Canadian Journal of Law & Jurisprudence XXXII No.1 February 2019, 173-194
© *Canadian Journal of Law & Jurisprudence* 2019 doi: 10.1017/cjlj.2019.8

Towards a Linguistic Criticism of Legal Hegemony:
Some remarks on 'Bentham v. Judges and Co.'

Guillaume Tusseau

Introduction

Bentham's hatred of the common law is legendary as is his dislike of the major *topoi* of natural law thinking embodied in the work of William Blackstone. It would be only a slight oversimplification to consider all of Bentham's writings as dedicated to a fierce criticism of many theses about the law. As examples, he criticizes the idea of civil society's emergence through a social contract, the contention of American and French revolutionaries that human beings were endowed with natural rights, the claim that the violation of natural laws made positive law invalid hence worthy of disobedience, and the common belief that the common law[1] is a form of law. For him, all these were so many false, incredible, mistaken, and misleading assertions.

In a word, these theses were *fictions*—which he carefully distinguished from "fictitious entities,"[2]—needing dismissal to make room for the universal operation of the scientific principle of utility. So broad were the arguments he offered against these views and, to his mind, so unescapable, that they led him to claim that "the season of *Fiction* is now over."[3]

However, Bentham's contempt for the operation of "legal fiction" was not limited to the major theoretical building blocks in the legal doctrine of his day. What he systematically and mercilessly 'demystified' was not only the doctrinal core, but the law practitioner's customary use of fictions. On that point, Bentham's criticism of the fictions became extremely technical, especially in its

Thanks are due to Professor Nader Hakim, who invited me to the Conference "Words and Law: Language, Identity and Power" at All Souls College, University of Oxford, where a first version of this text was presented.

1. This does not exclude the existence of several conceptions of what the common law is. See Michael Lobban, *The Common Law and English Jurisprudence, 1760-1850* (Oxford: Clarendon Press, 1991).
2. See the contrast between Jeremy Bentham, *De l'ontologie et autres textes sur les fictions*, edited by Philip Schofield, French translation by Jean-Pierre Cléro & Christian Laval (Paris: Seuil, 1997) at 287 [*De l'ontologie*] and Jeremy Bentham, *The Book of Fallacies*, edited by Philip Schofield (Oxford University Press, 2015). Nevertheless, Bentham's writings are far from totally unambiguous in this respect, see Nomi Maya Stolzenberg, "Bentham's Theory of Fictions—'A Curious Double Language'" (1999) 11 Cardozo Stud L & Lit 223; Guillaume Tusseau, *Jeremy Bentham : La guerre des mots* (Paris: Dalloz, 2011); Michael Quinn, "Which Comes First, Bentham's Chicken of Utility, or his Egg of Truth" (2012) 14 J Bentham Stud 1; Michael Quinn, "Fuller on Legal Fictions: A Benthamic Perspective" in Maksymilian Del Mar & William Twining, eds, *Legal Fictions in Theory and Practice* (Springer, 2015) 52.
3. Jeremy Bentham, *A Fragment of Government* in *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government*, edited by JH Burns & HLA Hart (The Athlone Press, 1977) at 441 [*Collected Works*].

denunciation of procedural law as employed by lawyers and judges. He thereby launched an offensive in the "war of words"[4] against the concrete mechanism, as used by a specific group of people—namely lawyers—, by which fiction corrupted reasoning and diverted the political system from its proper objective, the greatest happiness of the greatest number. He aimed to reveal the sinister interests that were at the origin of the law's chaos, while ridiculing the social contract and natural rights for reasoning that was inconsistent, ill-adapted to its objectives, and not attuned to the progress made by science.

Bentham's approach shared similarities with the Marxist criticism of hegemony for the elucidation of the *linguistic mechanism* that it revealed. But, at first sight, a comparison of these two may seem surprising, due to the legendary sarcasms that Karl Marx directed at Bentham. According to Marx, the latter was merely "that insipid, pedantic, leather-tongued oracle of the ordinary bourgeois intelligence of the 19th century,"[5] who, "With the driest naiveté […] takes the modern shopkeeper, especially the English shopkeeper, as the normal man. Whatever is useful to this queer normal man, and to his world, is absolutely useful. […] With such rubbish has the brave fellow, with his motto, 'nulla dies sine linea!,' piled up mountains of books. Had I the courage of my friend, Heinrich Heine, I should call Mr. Jeremy a genius in the way of bourgeois stupidity."[6] However, and conversely, no one can ignore how close the two were in their common criticism of the doctrine of human rights and of the way they are consecrated in constitutional texts, especially French ones.[7] Based on how Bentham accounted for the operation of fiction in the legal domain, the following sections will present a few notes regarding the presence of a theory of the hegemony of jurists in his writings.

Provided one disregards some nuances, hegemony is predominately related to the way a specific group manages to impose its own worldview on another group that it subjects to its authority. Hegemony ensures that the culture of the ruling class is assimilated by the subjected one. This is achieved to the extent that the latter has the impression that it is natural, necessary, and does not offer any alternative. In Marx's and Engel's theory, especially as developed

---

4. *Ibid* at 500; Jeremy Bentham, *Deontology Together with A Table of the Springs of Action and the Article on Utilitarianism*, edited by Amnon Goldworth (Clarendon Press, 1983) at 96 [*Deontology Together*]; Jeremy Bentham, *Official Aptitude Maximized, Expense Minimized*, edited by Philip Schofield (Clarendon Press, 1993) at 50; Jeremy Bentham, *"Legislator of the World": Writings on Codification, Law and Education*, edited by Philip Schofield & Jonathan Harris (Clarendon Press, 1998) at 155.

5. Karl Marx, *The Capital* (1867) vol 1, ch 24, s 5, online: https://www.marxists.org/archive/marx/works/1867-c1/ch24.htm#S5.

6. *Ibid*.

7. See Jeremy Bentham, *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, edited by Philip Schofield, Catherine Pease-Watkin & Cyprian Blamires (Clarendon Press, 2002) [Bentham, *Rights, Representation, and Reform*]; Karl Marx, "On the Jewish Question" in *Works of Karl Marx 1844* (1844), online: https://www.marxists.org/archive/marx/works/1844/jewish-question/; Karl Marx, "The Constitution of the French Republic Adopted November 4, 1848" in *Works of Karl Marx 1851* (1851), online: https://www.marxistsfr.org/archive/marx/works/1851/06/14.htm. See, e.g., Jeremy Waldron, ed, *'Nonsense upon Stilts': Bentham, Burke, and Marx on the Rights of Man* (Methuen, 1987).

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

in Antonio Gramsci's writings,[8] the essential explanatory motivations of that movement are to be found in the relations between infrastructure and superstructure. As Marx explained in his preface to *A Contribution to the Critique of Political Economy*:

> In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. […] Just as one does not judge an individual by what he thinks about himself, so one cannot judge such a period of transformation by its consciousness, but, on the contrary, this consciousness must be explained from the contradictions of material life, from the conflict existing between the social forces of production and the relations of production.[9]

It follows, according to what he wrote with Engels, that

> [t]he ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling material force of society, is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production […]. Insofar, therefore, as they rule as a class and determine the extent and compass of an epoch, it is self-evident that they do this in its whole range, hence among other things rule also as thinkers, as producers of ideas, and regulate the production and distribution of the ideas of their age: thus their ideas are the ruling ideas of the epoch.[10]

Making Bentham a precursor of Marxism or Marx a follower of Bentham,[11] would be quite meaningless. Nevertheless, it seems that, thanks to the intellectual tools that his theory of fictions and his linguistic theory provided him with, Bentham was in a position to contribute to the elucidation of the channels of this fabric of "mental production".[12] He put forward several promising clues, especially in the legal sphere, to understand how those he called the "ruling few" manage to subdue the "subject many". He offered precise and concrete contributions, to help one understand how the consent of subordinate groups is obtained, not only through coercion, but also thanks to their own relatively wilful

---

8. However, Gramsci never offered a precise definition of hegemony, a suggestive reconstruction is for example offered by George Hoare & Nathan Sperbert, *Introduction à Antonio Gramsci*, 4th ed (Paris: La Découverte, 2013) at 93-112.

