism by Mill, on the ground of Bentham's alleged lack of attention to the importance of "sympathy": 'Bentham', *The Collected Works Of J.S. Mill,* vol 10, pp. 95-9; see also M. Green, 'Sympathy and Self-Interest: The Crisis

Bentham's model of democracy and the application of the majority principle in a representative government has been discussed both by James[98] and Schwartz[99]. James makes the assumption that Bentham did not change his theory of law and sovereignty in his later writings.[100] This is a correct assumption on James's part, although based on the

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in Mill's Mental History', Utilitas, 2 (1989) 259-77, at 265-71.

The evolution of communities envisaged in *Deontology* resembled in many ways Mill's account of democracy and social evolution. Mill believed that the root of any social change would lie in the community. In his 'Considerations on Representative Government', Mill argued that there had to be a communal readiness to accept representative institutions. Mill also saw sympathy as an enlightening force, a force which could liberate a community from stagnant, indolent and dogmatic thought. One of the dangers of representative governments, he claimed, would be that of legislation uninformed by sympathy. In sympathy he saw an assurance that no single interest would dominate society: see *The Collected Works*, vol. 19, pp. 435-6, 445-7. Mill also saw in the communication and mutual influence between majorities and minorities (although the majority would be the ultimate force), the prime value of democracy. He would, like Bentham, see the "universal interest" in the context of such communication: see 'De Tocqueville on Democracy in America [I]', *The Collected Works,* Vol 18, pp. 71-3.

The argument advanced in this chapter also resembles what Mill said in 'The Spirit of the Age', about the two states in which society could exist. In a *natural* state of society, people were governed, and censored their government, within generally accepted parameters, known to all, regarding social organisation and the aptitude of the rulers. A representative democracy would be in such a state (an "optimisation of state institutions"). This state of society would be regarded as stationary, or as progressing only slowly towards questioning the basic principles upon which society was built. When society reached a certain stage of self-reflection as a result of freedom of communication, a questioning of the basic order could occur. All existing patterns of opinion would be in chaos, which might in turn lead to a new understanding and construction of society and its institutional organisation. At this stage, society would be in a *transitional* state: *The Collected Works,* Vol. 22, pp. 252-3. Mill's argument here can be seen as a statement of critical theory.

Further, Bentham's idea of a "community of sympathy" resembled in many ways Mill's idea of the "stationary state", in which enlightened individuals would enjoy fundamental rights and substantial equality: see 'Principles of Political Economy', *The Collected Works*, vol. 3, pp. 752-7; and also in this context, J. Riley, 'J.S. Mill's Liberal Utilitarian Assessment of Capitalism Versus Socialism', Utilitas, 8 (1996) 39-71, at 46-55.

[98] M. James, 'Public Interest and Majority Rule in Bentham's Democratic Theory' in Political Theory, 9 (1981) 49-64.

[99] P. Schwartz, 'Jeremy Bentham's Democratic Despotism' in *Ideas in Economics*, R. D. Collison Black (ed.), Basingstoke, 1986, pp. 74-103.

[100] James, 'Public Interest and Majority Rule', p. 51.

mistaken assertion that Bentham's legal theory required an unlimited despotism. Therefore, according to James, representative government would still be legally unlimited. James claims that Bentham implied that a legally unlimited government was needed in order to establish some unification of duty and interest among small interest groups, which could not form a genuine public interest, and hence could not achieve unification by themselves. Consensus formation would be local, and so minority groups would be able to form consensuses which would operate to prevent the formation and recognition of the universal interest. Each group would form a sinister interest,[101] and hence there would be no possibility of, or incentive for, arriving at a majoritarian universal interest. James assumes that, for Bentham, people were egoists who would ignore on every occasion the interest of others, and that the same would be true of groups, except where there was no contradiction between self-regarding and extra-regarding interest.[102] James is clearly mistaken in his account of Bentham's theory of motivation, in that he fails completely to discuss sympathy between individuals, let alone between groups. Further, the fact that minorities could compromise and reach a consensus implied that this consensus could *become* the universal interest. There was nothing impossible or undesirable in such a social process. Indeed, minorities could also arrive at a consensus with the majority group. *All* types of consensus would exemplify the unification of self- and extra-regard.

Schwartz also totally divorces self-regard from sympathy, and comes to the conclusion that under Bentham's account there would be nothing to stop the ruler from changing society as he wished.[103] Schwartz does not take account of the role of the POT in facilitating

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[101] Ibid., p. 54.

[102] Ibid., p. 53.

[103] Schwartz, 'Jeremy Bentham's Democratic Despotism', p. 81.

consensus between the majority and minorities as a society developed under a democratic government. His view of Bentham's psychology is binary. He portrays people's interests under Bentham's theory as either coinciding or incompatible.[104] He does not discuss the possibility of social interaction, that is influence and dialogue. Schwartz's analysis does not therefore capture the complexity of Bentham's insight regarding the manner in which social arrangements had the capacity to enhance interaction among members of the public, and between the public and central institutions. His claim that in Bentham's democracy there was nothing to stop the increase of government power under the majority[105] is clearly mistaken.

The claim regarding the social complexity of the formation of the universal interest with which the inquiry of this chapter began may now be better appreciated. The universal interest was a socially dynamic concept, the means of expression, though not the nature, of which would change, depending on whether the community was one of law, one of sympathy, or some hybrid form. The universal interest materialised as a result of a reciprocal process of mutual influence, or a struggle between many self-informed interests. Hence, the universal interest would be constantly changing. Under all circumstances, its formation involved more than just adding up static preferences. The moral and intellectual aptitude of individuals, and hence of the community, would change over time through communication.[106] Constitutional theory was a conception of the organisation of a group, based on some global utilitarian consensus regarding social relationships within it. As such, the utilitarian justification of a given constitutional theory would always mirror communal reflections regarding the balance

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[104] Ibid., p. 90.

[105] Ibid., p. 81.

[106] See in this context, *First Principles,* p. 70.

between private ethics and legislation.[107]

V

It has been maintained that the relationship of understanding over understanding could also operate through the medium of the will. However, in the constitutional sphere, the moral sanction as exercised by the population would be predominant, so the superiority would belong to the people rather than to the government. Of course, influence of pure understanding would flow in both directions. If the government remained stubborn, the antagonism between it and the people could lead to a situation where the people exercised their will over the holders of supreme operative power.[108] The degree to which the people interacted in this way with government would be the degree to which constitutional freedom existed. The more possibilities there were for free inter-subjective communication among the people, and between the people and the government, the better informed and effective would be the will of the people to which the moral sanction was attached. Further, under such conditions it would be reasonable to expect the holders of the operative power to perceive the popular will as imposing on them an obligation - a constitutional obligation:

> Constitutional liberty depends upon and is proportioned to the dependence of the possessors of efficient public power upon the will of the body of the people, in virtue of the originative power they possess.[109]

Constitutional limits reflected a socially dynamic conception of harm in a social group. As

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[107] Bentham declined to give an exact account of what such a balance should be: *IPML*, p. 281. See in this context, H.L.A. Hart, 'Bentham's Principle of Utility and Theory of Penal Law', in *An Introduction to the Principle of Morals and Legislation* (CW), J.H. Burns and H.L.A. Hart (ed.), Oxford, 1996, pp. lxxix-cxii, at xciii-xcvi.

[108] See *First Principles*, pp. 67-8, 30; see also Bowring, ix. 41.

[109] *On the Efficient Cause and Measure of Constitutional Liberty*, UC clxx. 168; see also ibid., UC cxxvi. 13, and *Essay on Political Tactics,* Bowring, ii. 332.

such, constitutional limits (and of course, sovereignty) represented a moral judgement. This social dynamism would be enabled only under the condition of free communication within the public sphere. "Freedom", ultimately, would be freedom of communication - of influence arising from an exchange of opinions.[110] Constitutional limits were not related merely to some entrenched social beliefs which were "accepted" as true, but reflected a socially dynamic process of enlightenment.

As has been argued in chapter 2, Bentham's concept of law embodied a moral judgement. His legal and political theory had the discovery, reshaping and realisation of social *possibilities* at its heart. From *Fragment* to *Deontology*, he was committed to this democratic aim. *The key value was participation.* The participatory community could reflect critically on the degree of coercion existing, and hence on the extent to which such a community conceived of itself as a *political* one. Thus, the democratic process - the social process of the transformation of the community - would accelerate sharply after a representative government had been put in place.

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[110] See the discussion of the meaning of a free government in *Fragment*, chapter 4, section IV, above. This again resembles Mill's 'On Liberty', in which flexibility in the borderline between the spheres of collective intervention and individual inviolability, the giving force to minorities' opinions (usually the most innovative and enlightening ones), the avoidance of the tyranny of the majority and of stagnation in public opinion (inter alia as a result of the acceptance of "custom"), in short the maintenance of a vibrant social dynamism, were the chief characteristics of constitutional liberty, and hence of free government: *On Liberty, The Collected Works,* vol. 13, pp. 219-31, 242-3, 262-73; see also pp. 289-90, note 97 above.

CHAPTER 7 - AN ANALYSIS OF CONSTITUTIONAL LAW, AND THE INSTITUTIONALISATION OF PUBLIC OPINION

I

This section explains further a point left undeveloped in chapter 2, in the discussion of constitutional law.[1] It is in constitutional law that a conceptual link can be made between Bentham's legal and constitutional theory, that is between his theory of law and his theory of representative government. The notion of constitutional law also connects the legal and popular elements which constituted his understanding of the concept of sovereignty.

Bentham wrote about constitutional law on many occasions.[2] He thought of constitutional limits in terms of law. However, any idea of legally limited government would create an incoherence in his thought. On the one hand, he saw a dimension of "legality" in the phenomenon of constitutional limits, that is in acts which would be considered "unconstitutional". On the other hand, he seemed clearly to differentiate between what was "legal" and what was "unconstitutional".[3]

Presenting "constitutional law" as something which could not signify illegality but could signify unconstitutionality was a very novel move indeed. The task of this section is to make the best sense, *on the basis of the argument so far*, of the problematic issue of constitutional

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[1] See chapter 2, pp. 68-9 above. It has been argued above that Bentham understood constitutional law in terms of constitutional limits. Thus Bentham's occasional discussion of constitutional law as having the role of determining the distribution of offices and personnel should be read as a portrayal of constitutional limits in these respects: see UC lxix. 235; *IPML*, pp. 281, note a, 307-11; and *First Principles*, p. 3.

[2] See, for instance, *IPML*, p. 281, *OLG*, pp. 19, 64-6, 80, Bowring, ix. 1-3, 9-11, and *First Principles*, pp. 1-5.

[3] *OLG*, p. 16.

law in Bentham's thought, a problem which he did not attempt directly to resolve. The main question which will be discussed is the extent to which the ideas of illegality and unconstitutionality are mutually exclusive.

Some scholars have tried to explain the incoherence of constitutional law within Bentham's thought, but they have either presented a conceptually insufficient account of constitutional law, or argued that Bentham was simply incoherent in attempting to explain how a legally limited government could be accounted for under the command theory of "a law".

An example of the latter group of scholars is Hart, whose criticism of Bentham's theory of sovereignty and the normativity of law led him, as has been seen, to the conclusion that Bentham's command theory of "a law" could not account for the idea of legal validity, nor in turn for the idea of a legally limited government.[4]

L.J. Hume's account, on the other hand, places him in the former group. He recognised that the concept of constitutional law related to the idea of a public trust, and that it would cover the designation of persons invested with legal powers, as well as the extent of the powers with which they would be invested. Hume rightly maintained that constitutional law necessarily possessed both penal and civil aspects, and that it would be integral and uniform like all the other types of law.[5] However, he neither confronted the problematic nature of sovereignty, nor in turn of constitutional law, within the command theory of "a law". Even Postema who, as has been maintained, presents some very important insights in regard to Bentham's theory of sovereignty and the social operation of the principle of utility, does not confront directly the dilemma which arises in regard to constitutional law: how could constitutional law be "law"? How could a mandate of the sovereign be unconstitutional but

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[4] See chapter 2, pp. 28-30, and chapter 5, pp. 204-7 above.

[5] Hume, *Bentham and Bureaucracy*, pp. 77-81.

not illegal?

