

# Positivist Jurisprudents Confronted: Jeremy Bentham and John Austin on the Concept of a Legal Power<sup>1</sup>

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*Bien que moins influente que celle de son disciple John Austin, la théorie juridique de Jeremy Bentham s'avère plus fructueuse. Tous deux se rattachent au positivisme juridique. L'un et l'autre distinguent radicalement le droit tel qu'il est du droit tel qu'il devrait être. Selon ces auteurs, la règle de droit est avant tout une prescription qui impose des conduites au moyen de sanctions. Comment rendre compte, dans ce cadre, des éléments des discours juridiques qui, loin d'imposer des obligations, semblent conférer des pouvoirs ? Bentham est le seul en mesure de soulever cette problématique, qui est l'une des plus débattues de la théorie juridique contemporaine. C'est donc sur le plan conceptuel que son positivisme s'avère préférable à celui de Austin. En effet, il présente, à un niveau métalinguistique, une véritable théorie des différents types de discours juridiques. Ensuite, il pratique lui-même de manière rigoureuse ces différents discours. C'est ainsi qu'il peut susciter des questionnements nouveaux, permettant d'approfondir la réflexion juridique et de la faire progresser.*

## Introduction

No one would refuse to characterize Bentham and Austin as “legal positivists”. But the price of this unanimity may be the very vagueness of this term, and its correlative poor informative quality. As it is well known, “positivism” has several meanings, which need to be clarified. Two authors are worth mentioning in this respect.

First, Hart has elucidated five major meanings of the word “positivism”:

(1a) Laws are commands of human beings;

(2a) There is no necessary connection between law and morals or law as it is and law as it ought to be;

(3a) The analysis of legal concepts is worth pursuing and is to be distinguished from historical enquiries, from sociological inquiries, and from the criticism or appraisal of law;

(4a) A legal system is a closed legal system in which correct legal decisions can be deduced by logical means from predetermined legal rules;

(5a) Moral judgements cannot be established or defended, as statements of fact can, by rational argument, evidence or proof<sup>2</sup>.

Hart points out that Bentham holds the first three views, i.e. (1a), (2a), and (3a). One can also say that Austin agrees with Bentham in this respect.

Secondly, Bobbio has distinguished three independent meanings of positivism:

(1b) An approach to the study of law, i.e. the will to build a science of law;

(2b) A theory of law, i.e. a set of assertions with which to understand and describe a set of phenomena linked to the emergence of the modern state;

(3b) An ideology according to which the law must, *qua* law, be obeyed<sup>3</sup>.

It is well known both that Bentham and Austin do not hold the third view, and that they adopt a positivist theory of law in the sense of law as a set of commands. They also delineate a positivist approach to law, first of all by their distinction between law as it is and law as it ought

<sup>1</sup> This text is part of a revised version of a paper presented at the Congress of the International Society for Utilitarian Studies, in Lisbon, 11-13 April 2003.

<sup>2</sup> H.L.A. Hart, « Positivism and the Separation of Law and Morals », in Id., *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983, pp. 57-58 n. 25.

<sup>3</sup> N. Bobbio « Sur le positivisme juridique », in Id., *Essais de théorie du droit*, pref. R. Guastini, Fr. trans. M. Guéret, C. Agostini, Paris, L.G.D.J. - Bruylant, coll. « La pensée juridique », 1998, pp. 23-38.

to be, and next by their reflection on the various legal disciplines.

In this and another, forthcoming, paper, I will try to elucidate the various meanings in which Bentham and Austin can be said to be positivists. Though each aspect will not be equally examined, I will lay the emphasis on positivism as a theory of law i.e. (1a) and (2b). But the pervading objective of my paper will most of all be to highlight some important aspects of Bentham's and Austin's approaches to the legal phenomena i.e. (3a) and (1b). This will allow to substantiate the widely held view according to which Bentham's work is superior to Austin. My aim is to underline some of the differences between their two positivisms, so as to be able to understand why Bentham's reflection can be said to be more fruitful and what makes his writings astonishingly relevant for modern legal theory.

