

Jeremy Bentham and the Law¹

1748-1832

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Here was an extraordinary human being, one of the most remarkable men of his long day, a great and original thinker far in advance of the accepted ideas of his time but born, if we can see any pattern or purpose in the unfolding of society, to face it with its sins of complacent inertia, its age-old harshness, cynicism and cruelty, and by sheer force of intellect and fearless attack to bend it in the reluctant direction of reforms so essential that one wonders what kind of a nightmare age ours would be had he not lived. He has been described as "a man of primitive manners, unblemished character, and undoubted earnestness in the cause of the people at large" for whom indeed before him there were few to speak and fewer still to challenge an entire social regime. The manners and customs, the thoughtless cruelty, the changeless content of the ruling hierarchy with things as they were, the brutality and musty antiquity of legal procedure and legal concepts, all these and more roused him to attack most of the accepted ideas and practices of his time.

England, like France in the quarter century before the revolution when reforming spirits sought reforms rather than revolution, was ready, given leadership, to stir from her long lethargy. Absolute power had corrupted the thinking of those in authority

¹ Jeremy Bentham and the Law: A Symposium. Edited by George W. Keeton and Georg Schwarzenberger on behalf of the Faculty of Laws, University College, London. London: Stevens and Sons Limited. Toronto: The Carswell Company, Limited. 1948. Pp. viii, 266. (\$6.00). Thirteen essays: Was Bentham a Lawyer? by H. F. Jolowicz; Bentham and English Penal Reform, by Margery Fry; Bentham and the Poor Law, by M. I. Zagday; Bentham on Civil Procedure, by M. I. Zagday; Bentham's Influence on the Law of Evidence, by G. W. Keeton and O. R. Marshall; The Restless Spirit of English Law, by R. H. Graveson; Bentham and Parliamentary Reform, by R. C. FitzGerald; Bentham's Contribution to International Law and Organization, by G. Schwarzenberger; Bentham in the United States of America, by C. W. Everett; Bentham, Foreign Law and Foreign Lawyers, by K. Lipstein; Bentham and the Indian Codes, by S. G. Vesey-FitzGerald; Bentham and Modern Legal Thought, by W. Friedmann; The Principle of Utility, by A. J. Ayer.

and blunted the quality of justice. The forensic eloquence of Lord Erskine in defence of the weak against the strong, the perilous doctrines of Tom Paine preaching the equality of men, were symptoms of smouldering unrest. Bentham's central crusade, that of a moral political economist, to which he gave his life and fortune, was that all human endeavour should promote the greatest happiness of the greatest number — should be weighed in the balance of good or ill according to its utility in terms of happiness for humanity. In France the reformers were not listened to in high quarters and the Revolution was the inevitable cleanser. In England, Hume and Burke and Lord Mansfield, Lord Brougham, Macaulay and Romilly, adopting as they could the ideas of Bentham, worked for reforms, and thus eased the highly explosive social and political tensions of the time — an evolution.

The law occupied a large part of the field of Bentham's philosophy. No greater tribute, no more balanced picture of the man as philosopher and humanitarian, no more satisfying account of his influence on the salutary development of the law can be needed than are found in this excellent book. To read and digest it must be for every lawyer an education if he would appreciate the vast organic changes that during the last century and a half have moulded our existing law and its administration. Nor is it too much to urge that every law student, for the good of his soul and that he may truly sense the dignity and the value of his rôle as lawyer, should be required to make it part of himself. John Stuart Mill said of Bentham that he

found the philosophy of law a chaos, he left it a science; he found the practice of the law an Augean stable, he turned the river into it which is mining and sweeping away mound after mound of its rubbish.

And Sir Henry Maine was equally emphatic:

I do not know a single law reform effected since Bentham's day which cannot be traced to his influence.