Constitutional law as part of a system of legislation

In *Constitutional Code* Bentham wrote,

> Public Opinion may be considered as a system of law, emanating from the body of the people. If there be no individually assignable form of words in and by which it stands expressed, it is but upon a par in this particular ...with ... *common law*. To the pernicious exercise of the power of government it is the only check; to the beneficial, an indispensable supplement. Able rulers lead it; prudent rulers lead or follow it; foolish rulers disregard it.[6]

Bentham saw constitutional law as forming part of a system of legislation, within the familiar scheme of his hedonistic psychology and moral theory. Constitutional law had several functions as part of a system of legislation. First, at its most general level, constitutional law belonged to the system of legislation like any other branch of law. The only thing that differentiated it from any other branch of law was its subject, namely officials, as opposed to private individuals. Constitutional law was concerned with the identification of officials' duty to promote the universal interest with their self-regarding interest, which on certain occasions could become sinister.

Second, the identification of duty and interest on the part of officials could have a particular application in the field of constitutional limits. Constitutional law was that part of a system of legislation which aimed at assigning limits to the extent to which centralised, institutional coercion by a government was permitted.

Third, the body of constitutional law was itself a system of sympathetic and moral obligations, a communal code which provided firm prescriptions concerning how, by whom,

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[6] *Constitutional Code*, p. 36. See chapter 6, pp. 236, and note 12 therein above, where it has been argued that Bentham saw the POT as a moral legislature. See in this context Ehrlich, *Fundamental Principles of Sociology of Law*, p. 22, suggesting that public opinion should be considered law.

and to what extent, centralised coercion should be exercised. As such, constitutional law belonged to the realm of private deontology. The degree to which every citizen and official was able to use it in his own prudential calculations would depend upon the degree of freedom of communication both within the public sphere, and between the public sphere and the government. In the language of sovereignty, constitutional law would involve the entrusting body, the people, being able to specify certain moral obligations (which would also be sympathetic ones). Such obligations would give substance to, or gradually modify, any object of volition which formed the basis of the trust which constituted political authority. This trust was understood by Bentham as involving a critical social justification of coercive measures.[7] Constitutional law, in this sense, would serve as a system of moral rules which indicated the degree of communal development. As such, it was a system of legislation which gave effect, to a greater or lesser extent, to the trust of the people in *any* type of government. This system of moral obligation, backed by the moral sanction, would be able, to a certain extent, to tie the hands of the legislature.

In short, constitutional limits would be the product of an interaction between private and public obligatory media. Constitutional law, like every other law, would aim to prevent the commission of offences. In the same way that every law was a security against mischiefs,[8] every constitutional law in principem would provide security against misrule, or public mischief. In terms of Bentham's classification of offences, misrule was a "public offence",

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[7] For a discussion of the modal object at the basis of this trust, see chapter 2, pp. 55-63 above.

[8] Bentham classified mischiefs in *IPML*, pp. 143-5. Primary mischiefs would cause pain directly to the object of the act. Secondary mischief, danger and alarm, could affect people other than the immediate object of the act.

directed against the community of non-assignable individuals.[9]

An analysis of an individual constitutional measure.

How could constitutional law be analyzed in terms of the conceptual framework put forward in OLG? The problem in seeking to account for constitutional law as part of a command theory of law, was that constitutional law could not be identical to any other legal measure. However, it could have the essential characteristics of law - an act and an expression of will with regard to that act.[10] It could also possess the force of law through the moral and sympathetic sanctions.

An individual constitutional law would be "split" in the same way that sovereignty was. The understanding of a constitutional law would have to incorporate two dimensions, both of which were necessary for a full account of it as a social phenomenon. Although a constitutional law in principem could be referred to as a unified constitutional law in a simplified sense, to present constitutional law exclusively in such a way would be to distort its socially dynamic nature and signification.

An individual constitutional law would necessarily have two interdependent dimensions - one social and one institutional. The first would involve a popular expression of will with regard to a certain proposition in relation to a certain action. This individual "moral law" would amount to a new condition placed upon the trust that had been bestowed by the people on the centralised coercive mechanism. In other words, the trust would operate as a conditional command, the condition being some proposition backed by the moral and the

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[9] See *IPML*, p. 203. In penal terms, breaches of constitutional law might also be classified as offences against sovereign trust, or as offences against sovereignty: see in this context, Burns, 'Bentham on sovereignty: An Exploration', pp. 403-5.

[10] *OLG*, p. 93.

sympathetic sanction.[11] An individual constitutional law would involve a single expression of will by the public, with regard to a particular constitutional limit. It would be a moral (and sympathetic) "law", and would have all the essential aspects of a law. Bentham's *OLG* was sufficiently general conceptually to accommodate such a popular manifestation of constitutional law.

The second dimension of constitutional law, the institutional, would come about as a result of the social process, as the legislature was influenced by the public. The popular or moral obligation could lead to the expression of a self-limitation on the part of the legislature. This self-limitation would be manifested by a constitutional law in principem, the breach of which would become an offence in the penal code. The sanction which would (or would not - depending on utilitarian calculations) enforce such a constitutional law in principem, would be the moral or the sympathetic. However, as will be seen in the next two sections, the expression of constitutional limits in the code would also help the judge, when assessing public opinion, to pass a judgement to the effect that a given act of the legislature was anti-constitutional.

"Anti-constitutional" would mean "contrary to constitutional law". This expression, in turn, would have two aspects. First, an anti-constitutional act would be contrary to a "sign" in the penal code. In this sense it would be "illegal", because it would be contrary to the penal code. Second, the term "anti-constitutional" would confirm that the legislature was subordinated to certain basic communal beliefs. These beliefs would have arisen from communication between the legislature and the public on previous occasions, and would also arise after the appearance of the proposed coercive measure.

This interpretation of unconstitutionality reconciles, on the one hand, the impossibility of

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[11] See chapter 2, pp. 60-1 above.

a mandate of the sovereign being "illegal", and on the other hand, its being "unconstitutional", that is contrary to constitutional law. Two wills, and therefore two "laws", were involved in the full exposition of constitutional law - that of the public and that of the legislature - and both would give expression to constitutional limits after the social process of mutual influence had occurred. In some cases, a transgression of a constitutional law in principem would not be perceived as a breach of duty in the eyes of the public, since they might concur with the reasoning behind it. Once the process of interaction had taken place, a new or modified constitutional law would be established. A popular proposition backed up by a sanction would crystallise into a new constitutional obligation and would be embodied in the code. The necessity of an interactive process between the public and the government meant that a transgression by the government of an obligation contained in a constitutional "sign" need not in all cases constitute a constitutional offence in the eyes of the public. It was possible for the legislature to convince the public that despite this infringement, no action had taken place to the detriment of the public interest.[12]

To sum up, a constitutional law was a provision in the code, and as such was "legal" in nature. However, as a popular constitutional limit, it was extra-legal in nature. Yet, even as such, it had an element of "legality", in that it complied with the conceptual requirement of a law. From the point of view of "descriptive sociology", it would make more sense to describe constitutional limits as the synergy of two constitutional "laws". These first of these "laws", communally based moral law, would be reflected in and interact with the second, a

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[12] Burns discusses manuscripts, dated between 1783-8, entitled *Projet d'un corps complet de droit*. In these materials Bentham discussed constitutional laws as mirroring certain broad privileges (which themselves incorporated certain fundamental freedoms). These laws were ultimately enforced by popular discontent, and if necessary, revolt. Further, these constitutional laws would be essentially incomplete, or imperfect, in that their execution and effect would depend on penal and procedural law: 'Bentham on Sovereignty: An Exploration', pp. 409-11.

correspondent institutional constitutional law in principem.[13] This socially dynamic manifestation of constitutional law would also reflect the social dynamism which characterised the concept of sovereignty.

The relationship between constitutional law and other branches of law

What was the relationship between constitutional law and other branches of law, namely civil, penal and procedural? Bentham claimed that the quality of the other branches of the law would depend on the basic interests from which they stemmed and which they endeavoured to protect. Constitutional law would determine the aptitude of the people in power and would constantly check their interest. Bentham said in this context that although the supreme operative[14] would be the body whose laws were immediately apparent:

> Still however it is the constitutional branch that is the most important of the two as being that on which the other depends for all its qualities and all its effects, as an effect upon its proximate cause.[15]

Constitutional law was the most important branch of law, because of its two dimensional nature. It was legislation about legislation.[16] It would determine which interests would determine all other legislation. Constitutional law would ensure that the whole system of penal law accorded with the universal interest. It would determine the end in view of any

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[13] Bentham accounted for the crystallisation into a "habit" of a pattern which signified a synergy of communal and institutional obligations: see *Deontology*, pp. 183, 205.

[14] For a discussion of this term, see chapter 5, pp. 171-2 above.

[15] *First Principles*, p. 37, editorial note 2.

[16] In *First Principles*, p. 3, Bentham referred to constitutional law as the *remotely* operative branch of the law, in contradistinction to the penal and civil branches of the law which were *immediately* operative (which is reminiscent of the distinction between the immediate and constitutional spheres of public reflection and the operation of the principle of utility).

individual law.[17] This end would of course incorporate constitutional limits, transgression of which would *expose* a flagrant breach of the universal interest. For instance, under a monarchy, treason and general political offences such as seditious libel were likely to be significant features of law. Torture would be common, while confiscation, inheritance rules, and the entire substance of the penal law would be geared towards the protection of the sinister interest of the monarch. The presence of royal gestures such as "pardon" and "mercy", as well as a cultivated belief in "legitimacy", would indicate a systematic protection and promotion of sinister interest.[18] A monarch would use these penal securities in order to avoid any *independent* reflection on the part of the public about the necessity to introduce a better form of government, one which would better adhere to the universal interest.

As has been seen, in *SAM* Bentham distinguished between a primary set of promises of self-limitation, and another set of promises which would give execution and effect to these primary promises.[19] Although constitutional laws could appear as constitutional provisions in a constitutional code, penal law and procedural law would be needed to turn breaches of them into offences. Penal law would constitute this "other set of promises". The provisions of penal and procedural law would give expression (which would lead to notoriety), as well as execution and effect, to constitutional law. Assistance from penal and procedural law was very important, especially in so far as defending *individuals* against misrule was concerned. In order to get protection, individuals would have to resort to procedures which entitled them to protection. Protection for individuals against misrule would be akin to individual

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[17] Bowring, ix. 3. As has been argued in chapter 5, pp. 166-7 above, the end of law was the question in relation to which every individual law ought to be analyzed.

[18] Bowring, ix. 36.

[19] See chapter 5, p. 187 above.

constitutional rights. In *SAM* Bentham argued that constitutional law would protect individuals against oppression in the same way that it would protect the public at large. It would be for the penal code to give execution and effect to a constitutional law which provided individuals with securities against oppression by rulers, for example against injurious confinement and banishment.[20]

In *First Principles*, Bentham argued that it would be difficult to understand constitutional promises as merely publicly-orientated moral obligations. As has been seen, these moral "laws", made by the POT, would need to become part of the penal law. They would need to be mirrored in self-imposed obligations which would then form part of the penal code. However, their introduction into the penal code would be enforced by the moral sanction. Even when the legal sanction was applied to constitutional "law", it would constitute an effectuation of the moral sanction.[21] In the following passage the fusion between the social and the legal, or the institutional, is most evident:

> The efficiency of the popular or moral sanction, with its Public Opinion Tribunal, can not be strengthened, but the efficiency of the law, in so far as its force is employed in augmentation of the happiness of the people, is also strengthened. In so far [as] a misdeed, which by reason of its detrimental effect on happiness is *vicious*, and thereby exposes the agent to punishment at the hand of the Public Opinion Tribunal, is moreover *criminal* - an act of delinquency against the law exposing the agent to punishment at the hands of the law....[22]

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[20] *SAM*, pp. 132-4.

[21] The relationship between the legal sanction and the moral sanction, as far as the idea of punishment was concerned, was that the moral sanction could react against a broader range of mischiefs. In *First Principles*, p. 291, Bentham said: "Punishment as applied by the legal tribunals - punishment applied under the name of punishment - attaches to such evil acts alone the mischief of which has place as well in a shape sufficiently determinate, as in a quantity sufficiently great, to warrant the application of evil in the shape and in the quantity in which it is so denominated. Punishment as applied by the Public Opinion [Tribunal], applied as it is in effect without the name, attaches itself to mischief in all shapes in which the hand of man can, without special and sufficient justification, be instrumental to the production of it".