9. *A Contribution to the Critique of Political Economy* (Moscow: Progress Publishers, 1977), online: https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm.

10. Karl Marx & Friedrich Engels, *The German Ideology* (1845-1846), online: https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01b.htm#b3. See similarly, regarding the law, Friedrich Engels, *The Housing Question* (1872), online: https://www.marxists.org/archive/marx/works/1872/housing-question/ch03.htm.

11. For a methdological proposal consisting in making two authors complement one another's theories, see for example Anne Brunon-Ernst, *Utilitarian Biopolitics: Bentham, Foucault and Modern Power* (Pickering & Chatto, 2012).

12. Offering concurring remarks, see François Ost & Michel van de Kerchove, "De la 'bipolarité des erreurs' ou de quelques paradigmes de la science du droit" (1988) 33 Archives de philosophie du droit 177 at 193-94.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

complicity and active participation. In this respect, according to what is also a major tenet of Marxist legal philosophy,[13] the very form of the law is not neutral. In itself and independently from its content *hic et nunc*, the law appears subservient to the reinforcement of juridification while simultaneously making the latter more powerful and active in the solidification of specific structures of power. By focusing on the linguistic dimensions of the use of fictions by jurists, Bentham highlighted the progressive establishment, self-preservation, and spread of the realm of the law.

These intuitions will be substantiated with a few technical examples of Bentham's criticism of legal fictions. These examples will provide the raw material necessary to examine how, through them, Bentham developed an original methodology to unveil the mechanics of "Judges and Co."'s sinister interest and their plan for the enshrinement of a form of hegemony.

I. The technical criticism of legal fictions

Throughout his writings, Bentham gave several illustrations of the process of the legal fiction.

A. The device of fictio juris

For Bentham, fiction was more than an intellectual artifice with only a strictly technical scope. He considered it a mystifying apparatus.

1. Definition of the fictio juris

According to Pierre Johannes Jeremia Olivier,[14] one can find the origin of the classical conception of the legal fiction in the works of the Glossators, and especially in that of Azzo.[15] This concept has six defining characteristics: (1) as to

13. See especially Evgeny B Pashukanis, *Law and Marxism: A General Theory*, English translation by Barbara Einhorn, edited and introduction by Chris Arthur (Ink Links, 1978). See also, for general presentations, Hans Kelsen, *Sozialismus und Staat: Eine Untersuchung der politischen Theorie des Marxismus*, 2nd ed (Leipzig: CL Hirschfeld, 1923); Hans Kelsen, *The Communist Theory of Law* (Stevens & Sons, 1955); *Soviet Legal Philosophy*, English translation by Hugh W Babb, introduction by John N Hazard (Harvard University Press, 1951); Konstantin Stoyanovitch, *Marxisme et droit*, preface by Henri Batiffol (Paris: Librarie générale de droit et de jurisprudence, 1964); Csaba Varga, ed, *Marxian Legal Theory* (Aldershot: Dartmouth, 1993); Norbert Reich, Hrsg, *Marxistische und sozialistische Rechtstheorie* (Frankfurt am Main: Athenäum, 1972); Jacques Michel, *Marx et la société juridique* (Paris: Publisud, 1983); Manuel Atienza & Juan Ruiz Manero, *Marxismo y filosofia del derecho*, 2nd ed (México: Fontamara, 2004); "Marx et le droit" (2018) 10 *Droit & Philosophie*, online: http://www.droitphilosophie.com/app/webroot/upload/files/pdf/dp10_ebook.pdf.

14. *Legal Fictions in Practice and Legal Science* (Rotterdam University Press, 1975) 59-80. See also Anne-Blandine Caire, *Les fictions en droit : Les artifices du droit : les fictions* (Clermont-Ferrand: Centre Michel de l'Hospital, 2015); *Legal Fiction*, *supra* note 2.

15. See also Antonio Dadino Alteserra, *De fictionibus juris tractatus quinque. Quibus accessit Solemnis Prælectio ad I Cum societas ff pro socio* (Paris: P Lamy, 1659). For a commentary, see Cyrille Dounot, "Le *De fictionibus juris* de Dadine d'Auteserre, premier traité consacré aux fictions de droit" in Caire, *supra* note 14 at 71-82.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

assumptio, fiction consists in relying on a given assertion; (2) its *contra veritatem* dimension results in facts being proven or likely to be proven, but nonetheless dismissed by the reasoning; (3) because of its *pro veritate* element, fiction does not admit any contrary evidence; (4) one's acceptation of being *in re certa* makes it possible to assert that the adoption of fiction is not the result of an error but of a deliberate decision; (5) the *a jure facta* element indicates that such a method is allowed by law; (6) the *ex aequitate* element points out to the motivation behind the introduction of fiction.

As result, "[a legal fiction is] an assumption of fact deliberately, lawfully and irrebuttably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science."[16]

Black's Law Dictionary gives a more synthetic definition of the process of fiction as "an assumption that something is true even though it may be untrue, made especially in judicial reasoning to alter how a legal rule operates; specifically, a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object."[17] One of Bentham's definitions is similar: "By fiction, in the sense in which it is used by lawyers, understand a false assertion of the privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true."[18]

2. A word that is mystifying in itself

Though Bentham's definition is quite neutral, he noted that calling this process a "fiction" was not devoid of misleading ambiguities. Once more, the denunciation of that process is connected to a theory of language that operated at a deeper level.

Speaking of legal "fiction" indeed proved to be a fallacy in itself. Such a word tends to transfer onto that process the favour that surrounds poetic fiction, and thus to qualify the suspicion that any reasoning will call for when it is based on an erroneous premise rather than on truth, clarity, and the obvious.[19] Bentham ironically remarked that as a result, "Uttered by men at large, wilful falsehood is termed wilful falsehood: uttered by a judge as such, it is termed fiction: understand *judicial fiction*."[20] That change of words modifies the way one looks at a process that remains identical in itself.

The positive law of his time served as a basis for Bentham's questioning of several examples of that abusive technique.

---

16. Olivier, *supra* note 14 at 81.
17. 4th pocket ed (West, 2011) 446. See also Yann Thomas, "*Fictio legis*: L'empire de la fiction romaine et ses limites médiévales" (1995) 21 *Droits* 17.
18. Jeremy Bentham, *Constitutional Code* in *The Works of Jeremy Bentham*, edited by John Bowring (W Tait, 1843) vol 9 at 77 [*Works*].
19. Jeremy Bentham, *Justice and Codification Petitions* in *Works*, *supra* note 18, vol 5 at 452, 512. See also Jeremy Bentham, *The Book of Fallacies* in *Works*, *supra* note 18, vol 2 at 466.
20. Bentham, *Justice and Codification Petitions*, *supra* note 19 at 452.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

B. Examples of condemned fictions

Based on a justification that Bentham did not find convincing, fiction had wormed itself into the whole common law.

1. Substantive fictions

One of the paroxysmal examples of fiction, which was famous and yet fairly simple, was that of the crime of grand larceny, punishable by death in the 19th century. Stealing more than 40 shillings belonged to that category of crime. However, to avoid handing down death sentences, which they deemed excessive, the judges ruled numerous misdemeanours as being worth 39 shillings. In 1808, this fiction was obvious, since the theft of 10 sterling pounds, that is, 200 shillings, was estimated as being worth 39 shillings.[21]

Bentham mentioned that very example: "take two pieces of gold coins, two guineas, each of full weight, and, under the eye of an approving judge, to change the prisoner's doom from death to transportation, the two-and-forty-shillings'-worth of gold coin be valued by twelve jurymen, speaking upon their oaths, at nine-and-thirty shillings, and no more."[22] According to Bentham, when confronted with such a situation, one could not but realise that the judges were usurping the legislator's role.