My approach of Bentham and Austin starts from one of the most debated concepts of modern legal theory, that of "legal powers", or "competence norms", or "power-conferring rules", or "empowering norms", or "rules on the production of rules". This problematic requires much effort from the lawyers' imagination<sup>4</sup>. For example, it compels legal theory to resort to complex concepts, such as dispositional properties<sup>5</sup>, to complex developments in the logic of norms<sup>6</sup>, or to very sophisticated aspects of the theory of speech acts<sup>7</sup>. In France, one of the first contributions to this debate relied on Husserl's phenomenology<sup>8</sup>.

Despite the tools resorted to, the debate is far from coming to an end that would satisfy everyone. But the plain fact remains that legal theory, and lawyers in their current activities, are in need of a concept of legal power. What is at stake here is no less than one of the very "fundamental legal conceptions", to borrow from Hohfeld's terminology. One of the major Bentham Scholars, Hart, notes that "Bentham alone among analytical jurists has attempted a detailed analysis of this notion [power]<sup>9</sup>." Thus it may be of interest for the current debate to see what Bentham has said on this topic, and to assess whether useful insights are to be found in his writings. But first, and such is the aim of this paper, one has to explain how come that Bentham, and not Austin, had interesting things to say on this topic, in spite of being two "positivists" belonging to the same tradition of *analytical jurisprudence*.

At this point, I would like to introduce a remark regarding my methodology and the claims of my paper. One can distinguish between two main approaches to a given author. First, one can try to discover what the author actually wanted to say. Secondly, one can try to reconstruct the thought of an author in a systematic form. I readily embrace here the second, reconstructive, conception. By the way, I want to make clear that criticizing my paper for lack of any historical consciousness is perfectly well grounded. But it will miss the point. My point of

<sup>4</sup> See generally T. Spaak, *The Concept of Legal Competence. An Essay in Conceptual Analysis*, Engl. trans. R. Carroll, Aldershot, Dartmouth, 1994; J. Ferrer Beltrán, *Las normas de competencia. Un aspecto de la dinámica jurídica*, pról. R. Guastini, Madrid, Centro de estudios políticos y constitucionales – Boletín oficial del Estado, col. « El Derecho y la Justicia », 2000; G. Tusseau, *Les normes d'habilitation*, préf. M. Troper, Paris, Dalloz, coll. « Nouvelle bibliothèque de thèses », Vol. 60, 2006.

<sup>5</sup> J. Ferrer Beltrán, *op. cit.*

<sup>6</sup> S.O. Hansson, « Legal Relations and Potestative Rules », in *A.R.S.P.*, Vol. 82, 1996, pp. 266-274; L. Lindahl, *Position and change. A Study in Law and logic*, Engl. trans. P. Needham, Dordrecht, Boston, D. Reidel Publishing Company, coll. « Synthese Library », Vol. 112, 1977; R.A. Guibourg, « Formalization of Competence », in E. Garzón Valdés, W. Krawietz, G.H. Von Wright, R. Zimmerling (ed.), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*, Berlin, Duncker & Humblot, 1997, pp. 455-473; K. Świrydowicz, *Analiza Logiczna pojęcia kompetencji normodawczej*, Warszawa, Poznań, Państwowe Wydawnictwo Naukowe, Polska Akademia Nauk, Oddział w Poznaniu, Seria « Metodologia Nauk », t. 15, 1981; I. Pörn, *The Logic of Power*, Oxford, Blackwell, 1970.

<sup>7</sup> D.W.P. Ruiters, *Institutional Legal Facts. Legal Powers and their Effects*, Dordrecht, Boston, London, Kluwer Academic Publishers, coll. « Law and Philosophy Library », Vol. 18, 1993.

<sup>8</sup> P. Amselek, *Méthode phénoménologique et théorie du droit*, préf. C. Eisenmann, Paris, L.G.D.J., coll. « Bibliothèque de philosophie du droit », Vol. 2, 1964.