[22] *First Principles*, p. 291.

The formal part of constitutional law could be part of a penal code. A constitutional law in principem could become a part of the penal code. Bentham defined the penal element of constitutional law. This penal element was a scheme of offences ("you shall/shall not do that" backed by punishment). Some expository matter could be attached to these penal provisions, as to any other individual law.[23] The penal element of constitutional law would have as its objective,

> The giving a description of a particular class of crimes, and of means employed against them, in the character of remedies. But that the thread may not be interrupted, convenience recommends the placing what belongs to these crimes, in company with what belongs to others, in the penal code.[24]

Bentham argued that the penal part of constitutional law would relate firstly to the making rulers liable as offenders. Secondly, and more importantly, these constitutional offences would necessarily be connected to facilitating the public detection of the abuse of official powers. In the following passage, Bentham connected the determination of constitutional limits by popular judgement, with their effectuation, if possible, by concerting measures for resistance:

> [The constitutional arrangement would be designed so that] acts done in resistance to, or for prevention of, misrule, and thence productive of more good than evil,- to such acts, of whatever penal denomination they may appear susceptible, **no such punishment, if any, shall be allotted**, as might, with propriety, be allotted to them, if the application of them to the prevention of misrule had no place.[25]

This passage foreshadows the discussion in the last section of this chapter, in which it will be argued that judges, when considering acts of disobedience on the part of citizens against misrule, could and should refuse to punish. Thus Bentham related constitutional law to both

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[23] On expository matter, see *OLG*, pp. 198-9; see also Hart, *Essays on Bentham*, pp. 118-22.

[24] Bowring, ix. 9-10.

[25] Ibid., p. 10.

the penal and procedural codes. Adherence to constitutional law could be guaranteed by permission given by procedural law to judges to refrain from punishing people who had disobeyed on the ground that they were disobeying an act of misrule.

It has already been argued in chapter 5 that Bentham's Constitutional Code was a single individual constitutional law in principem which would mirror a law "enacted" by the public. Its exposition in the *penal* code might be something like: "powers of government shall be exercised in accordance with what is provided for in the constitutional code". This comprehensive constitutional law in principem would exist alongside other constitutional limits which could appear both in the constitutional and penal codes. Under Bentham's system, the constitutional code itself would include penal elements and definitions (expository matter), more akin to civil law.[26] Bentham decided to include both penal and civil elements in a single, separate, constitutional code, although all the provisions in this code *could be* theoretically divided between the civil and the penal codes. It goes without saying that in Bentham's proposed penal code, individual constitutional laws in principem would not be mentioned. Constitutional limits would be mentioned as public offences in the penal code, although their full exposition would be given in the constitutional code.

Effectiveness and validity / legality and validity.[27]

"Effectiveness", in Bentham's legal and political enterprise, had a wider meaning than "receiving obedience". The expression "habit of obedience" encompassed popular reflection and judgement, both of which were elements in Bentham's concept of sovereignty. A coercive measure had "effectiveness" when it had a certain impact on social attitudes. As has

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[26] The distinction between penal and civil law is discussed in *OLG*, chapter XVI.

[27] See also chapter 2, pp. 28-9, 34-5, and chapter 3, pp. 92-5 above.

been argued, such an impact would involve a reflection which related not only to existing conventions concerning limits to legislative power, but also lead to social reflection on the potential consequences of the measure in respect of such limits. "Effectiveness" was not simply a question of whether a given measure was obeyed or not, as Hart portrayed it.[28]

In *SAM*, Bentham said that there could not be a situation in which the violation of a constitutional promise by the legislature could be seen as having no legal effect. When a coercive measure had been promulgated, neither a citizen nor a judge could deny that, in point of fact, there had been an authentic enactment of a coercive measure by the governmental authority. This authority itself would be considered for most purposes to be justified, and hence an acceptable law-making body. Yet, in Bentham's system, once a measure was viewed as unacceptable by the people, they could still reflect on it, and the subject of reflection would be whether it should be refused recognition as *a legal measure* despite its authenticity. A socially sensitive understanding of "validity" could not be complete without accounting for such a reflection. The people might decide to disobey the measure. "Effectiveness" here had a wider sense of "permitted by the people", rather than mere obedience to the law. Effectiveness, or "permissibility", would be based on *public reflection*. Public reflection would consist in a general moral evaluation of the coercive measure in hand, and as such might lead to the measure being accepted *as* a legal measure. At this point legal validity and effectiveness would no longer be conceptually distinguishable.[29] Disobedience amounted to a statement that the measure ought not to have been enacted. In the same way, a declaration made by a court that a measure was anti-constitutional amounted to holding the

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[28] Hart, *Essays on Bentham*, p. 234.

[29] In Hart's terminology, the measure in question had transgressed the boundaries of the social practice which gave rise to the rule of recognition, a rule which formed the basis of normativity for any legislative measure.

measure ultra vires, which was to say that the measure should not be seen as a legal mandate.[30] The limits it of sovereignty could therefore be spoken of as being created and modified *by* the public reflection which prompted the disobedience. It has been argued above that in *OLG* Bentham saw the critical ability of the populace to *reflect upon* the limits of acceptable coercion as a necessary element in the concept of sovereignty. In *SAM* he developed this theme further.[31]

This understanding of "effectiveness" in a wider sense than mere "obedience" leads to a consideration of the distinction between "invalidity" and "illegality". On the face of it, what was "valid" and what was "permissible" could not be different in kind. As has been argued, in terms of the exercise of powers, the "quality" (a fictitious entity which makes sense in the context of a utilitarian judgement) and "quantity" (a fictitious entity emanating from claims about the limits of competence, which also makes sense only in the context of a utilitarian judgement) of the exercise of power were seen by Bentham as generically indistinguishable.[32]

Postema concedes that Bentham did not always keep clear in his mind the distinction between legally permissible and legally valid. The latter seemed to have been lost in the former.[33] However, Postema argues that Bentham had accounted for what would be socially "conceived as law", and that Bentham saw sovereignty as an epistemic test of "recognition". Hence, Postema claims, Bentham ultimately accounted for legal validity. In other words, Postema maintains that popular recognition of the authenticity of a coercive measure is very

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[30] See the discussion of "adoption" in chapter 3, pp. 92-95, and note 16 therein above.

[31] *SAM*, pp. 139-40.

[32] See chapter 5, pp. 180-2 above.

[33] Postema, *Bentham and The Common Law Tradition*, pp. 257-8.

similar to what Hart referred to as "legal validity". In arguing this, Postema brings Bentham's idea of sovereignty into line with Hart's. It has been argued in chapter 2 that this interpretation of Bentham's account of sovereignty merely as a test of "authenticity" is inadequate.[34]

There was no need for Bentham to distinguish conceptually between validity and legality. A declaration by a court that an act was anti-constitutional would mean that an act was contrary to constitutional law. This would mean that *despite being authentic*, it would be constitutionally, and hence legally (in the sense of constitutional law), *impermissible*. The difference between legally permitted and legally valid was that the element of "permissibility" related to different laws. "Legal validity" referred to permissibility in reference to certain constitutional laws. These laws were "adopting" laws, in that they would assign powers to certain actions and relationships. Permissibility with regard to "validity" and permissibility with regard to "legality" might differ in terms of their *scope* and in terms of the *sources* of the permission. Tests for "validity" and for "legality" might not be identical. For example, it might be that what made a contract valid was a certain statute or court's ruling which adopted contractual dealing. There might be another law which rendered the execution of certain contracts illegal. As far as sovereignty at the top of a social hierarchy was concerned, there needed to be an extra-legal coercive measure which would delegate legal powers to governments.[35] The ultimate arbiter of constitutional permissibility, at the top of a hierarchy, although conceived of conceptually as "a law", would be of an extra-legal

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[34] See chapter 2, pp. 76-81 above.

[35] Sovereignty would always be "split" and relative in nature: see chapter 3, pp. 92-5 above.

nature.[36]

Bentham's statement that a mandate of the sovereign could not be illegal was true as a matter of logic, given the supposition on which sovereignty was based. Yet a mandate of a sovereign could certainly be constitutionally illegal as a matter of a social practice. Hart's theory was deficient in that it was socially static: for him, constitutional law was a limitation on government which was legally validated by the rule of recognition. Hart failed to show that constitutional law was also a social process, of which both the people's continuous checking, and the *permissions* of an investing body, were an inherent part.

Even the idea of "validity" had to relate conceptually to some expression of will (commands, prohibitions, permissions, permissions to forbear), which was a result of some judgement. It is overtly reductionist to describe validity merely as authenticity. An act of "recognition" of a measure as a valid law was the *result* of a justificatory, and hence "permitting", process.[37]

For Bentham, the idea of something being contrary to law, or illegal, could be applied also to the *competence* of every subordinate authority in a state:

> The supreme authority in a state is that on the will of which the exercise of all other authorities depends: insomuch that, if, and in so far as, by any other authority the will of the supreme authority is contravened, **the constitution** by which the several powers are allotted to the several authorities is violated, and what is done is **contrary to law**.[38]

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[36] See *OLG*, p. 28, where Bentham mentioned the idea of "validity" of mandates in the context of his discussion of adoption.

[37] Curiously, Postema also seems to concede the necessity of an element of permissibility at some point despite his general claims to the contrary. He argues that, quite often, the ideas of "duty" and "disability" go hand in hand. He gives an example to the effect that a moral "duty" is always attached to any disability which is manifested in a Bill of Rights: see *Bentham and The Common Law Tradition*, p. 259; see also ibid., p. 257, in which Postema affirms that Bentham saw limitations on sovereign power as a kind of duty to the people.

[38] Bowring, ix. 96.

A dimension of superiority and subordination, and hence of "permissibility", should also be ascribed to "constitutionality". The entities which Hart called "power-conferring rules" could not conceptually be fully distinct from "duty-imposing rules", although no doubt they represented different types of laws. This conceptual fusion would be characteristic of *any* act of delegation. This fusion would hold good for any act of "adoption" or "pre-adoption" effecting a delegation of some authority either to make law or to enter into legal relations. To see something *as* law implied a more general constitutive "volitioning", or duty-imposing law. Any presentation of a chain of validation of the sort Hart put forward in *The Concept of Law,*[39] as an epistemic test of "recognition" of a purely "power-conferring" nature, is incomplete and misleading.

Hart was right in claiming that, for Bentham, permissibility was a key concept. However, it was wrong for Hart conceptually to differentiate permissibility from legal validity. The criteria which differentiated "social validity" from "legal validity" would also have to embody a dimension of permissibility. A rule which permitted a transition from the "socially valid" to the "legal valid" was a constituting rule.

To represent validity as merely a test of "authenticity" would be to take too socially-distorted a view. The idea of "constitutional" should be taken to imply some permissible boundary or sphere of power. Validity would have to be explained in this context in order to be socially plausible.

One drawback of Bentham's account might involve the fact that, because legal validity and efficacy were connected, constitutional limits could be counter-intuitive. Bentham's ideas make immediate intuitive sense only when the investing body (as it has been called in chapter 2) can actually be perceived as engaging in a constitutional judgement as to the limits of

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[39] Hart, *The Concept of Law*, pp. 102-4.

justified authority. It is harder to account for constitutional limits when the judgement of the body of the people is stagnant or latent. Hart exploited this weakness. However, he did so at the expense of neglecting to account for the socially-dynamic nature of the rule of recognition. Bentham saw the question of the ultimate authority and validity of law as an *interpretive* question to be answered in a popular fashion (within the limits of the actual transparency of communication which characterised the community in question), rather than as a drily descriptive one. Therefore, as has been argued in chapter 2, his theory ultimately takes the analysis of legal phenomena into the realm of a popular utilitarian critical interpretation of an ultimate trust. As such, his account of law contains irreducible moral features, and arguably can not be regarded as fully committed to legal positivism.