2. Procedural fictions

The most numerous fictions were nonetheless related to procedure, that is, the adjective branch of the law. Bentham examined this area of law quite thoroughly.[23] Three examples are worth studying in this respect. They illustrate how problematic was, according to Bentham, the fact that "The common law was in essence a system of adjudication, which draw its substantive notions from below through cases presented to courts [… and] aimed to work as a system to remedy any wrong correctly presented, […] the courts, in making their rulings, [drawing] on a multiplicity of sources."[24] This mechanism resulted in any procedural defect, however minor, being fatal to the protection of one's rights.

First, Bentham tackled the procedure of bail and pledge of prosecution as follows. A plaintiff had to establish a security before he could force a defendant to respond to any request in a jurisdictional action. Two friends (called "pledges

---

21. See Chaïm Perelman, *Logique juridique : Nouvelle rhétorique*, 2nd ed (Paris: Dalloz, 1979) at 63.

22. Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* in *Works*, *supra* note 18, vol 7 at 418 [*Rationale of Judicial Evidence*]. See also Jeremy Bentham, *Rationale of Judicial Evidence Specially Applied to English Practice* in *Works*, *supra* note 18, vol 6 at 273.

23. See, e.g., Anthony J Draper, "'Corruption in the Administration of Justice': Bentham's Critique of Civil Procedure, 1806-1811" (2004) 7 J Bentham Stud; Judith Resnik, "The Democracy in Courts: Jeremy Bentham, 'Publicity', and the Privatization of Process in the Twenty-First Century" (2013) 10 No Foundations 77.

24. Lobban, *supra* note 1 at 67. See generally *ibid* at 47-79.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

of prosecution") bound themselves to pay a sum of money in case the plaintiff lost his case.

> So in the case of sham bail, on the part of the defendant. The defendant pays an attorney, who pays an officer of the court for making, in one of the books of the court, an entry, importing that on such a day two persons bound themselves to stand as sureties for the defendant; undertaking, in the event of his losing his cause, and being ordered to comply with the plaintiff's pecuniary demand, either to pay the money for the defendant, or to render his body up to prison. No such engagement has been taken by anybody.—The persons spoken of as having taken it, are not real persons, but imaginary persons; a pair of names always the same, John Doe and Richard Roe.
>
> The impossibility that this vile lie should be of use to anybody but the inventors and utterers of it, and their confederates, is too manifest to be rendered more so by anything that can be said of it.
>
> In the original institution of this security, the "pledges of prosecution," as little regard was paid to the ends of justice, as in the subsequent evasion of it.[25]

The desire to respect technical rules that were arguably out-of-date, and whose relevance seemed disputable since no real bail existed, consequently resulted in pure outward behaviours being demanded of the defendant as well as of law professionals.

Secondly, the expression "stealing jurisdiction"[26] designated the conflicts that opposed different courts, which then resorted to fictions in order to retain their jurisdiction in certain disputes. Originally, the King's Bench Division had no jurisdiction in cases in which people were not remanded in custody. That is why, in order for that court to extend its jurisdiction, the writs claimed that the defendant had been detained by the marshall of the King's Bench Division for a crime, though no such thing had ever happened. The court was thus able to extend the scope of its jurisdiction and the judges and other judicial officers could collect the corresponding fees. Bentham mocked that "sometimes [the defendant] is told that he is in jail."[27]

In a case mentioned by Sir Edward Coke, an issue of territorial jurisdiction was also at the origin of an obvious fiction: "An obligation made beyond the seas may be sued here in England, in what place the plaintife will. What then if it beare date at *Bourdeaux* in *France*, where shall it be sued? And answer is made, that it may be alleaged to be made *in quodam loco vocat' Burdeaux* in *France*, in *Islington* in the county of *Middlesex*, and there it shall be tried, for whether there be such a place in *Islington* or no, is not traversable in that case."[28] The will to attract the disputes to their court thus resulted in the judges' resorting to reasonings which showed no concern for verisimilitude or credibility and were pure plays on words.

---

25. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 284.
26. Jeremy Bentham, *Scotch Reform* in *Works*, *supra* note 18, vol 5 at 13.
27. Jeremy Bentham, *Truth* versus *Ashhurst; or Law as it is, Contrasted With What it is Said to be* in *Works*, *supra* note 18, vol 5 at 234.
28. *First Part of the Institutes of the Laws of England, or, a Commentary upon Littleton*, 13th ed (G Kearsly, G Robinson, 1775) at 261.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

Thirdly, the procedure of *ejectment* produced noticeable fictions too.[29] That action, which was applicable until 1852,[30] aimed to recover the possession of a piece of land, for example, against a defaulting tenant or an illegal occupant. The difficulty to implement the normally applicable juridical actions resulted in people's trying to contest the deed of property itself before a court, through a procedure of ejectment.

This roundabout means, which became quite common in 1565-1570, consisted for the plaintiff who claimed the possession of a property deed in granting a lease to a fictitious person, called John Doe. An action was then brought to court in the name of that tenant against another fictitious person, called Richard Roe, who had supposedly evicted him. A letter was sent to the real defendant, requiring him to act in the name of the alleged tenant. Indeed, only the real tenant, Roe not included, had a deed that legitimated his action before the court. If the real defendant did not act, the decision was against Roe, and the initial plaintiff recovered his property. The right to action of the real defendant was thus based on the necessity to acknowledge the existence of the fictitious property deed, of the entry and of the eviction.[31] To make it possible for the courts to recognise the rights of the real plaintiff and defendant, it was therefore necessary, as Bentham summarized, that "A foolish story is told about somebody called Doe, that was turned out by somebody called Roe—an imaginary man by another."[32] Again, the intellectual roundabout methods used to make one's rights recognised were so highly complex and artificial that they seemed ludicrous.

According to some classical explanation, those dry elements of legal technique, which Bentham contested, were related to the complex history of the formation of the English legal order. Different strata were superimposed, associating local customs, Roman law, Church law, Norman law and royal law. Each was applied at a local or national level, by different bodies, including courts, which inevitably competed and fought against one another. Thus, because the type of plea, writ, and form of action involved, often decided on a case-by-case basis, largely determined which institution had jurisdiction and which sources of substantive law were applicable, procedural law became crucial.

According to most historians of the English law, there was no other way for jurists to overcome those complexities, in particular to adapt the substantive law to changing social needs, than to use fictions. Thus, substantial innovations were produced under cover of formal continuity.[33] Though he did not ignore that

---

29. Peter Sparkes, "Ejectment: Three Births and a Funeral" in Del Mar & Twining, *supra* note 2 at 275-91.

30. *Real Property Limitation Act* 1833, c 27.

31. John Hamilton Baker, *An Introduction to English Legal History*, 3rd ed (Butterworths, 1990) at 341-43.

32. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 278.

33. See, e.g., Baker, *supra* note 31 at 1-154; Stroud Francis Charles Milsom, *Historical Foundations of the Common Law*, 2nd ed (Butterworths, 1981); Andrzej Bryk, *The Origins of Constitutional Government: Higher Law and the Sources of Judicial Review*, 1st ed (Kraków, Wydawnictwo uniwersytetu jagiellońskiego, 1999) at 97-111; Michael Lobban, "Legal Fictions Before the Age of Reform" in Del Mar & Twining, *supra* note 2 at 199-223; Maksymilian Del Mar, "Legal Fictions and Legal Change in the Common Law Tradition" in Del Mar & Twining,

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

aspect, Bentham was less lenient, and offered a less charitable reading of the use of fictions. Starting from those considerations, he was able to draw more general conclusions. Indeed, such abuses of words were not only twistings of a rigorous use of language. The real problem was that there was nothing fortuitous in them. For him, they were the result of a carefully planned strategy by interests he called "sinister".