<sup>9</sup> H.L.A. Hart, « Bentham on Legal Powers », in B. Parekh (ed.), *Jeremy Bentham – Critical Assessments*, Vol. 3, *Law and Politics*, London and New York, Routledge, 1993, p. 119.

view here will be a kind of dogmatics of Bentham's writings, aiming at highlighting in his reflections what is of use for contemporary legal theory. Evidently, this is not to dismiss historical studies about Bentham. I regard my choice, most of all, as the acknowledgement of the limits in which I find myself intellectually competent to speak about Bentham. I want to present a few elements in order to prove Bentham's relevance for some aspects of a specific problematic of contemporary legal theory. I also intend this paper as a contribution to underline the usefulness of Bentham's legal theory not only from a historical point of view, but also from a strictly conceptual and juristic one.

I will first elaborate on the basic idea that Bentham is a leading figure of universal jurisprudence, and focus on some basic elements of his legal theory. This will lead to stress different aspects of Bentham's and Austin's positivisms, and to examine the causes and the fundamental aspects of their approaches to the concept of a legal power

### **A. A Few Truisms About Bentham's Legal Theory**

One has to be conscious of a distinction between two linguistic levels. The level of Bentham's own legal theory is not to be confused with his theory of various types of legal discourses, and especially with his program regarding how to construct a legal theory. The second discourse takes the first for its object. I will firstly and briefly try to elucidate Bentham's theory of jurisprudence. This will allow to assess his concept of a law, i.e. an element of his theory of law, i.e. what a theory of universal jurisprudence bears upon.

#### *1. Bentham's Theory of Jurisprudence*

I will successively examine Bentham's definition of universal expository jurisprudence and one of the main topics it has to deal with, namely the problem of the individuation of laws.

##### *a. The Definition of Universal Expository Jurisprudence*

Bentham's being the father of universal jurisprudence is quite a commonplace<sup>10</sup>. From this point of view, Austin's thought is clearly derivative and considerably less developed. Bentham's reflections on this subject follow from very practical reflections. His elaboration of a concept of jurisprudence and his distinctions of various sorts and branches of jurisprudence derive from the elaboration of the project of a penal code, and from his will to delimit the respective fields of civil law and penal law. According to him,

A book of jurisprudence can have but one or the other of two objects: 1. to ascertain what the law is: 2. to ascertain what it ought to be. In the former case it may be styled a book of expository jurisprudence; in the latter, a book of censorial jurisprudence: or, in other words, a book on the art of legislation. [...] A book of expository jurisprudence is either authoritative or unauthoritative. It is styled authoritative, when it is composed by him who, by representing the state of the law to be so and so, causeth it so to be; that is, of the legislator himself: unauthoritative, when it is the work of any other person at large. [...] in point of extent, what is delivered concerning the laws in question, may have reference either to the laws of such or such a nation or nations in particular, or to the laws of all nations whatsoever: in the first case, the book may be said to relate to local, in the other, to universal jurisprudence. [...] Now of the infinite variety of nations there are upon the earth, there are no two which agree exactly in their laws: certainly not in the whole; perhaps not even in any single article; and let them agree to-day, they would disagree to-morrow. This is evident enough with regard to the substance of the laws: and it would be still more extraordinary if they agreed in point of form; that is, if they were conceived in

<sup>10</sup> G. Tusseau, *Jeremy Bentham et le droit constitutionnel. Une approche de l'utilitarisme juridique*, Paris, L'Harmattan, coll. « Logiques juridiques », 2001; W. Twining, *Globalisation and Legal Theory*, London, Edinburgh, Dublin, Butterworths, 2000.

precisely the same strings of words. What is more, as the languages of nations are commonly different, as well as their laws, it is seldom that, strictly speaking, they have so much as a single word in common. However, among the words that are appropriated to the subject of law, there are some that in all languages are pretty exactly correspondent to one another: which comes to the same thing nearly as if they were the same. Of this stamp, for example, are those which correspond to the words power, right, obligation, liberty, and many others. [...] It follows, that if there are any books which can, properly speaking, be styled books of universal jurisprudence, they must be looked for within very narrow limits. Among such as are expository, there can be none that are authoritative: nor even, as far as the substance of the laws is concerned, any that are unauthoritative. To be susceptible of an universal application, all that a book of the expository kind can have to treat of, is the import of words: to be, strictly speaking, universal, it must confine itself to terminology<sup>11</sup>.