II

The last two sections of the chapter deal with Bentham's attempt to give an institutional aspect to the public sphere. These sections will examine Bentham's proposal for institutionalizing the operation of the sympathetic and the moral sanctions, using legal institutions in the process. These sections show that Bentham recognised a problem in the effectiveness and efficiency of the operations of the POT in its most general form, especially when immediate action by it was needed. Such immediate action was needed, a fortiori, in the determination and effectuation of constitutional limits. The practical means of achieving greater efficiency and effectiveness in the POT'S operation was to make the interaction (influence) between the public sphere and officials as intense as possible. Bentham's aim in his practical design for achieving, inter alia, a constitutionally limited government was to make legal proceedings as exact a reflection as possible of the communication between the

public and the government.[40]

The medium through which interaction between the public and the government would take place was that of legal institutions and procedures. These would be the most suitable structures to deal with constitutional limits. A constitutional debate could go on under the umbrella of the legal system and its procedures. This debate would be conducted by a legally established body which would actively represent the "semi-real and semi-fictitious" POT. Bentham proposed the establishment of a new institutional body which he called the "Quasi-Jury". This body, whose own collective opinion would constantly interact with the public at large during the course of a trial, would influence and be influenced by the public. Interaction would also occur between this body and governmental institutions.

Further, interaction between the institutional version of the public interest and the "popular" version of it would occur in the mind of the judiciary. The judiciary would be the prime speaker for both elements. Judges' minds would interact both with the public and with the government.

In this section Bentham's practical proposal, which is not currently realised anywhere in the world, will be discussed. This proposal, regardless of its practicality, puts the seal on the argument that Bentham was a philosopher who believed in the judging power of the people and the public sphere. The faith he placed in well-expressed public judgements was immense. The trust he had, as a practical theorist, in ordinary people participating in what

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[40] There would be, of course, a great deal of friction in trying to transform theoretical arguments into practice. Two remarks can be made in this respect. First, Bentham would have liked constitutional laws in principem to have been manifested in the code with as much exactitude as any other law, so that judges and people could refer to them easily. Second, this thesis has argued that Bentham advocated public participation in determining and effectuating constitutional limits. As far as Bentham's republic was concerned, all things being equal, in order further to interpret certain laws in a particular case, some institution, such as a judiciary, would have to interact with public judgement.

is usually confined to professional circles is something very unusual even today. What is described here shows Bentham's strong belief in the liberating force of public judgement. It will be argued that in this scheme Bentham attempted to lay down guidelines for the practical realisation of a life-long project, namely the establishment of an institutional foundation through which a vital, dynamic public sphere could focus itself and effectuate its measures. This practical proposal by Bentham formed a continuation of the project of his early career, namely to facilitate the understanding of legislation, and to render individual laws clear and comprehensible, or, in other words, to liberate the public sphere.

The POT would face inevitable difficulties in its operation. The fictitious POT "sub-committees" of interested citizens could not be sufficiently determinate to debate constitutional issues in a focused way. It was not clear that people would be able to look beyond their immediate interactional environment, in order to perceive the interest of their society as a whole, in the way Bentham wished them to. What people needed was some institutional focal point of reference.

Further, a proper and speedy remedy was needed against a grave breach by the legislature of its social agreements with the people between elections. This was true both at the level of the individual and at that of society. A forum with effective immediate powers was needed, which could provide security *for individuals* against misrule - misrule which stemmed from transgression by the legislature of constitutional limits. Moreover, where the legislature tried to break a very firm social agreement, including the constitutional code, a way of preventing it from bringing the proposed measures into effect had to be provided.[41]

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[41] See *First Principles*, pp. 291-2; see also *SAM*, p. 132, where Bentham specifically discussed the protection of individuals against oppression. Bentham stated that various protections afforded to individuals owed their existence exclusively to *constitutional law.* Again, these protections could be effected only by invoking the legal system, that is penal law and procedure.

The Quasi-Jury

This section will discuss the establishment of the Quasi-Jury - the body which had the task of institutionalizing public opinion, or "quasi-legalizing" the moral sanction.

During a trial, the court gallery would contain individuals who watched the proceedings, and who thus formed a "sub-committee" of the fictitious POT for the purposes of that trial. Bentham however also provided for a judicial body composed of lay people, which he termed the *Quasi-Jury*.[42]

Bentham opposed many elements of the popular conception of jury trial for various reasons, though this is not the occasion to go into the detail of his objections. It is sufficient to say here that Bentham opposed the attachment of any power to the jury's decision. In other words, he opposed a system in which there was an automatic obligation upon the judge to execute the jury's decision. Such an obligation might prejudice the jury, for instance by making them reluctant to convict the defendant, because they could see themselves as responsible for his potential suffering. He also believed that the decision of the jury was very much dependent on, and manipulated by, the directions of the judge. Manipulation by the judge implied that the jury's ruling would not be based on different reasoning from that of the judge, even in a case where independent reasoning would be appropriate.[43]

The Quasi-Jury was Bentham's replacement for the traditional jury. It would consist of "an *everchanging* body of *Assessors, convened from the body of the people*, for the purpose of serving by the exercise given to their functions in the character of checks applied to the power, which but for these and other checks ... would be arbitrary, in the hands of the

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[42] The reason for this bizarre name was that the proposed body would retain some of the traditional jury's characteristics.

[43] *Principles of Judicial Procedure* (hereafter *PJP*), Bowring, ii. 118.

permanent judges".[44] Despite the fact that it would be an official body, the Quasi-Jury was sui generis, because its character was "more of that of a section of the POT, than of that of a body of commissioned and official judicial functionaries".[45]

The main features of the Quasi-Jury were:

First, the area of competence assigned to this body was *identical* to that of the judge. There would be no distinction between what was a matter of fact, which was traditionally said to be the jury's domain, and a matter of law, which was not. The jury, therefore, would be present during the whole proceedings. The institution is unparalleled in any major legal system. The institution was unique, said Bentham, since no other system allowed men without any appropriate legal experience to be admitted into *any* share of judicial power.[46]

Second, the Quasi-Jurors' decision would not have any formal legal consequences. The decision would not be binding, in the sense of creating legal rights and obligations for the parties.[47] In short, their judgement retained the character of an opinion. As a result, their decision, whatever it might be, could not produce mischief in any form,[48] and they could therefore bear no direct moral responsibility for its consequences.[49] They were also to decide the case without being subject to direction from the judge. Bentham's intention was to make them free both from the influence of the judge and from any worries which they might have as to the possible consequences of their decision for a guilty party.

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[44] Bowring, ix. 556.

[45] *PJP*, Bowring, ii. 149.

[46] Bowring, ix. 554.

[47] *PJP*, Bowring, ii. 149.

[48] Ibid., p. 141.

[49] Ibid., p. 144.

Thirdly, they would exercise the same functions as the judge and more besides. They could interrogate the witnesses and the judge, who also had an interrogative role in Bentham's system of procedure. They would declare their own judgement, furnished by their own reasoning, and in some cases they were even to consider the utility of sending the case to appeal.[50] The declaration of their opinion was not confined to the simple dichotomy of "guilty" or "not guilty", but consisted of the full expression of agreement or disagreement with the judge's decree, and the reasons for such agreement or disagreement.[51]

Fourthly, their number would be three and not twelve as in the traditional petty jury. This was to enable them to arrive at a verdict during the normal course of litigation. Twelve members could only pretend to have arrived at such a consensus: there might have been a number of them who, although opposed to the verdict, did not have an adequate opportunity to express their views.

Fifthly, their composition would reflect the different branches of aptitude which different sections of the public were likely to possess. The Quasi- Jury was to be made up of one erudite member - what Bentham called the *aristocratic* part of the Quasi-Jury - and two less erudite members - what he called the *democratic* part. The erudite member would possess greater knowledge and judgement, yet would be more prone to sinister interest and hence to corruption. His strong point was intellectual aptitude. The less erudite would be more likely to possess moral aptitude.[52]

Finally, Bentham described the integration of the Quasi-Jury into the legal procedure.

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[50] Bowring, ix. 561 -2.

[51] Ibid.

[52] Ibid., pp. 43-4. In a modern pluralist society a different system of mirroring sections of the population would be required.

Initially, there would be a preliminary inquiry held *without them*. However, on the application either of the judge or a party to the suit, there would have to be a full trial with Quasi-Jury. Furthermore, if the suit went to appeal, the appellate hearing would *always* be held in the presence of the Quasi-Jury.[53]

Two judgements would therefore be produced by this procedure, that of the judge and that of the Quasi-Jury. They would be arrived at independently of one another, but the possibility would exist of the one influencing the other. The crux was that they would be *independently* formed under the framework of a single procedure, yet they would interact, in the sense that each side, be it the judge or the Quasi-Jury, would try to assess what judgement was being formed by the other.

One judgement would be arrived at by the judge. His substantial experience, both in ascertaining matters of law and of fact, would tend to make him concentrate on a proper application of the code of law. He would form his judgement according to what, in his analysis, would be the proper execution of the relevant portion of the substantive penal law (constitutional law, as we have seen, included). Bentham did not want to replace the judge with the Quasi-Jury, since no one could apply the code of law with as much expertise as the judge.[54] His decision would therefore carry imperative force. It would affect the legal rights and obligations of the parties.

The second judgement, which would also be formed during the proceedings, but which, to repeat, would be procedurally independent of the first, was that of the Quasi-Jury. They would possess an optimal combination of intellectual and moral aptitude. The process of announcing two judgements would be repeated in the event of an appeal.

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[53] *PJP*, Bowring, ii. 159-61.

[54] Ibid., p. 145.

What were the advantages of a procedure which produced two independent judgements?

The first and the most obvious was that the elicitation by the public of evidence would be made more reliable. The process of evidence elicitation would occur through direct interaction between witnesses and representatives of the public, without mediation by lawyers. The Quasi-Jury would be able to question witnesses directly. There would be no distortion in the communication of evidence, as there might be if the public were mere spectators. As Bentham stated, this procedure meant that evidence,

> passes immediately from the lips of the relating witness to the ears of the judge and the surrounding auditory, without being strained through the hands of professional or official instruments, or both, and then reduced to writing by them, they being paid all of them at the rate of so much a word for extracting it.[55]

The second improvement was the magnification of the check on the moral aptitude of the judge. The judge's main deficiency was his propensity to sinister interest. While Bentham opposed the jury system for various reasons, he still saw the main benefit of a jury as providing security against the potentially sinister interest of judges. Such a sinister interest, Bentham argued, was most likely to emerge in constitutional cases where the government was on the defensive:

> In the most important portion of [criminal cases], viz. that in which the alleged crime belongs to the field of constitutional law [where the rulers possessed a sinister interest], the judge who, as such, would never fail to possess (to an amount more or less considerable) interest, adds to the ostensible situation of a judge, the real character of a party, viz. on the plaintiff's side of the cause. In these cases, nothing therefore that can contribute to the establishment of a counter-force, capable of applying an effectual check to the force of this temptation, can be either needless or superfluous.[56]

Because constitutional problems could be dealt with in a court of law, this passage, although

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[55] Ibid., p. 147.

[56] Ibid., p. 119.

arguably conceiving the government as plaintiff, must mean that governments might also become a party to a law suit on the ground of the unconstitutionality of their measures. It implicitly confirmed that the POT, as such, could not be fully relied upon, and that there was a need to incorporate constitutional matters into judicial procedure. Secondly, the judge was to be the one who ruled on the anti-constitutionality of the matter. Finally, Bentham wanted the judge to be dependent on the Quasi-Jury rather than exclusively on the legislature. Only in this way could the court be made an effective "counterforce" to the potential "sinister" interest of the legislature.

Bentham argued that if appropriate moral aptitude on the part of the judge was to be secured, it would be necessary to provide for a popular critical body which would also take an active part in the proceedings. The Quasi-Jury would help to secure the judge's moral aptitude in that it would force the judge to give reasons for his decision. The judge, before making up his mind as to the outcome of the case, would think very carefully before submitting to sinister interest. The moral force of his decision might be strengthened or weakened by the Quasi-Jury's comments, but he alone would face the consequences of the decision. The judge would be forced to think in terms of what the Quasi-Jury *probably* thought, and in the case of an appeal, in the light of what he *already* knew they had said in the first instance: "the judge finds himself subjected to ... the obligation of giving to the Jury and thence *to the public at large*, explanations and reasons, having for their object and tendency, the rendering the nature of the case clearer to the public".[57]

However, the most important contribution made by the Quasi-Jury was the improvement given to the operation of the POT. This was done by educating the public, and developing a participatory model of democracy. In a striking image, Bentham saw every court as a

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[57] Bowring, ix. 555.

school of justice:

> Every judicatory of which a jury forms a part, is a school of justice: without the name it is so in effect. In it, the part of the master is performed by the judge; the part of the scholars, by the jurymen; and what takes place, takes place in a company more or less numerous of spectators. The representation there given is given by a variety of actors, appearing in so many different parts.