II. Unveiling the sinister interest of jurists

The proliferation of fictions only aimed at perverting the majority of the people's sound practice of utility calculus. So as to reestablish the latter, Bentham had to reveal what lay hidden behind fictions and to question the current legal establishment and the relation of power it had created.

A. Demystifying the use of the fictio juris[34]

Bentham's insistence on the linguistic dimension of the phenomenon enabled him to propose a pioneering analysis of the mechanism of the *fictio juris*.

1. A hermeneutics of suspicion

As Lon L. Fuller pointed out, "A fiction becomes understandable only when we know why it exists, and we can know that only when we know what actuated its author."[35] Fuller proposed a discussion of the different motivations behind the use of fictions, and especially of their emotional dimension. He explained the way they can facilitate the presentation of the law. He insisted on their capacity to mask the exercise of power or to hide a substantial innovation behind a formal form of conservatism.[36] Bentham was far more critical.[37]

His reasoning illustrated a form of the hermeneutics of suspicion defined by Paul Ricœur.[38] While hermeneutics may be understood as the charitable and faithful restoration of the meaning the objects spontaneously present, the hermeneutics of suspicion claims to break off with the appearances presented by the phenomena. As illustrated by the works of Nietzsche, Marx and Freud, this approach aims to demystify meanings and reestablish their often hidden real scope, through a critical analysis. The elimination of the illusions of which they are both the result and the medium should make it possible to reach a more genuine

---

supra note 2 at 225-53. Offering a synthesis of arguments *pro et contra* regarding fictions, see Olivier, *supra* note 14 at 88-92.

34. On demystification in Bentham's work, see Herbert Lionel Adolphus Hart, "Bentham and the Demystification of the Law" (1973) 36:1 Mod L Rev 2.

35. "Legal Fictions" (1930-1931) 25:4 Ill L Rev 363, 513, and 877 at 513.

36. *Ibid* at 516-29.

37. See, e.g., the criticism he voices against fiction in *Constitutional Code*, *supra* note 18 at 77-78.

38. *Freud and Philosophy: An Essay on Interpretation*, English translation by Denis Savage (Yale University Press, 1970) at 20-36. See also Alison Scott-Baumann, *Ricœur and the Hermeneutics of Suspicion* (Continuum, 2009).

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

awareness of the operation of human phenomena. Thus, those three authors insist respectively on the vanity in believing in the possibility of an ultimate knowledge, on the creation of ideological constructions by the relations of production and on guiding of human behaviours by phenomena which escape the immediate consciousness of actors.

Bentham's approach was similar. His criticism of the class of jurists, and especially of the judges, was part of a much larger movement of that time, which had existed since the Middle Ages.[39] The questioning of the operation of justice and the satire of the magistrates and of the lawyers were commonplace in European literature. For example, François Rabelais, annoyed by the Sorbonne's ban of the Fourth book of *Pantagruel* and by the suspension of the publication ordered by the *Parlement de Paris*, for example depicted the president of that court under the features of Gripe-men-all, Archduke of the Furred Law-cats.[40] Generally speaking, judges, or "Furred Law-cats"

> are most terrible and dreadful monsters, they devour little children, and trample over marble stones. […] The hair of their hides doesn't lie outward, but inwards, and every mother's son of 'em for his device wears a gaping pouch […]. They have claws so very strong, long, and sharp that nothing can get from 'em that is once fast between their clutches. Sometimes they cover their heads with mortar-like caps, at other times with mortified caparisons. […] Among 'em reigns the sixth essence; by the means of which they gripe all, devour all, conskite all, burn all, draw all, hang all, quarter all, behead all, murder all, imprison all, waste all, and ruin all, without the least notice of right or wrong; for among them vice is called virtue; wickedness, piety; treason, loyalty; robbery, justice. Plunder is their motto, and when acted by them is approved by all men, except the heretics; and all this they do because they dare; their authority is sovereign and irrefragable.[41]

Grippeminaud reappeared in La Fontaine's *Fables* under the features of a cat-judge who "solves [the litigants' complaint] with but a pair of swallows",[42] and the universe of trial was parodied by Racine in his play *Les Plaideurs*.

In the second half of the 18th century, such common representations of justice resulted in a broad movement of hostility towards judges. A similar criticism against the obscurities and technicalities of legal language and their contribution to a form of illegitimate domination was expressed for example by Cesare Beccaria, whose *Dei delitti e delle pene*[43] had a considerable influence on

---

39. See, e.g., Jacques Krynen, "Un exemple médiéval de critique des juristes professionnels : Philippe de Mézières et les gens du Parlement de Paris" in *Histoire du droit social : Mélanges en hommage à Jean Imbert* (Paris: Presses universitaires de France, 1989) at 333-44; Marcel Rousselet, *Histoire de la magistrature française des origines à nos jours* (Paris: Librairie Plon, 1957), vol 2 at 389-407; Benoît Garnot, *Justice et société en France aux XVIe, XVIIe et XVIIIe siècles* (Paris: Ophrys, 2000) at 159-64.

40. *Gargantua and his Son Pantagruel*, Book V, ch 6 ff, online: http://www.gutenberg.org/files/1200/1200-h/1200-h.htm#link52HCH0011.

41. *Ibid*.

42. Jean de La Fontaine, "The Cat, the Weasel, and the Little Rabbit" in *The Complete Fables of Jean de La Fontaine*, English translation by Norman R Shapiro, introduction by John Hollander (University of Illinois Press, 2007) 179 at 180.

43. *Dei delitti e delle pene : Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna nell'Europa del Settecento*, (Torino: Einaudi, 1999).

Bentham's theory of penal law.[44] In France, this showed in a massive criticism of justice in the *cahiers de doléances*.[45] After the Revolution, that criticism led to the abolition of the Ancien Régime parliaments and to the passing of the 16-24 August 1790 Act. As in Bentham's work, this was supported by the will to simplify the procedure, to give judges a sense of responsibility and to subject them to the will of the legislator. As Thouret for example said of justices of the peace, "this institution's main utility will not be if it does not provide a very simple, summary and costless justice, whose natural equity, rather than the meticulous rules of the art of deciding a case, leads the way".[46]

Though some of Bentham's writings relate to Rabelais' irony, and though his criticism followed the trend of the time, the method Bentham elaborated was unquestionably novel. It first underlined the linguistic and symbolic system through which some mystification operated at the core of the law.

As presented by Bentham, the English law was complex, hardly comprehensible since it was often written in Latin or in some legal variety of French inherited from the Norman Conquest, and mainly resulted from court decisions which had almost no official compiling. "This was doing much; but it was not doing every thing. Fiction, tautology, technicality, circuity, irregularity, inconsistency remain. Ut above all the pestilential breath of Fiction poisons the sense of every instrument it comes near."[47]

2. The self-maintained mechanism of fiction

Fiction was presented as necessary to the satisfying working of justice. Because of its structure, the common law largely developed thanks to fiction, which served to extend the scope of decisions rendered in a particular case to other facts, and to compensate for the absence of statute law.

Blackstone extolled this method of calculated falsehood which, serving justice and truth, made it possible to find fair solutions. Writing in Latin, which was quite symptomatic, he underlined the fact that "*in fictione juris semper subsistit aequitas*."[48] Bentham could never have accepted that:[49]

> Behold here one of the artifices of lawyers. They refuse to administer justice to you unless you join with them in their fictions; and then their cry is, see how necessary fiction is to justice! Necessary indeed; but too necessary: but how came it so? and who made it so?