But how account for the prodigious Bentham? What was his background? Whence his reforming Ishmaelite zeal, so unique, sudden and isolated in his eighteenth and early nineteenth century England? An English reviewer of *Yankee from Olympus* asked the same question about Mr. Justice Holmes — why his radicalism, his vivid dissents in favour of trade unions and liberal trends of thought, seeing his origins in Tory Boston and staid New England? — though one must not forget that his father, the genial Doctor, was a bitter critic and reformer of medical practice as he found it, and a leader in new ideas and more

scientific methods. There is perhaps no ready answer, other than that they came that way, as did Burns or Shakespeare or Jeremiah, and were true to themselves and other could not do. Bentham came endowed with an unusual intellect tempered to challenge and to smite — original, precocious, and unpredictable. It may have been no reflection on the standards of the University of Oxford that, going up from Westminster School in his thirteenth year, he took his bachelor's degree at the age of fifteen and his master's degree at eighteen — though Goldwin Smith in his *Oxford and her Colleges* says that:

the University as a teaching and examination body had [in the eighteenth century] fallen into a dead swoon; and that Lord Eldon's examination for his degree comprised two questions only; 'What is the meaning of Golgotha?', and 'Who founded University College?'

Bentham was born in London of well-to-do parents, and his father, who had contacts with influential people in the law, urged him to prepare for the profession. In the year in which he took his bachelor's degree (1763) he became a student at Lincoln's Inn, but soon returned to Oxford where he attended Blackstone's lectures. He took no notes —

my thoughts were occupied in reflecting on what I heard. I immediately detected his fallacy concerning natural rights; I thought his notions very frivolous and illogical about the gravitating downwards of *haereditas*; and his reasons altogether futile, why it must *descend* and could not *ascend*, etc.

He found Blackstone full of an easy optimism that disgusted him — he did not agree that all (law) was for the best in the best of all possible (legal) worlds. Yet it was Blackstone's lectures that set him thinking along ways of reform. Blackstone, he says, "was succeeded by Dr. Beavor, who read lectures on Roman law which were laughed at, and failed to draw such audiences as Blackstone drew"; and in later life his contempt for "Rome-bred" law equalled that for even the English system. As a schoolboy, translating at his father's request Cicero's *Tusculan Disputations*, he concluded that the book "like most of the other philosophical writings of that great master of language, is nothing but a heap of nonsense". He could see nothing but dead wood and imitative stupidity in accepted dogmatisms —

This boy's mind [says Dr. Jolowicz] was already so tough and so impervious to authority that he could not help criticizing the moment he first really began to hear about law. Authority meant nothing to him then, and it never meant anything to him for the rest of his life.

His life and work prove that this youthful attitude was not priggishness. It was intensely clear-sighted and independent

thinking out loud. He felt that Blackstone and Beavor were not advancing and improving the science and overcoming many age-old, outworn and often oppressive principles, but were merely systematizing and explaining them so that, changeless and infallible, they might be perennially accepted.

Then there was the other more urbane side of his contradictory make-up. He was a fine classicist, ready with a quotation or allusion to point an argument, though never mistaking the tag for the argument. He was very fond of music, caring little for the other arts. His conversation and letters were "sprightly, colloquial and full of interest in his surroundings". From 1781 onwards he was frequently a guest at great country houses, where he met distinguished and interesting people, enjoying the life and gaiety though bored with having to change his clothes twice a day (but not otherwise "tired of all this buttoning and buttoning" of his ordinary days), and a favourite with the ladies. And lest anyone miss the import of the reference to his "primitive manners", be it remembered that Izaak Walton quotes Sir Henry Wotton's description of the "primitive temper" of Archbishop Whitgift as "such a temper, as when the Church, by lowliness of spirit did flourish in highest examples of virtue". His financial independence and his genius for friendship grounded the *élan* with which he lived and worked. He could storm at old abuses and offend and again win over those in authority, but he could not be starved into silence and obscurity.

It is remarkable that though not a precise student of law and instinctively avoiding its logical and subtle refinements, he should have understood so well its need for reform. "He had indeed neither the typical virtues nor the typical vices of a lawyer, but he had amazing horse-sense for a philosopher", says Dr. Jolowicz, and that horse-sense, mixed often with a visionary's errors of judgment, marked all of his work. He confessed his gross ignorance of the law, and never practised. "I was set", he said, "to read old trash of the seventeenth century, and I looked up to the huge mountain of law in despair. I can now look down on it from the heights of utility." Yet Brougham and Romilly, his friends, recognized his weight with "even sound practical lawyers of the better school". His consistent repudiation of all authority was his strength for sustained combat, but it was also his weakness — for it led him into serious error of detail, a thing that troubled him little if his general purpose stood clear.