There were many actors in the court - attorneys, parties and so on - and the jury would be excited by the performance of all of them, "and the reasoning faculty", said Bentham, "with matter infinite in variety for it to operate upon, is continually called forth into exercise".[58]

The publicity given to judicial proceedings would improve the moral and intellectual capacity of each person who took notice of the proceedings. A lay person would receive excellent training in mastering a critical attitude, from observing the judicial drama in court, or the "simple entertainment" as Bentham called it.[59]

Bentham also believed that through participation in the legal process, the capacity of society for effective and immediate democratic scrutiny would be enhanced:

> In general terms, the use of the unimpowered jury consists in this: - viz. in its capacity of being introduced into any country in which the state of society is regarded as not being sufficiently advanced to render it conducive upon the whole to the purposes of justice, **to vest any such power in the great body of the people.**[60]

Bentham placed immense reliance on the people and wanted them gradually to improve in capacity and confidence by means of an active judicial role. The Quasi-Jury would enhance the capacity of the POT to censor their government, not only in relation to the expediency of its measures, but also in relation to the legitimate boundaries of its powers. For such an improvement to take place in the social body, each individual had to develop his own critical

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[58] *PJP*, Bowring, ii. 125.

[59] Ibid., p. 137.

[60] Ibid., p. 127.

capacity.

This school of justice could transform an unenlightened society into an enlightened one:

> Sooner or later, **by this institution alone**, would the state of society be raised from the lowest level to the highest. By way of encouragement, that the men thus placed in a sort of judicial situation may be impressed with a sense of their own dignity, and their functions be an object of desire and source of satisfaction rather than aversion, a station somewhat elevated and ornamented should be assigned to them, with something of a decoration to be worn about their persons.[61]

By means of participation in this institution many individuals would acquire the confidence to handle legal questions. It would bring the people into the legal process.

But the role of the Quasi-Jury was not only to be understood in terms of its general social effects. It had the practical significance of helping to institutionalize the POT *in the case under consideration*:

> Along with the jury, a portion of the public has all along been let in. The jury itself forms **on each occasion** part and parcel of the great public at large; and in proportion to the change made in the persons by whom that function is performed, that portion receives enlargement.[62]

By being a portion of the POT, this Quasi-Jury gave the tribunal much more effect and focus. Bentham argued that the purpose of the Quasi-Jury was, "to give *strength* to the aggregate force of the intellectual power throughout the community, and with continually augmented effect to render more and more apt those of whom it finds least so".[63]

However by far the most revealing statement made by him with regard to the contribution offered by the Quasi-Jury to the operation of the POT appeared in *PJP*. There he said that the POT for the purpose of a trial was only a fictitious entity. Its sub-committee was formed totally incidentally. Its members were self-appointed, not present unless by accident. Hence,

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[61] Ibid.

[62] Ibid., p. 141.

[63] Ibid., p. 143.

its composition was notoriously prone to fluctuation. In the case of the Quasi-Jury, however, everything said in this sub-committee of public opinion was more tangible since its judgement would be expressed and reasoned. They were a determinate and representative sample of the POT's unofficial judicatory. For the particular purpose in question this unofficial judicatory - the "court of the general public"- was *officialised* (Bentham's term) by the Quasi-Jury.[64] This statement shows that it was Bentham's vision that public opinion should find expression within the institutions of the legal system.

What was the relationship between the public at large and the Quasi-Jury? The Quasi- Jury would form a sub-committee of the POT; and from its several members, the information "respectively possessed by them radiates out of doors through so many circles of indefinite extent, of which they are respectively the centres".[65] So the process of institutionalization was not a one-way process. After a matter had been publicly debated, the Quasi-Jury would hear the evidence and participate in the legal process as if they were full-time officials. The fact that the debate was focused would make it easier for the general public to understand the issue, and to form a reasoned judgement on the merits of the case. The public's deliberations when watching the proceedings would be geared towards the necessity of making a real decision on a contentious issue. On the other hand, the Quasi-Jury would also be influenced by a focused debate among the wider public in the formation of their reasoning and judgement, because during the proceedings they would be made aware of public attitudes through reports in various newspapers.

To sum up, by being part of the legal process and still representing popular opinion, the Quasi-Jury would serve as a check on the way in which judges applied the code. The Quasi-

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[64] Ibid., p. 144.

[65] Ibid., p. 147.

Jury would improve the efficiency of the formation of the public judgement in relation to the contentious issue in question (which might be a legal question or a constitutional question regarding the limits of acceptable coercion). The judge would not be dependent on government officials in a way likely to produce sinister interest on his part. Instead he would be made to interact *directly* with the Quasi-Jury, and would compete with them for public sympathy. This interaction would be combined with direct dependence on the public, because under *Constitutional Code*, although appointed by the Justice Minister, judges could be removed, either by the Justice Minister, or by a popular vote in their district of operation.[66]

The constitutional role of judges

In *Constitutional Code*, Bentham envisaged that judges would, inter alia, provide a legal check to any action by the legislature which potentially transgressed the limits of acceptable coercion. This legal check would also constitute the means of giving execution and effect to constitutional promises made by the legislature.

Bentham's attitude to judges changed as his career progressed. It is well known that as a legal reformer he wanted to scrap judge-made law and to provide for a pannomion, or a complete code of law.[67] A complete code would make law knowable, and therefore its censorship possible.

This is not the occasion on which to reconstruct in detail Bentham's understanding of

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[66] Bowring, ix. 529-32. With regard to Bentham's provision for judicial appointment, see pp. 328-9, note 77 below.

[67] See, for instance, *Fragment*, pp. 487-8, and *OLG*, chapter 15, and pp. 232, 239-42. For Bentham's critique of the common law as well as his view of the judicial role under his complete code of laws, or pannomion, see D. Lieberman, *The Province of Legislation Determined: Legal theory in eighteenth-century Britain,* Cambridge, 1989, chapter 11, and pp. 280-2, 289; see also M. Lobban, *The Common Law and English Jurisprudence 1760-1850*, Oxford, 1991, pp. 169-84.

judicial activity, or to analyze in depth what judges were supposed to do when a legal case came before them.[68] Although the question of the constitutional powers of judges is the main issue here, in many respects these powers would overlap with judicial activity in non-constitutional cases.

As early as *Fragment,* Bentham discussed, albeit with strong disapproval, a constitutional role for the judiciary through their possession of some negative powers or checks on government. He did not approve of judges having these powers, because they would enable judges not only to repeal laws but also to create new ones. Such controlling powers would amount to a power of legislation in the hands of judges. Bentham objected to judge-made constitutional law because the *people* would not have any share in checking judicial power. It would be absurd, Bentham argued, to transfer power from the hands of the legislature, over which the people did have some influence, to judges, over whose powers they had no influence.[69]

In his mature constitutional writings, Bentham gave constitutional powers to judges.[70] Bentham overcame his own objection stated in *Fragment* by making judges responsible *directly to the people.* It would not be the case that judges would simply have unchecked powers.

Like any other official, judges were prone to be guided by sinister interest, or to become

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[68] See in this respect, Postema, *Bentham and The Common Law Tradition*, pp. 403-39, and J.R. Dinwiddy, 'Adjudication under Bentham's Pannomion', Utilitas, 1 (1989) 283-9; see also *Official Aptitude Maximized; Expense Minimized* (CW), P. Schofield (ed.), Oxford, 1983, pp. 354-5, and Supplement to *Papers Relative to Codification and Public Instruction*, London, 1817, pp. 114-26. See, finally, M. Lobban, *The Common Law and English Jurisprudence 1760-1850*, pp. 120-44.

[69] *Fragment*, pp. 487-8.

[70] See Bowring, ix. 479-89, 502-15; see also Rosen, *Jeremy Bentham and Representative Democracy*, pp. 149-63.

accomplices in a sinister enterprise.[71] This was to be solved, inter alia, by making all judicatories single-seated, and by the provision for judicial migration between the various districts of their operation.[72] Checks, and hence security for the appropriate aptitude of judges, would be provided for by the POT in general and the Quasi-Jury in particular.

It has been argued that Bentham wished to bring about some institutionalisation of public opinion through the legal process. This institutionalisation could serve as a check on the decision of the judge in any court case. He maintained, however, the Quasi-Jury's non-official character by denying it any imperative powers; it was for the judge to decide the case in the *institutional*, and hence legal (rather than the moral/popular), channel of procedure. Bentham wished the institutional aspect of the judge's decision to be placed in free interaction with the popular or moral aspect. This subsection seeks to demonstrate that the judge was responsible for providing the ultimate legal check on the use of government powers.

Bentham saw the exercise of judicial power as an exercise of sovereignty.[73] In *Constitutional Code*, when Bentham wrote about "responsibility", he argued that judges could never declare an ordinance of the legislature null and void, whatever its potential effect might be. This was so, even if, in the opinion of the judge, the tendency of the enacted measure would be to diminish the powers of the constitutive authority (the body of the people). Nevertheless, Bentham gave the judge the power to declare his opinion as to whether a

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[71] Bowring, ix. 455.

[72] Ibid., pp. 496-9; see also Bowring, iv. 324-5, 361.

[73] In *On the Efficient Cause and Measure of Constitutional Liberty*, UC cxxvii. 5, Bentham wrote: "in this sovereign power is essentially comprised that of making laws in all cases, that of judging in dernier resort whether they have been disobeyed in any instance, and that of providing for their being executed *upon* those by whom they have been disobeyed: and therefore in so far judicial power and executive".

transgression of constitutional limits by the legislature had occurred.[74]

A further confirmation of the competence of the judge to declare such an opinion can be found in the Bowring edition of the third volume of Constitutional Code, which was mainly devoted to the judicial establishment. In the context of discussing the powers of a Judge Depute, Bentham wrote: "To a Judge Depute belongs not the power, given to the Judge Principal: namely that of **representing an act of the Legislature as being anti-constitutional**".[75] The message that the judge would send by such a declaration, *both to the public and the government*, was that such an enactment ought not to have been enacted, and that it ought to be annulled.

What practical effects followed a declaration by the judge that a legislative act was anti-constitutional? Bentham argued that once the violation of a constitutional promise by the legislature had been declared criminal, and as such punishable, resistance to it should be lawful and not punishable. The degree of freedom under a constitution depended on the ability of the people to resist what they regarded as the breach of a constitutional promise by the legislature. Resistance could be freely carried out only on the basis of a prediction on the part of the resisting group, that their acts would not be punished. Otherwise nobody would have the motive to resist. If no one resisted, Bentham said, then the system would be characterised by "unreserved obedience, active or at least passive".[76]

In *Constitutional Code*, Bentham maintained that institutions could be designed in such a way that acts which were done in resistance to misrule would not be punished. A plausible "misrule plea" in court would secure the resistors from punishment. Judges were entrusted

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[74] *Constitutional Code*, p. 45.

[75] *SAM*, p. 140.

[76] Ibid.

with the power not to impose a punishment in the most severe cases of misrule, the most severe transgression of the universal interest, which is to say in the event of what Bentham would term an unconstitutional act. Bentham acknowledged that if an individual was prosecuted for an alleged act of disobedience, the case would prima facie still call for the judiciary to inflict punishment. However, he continued: "True, (that such a punitive measure may be inflicted); but that it should be, *is not likely*, were it only for this - namely, that the judge is dislocable by the majority of the electors in the district."[77] Since the judge was

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[77] Bowring, ix. 121.

A word must be said here about Bentham's provision for judicial appointment and dismissal. In the text of this note a number of references are made to *A Draught of a Code for the Organization of the Judicial Establishment in France* (1790), Bowring, iv. 287, (hereafter *"Draught"*), in which Bentham discussed some possibilities for judicial appointment and dismissal, or - using his terminology - location and dislocation.

The prime consideration with regard to the appointment of judges, both immediate and appellate, would be the preservation of their appropriate aptitude (for a useful summary, see *First Principles*, pp. 130-1). As far as appointment was concerned, the considerations bearing on how to secure judicial aptitude were similar to those for members of the legislature.