---

44. See Philippe Audegean, *La philosophie de Beccaria : Savoir punir, savoir écrire, savoir produire* (PHD Thesis, Université Paris I-Sorbonne, 2003) [Paris: J Vrin, 2010]; Philippe Audegean, "Beccaria et l'écriture du droit modern" in Laurence Giavarini, ed, *L'écriture des jurists : XVIe-XVIIIe siècles* (Paris: Classiques Garnier, 2010) at 167-82.

45. Rousselet, *supra* note 39, vol 1 at 116.

46. Discourse of Thouret (24 March 1790), Archives parlementaires, vol 7 at 346.

47. Bentham, *Fragment of Government*, *supra* note 3 at 411.

48. William Blackstone, *Commentaries on the Laws of England*, 3rd ed (Clarendon Press, 1765-1769), vol 3 at 43. See also Sir Edward Coke, *Reports*, 11th part (London, UK: Printed by E & R Nutt & R Gosling, 1727) at 51 ("In fiction of law equity always exists").

49. Bentham, *Constitutional Code*, *supra* note 18 at 59; Bentham, *Fragment of Government*, *supra* note 3 at 510-11; Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 417.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

> As well might the father of a family make it a rule never to let his children have their breakfast, till they had uttered, each of them, a certain number of lies, curses, and profane oaths; and then exclaim, You see, my dear children, how necessary lying, cursing, and swearing, are to human sustenance![50]

This mechanism was quite perverted, since those who wanted to bring an action to court, or more broadly, to know their rights, were forced to resort to the fictions the jurists had contrived. Power and domination express themselves thanks to language to the extent that language, already expresses a form of domination by organising the legitimate positions of speakers, and classifying and distinguishing categories of objects.[51] In the legal sphere, "The professionals create the need for their own services by redefining problems expressed in ordinary language as *legal* problems, translating them into the language of the law…"[52] It was therefore unsurprising that fictions spread in procedural law in particular. The mechanism of sinister interest maintained itself in that manner, as people were forced to become complicit in the fictional usurpation that operated to their detriment. Moreover, though fictions went hand in hand with irksome procedures for the litigants, they worked, insomuch as they were detached from any concern for verisimilitude, in a purely mechanical, automatic way in law professionals.[53] They were detrimental to the former, but very economical for the latter.

Fiction's consequence on the mind when brought to such a degree of perfection was as follows:

> Fiction debases the moral part [*i.e.*, the inclination towards the greatest happiness of the greatest number] of the mental frame of all those by whom application is made of it. Fiction debases the intellectual part of the mental frame of all those upon whom the imposition passes, and by whom the lie uttered in place of a reason is accepted as constituting a reason, and that a sufficient one: and when employed by a judiciary functionary, the evil is greatly aggravated.[54]

This resulted, according to Bentham, in that "here, it is not the will that is confounded and overwhelmed: it is the understanding that is deluded."[55] Although some might not be duped, those who might be misled, thus serving the interests of the jurists, were numerous. There are two types of prejudices. The first is rooted in the perception someone has of their own interest, while the second results from the influence the others have on them. Fictions are precisely one of the essential media of the "adoptive prejudice",[56] which results in the ideas of

---

50. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 287. See also Jeremy Bentham, *Nomography; or the Art of Inditing Laws* in *Works*, *supra* note 18, vol 3 at 241.
51. Pierre Bourdieu, *Language and Symbolic Power*, edited and introduced by John B Thompson, translated by Gino Raymond & Matthew Adamson (Harvard University Press, 1991).
52. Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38 Hastings LJ 814 at 834 [The Force of Law].
53. Elie Halévy, *La formation du radicalisme philosophique*, edited by Monique Canto-Sperber (Paris: Presses universitaires de France, 1995), vol 3 at 82.
54. Bentham, *Constitutional Code*, *supra* note 18 at 59.
55. Bentham, *The Book of Fallacies*, *supra* note 19 at 466.
56. Bentham, *De l'ontologie*, *supra* note 2 at 146.

the ruling class being the "ruling ideas of the epoch", according to what Marxist theory regards as false consciousness.[57]

The Utilitarian philosopher established a close relation between language and action in this respect. Owing to a phenomenon of association of ideas,[58] some words contain in themselves value judgments that are more or less made explicit. Consequently, the simple use of words is in itself a way of judging facts or behaviours, prompting actions of approval or criticism. The utility calculus made by all can therefore be distorted by the concepts they use to comprehend the sensations of pleasure and pain they must analyse.[59] Calculating in advance and without the co-speakers being aware of it,[60] they can result in a discrepancy between the empirical experience, beliefs and actions of individuals. As such, in addition to defeating Bentham's ideal of transparency, the calculation the legislator makes is also troubled by individual appreciations that wrongly conclude to the utility, or lack of utility, of certain facts or behaviours. All that is an obstacle to the project "to rear the fabric of felicity by the hands of reason and of law."[61]

Bentham elaborated a graphically designed "table of the springs of action: shewing the several species of pleasures and pains, of which man's nature is susceptible: together with the several species of interests, desires, and motives, respectively corresponding to them: and the several sets of appellatives, Neutral, Eulogistic and Dyslogistic, by which each species of motive is wont to be designated." While the nature and true *hic et nunc* utility of the different pleasures do not vary, the words that are used to refer to them may result in giving them a value they do not have. Thus, to the neutral word "hunger" correspond both the laudatory word "love of the pleasures of the social board, of the social bowl, of good cheer, etc." and the derogatory word "gluttony". Depending on which of the three words is used, the measurement of the quantity of happiness resulting from eating differs quite distinctly.

In the political domain, "Amongst the instruments of delusion employed for reconciling the people to the dominion of the one and the few, is the device of employing for the designation of persons, and classes of persons, instead of the ordinary and appropriate denominations, the names of so many abstract fictitious entities, contrived for the purpose":[62] the "Crown" or the "Throne" instead of Kings or the King, the "Church", instead of the "Churchman", the "Law" instead of "Lawyers", the "Court", instead of "Judges". Through such a clarification of language and of its emotional dimension, that is, of the "words under cover of which an ungrounded judgment is wont to be conveyed",[63] Bentham intended to exclude as much as possible the foreign value judgments that language conveys.

---

57. See, for example, Denise Meyerson, *False Consciousness* (Clarendon Press, 1991).
58. See especially Philip Schofield, *Bentham: A Guide for the Perplexed* (Continuum, 2009) at 53-60, 104, 113.
59. Bentham, *Deontology Together*, *supra* note 4 at 100-05.
60. Jean-Pierre Cléro, *Bentham: Philosophe de l'utilité* (Paris: Ellipses Marketing, 2006) at 154.
61. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by James Henderson Burns & Herbert Lionel Adolphus Hart (The Athlone Press, 1970) at 11 [*Introduction to the Principles*].
62. Bentham, *Constitutional Code*, *supra* note 18 at 76.
63. Bentham, *Nomography*, *supra* note 50 at 274.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

Because it fought against what was but a sort of alienation, that aspect of the war of words had no other aim than to realise "the emancipation of the individual judgment".[64] This in turn revealed that fictions were but an instrument serving a specific class.