Lawyers he constantly pilloried for their self-seeking and

corruption, their regard for law as a means merely of making money, their flight before every problem to some authority despite the human and social issues behind it — a case should not be decided upon a fixed rule universally absolute, but according to what will be most beneficial or give the best results in the circumstances — the utility of the decision. Yet he was the lifelong advocate of codification, not because codes were wholly advisable but rather because they would be a lesser evil and should contain a simple statement of the law which every man could read for himself. Grand juries he held were “purely mischievous” — and England has recently abandoned them. Constitutional theory was not nearly so important as the due observance of the Standing Orders of the House of Commons, “the original seed-bed of English liberty”, as he said, without which there would be no legislation and no Constitution — and he first saw and proclaimed this essential truth. He ridiculed the old equity procedure, with substantial accuracy, as Sir William Holdsworth acknowledges, and with such effect as to lead to great reforms. The distinction between subjective and objective right he first analyzed in England to the advantage of later writers who have elaborated it. He was the arm-chair philosopher-lawyer *par excellence* who saw through forms to the essence.

There was his struggle for penal reform, by which he is perhaps most generally remembered. With but a slight knowledge of psychology, with little or no contact with the masses or with criminals, he could by self-knowledge and a projection of his imagination look at the penal laws from their level and sense their abysmal helplessness. The penal law was intensely cruel, and Bentham hated with convulsive hatred the system that made that cruelty possible and perpetuated it. He was almost alone, for there was no general public protest. We hear nothing of it from the great Dr. Samuel Johnson who loved justice; nor from Charles Lamb, the whimsical and kind-hearted. The system suited, or did not shock, the mentality of the time. But a young Italian nobleman, Beccaria, had in 1764 published his *Dei Delitti e delle Pene*. He too claimed that laws should be based on public utility, the benefit to society in the greatest happiness of the many, not as previously, on the passions of the few. Prompt and certain justice, the measure of criminality the measure of the injury to society, leaving to God to deal with offences toward religion, the right of a prisoner to time and opportunity to prepare his defence, the futility of forcing him to take an oath since “no oath has ever yet made any criminal speak the truth”.

Here was grist and stimulus for Bentham's mill, and upon it he elaborated a whole theory of legislation. As to crimes and their punishment he insisted that the punishment fit the criminal as well as the crime — to accomplish which the intention of the delinquent, his motive, his life and character (and recidivist tendency), the circumstances which gave the opportunity for his offence, should be weighed. He would thus analyze evil. The prisoner should be rehabilitated and given useful work to do, encouraged to read and listen to music, be fed and clothed decently and helped to re-orient his life. The death penalty should be abolished for all offences. How very modern, all this! The death penalty — the almost universally accepted sanction for over two hundred "crimes":

Whence originated, Bentham asks, the prodigal fury with which the punishment of death has been inflicted? It is the effect of resentment which at first inclines to the greatest rigour; and of an imbecility of soul, which finds in the rapid destruction of convicts the great advantage of having no further occasion to concern one's self about them.

And in spite, perhaps because, of the law's severity, crime was rampant. In an eloquent passage, Margery Fry paints this thumb-nail sketch:

Highwaymen infested the roads, foot-pads the streets and squares of London. More than half the hackney-coachmen were flashmen, or accomplices of thieves — thousands of coiners were employed in the manufacture of false money. . . . And all the time the manufacture of criminals went busily on.

Children were enticed to steal before they knew it was a crime. Samuel Rogers, born fifteen years later than Bentham, reported seeing 'a cartload of young girls, in dresses of various colours, on their way to be executed at Tyburn'; between 1787 and 1797 ninety-three children were transported to Australia, but most of the budding criminals went to complete their apprenticeship in gaol, where urchins of five could be found sentenced for the most trivial 'crimes'.