Bentham thought that both democratic ascendency (which would mean "responsibility"), and liability to dislocation by superiors (subordination), were vital to the establishment and persistence of the appropriate aptitude of the judiciary (*PJP*, p. 8). He advocated a continued dependence of judges on the supreme judicial authority, that is the Justice Minister, and on the people in the judge's district of operation. He thought it important for judges to compete for the attention of the people like a shopkeeper who wanted to be popular with his customers (*Draught,* pp. 336, 359). An *independent* judiciary would be a synonym for despotism. The judiciary would have to be independent of the establishment, but *dependent* on the people (ibid., p. 362).

Bentham made the appointment of judges depend on the wishes of the people. He considered the possibility of allowing the people to elect judges and suggested an experimentation with such election (ibid., pp. 307-9). Elections should not be contested at frequent intervals, as this would disturb judicial activity (ibid., p. 366). In England, election of judges would be too difficult because, Bentham argued, people were not used to electing judges to dispense justice locally. The idea of electing judges was too far beyond their imagination. Yet, in *Draught*, which was written for the French, he did not rule out the popular election of judges in principle.

Bentham also provided for an auction in which the candidate for the office who would be willing to give to the state a portion of his own property would be considered to be the most suitable for the job. Despite the obvious potential corruption of candidates for a judicial post associated with such a proposal, Bentham maintained that this method would reveal the personal commitment of the candidate towards doing the work. The auction was not meant

accountable to the people, he might have ample motive for refusing to impose a punishment, as long as he gave appropriate reasoning.

In this way protection was offered to individuals against misrule. This protection was immediate, because disobedience was effectively recognised and endorsed by the legal system. In the first instance, one citizen or body of citizens would disobey and not be punished. This might well come to the notice of the collective body of the people in their capacity of constitutive authority, that is as the electors of the legislature. This would be likely because the POT, which coincided with the constitutive authority, would be focused on the court case. Thus the process of effective resistance might begin as civil disobedience on the part of a single individual or group of individuals. If the constitutive authority endorsed a decision of the court not to punish, collective disobedience to the potential anti-constitutional measure might be organised in a very short time. The intensity of the interaction between government

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to operate in isolation. Together with the power of removing judges by popular petition, these methods of appointment were effective means to secure judicial aptitude. Bentham argued that no rich man would wish to become poorer by giving up a great deal of his property, working long hours, and still face the prospect of being dislocated at short notice (ibid., pp. 372-5).

Eventually, in *Constitutional Code,* Bentham opted for the appointment (location) of judges for life by the Justice Minister (Bowring, ix. 521, 529). However, maintaining his early position in the *Draught*, Bentham gave the people powers of dislocation over judges analogous to the powers they had over members of the legislature. Moreover, the Justice Minister also had dislocative powers (ibid., p. 522, 532).

These proposals show yet again the enormous faith Bentham had in the capacity of ordinary people to comment on official activity, as well as to give execution to their judgement. However, he rejected the popular location of judges on the grounds that the supreme constitutive (the electorate) would not be able to make a professional evaluation of the merits of candidates. The electorate would not possess sufficient intellectual aptitude in this regard. It would be difficult for a layman to estimate the intellectual abilities of a prospective candidate to give execution and effect to the law. The Justice Minister was better able to make such an estimate accurately. Bentham also ruled out the legislature's appointing the judge because of the obvious danger of the formation of a compact between a prospective judge and the legislature, in a fashion which would operate to deceive the public. In contrast, it would be hard for the Justice Minister alone to form a compact with a prospective candidate without such corruptive activity being detected by the public.

and people would be heightened by the effect given to popular discontent by the institutions of the system. The precondition for this chain of events would be the democratic threat of the eventual dislocation of officials.[78] This would be the point at which the moral sanction would operate at its highest level of efficiency. However, all this intense interactional activity between the government and the people would still be *contained* within the democratic constitution and the legal system which operated under it.

The dual role of judges, as both legal officials and as the prime assessors of public opinion, was designed to *initiate* and *legitimatize* such collective disobedience within the shortest time possible after the measure's appearance. As has been argued in chapter 5, the whole purpose of the *Constitutional Code* in this respect was to *encourage* or to *invite* people to disobey a measure which was regarded as imposing unacceptable coercion.[79] This would be done without causing turmoil. People would be able to convince their politicians, through legal procedure, that a transgression of the limits of acceptable coercion had taken place. The joint force of the legal system and the popular voice would avoid the risk of "mob resistance", yet avoiding compromise of the freedom to disobey certain measures deemed to be unacceptable. In other words, the legal system would not only help to make the public aware of the need to resist, but would also provide the means to resist, while ensuring that such resistance did not degenerate into chaos.

Let us assume that an immediate judge would not dare to declare an act to be anti-constitutional, because he was unable to free himself from the establishment's influence. What would be the subsequent chain of events under such a constitution? In a constitutional case, an appeal would probably be launched in the event of a disagreement between the judge

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[78] Bowring, ix. 121

[79] Ibid., p. 120.

and the Quasi-Jury. These circumstances would signify a disagreement between the legal and the popular tribunals. Public debate on the issue would be intense. The judge's decision and that of the Quasi-Jury would compete for the attention of the POT. The appellate judges would have heard the Quasi-Jury's reasoning, as well as the public response to it, and they would probably feel much less reticence in declaring the act to be anti-constitutional. The growing threat posed by such a chain of events would be so real and great that the legislature might consider it wise to reverse its policies.[80]

A final word should be said here about Hart's criticism of Bentham. Hart argued that the "habit of obedience" could not be imputed to the *courts* when refusing to punish disobedient citizens. This was so, Hart claimed, because if constitutional limits were created *by* the court's *habit*, the court logically could not refuse to punish the disobedient citizen in the first instance in which the legislature enacted an unconstitutional measure.[81] A "habit" would presume some past practice of the court to that effect. The role of judges, in the context of the argument advanced in this thesis, was far more extensive than Hart admitted. Hart did not give sufficient consideration to the role of the *people* in the *courts*, a role which was designed both to create and to give effect to constitutional limits on the power of government. Further, "obedience" could, in a certain sense, be imputed to the court, and thus the interpretation survives Hart's logical objection. Hart did not consider the precise nature of the proceedings in which an issue of constitutional limits would be raised for the first time. During such proceedings, despite the fact that a constitutional issue was being considered *for the first time*, the court would be able promptly to assess the extent of social discontent with a newly proposed coercive measure. The court would be able to detect a change in the "habit

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[80] See chapter 5, p. 198 above.

[81] Hart, *Essays on Bentham*, pp. 235-8.

of obedience" immediately after such a change had taken place.

The design of the *Constitutional Code* gave practical realisation to the idea that the judge formed a part of the people. His judgement, or let us say the ultimate judgement of the legal system, would interact with, and hence would mirror to some extent, what the public thought. Judges belonged officially to the operative power, but they had one foot in the constitutive (the public) as well. They were the mediators between these two main forces of the constitution, which would come to interact in an efficient way both in the public and the institutional spheres. Popular determination of the limits of the social justification of coercion had a central role in the rationale of this arrangement.

CHAPTER 8 - CONCLUSION

I

This chapter ties together the main arguments of the thesis. In addition, some general points concerning the possible significance of these arguments to various modern debates will be mentioned.

This thesis puts forward a creative and constructive interpretation of Bentham's legal and political thought. At the most general level, the level of universal theory, Bentham's legal and political thought has been reconstructed to show a conceptual connection between, on the one hand, his account of constitutional limits, and on the other hand, his account of the realisation of communicative possibilities in the public sphere. Throughout Bentham's career, he saw the people as the body which was responsible for "determining and effectuating constitutional limits". This formula captures his meaning more accurately than the much criticised idea of the "habit of obedience", or "the disposition to obey".

Bentham's concern at the level of universal theory was with what was *possible* rather than with what was *desirable*. The unfolding of communicative *possibilities* with regard to, on the one hand, the justification for centralised coercion (security through rules), and, on the other hand, with regard to the limitation of such coercion (security from rule), lay at the centre of Bentham's political philosophy. Instead of justifying morality upon a-priori substantive metaphysical principles, his main goal was to liberate the public sphere and to unfold communicative possibilities within it. Arguably, his criticisms of the common law, his own theory of legislation and law, as well as his constitutional theory, all shared the rationale of contributing to the realisation of the aim, admittedly broad, of liberating the public sphere. His ambition was to account for the limits of the social justification of

authority and law, always bearing in mind the manner in which human psychology could be the basis of radically different prudential judgements as the process of unfolding communicative possibilities in the public sphere continued.

Bentham was conscious, from a very early stage of his career, of the enormous potential which public opinion had for freeing people from well-established, and falsely-justified, coercive patterns. Public discussion could develop from an activity which barely existed, or existed only for a small number of individuals, into a full-scale exchange of ideas between every member of the community. Such a development would be mirrored in the realm of constitutional limits. Both the transparent nature of the exchange of views, and, in turn, the possibility of arriving at critical constitutional reflections in the "public sphere", were crucial to Bentham's utilitarian enterprise. Constitutional limits reflected the extent to which individual judgements were transparent to exchanges of views as well as to the development of communal obligations as a result of such exchanges. In the long run, utilitarian political theory could conceive a shift in the locus of obligation from centralised institutions into the community, so that self-government would predominate.

From a substantive point of view, constitutional limits represented communal self-reflection on the central moral principles around which a community revolved. In this context, constitutional limits could be seen as general critical reflections in the public sphere as a resulting from communication within it. These reflections concerned the justification of a given pattern which was charted between unity in conceptions of good and differentiation or, neutrality between such conceptions. In other words, constitutional limits in the context of a utilitarian theory would realise the communicative possibility of forming and revising a consensual notion of harm. Such a notion of harm could evolve to accommodate neutrality between differing conceptions of the good.

Bentham assumed that as communication between people became more transparent, they would be enlightened with regard to the extent of the real conflict between them. This enlightenment would mean that, gradually, more and more *limits* to the exercise of coercion could be realised. In a utilitarian system, general prescriptive propositions with regard to the limits to the exercise of coercion would be socially entrenched. As such, these limits would reflect the culture of the community. So entrenched, these propositions would serve as a moral threshold in communication among people, and between the people and the government. They would form an obligatory context in which prudential utilitarian calculations would be carried out, either by officials or by every individual. These prescriptive propositions could be entrenched in the imposition of self-limitations by the legislature in a code of law, and could be further interpreted by courts.[1]

Law, or the exercise of political deontology, was a coercive instrument for the co-ordination of moral beliefs. Law was effectuated by creating certain offences, which were arrived at by the legislature utilising some conceptions of harm (or in Bentham's language, mischief). These conceptions of harm might reflect a communal conception of harm to a greater or lesser extent. Some purely instrumental conception of harm, one which led to the investment of authority in legal institutions, would have to exist in every political community - even in a pure monarchy. Such an instrumental conception identified harm as insecurity, which would result from the absence of the co-ordination of moral beliefs. However even this purely instrumental, co-ordinative role of centralised coercion would facilitate communication in the public sphere with regard to the limits of justified institutionally-based

[1] It is beyond the scope of this thesis to construct a theory of adjudication. However, justification of judicial decisions which resolved constitutional disputes would have to relate at the most abstract level to a communal conception of harm based on these prescriptive propositions.

coercion. This communication, which could result in the crystallisation of increasingly sophisticated communally-based obligations, would be reflected in a two-way influential activity between the government and the public.

Thus, in a political community, to a greater or lesser extent, an ongoing tension might evolve between crystallised communal conceptions of harm, as embodied in co-ordinated communal principles, and the government's conception of harm upon which coercion was based (in the name of security, or the need to co-ordinate moral beliefs). Indeed, this tension could also exist between a representative government which re-presented, coerced and enforced the majority's view *as* a "public" conception of harm, and the conception of harm which existed among people in the community. This tension would lead to self-reflection on the part of the public sphere upon the extent of the powers of such a representative government. This popular collective reflection would establish certain communal principles as an obligatory context which would operate to limit governmental powers. These principles would form constitutional limits in that they would serve as an *entrenchment* of a given communal conception of harm. This conception would *condition and circumscribe any* legislative activity which was justified by immediate expediency. Communal obligations would form the basis for constitutional offences, in that their transgression might be perceived by members of the community as harmful. Hence, a communal "learning process" would signify a shift of the obligatory media from central institutions to the community.