B. The revelation of the sinister conspiration

The fictions that appear relatively technical within the framework of positive law become fallacies when they are used to deceive. There is always some hidden interest behind language processes. That is why Bentham repeatedly denounced the undertakings that, through fiction, abuse most people and operate contrary to their happiness. Coming first among the hidden interests is that of the "Lawyer-craft"[65] or "lawyer tribe",[66] "fraternity of lawyers",[67] "Judge and Co",[68] or even "gang of professional lawyers".[69]

1. The interest of jurists v. the interest of the greatest number

For Bentham, an obvious conflict exists between the interest of the jurist and that of the greatest number. In a characteristic passage, he writes,

> The opinions of lawyers in a question of legislation, particularly of such lawyers as are or have been practising advocates, are peculiarly liable to be tinged with falsity by the operation of sinister interest. To the interest of the community at large, that of every advocate is in a state of such direct and constant opposition (especially in civil matters,) that the above assertion requires an apology to redeem it from the appearance of trifling: the apology consists in the extensively prevailing propensity to overlook and turn aside from a fact so entitled to notice. It is the people's interest, that delay, vexation, and expense of procedure, should be as small as possible:—it is the advocate's, that they should be as great as possible; viz., expense, in so far as his profit is proportioned to it—factitious vexation and delay, in so far as inseparable from the profit-yielding part of the expense. As to uncertainty in the law, it is the people's interest that each man's security against wrong should be as complete as possible; that all his rights should be known to him; that all acts, which in the case of his doing them will be treated as offences, may be known to him as such, together with their eventual punishment, that he may avoid committing them, and that others may, in as few instances as possible, suffer either from the wrong, or from the expensive and vexatious remedy. Hence it is their interest, that as to all these matters the rule of action, in so far as it applies to each man, should at all times be not only discoverable, but actually present to his mind. Such knowledge, which it is every man's interest to possess to the greatest, it is the lawyer's interest that he possess it to the narrowest, extent, possible. It is every man's interest to keep out of lawyers' hands as much as possible—it is the lawyer's interest to get

---

64. Emmanuelle de Champs, *La déontologie politique ou la pensée constitutionnelle de Jeremy Bentham* (Genève: Librairie Droz, 2008) at 52.
65. See, e.g., Bentham, *Book of Fallacies*, *supra* note 19 at 456.
66. Bentham, *Fragment of Government*, *supra* note 3 at 513.
67. Bentham, *Constitutional Code*, *supra* note 18 at 78.
68. See, e.g., Bentham, *Justice and Codification Petitions*, *supra* note 19 at 455, 481, 512.
69. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 203.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

> him in as often, and keep him in as long, as possible,—and thence, that any written expression of the words necessary to keep non-lawyers out of his hand may as long as possible be prevented from coming into existence; and when in existence, may as long as possible be kept from being present to his mind,—and when presented, from staying there. It is the lawyer's interest, therefore, that people should continually suffer for the non-observance of laws, which, so far from having received efficient promulgation, have never yet found any authoritative expression in words. This is the perfection of oppression: yet, propose that access to knowledge of the laws be afforded by means of a code, lawyers, one and all, will join in declaring it impossible. To any effect, as occasion occurs, a judge will forge a rule of law: to that same effect, in any determinate form of words, propose to make a law, that same judge will declare it impossible. It is the judge's interest that on every occasion his declared opinion be taken for the standard of right and wrong—that whatever he declares right or wrong be universally received as such, how contrary soever such declaration be to truth and utility, or to his own declaration at other times:—hence, that within the whole field of law, men's opinions of right and wrong should be as contradictory, unsettled, and thence as obsequious to him as possible; in particular, that the same conduct which to others would occasion shame and punishment, should, to him and his, occasion honour and reward; that on condition of telling a lie, it should be in his power to do what he pleases, the injustice and falsehood being regarded with complacency and reverence; that as often as by falsehood, money, or advantage in any other shape can be produced to him, it should be regarded as proper for him to employ reward or punishment, or both, for the procurement of such falsehood.[70]

By transforming the legal language into a separate language which could not be understood by the average citizen, the judges created a specific language for their use only.

> The object and use of language (meaning ordinary language,) is to convey information: information which, in some way or other, shall be of use: for which purpose (except in here and there a case, too extraordinary to present on this occasion a claim to notice,) it must be true. The object and use of lawyers' language is twofold: partly to prevent information from being conveyed to certain descriptions of persons; partly to cause such information to be conveyed to them as shall be false, or at any rate fallacious: to secure habitual ignorance, or produce occasional misconception.[71]

For Bentham, in the "List of the devices employed under the fee-gathering system, for promoting the ends of established judicature, at the expense of the ends of justice" that the *Rationale of Judicial Evidence* described in detail, there was, with the exclusion of the parties, the remoteness of the courts, the waiting period before judgments, the praise of the judicial law, etc., the goobledegookness of fiction.[72] This monopolising of words ensured solidarity among jurists by separating them from the rest of society, reinforced their opposition to reform and made people adopt a reverential and intimidated attitude towards them.[73] This form of linguistic capture is one of the social devices that allows to consider them as a hegemonic class.

---

70. Bentham, *Book of Fallacies*, *supra* note 19 at 395.
71. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 280.
72. *Ibid* at 225-311. See also Bentham, *Nomography*, *supra* note 50 at 270.
73. Hart, *supra* note 34.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

Within that framework, fiction was used "to produce—1. on the part of the law, uncertainty, incogniscibility, matter of sham science; 2. on the part of the non-lawyer, conscious ignorance, thence consultation and advice (opinion trade) or misconception, thence misconduct, litigation, lawyer's assistance or vicarious service, with advice at every step; 3. on the part of the lawyer […] propensity to regard reform as hopeless, or undesirable; 4. For professional lawyer, monopoly of succession to judicial offices."[74]

Pierre Bourdieu's analysis of the constitution of the "juridical field" is quite close. For him,

> the institution of a 'judicial space' implies the establishment of a borderline between actors. It divides those qualified to participate in the game and those who, though they may find themselves in the middle of it, are in fact excluded by their inability to accomplish the conversion of mental space—and particularly of linguistic stance—which is presumed by entry into this social space. The establishment of properly professional competence, the technical mastery of a sophisticated body of knowledge that often runs contrary to the simple counsels of common sense, entails the disqualification of the non-specialists' sense of fairness, and the revocation of their naïve understanding of the facts, of their 'view of the case.' The difference between the vulgar vision of the person who is about to come under the jurisdiction of the court, that is to say, the client, and the professional vision of the expert witness, the judge, the lawyer, and other juridical actors, is far from accidental. Rather, it is essential to a power relation upon which two systems of presuppositions, two systems of expressive intention—two world-views—are grounded. This difference, which is the basis for excluding the non-specialist, results from the establishment of a system of injunctions through the structure of the field and of the system of principles of vision and of division which are written into its fundamental law, into its *constitution*. At the heart of this system is the assumption of a special overall attitude, visible particularly in relation to language.[75]

Here, the hegemonic system is perfect as it operates without any violence. It is even made the object of voluntary adhesion by the people. The concrete and material practices that are related to the vindication of one's "rights" are internally connected to a specific cultural artifact, and have a very specific effect on the consciousness of the litigants that is subservient to the jurists' interests. The very inclusion of the layman in this legal social practice implies his participation in the ideological system that subdues him. Adopting a Marxist perspective, Louis Althusser made clear one of the specificities of the law in this respect. According to him, social reproduction does not only depend on coercion and violence. It relies largely on ideology. This is why social reproduction is the result of the combined actions of the "Repressive State Apparatus" and a multiplicity of "Ideological State Apparatuses". The Government, the administration, the army, the police, etc., belong to the first category, whereas the religions, the school, the family, the media, etc., belong to the second. Despite their variety, all the Ideological State Apparatuses embody a similar ideology, which is that of the ruling class. They contribute to the reproduction of the conditions of

74. Bentham, *Scotch Reform*, *supra* note 26 at 13.
75. "The Force of Law", *supra* note 52 at 828-29.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

production, i.e., to the establishment, justification, inculcation, and objectivation of capitalist exploitation. One of the specificities—and maybe the uniqueness—of the law is that it belongs both to the Repressive State Apparatus, as it is instrumentally related to the official administration of violence, and to the system of Ideological State Apparatuses. But whereas Louis Althusser offers no explanation for the latter, Bentham's linguistic approach offers very powerful analytical tools.[76]