Good government, Bentham stormed, could not exist and certainly was not suggested while such things could be. The greater (though not the optimum) humanity, good sense and urge to reform that have marked the treatment of the criminal in the last century, owe an everlasting debt to the little man of "primitive manners" and flaming apostleship who, as Margery Fry adds:

. . . applied the touchstone of the 'greatest happiness' principle to the matter and the administration of English law, and found them wanting; instead of happiness they produced misery, instead of justice, ruin.

It is difficult indeed here to do more than suggest the scope of Bentham's all-embracing plans and suggestions for reform. Central to his conception was the wiping out of the inconsistencies of accumulated statutes, the vagaries of the judge-made common law, the surprises lurking in forgotten but not abrogated "sleeping" laws, to be replaced by a complete codification of the whole law in root and branch. There he failed, though some parts of English law have in more recent years been codified. But the very active trend toward codification in the United States, early in the last century, owed much to his influence. Transportation of delinquents he abhorred next to the death penalty — the burden of that crime against humanity intolerable for him. His protests, Margery Fry feels, influenced the ending of deportation to New South Wales — when, gentle reader? — only in 1840, while English men and women went smugly to church and chapel and supported the Society for Promoting Christian Knowledge — in the colonies:

The first convoy of eleven ships conveying convicts to Australia sailed in May 1787, when Bentham was about twenty years old. With officers, marines, their wives and children, with 742 convicts, male and female, it set sail on 'a nine months' journey to a destination six months away from the nearest source of food'. Clothing for the 190 women had been forgotten; so too, had medical stores. Almost naked, hungry, sick, without shelter and without hope, life seemed to lose all value for the wretched prisoners. 'If the natives shot at them with arrows, they simply sat still, hoping to be killed'.

The second fleet sailed with some thousand more convicts; 261 died on board and fifty more shortly after landing. The men were confined on board by old slave irons and when a man died in his fetters the convicts concealed the corpse in order to draw his rations.

In 1799 out of 300 convicts on one ship, 101 died on the voyage.

As for fiendish misery, the Irish emigrants who sailed to Canada in the 1840's and died in droves from ship fever on the voyage and upon landing suffered, they too, from man's almost incredible inhumanity to man — a "creature most dear unto God", and only a "little lower than the angels". The mental climate had little changed. And Wordsworth was crooning in the Lake Country, and Coleridge and De Quincey swooning upon their opium — oblivious while some of these things were going on; and Carlyle had not our long perspective to stir his grumbling thunder and to suggest to him that Bentham, too, was called forth by and to serve his and the coming age and all the length of days.

And one could go on and on, thumbing through the pages and chapters of this most captivating book. But why do so?

Every side of Bentham's thought and continuing influence for good are mirrored in the titles of the various essays. An attempt has been made only to suggest their worth and their provocative interest, their enduring picture of one of the great benefactors of our modern civilization which has been described as but a thin veneer over our original savagery — in some ways not so remote, either; their implicit warning to us to maintain the authority of rational disciplines and laws by reasonable and humane reform in step with, even in advance of, the perils and dangers of the social ferment that engrosses us, with an eye to the often wholesale and flagrant defiance of law. If the law is respected it is more likely to be observed. For laws are like a thin veil through which human needs can break with catastrophic force. The law was made for man, not man for the law.

The Commonwealth of Letters

There is no reason why legal arguments or judicial judgments should not be expressed in good English. There is every reason why they should. The advocate who can impart a literary flavour to his address adds to its persuasiveness and attraction. 'Nor pleads he worse who with a decent sprig of bay adorns his legal waste of wig.' Exotic flowers of oratory are not suitable adornments for our modern law courts but the Temple has never disdained to deck its plots with the classic blossoms of the English flower garden. It is of even more importance that those who sit in judgment should have a mastery not only of law but of letters so that they may be able to use with ease and freedom — and I should like to add, with distinction — the vehicle of language in which their decisions must be conveyed. The craftsman comes to take a joy in his sheer craftsmanship. I venture to think that there are few higher intellectual pleasures than success in the task of expressing an argument or a conclusion in just precisely the right language, so that the thought is caught and poised exactly as we would have it. Clear thinking always means clear writing and clear writing is always good writing. (Lord Macmillan: Law and Letters. American Bar Association Journal, October 1930)