Communal obligations would operate as reflections vis a vis any form of unified expression of coercion, whether institutionally or communally based. These reflections would be conducted in a "constitutional" sphere in which the reasons for justifying certain measures of coercion qua obligations would be the subject-matter. This constitutional sphere was contrasted with an immediate sphere of reasoning in which justifying a particular exercise of

coercion would be the subject-matter. The interaction and critical reflection in the constitutional sphere, the sphere of "constitutional permissibility", may be seen as an alternative to what Hart called the rule of recognition. The elements of censuring coercive measures, and seeing them "as" valid authoritative utterances, were conceptually linked in the idea of "constitutional permissibility". "Validity" was a notion which embodied critical considerations.

Constitutional limits would be ultimately established as moral and sympathetic obligations. However, communally-based coercion did not point towards the stagnation of public debate. Full publicity of governmental business, and the maintenance of a free exchange of ideas, which could operate to expose certain patterns of unjustified domination (for example claims for social unity which went too far at the expense of social differentiation), might be effectuated by institutions, or by the community itself. However, the account offered here does, under the auspices of the principle of utility, allow for the possibility that collective communal attitudes could regress as well as progress, for instance leading to a strengthening of centralised institutional coercive mechanisms. Thus, over time, constitutional limits or general communal principles would change as a community evolved. These changes would occur as a result of an ongoing process of the exchange of ideas, and the embodiment of this exchange in general communal obligations.

Communal obligations signified constitutional limits arrived at as a result of communication in the public sphere. Such communication helped to expose the limits to the necessary domination of institutionally-based coercion. As such, the development of constitutional limits would reflect the transparency, both to the prudential reasoning of officials and to that of each member of the public, of the communicative activity between people, or within the public sphere.

In the light of this broad understanding of constitutional limits, many particular areas of Bentham's thought, often regarded as problematic or incoherent, have been subjected to a new interpretation. Sovereignty has been interpreted as a "split", or two-dimensional concept. Any exercise of political authority had to imply the judgement of another body with regard to the moral justification of that authority. This "judging" body was an entrusting body, whose "suspended" conditional command to a prospective authority was the essence of the trust which would constitute any "political" society. The conditions of this trust would change as the community changed. This was the jurisprudential framework in which a "judging" public sphere was shown to be conceptually connected to the determination and effectuation of constitutional limits. The two interdependent dimensions which formed the concept of sovereignty were mirrored in a conceptual account of constitutional "law", under the command theory of "a law".

Sovereignty was not only of a "split", but also of a relative and plural nature. In abstract terms, sovereignty could be described as a relationship of superiority and subordination existing within a validating "permitting" context, itself featuring relationships of superiority and subordination. The "split" nature of sovereignty implied a dynamic social activity which operated at a given level of the hierarchy of relationships of superiority and subordination. In contradistinction to this hierarchical relativity, sovereignty could exist as a plurality of hierarchies, horizontally manifested across each hierarchical stage. Both vertical relativity and horizontal plurality of sovereignty could help to resolve the tensions which arose in the attempt to explain the relations between the multiplicity of "legal" operations on the one hand, and the operation of sovereignty as a trust between a *unified* social judgement of a people and a coercive body on the other. The connection was again established here between constitutional limits and the public sphere. Constitutional limits and law would mirror the

extent to which the diversification of the public sphere could be contained by any unified representation of a group, this unified representation being required for utilitarian reasons of certainty, and hence, security.

Constitutional limits determined the extent to which the united hierarchy of a "community" should prevail over, or contain, the plurality of hierarchies which cut across it. This paradigm remained applicable whether state law or international law was under consideration. Constitutional law as a mirror of a communal change would reflect the ways in which the various domains of relationship of superiority and subordination could influence and modify one another. This mutual influence could determine two aspects of constitutional limits. First, the unity/plurality relationships at each level of hierarchy could be determined. The extent to which individuals or individual communities would manage their own affairs within a larger whole would be determined. Second, the determination of unity/plurality could lead to another determination and effectuation of the exact social manifestation of sovereignty (i.e. the "split") within any hierarchical level between an entrusting judging body and a central coercive authority. Thus the idea of "validity" had to embrace not only the nature of the concept of sovereignty, but also its relative social manifestation.

The basis of a flexible account of social evolution is arguably found in *A Fragment on Government*, in which the universal features of political society, and the way which these features related to constitutional limits, were discussed. Yet again, the relationship between constitutional limits and the public sphere was a theme of this early work.

In *Fragment,* Bentham advocated a position which has been termed "utilitarian-based anarchism". This philosophical anarchism, which implied the existence of a residual moral autonomy, was based on Bentham's epistemology. This epistemology criticised any theory which asserted the existence of (as opposed to an argument for the existence of)

imprescriptible moral obligations. Bentham's utilitarianism and his epistemology were both compatible with the existence of political societies, founded on the expediency of political authority. However, it has been argued that "political society", which consisted in popular, participatory, collective reflection as to whether to obey the institution of law, was capable of existing in various forms, reflecting different cultures and times. Bentham's philosophical anarchism, under the auspices of the principle of utility, implied that there could be many possibilities for the realisation and development of schemes of obligation within a social group. These possibilities could become actual social manifestations in the course of a group's history. However, only if people possessed this "philosophical anarchic attitude" (the ability to question centralised coercion in the categorical/constitutional sphere) would they be able to seize these opportunities, and to reflect upon the way their society was organised. This attitude could override any existing ideological justification of political authority. As such, this attitude was the most important liberating force in civilised societies. Bentham wanted to cultivate such an attitude in the population. No argument about the justification of the exercise of authority, and the utilitarian gains consequent upon it, could wholly exclude the moral autonomy of the population, that is their capacity to think at the categorical, constitutional level about obligations qua valid obligations. Thus Bentham's theory could accommodate the anarchistic attitude, and even a community based on an anarchistic ideology, without compromising security, without abandoning the epistemic necessity of his sanction theory of duties, and without assuming any inherently bad or virtuous characterisation of human nature. As far as the social operation of the principle of utility was concerned, any indirect operation of the principle at the immediate level was subjected to, and confined by, a constitutional context, in which the operation of the principle was direct. Under the categorical, constitutional operation of the principle, the people, in Bentham's

enterprise, had a direct participatory role in determining and effectuating constitutional limits.

A participatory role for the people existed also in Bentham's mature constitutional writings. In these writings Bentham conceived of constitutional limits, that is the *extent* of the exercise of power by the government, in terms of the *quality* of its exercise. Generally, a good government could be maintained only if it were subjected to the continuous judgement of the people. More particularly, a bad government would not yield to public judgement with regard to the limits of acceptable coercion. In seeing constitutional limits as a continuous judgement of the people, Bentham formed his "enabling rationale" for good government. The government was not a-priori limited, but was a-posteriori limited by the check of a vibrant popular judgement, which related to the pattern which mediates between various abstract prescriptive propositions. A good government would be responsive in such a way as to tie its own hands in regard to the extent of the coercion it *could* exercise. If it failed so to do, the people would be able to resist it. Bentham in fact used the language of *Fragment* in his mature constitutional writing in linking constitutional limits to a public judgement which would, if necessary, lead to disobedience. In his mature constitutional thought, Bentham recognised that to facilitate resistance in the case of a transgression of constitutional limits was to make a prime contribution to the attainment of free government. His democratic theory was the logical conclusion of the participatory role which he provided for the people as early as *Fragment*, in relation to the conditions for the existence and persistence of a free government. In his democratic theory, Bentham gave effect to his life-long enterprise by proposing a system in which the activity central to the concept of sovereignty, the interaction between the public sphere and the government, would be in a state of greatest intensity. However, the implication of this continuous role of the public sphere in Bentham's enterprise was that representative democracy did not exhaust the democratic potential of the public

sphere in determining and effectuating constitutional limits.

Bentham's conception of the public sphere has been analyzed both in its general abstract formulation, and in terms of his theory of human motivation. The POT has been interpreted as an "observer" which each person creatively imagines for himself as a result of the process of communication. Bentham wanted to establish a government which would be constantly improved under the panoptic principle. A situation where there was a high level of participation, and in particular, where constitutional limits were established, maintained and improved by such participation, has been referred to as "panoptic democracy". The cultivation of the panoptic principle was the basis upon which Bentham's idea of the "enabling rationale" for good government could be plausibly defended.

In discussing the concept of "influence", it was argued that Bentham believed that a free exchange of ideas in the public sphere would lead to enlightenment. Influence, which included both understanding and a volitional element, could focus public debate on constitutional issues in exposing unnecessary or iniquitous obligatory patterns within a community. The role of the sympathetic and the moral sanctions, and the relationship between them, accounted for the motivational basis for these activities of "influence" within the public sphere, activities which were at the heart of consensus formation.

Bentham's philosophical anarchism was the driving force which transformed a "community of law" into a "community of sympathy", where self-government predominated. This part of the discussion identified the connection between constitutional limits and the public sphere as the foundation stone of Bentham's legal and political enterprise: constitutional law was a mirror in which a community viewed itself, and as such determined the extent to which obligatory media were effectuated in the community, whether through communal-based morality (private deontology), or through centralised coercive legal institutions (political

deontology). Finally, one of Bentham's practical recommendations, namely his proposal to incorporate public judgement into official legal institutions, was discussed.[2]

In this thesis a unifying rationale for Bentham's legal and political enterprise has been constructed. In justifying this construction, issue was taken with scholars who hitherto have not attempted to explain his texts in the light of some unifying theme. Hart, Kelly, Rosen, Hume, and James, have all provided important illuminations of certain aspects of Bentham's theory. Their arguments make sense in the context of the problems they were addressing, but they all erred in not relating their enquiries to the fundamental question in Bentham's thought, namely how can coercion within a social order be limited under the auspices of the principle of utility. All of them developed interesting interpretations of certain aspects of Bentham's enterprise. However, all of them, in their different ways, had a profoundly limited view of Bentham's endeavours.

Postema's work stands as an exception to the accounts which have failed to make sense of Bentham's theory as a whole. Postema looks at many published and unpublished texts, and presents a unified interpretation of Bentham's enterprise. This thesis accepts and builds upon many of his conclusions. In particular, it shares the view that Bentham retained the same theory of law throughout his career, a theory which embraced an interaction between the people and the government which determined the limits of sovereignty. It accepts also that Bentham ultimately provided for a direct operation of the principle of utility.

However this thesis arguably both refines and goes further than Postema's account in two

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[2] This attempt by Bentham to "institutionalise the public sphere" is not without risk. It can put the freedom of public discussion in peril in the sense of forcing people to discuss issues in a way which is geared to some systemic goal, such as the goal of the legal system. One of the central tenets of this thesis, however, is that communication in the public sphere and democratic participation can be carried on free from systemic influences: see W.T. Murphy, 'The Habermas Effect: Critical Theory and Academic Law', Current Legal Problems, 42 (1989) 135-65, at 153-4.

respects. First, it seeks to show that the direct participation of the people in determining and effectuating constitutional limits remained a concern for Bentham in his mature constitutional writings, and in his writings on private ethics. Postema does not consider these mature texts in depth. In fact, Postema pays insufficient attention to Bentham's constitutional theory and his theory of private ethics. Second, the thesis goes further than Postema in developing a constructive interpretation of Bentham's legal and political enterprise. It presents Bentham's account not as resembling modern theories of law, such as Hart's, but as a highly abstract theory of law, linked to his understanding of the dynamics of social change. Bentham's scientific approach to motivation, combined with highly abstract ideas such as the POT, reveal him in a totally different light from that in which Hart or Postema saw him. In short, Postema does provide a broad rationale for Bentham's legal theory, but this is not sufficient to account for the many lacunae in Bentham's theory. Further, Postema's interpretation does not appreciate the scope of Bentham's enterprise.

Postema's underestimation of the scope of Bentham's theory has other particular implications. First, he provides only a limited insight into Bentham's understanding of the public character of law. Second, Postema's interpretation of Bentham's theory of sovereignty is misguided. His idea of "interactional custom" is incoherent, and fails to capture Bentham's understanding of sovereignty as a "split", two dimensional concept, which embodies the critical judgement of an entrusting body. Third, as far as the operation of the principle of utility is concerned, Postema's does not explain the significance of the constitutional sphere and its relation to the direct operation of the principle. This omission leads Kelly to suggest that Postema's account ultimately fails to adhere consistently to Bentham's sanction theory of duties, and to Bentham's assignment of prime importance to security in his scheme.