Legal terminology was so coveted because it enabled jurists to earn a considerable amount of money. As Michael Lobban puts it, "the technical system [i.e., the one criticised by Bentham] gave the key power to the clerks who drew up pleas."[77] That is why financial interest was frequently presented as the main motivation[78] for what was a sort of business of the manipulation of fictions.[79]

To Bentham, the conflict among judges to extend their jurisdiction was thus based on financial considerations, "stealing power from them, was stealing fees. Accordingly, when, towards the close of the seventeenth century, a theft in this shape had been committed, war broke out in Westminster-hall, and fictions, money-snatching lies, were the weapons."[80] More broadly, "In every instance, [judicial fiction] had and has for its purpose, pillage."[81] In the years after Bentham finished his studies, his father insisted on his becoming a lawyer. However, acting on his conscience, and before his disgust turned him away from that activity, he encouraged his potential clients to reach out-of-court settlements rather than bear the cost of trials.[82] Thus the manipulation of words is nothing fortuitous, for it represents "fruits of scientifically and diligently cultivated delay, vexation, and expense"[83] and "a perpetual conspiracy of lawyers against the people".[84]

In a way that is not unrelated to the Marxist analysis of hegemony or Bourdieu's conception of the juridical field,[85] Bentham considered that it was just as much from an institutional, material, economic, social or cultural way, as from a strictly linguistic and, *in fine* ideological way, that that group created its own solidarity. The contrast seemed quite striking compared to the situation of the legislator: "The legislator, perhaps an unletter'd soldier, perhaps a narrow-minded priest, perhaps an interrupted, unwieldy, heterogeneous, unconnected multitude: the judicature, a permanent, compact, experienced body, composed

---

76. "Ideology and Ideological State Apparatuses (Notes Towards an Investigation)", translated by Ben Brewster in *Lenin and Philosophy and Other Essays* (Monthly Review Press, 1971), online: https://www.marxists.org/reference/archive/althusser/1970/ideology.htm; Louis Althusser, *Sur la reproduction*, preface by Jacques Bidet (Paris, Presses universitaires de France, 1995).
77. Lobban, *supra* note 1 at 146.
78. Bentham, *Justice and Codification Petitions*, *supra* note 19 at 512.
79. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 203.
80. Bentham, *Justice and Codification Petitions*, *supra* note 19 at 453.
81. *Ibid* at 452.
82. Charles Warren Everett, "Introduction" in Jeremy Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England*, edited by Charles Warren Everett (Clarendon Press, 1928) at 1.
83. Jeremy Bentham, *Introductory View of the Rationale of Evidence for the Use of Non-Lawyers as Well as Lawyers* in *Works*, *supra* note 18, vol 6 at 11.
84. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 270.
85. Bourdieu, "The Force of Law", *supra* note 52.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

of connected individuals, participating in the same affections and pursuing the same views."[86]

2. The ramifications of the sinister interests

Bentham saw, however, that the empire of fiction extended far beyond the sole juridical field, and his conviction was reinforced each time his different proposals of reform failed. Especially after the failure of the Panopticon, which he attributed to King Georges III,[87] and which financially and psychologically ruined him, his denunciation of fiction became increasingly brutal. "But it is the fraternity of lawyers, who (if they have not decidedly the most to gain by the dexterous management of this or of other fallacies) have, from the greatest quantity of practice, derived the greatest degree of dexterity in the management of it."[88]

Since fiction permeated the whole public system,[89] Bentham's fight targeted the king, the ministers, the members of Parliament, the prelates, in short, all those who, since they belonged in some way to the ruling minority, acted to the detriment of the greatest happiness of the greatest number. "Thief to catch thief, fraud to combat fraud, lie to answer lie. Every criminal uses the weapon he is most practised in the use of: the bull uses his horns, the tiger his claws, the rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use picklock keys: licensed thieves use fictions."[90] His harsh words were not therefore against only a specific group, but were directed at the whole ruling system of the political society, as the greatest happiness of the greatest number seemed to ask for increasingly radical reforms. It thus targeted the contribution of the legal language itself to the hegemony of a specific political and social category that had managed to establish its own mindset as a necessary and universal one.

Conclusion

In the legal field, words have an influence and an importance unfound in other types of discourse,[91] since the manipulation of the words and of their meaning plays a decisive role in the happiness of the community. The denunciation of the abuses revealed by Bentham in his war of words against fictions first targeted the jurists and "the artificiall reason and judgment of Law" for which Lord Coke praised them.[92] However, it must be extended, since fiction appeared to be the multi-purpose instrument of the sinister interests: "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system

86. Jeremy Bentham, *Of the Limits of the Penal Branch of Jurisprudence*, edited by Philip Schofield (Oxford University Press, 2010) at 227-28 [*Of the Limits*].
87. On the history of this project, see Janet Semple, *Bentham's Prison: A Study of the Panopticon Penitentiary* (Clarendon Press, 1993).
88. Bentham, *Book of Fallacies*, *supra* note 18 at 434.
89. See, e.g., Bentham, *Constitutional Code*, *supra* note 18 at 77-78.
90. Bentham, *Rationale of Judicial Evidence*, *supra* note 22 at 285-86.
91. Bentham, *Rights, Representation, and Reform*, *supra* note 7 at 321-22.
92. *Prohibition Del Roy*, [1607] EWHC KB J23 at 1343.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

the principle of rottenness."[93] One may reproach Bentham for simultaneously taking together and contesting two sorts of fictions, and for using "fiction" as a generic but far from exact word. The first sort would supposedly belong to important ideological constructions that would contribute to support a whole system of government.

The second would operate at a reduced level, within the frame of the daily operations of that system. For him, however, the law of nature, natural rights, social contract and fictions of the juridical technique all went against a rational orientation of action, by distorting, in each man, the operation of intelligence that he assimilated to the working of the principle of utility. Most important, they all participated in the reinforcing of the power of only one group. To denounce that fallacious undertaking, it was necessary to pay attention to language, deconstruct its mechanism, to reveal it so that everybody could then be able to spontaneously decode discourses. That is the reason why Bentham's linguistic project immediately led to a complete educational programme. The latter was realised in his *Chrestomatia*,[94] where he gave the detail of the subjects that young people should be taught in a society that intends to realise the greatest happiness of the greatest number. Mystification would then no longer be appealing to the sinister interests, since it would no longer be efficient, but immediately transparent.

Nevertheless, one can wonder whether the alternative tools Bentham offered to fight sinister interests were not fundamentally misconceived. From this point of view, the major limit to Bentham's analysis, and its major difference—if not defect—when compared with the Marxist one, depends on his conceiving of legal hegemony as the offspring of a form of plot. Because of his atomism and nominalism, he fails to imagine the possibility of an even more naturalised version of this form of hegemony, by which the legal language's own necessity could impose practical and intellectual constraints upon the actors themselves. In a Marxist perspective, so to say, the legal structure itself acts—not the actors embedded within it. As this legal structure is progressively constructed as an autonomous sphere, the lawyers are not only inculcating their own preferred viewpoint in the subject many. As the structure operates as a linguistic device, it is as though the law *qua* artificial creation had a life of its own, which could not be controlled by its creators themselves.

From this viewpoint, Marxism may offer more powerful and more fruitful analytical hypotheses than Benthamism, because it offers a possibility to go beyond the topic of mere wilful mystification, and to realise to what extent the device itself is allowed to establish its own autonomy, and works precisely this way. Here, a parallel could be suggested with Marx's theory of fetichism, where he explains how human artifacts tend to appear, even with respect to their very social

93. Jeremy Bentham, *The Elements of the Art of Packing* in *Works*, *supra* note 18, vol 5 at 92. See also Jeremy Bentham, *A Comment on the Commentaries*, in *Collected Works*, *supra* note 3 at 269; Bentham, *Constitutional Code*, *supra* note 18 at 59.

94. Jeremy Bentham, *Chrestomathia*, edited by Martin John Smith & Wydham Hedley Burston (Clarendon Press, 1983).

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

properties, as objective realities to their own authors.[95] To say the truth, it appears as though the legal machinery was going of itself, and was totally indifferent to the specific acts of concrete individuals. It then seems impossible for legal reality not to appear as it appears, which leads to the suggestion that Bentham's very project is doomed to fail. As a consequence, one could very well wonder whether Bentham was not himself a victim of the hegemony he depicted and criticised, as he appeared incapable of reaching outside his panlegalism. As Valerie Kerruish once put it, "Jurisprudence is stuck in the dogma of law's innocence."[96]

It is not by chance that Bentham never seemed to escape from the legal mindset he had elucidated as the specific form of political domination of his time. Indeed, what Bentham provided the reader and the reformer with was nothing else but legal concepts. Even if they appeared more precise and more consistent than those English legal thought offered at his time, one can call into question the very possibility for his "critical jurisprudence"[97] to overcome a hegemony that was precisely tied to legal language.[98] "Legibility"[99] refers to the way one imagines the rationalisation, standardisation, modelisation of the social magma, with the aim of reading it but also of remaking it, reforming it, and manipulating it. In his reformatory projects, Bentham exclusively relied on the "legibility" of any social intercourse in terms of purely legal relationships. This may explain why he remained faithful to a specific standpoint which allowed for no escape from the legal vernacular and conceptual universe. For example, "direct legislation" being conceptualized within this framework seemed quite natural. But Bentham additionally considered all the other means to achieve the greatest happiness of the greatest number through a legal lens. Most of them were significantly studied under the rubric of "indirect legislation". Private ethics and education were all conceived of in legal terms as varying forms of the art of government.[100] Ethics included both private ethics and politics.[101]

In his manuscripts on *Indirect Legislation*, Bentham considered the possibility of establishing "codes of morality" to increase the impact of the moral

---

95. Marx, *The Capital*, *supra* note 5, s 4. For a clear explanation, see especially Jacques Michel, *Marx et la société juridique*, *supra* note 13 at 158-207; Etienne Balibar, *La philosophie de Marx*, 3rd ed (Paris: La découverte, 2010) at 41-75.

96. Valerie Kerruish, *Jurisprudence as Ideology* (Routledge, 1991) at 22.

97. See, e.g., Douglas Long, "Political and Philosophical Radicalism: The Place of the Utility Principle in Jeremy Bentham's Early Writings on Critical Jurisprudence" (2008) Kadish Center for Morality, Law, and Public Affairs, University of California, Berkeley, available online at: http://www.escholarship.org/uc/item/3q11q6vr; Douglas Long, "Jurisprudence and the Art of Government: Justice and Public Utility in Jeremy Bentham's *Elements of Critical Jurisprudence*" (2008), online: http://www.cpsa-acsp.ca/papers-2008/Long.pdf.

98. See Guillaume Tusseau, "An Old English Tale? Bentham's Theory of The Force of a Law" in Guillaume Tusseau, ed, *The Legal Philosophy and Influence of Jeremy Bentham: Essays on* 'Of the Limits of the Penal Branch of Jurisprudence' (Routledge, 2016) at 80-133.

99. For an explanation of this concept, see especially James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998).

100. See, e.g., Bentham, *Introduction to the Principles*, *supra* note 61 at 283, reproduced in Bentham, *Of the Limits*, *supra* note 86 at 5; Jeremy Bentham, *Principes du code pénal* in Jeremy Bentham, *Traités de législation civile et pénale* (1802), edited by Etienne Dumont, preface by Malik Bozzo-Rey, Anne Brunon-Ernst & Emmanuelle de Champs (Paris: Dalloz, 2010) at 33-405.

101. Bentham, *Chrestomatia*, *supra* note 94 at 204.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

sanction. In the field of constitutional law, the aim of which is finally to "codify democracy,"[102] Oren Ben-Dor noticed that "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."[103]

In this respect, Bentham's main failure may be to focus on only one of the two concepts of ideology identified by Karl Mannheim, and to disregard the other. According to Mannheim, the term "ideology" can be understood in two related, but nevertheless different ways, which he respectively deems "particular" and "total":

> The particular conception of ideology is implied when the term denotes that we are sceptical of the ideas and representations advanced by our opponent. They are regarded as more or less conscious disguises of the real nature of a situation, the true recognition of which would not be in accord with his interests. These distortions range all the way from conscious lies to half-conscious and unwitting disguises; from calculated attempts to dupe others to self-deception. This conception['s] […] particularity becomes evident when it is contrasted with the more inclusive total conception of ideology. Here we refer to the ideology of an age or of a concrete historico-social group, e.g., of a class, when we are concerned with the characteristics and composition of the total structure of the mind of this epoch or of this group.[104]

Both these conceptions insist on understanding what is said, thought or done by observing the social conditions of the individual or the group to which they belong. But they nevertheless differ in several respects. Their main difference rests on the fact that the particular conception of ideology focuses on only part of the opponent's thought or behaviour, whereas the total conception addresses more broadly the opponent's total *Weltanschauung*. Consequently, starting with the particular conception of ideology leads one to develop a kind of psychology of interests that tries to elucidate the reasons why an opponent is lying or concealing the truth. On the contrary, when understanding ideology in the total sense, "We touch upon the theoretical or noological level whenever we consider not merely the content but also the form, and even the conceptual framework of a mode of thought as a function of the life situation, of a thinker."[105] In the latter case, the insistence on individual's motivation, which is at the heart of

---

102. Paola Rudan, *L'inventore della costituzione : Jeremy Bentham e il governo della società* (Bologna: Società editrice il Mulino, 2013) at 167-243. See also Paola Rudan, "Society as a Code: Bentham and the Fabric of Order" (2016) 42 History of European Ideas 39.

103. Oren Ben-Dor, *Constitutional Limits and the Public Sphere: A Critical Study of Bentham's Constitutionalism* (Portland: Hart, 2000) at 159.

104. *Ideology and Utopia: An Introduction to the Sociology of Knowledge*, preface by Louis Wirth (Harcourt, Brace and Company, 1952) at 49-50.

105. *Ibid* at 51.

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press

Bentham's understanding of human action, is beside the point: "The former [i.e., the particular conception] assumes that this or that interest is the cause of a given lie or deception. The latter presupposes simply that there is a correspondence between a given social situation and a given perspective, point of view, or apperception mass."[106]

According to Mannheim, although the general *Weltanschauung* depends on the activities and thoughts of the individuals who participate in specific parts of this global mental system, it cannot be reduced to a mere aggregation of their respective experiences. Bentham's critique of fictions clearly evidences that he operates with the first concept of ideology. But despite the richness of his understanding of how legal language leads to the establishment of a self-contained sinister culture, he falls short of seeing it in a way that would be closer to Mannheim's total conception or ideology. This may explain why he was not able to perceive reflexively and critically his own embeddedness in the legal framework he denounced. In the end, one may wonder whether Bentham's criticism escapes Bentham's criticism itself, and whether, like the one Marx proposed, a critique of the critique[107] should not be offered.

106. *Ibid.*

107. See especially Emmanuel Renault, *Marx et l'idée de critique*, 1st ed (Paris: Presses universitaires de France, 1995).

https://doi.org/10.1017/cjlj.2019.8 Published online by Cambridge University Press