For all these reasons Postema arguably does not succeed in accounting for constitutional

limits in Bentham's theory, and fails to exhaust the potential of that theory. In consequence, Postema goes on to deny that Bentham provided for fundamental rights which could and in fact did, limit governments (despite his explanation of Bentham's idea of limited sovereignty). Further, Postema argues that Bentham was hostile to the very notion of fundamental rights, and to their accommodation in his legal and political enterprise.[3]

II

There is no room to discuss here in detail the implications of this thesis and its possible contemporary significance. Many of these implications have been dealt with in more detail in the course of the argument. Nevertheless, a brief discussion of the main themes is in order.

Firstly, the argument of this thesis has the potential to form a bridge between some seemingly opposing conceptions of what legal theory should be about. The thesis might offer a possible link between the analysis of legal concepts and the sociology of law. It is difficult for Hart's "descriptive sociology" to answer the criticism made by sociologists of law. The central tenet of this criticism has been that whatever allegedly universal social features one attributes to legal concepts, an analysis of law as a *union* of primary and secondary rules in a legal system can not fully account for legal pluralism, or for the "living law", or the law of the people.[4] In short, any allegedly universal account of *the* concept of law runs the risk of not being able to account for the complexity of operations, influences, and the dynamism which characterises particular societies. For an account of law to provide a bridge between

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[3] See chapter 5, p. 199, note 73 above.

[4] See D. Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law', Legal Studies, 2 (1984) 157-74, at 173-4.

analytical jurisprudence and the sociology of law, it must explain the conceptual connection between the complexity of normative relationships in a particular society, and *the understanding* of legal concepts. Under the auspices of the principle of utility, the fact that a popular determination and effectuation of limits to centralised, institutional legal interventions can be introduced *as part of* a discussion of the phenomena of law may be the starting point for a such a bridge. A utilitarian theory can do "descriptive sociology" which will also have empirical significance, in that it does not detach the understanding of legal concepts from the fabric of the social group in which legal discourse operates. The relationship between constitutional limits, which are part of the *conceptual understanding of law*, on the one hand, and the collective judgement of an entrusting body, on the other, can arguably serve as such a bridge. It is only in a theory with as wide a philosophical basis as Bentham's that the possibility of such a bridge between the conceptual and the empirical can be seriously envisioned.[5]

Secondly, the thesis offers some arguments in relation to the *nature* of the justification of political authorities. The argument about the "split" nature of sovereignty arguably offers a perspective from which to evaluate formal constructions like Hart's rule of recognition. The perspective from which Bentham viewed the concept of sovereignty, involving as it did a socially dynamic critical self-reflection, would allow him to criticise the unacceptable reductionism involved in describing formal criteria of authenticity as the basis for legal validity, and in turn to criticise legal positivism. Modern accounts which attempt some conceptual identification of legal validity and moral worth refer to the *purpose* of law. In these accounts, the identification of legal validity and moral worth is compatible with the existence of unjust legal systems. Bentham's doctrine of sovereignty can be interpreted as

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[5] See Cotterrell, *The Sociology of Law*, pp. 10, 38-41.

pointing to yet another purposive dimension which involves some conceptual unification of law and morality. Despite the compatibility of such a thesis with the general claim of legal positivism, Bentham's theory can be seen to assert that the existence of the "morally just" law would be an *enhancement*, or *augmentation*, of certain formal features of law which involve moral postulates. In the context of the argument of this thesis, the more people participated, and the more transparent the communication between them, the more extended would be the conceptual overlap between what was "legally valid" and what was "morally just".

Thirdly, the thesis demonstrates the connection between jurisprudence and public law, or constitutional law. It shows that utilitarianism in Bentham's thought could and did accommodate entrenched fundamental rights, which *limited the validity* of the actions of a sovereign legislator. However, utility only made sense of the notion of fundamental rights within the context of a vibrant debating and hermeneutic community. Any utilitarian policy-making on the part of the legislature would be *limited* by a communal consensus which had both interpretive (as far as utility derived from expectations was concerned), and consequential features. Thus, the claim that rights trump utility does not take into account the different levels at which utilitarian calculation was involved in, and interacted with, policy-making activity. The thesis argues that not only does utilitarian theory recognise the existence of fundamental rights, but that it also sees the ultimate power, a power which makes constitutional law, as *judicial* in nature - a power which can judge the validity of measures originating from the policy-making body. A utilitarian political theory can accommodate the claim that certain moral parameters can *limit* the scope of policy-making considerations. A utilitarian political theory can account for the communicative possibility that people would arrive at prescriptive propositions which were not vulnerable to the dictates of immediate expediency.

Thus, the claim that a non-prescriptible rights-based political theory, which relies on the intuitive moral justness of rights, trumps a utilitarian-based theory might be contested. To be plausible, such a claim would have to provide a better epistemological and social basis for the explanation both of such intuitions and of rights than one grounded on utility. In other words, the issue at stake is which of the two theories, namely one which relies on what is intuitively just, or one which relies on what is communicatively possible, can provide a better social and epistemological account of fundamental rights. The position adopted in this thesis is that an argument about rights can always be made. However, for such an argument to take root in the consciousness of a people, both transparency in communication, and in turn a degree of empathy and sympathy, have to be achieved. It is the tutelary force of sympathy which causes an agent facing a *moral* dilemma to recognise a moral threshold which signifies fundamental rights, rather than to act on considerations of immediate expediency.[6]

On a more particular level the thesis casts some light on the meaning of the rule of law. The idea of the rule of law as a constitutional principle has always been in conflict with the idea of the sovereignty of parliament, in that the rule of law can not accommodate constitutional limits on the *validity* of *primary* legislation. These two ideas can loosely co-exist only if, as Dicey held, the limits on sovereignty as a power to legislate coincide *in the long run* with the dictates of popular sovereignty in a democracy. In the absence of entrenched constitutional limits which take precedence over government activities, there is,

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[6] See A. Gewirth, 'Can Utilitarianism Justify any Moral Rights?', in J.R. Pennock and J.W. Chapman (ed.), *Ethics, Economics and The Law*, NOMOS, XXIV, New York, 1982, pp. 158-93, at 164-73, and K. Greenawalt, 'Utilitarian Justification for Observance of Legal Rights', ibid., pp. 139-47; see also H.L.A. Hart, 'Between Utility and Rights', in A. Ryan (ed.), *The Idea of Freedom*, Oxford, 1979, pp. 77-98, at 93-7.

under Dicey's scheme, no immediate protection for the rights of minorities.[7] This thesis argues that constitutional limits are a mirror of communal development. As such, constitutional limits can be entrenched as parts of the law, in a way which would prima facie limit legislatures, whose powers would always be subject to communal critical moral judgement. In advocating an enabling rationale for government checked by public judgement, even between elections, Bentham, in effect, makes legal and popular sovereignty conceptually coincide, and takes this coincidence to its logical conclusion in his democratic design of a constitutionally limited government. A proper understanding of the concept of sovereignty would have prevented Dicey from making the distinction between internal legal sovereignty (law-making powers) and external popular sovereignty (popular judgement). In putting the emphasis on the participatory public, Bentham designed a government which did not give officials the ultimate authority. Bentham provided for constitutional adjudication in which judges would interact with the public, and would give execution and effect to constitutional self-limitations imposed by the government. In short, the enabling rationale for government (as manifested, for example, in the doctrine of the "sovereignty of parliament") should not be confused with unlimited government. The rule of law as a constitutional principle can not only account for constitutional limits, but also has participatory citizenship and public judgement at its core.

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[7] P. Craig, *Public Law and Democracy in the UK and the United States of America*, 1990, pp. 15-7, 30-41; see also J. Jowell, 'The Rule of Law Today', in J. Jowell and D. Oliver (ed.), *The Changing Constitution*, Oxford, 1994, pp. 57-78, at 72-3. Jowell sees the rule of law, firstly as a rule of institutional morality under which the certainty of the rules and procedural fairness guide official action; secondly as a limitation to official action, namely as a rule which *disables* government from abusing its power. When he comes to view this in relation to the sovereignty of parliament, he admits that all the rule of law can amount to in the absence of a bill of rights and constitutional adjudication is the democratic prospect of popular criticism of primary legislation. In making this admission, Jowell limits himself to a very narrow view of the connection between the rule of law, popular judgement, and limits to legal validity.

Finally, in its main thrust, the thesis aims to show how Bentham's notions can contribute to modern accounts of social theory. It has to be conceded that there are many aspects of Bentham's thought which do not fit modern society. In fact, his thought can be seen as contributing to many of the ailments of a modern individualistic, over-regulated society. His thought could not take into consideration the systemic division of society today, the loss of sense of community, the rise of multinational corporations as major players in political affairs, and, of course, the rise of the mass media. Bentham's model of centralisation and governmental control is a prototype of a "political system", as discussed by Habermas. Habermas criticises the transformation of the public sphere, from a sphere in which focused public debate is conducted, into a sphere which gathers its rhetoric of communication from various systems, such as "politics", and from the mass media. As a result of this colonization by systemic, technocratic thought, public debate loses its focus and critical edge, and, as a result, its emancipatory potential. Bentham's idea of democratic participation would, on the face of it, succumb to the strains resulting from the subjection of public opinion to the political system, rather than succeed in identifying and protecting means of communication, free from domination by "system", which would in turn protect genuine individuality.

Having said that, some of Bentham's theoretical presumptions about consensus formation could be adapted for today's world and still serve as useful tools in understanding modern society, although this would involve applying them "beyond Bentham". First, Bentham's idea of "constitutional limits" in its general sense, namely as a concept which is arrived at and reflected upon in a "learning process" during which a community changes, brings his thought in line with the primary concern of critical social theorists such as Habermas. In other words, a new formulation of the notion of the "protection" of individuality from the encroachment of "system" would have to be made in order to render Bentham's idea of

constitutional limits relevant to modern late capitalist society.

Second, the operation, as a critical standard, of "utility" or "usefulness", of pains and pleasures, as well as entities related to them like sympathy, empathy, influence and sanctions, could serve to establish a formal universal account of inter-subjective communication. These entities could be the cornerstones for a critical theory, which combines a philosophy of consciousness (idealism) with the alternative which Habermas calls "communicative rationality" or inter-subjective communication. There is a plausible case to argue that some notion of usefulness, entailing ideas of types of influence, and sanctions of sympathy, would have to be at the heart of any formal idea of universal pragmatics and consensus formation of the type Habermas advocates.

Utilitarian notions, in short, could have a large part to play, not only in terms of the instrumental applications of the kind for which Bentham wanted to use them (in the context of legislation and law, for example), but also within a theory of inter-subjectivity wherein they would relate to a more symbolic function of communication. This communication would pave the way towards a different form of social organisation, towards the crystallisation of some new "useful" conception of the relationship between self and collectivity. From the perspective of such a society, liberal utopias, as envisaged by Bentham and Mill, would appear oversimplified and relatively primitive.

III

This thesis has attempted to effect a change of *emphasis* in the reading of some of Bentham's writings. It shows Bentham as a thinker whose universal enterprise did not aim at establishing once-and-for-all solutions. It has emphasised that aspect of his thought which continuously sought to unlock the emancipatory potential, through which any form of social

organisation could be criticised and changed in fundamental respects. His POT offered day to day criticism within a democratic system. However, it could also serve a much wider emancipatory social role, related to how the community saw itself. Perhaps ironically, Bentham, in producing his model of democratic government, did not exhaust the potential of his own theory. His theory was formal in that it could accommodate many forms of social organisation, some of which he was unable to envisage in his own time.

The thesis identified a latent realm of freedom, one which would simply mean a substantial absence of centralised coercion (influence of will over will) from communication, from the exchange of views about future possibilities, and from consensus formation within the public sphere. To this freedom, Bentham was, to some degree, committed in all his legal and political writings.

Bentham's relevance - mentioned all too briefly here - lies in the fact that his ultimate notion of democracy valued participation not merely as a tool for ensuring the responsibility of officials, but also as a means of liberating the public sphere from dogma, *including* any myths about the goodness of an existing system according to which society was understood and, in turn, organised. Indeed, freedom of communication in the public sphere, the maintenance of the random nature of the exchange of opinions within it, was the ultimate basis for his defence of democracy.

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