In Bentham's vocabulary, « jurisprudence » appears as shorthand for any type of legal discourse. He includes under it both the language of the legislator himself, the language of the science of law, the language of legal politics, and the language of legal theory. In spite of the distinctions he subsequently draws, such a linguistic choice is not very accurate. E.g., an authoritative book of expository jurisprudence and an unauthoritative one can hardly be presented on the same footing. The first is by no means descriptive, but rather strictly prescriptive: this is the language of the law itself. As Bentham suggests, this book is that of the person who, by so presenting the law, causes it to be so. This nearly suggests a performative use of the legal language, which is no other than the linguistic acts through which the legislator emanates prescriptions<sup>12</sup>. Thus, it might be suggested that there is nothing strictly expository in this discourse. On the contrary, it is prescriptive. An unauthoritative book of expository jurisprudence, i.e. no other than a book on the science of law, firstly is readily descriptive, and not prescriptive. Secondly, it does not belong to the same linguistic level as an authoritative one. It bears upon a book of so-called authoritative « expository » jurisprudence, and belongs to a meta-language relative to it. A book of censorial jurisprudence, whether approving or criticizing a given legislation, belongs to that same metalinguistic level, and bears upon a given book of authoritative « expository » jurisprudence. Nevertheless, the type of this discourse is not the same as the unauthoritative expository's. It is prescriptive, and not descriptive, like the discourse of a legislator.

In spite of the shortcomings of his distinctions, which are, as may be clear, quite easily removed, Bentham provides a very precise characterization of universal expository jurisprudence. Bentham's universal expository jurisprudence is a formal enquiry, aiming at elucidating the concepts that are common to any possible legal system. It is not a strictly intellectual enterprise, but a reflection that has to meet deep and strong practical and concrete aims. As the final chapter of *Of Laws in General* clearly proves, his conception of jurisprudence is, as a consequence, radically instrumental. In his view, it has not to be pursued for its own sake, but only as a preliminary to the reforms that will promote his political goals. This definition of universal expository jurisprudence belongs to a metalanguage relative to the linguistic level at which Bentham is to develop his own legal theory. The first question to be dealt with by Bentham's newly coined universal expository jurisprudence, and that which is also dealt with at length by Austin in *The Province of Jurisprudence Determined*, is that of the individuation of a law.

#### b. The Problematics of the Individuation of a Law

Bentham's thought on the individuation of laws intends to meet the needs for a complete body of law that would allow for a successful utilitarian direction of behaviours. In the *Introduction*

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<sup>11</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns, H.L.A. Hart (ed.), London, The Althone Press, 1970, pp. 293-295.

<sup>12</sup> For reasons I have no space to state here, I disapprove of the idea of considering performative discourse as a *tertium quid* between prescriptive and descriptive discourse.

to the *Principles of Morals and Legislation*, he writes:

To ascertain what sort of a thing a law is; what the parts are that are to be found in it; what it must contain in order to be complete; what the connection is between that part of a body of laws which belongs to the subject of procedure; and the rest of the law at large:—All these, it will be seen, are so many problems, which must be solved before any satisfactory answer can be given to the main question above mentioned [that of the limits between the civil and the penal branch of the law].

Nor is this their only use: for it is evident enough, that the notion of a complete law must first be fixed, before the legislator can in any case know what it is he has to do, or when his work is done<sup>13</sup>.

In the concluding note of this book, he continues:

What is a law? What the parts of a law? The subject of these questions, it is to be observed, is the *logical*, the *ideal*, the *intellectual* whole, not the *physical* one: the *law* and not the *statute*. [...] By the word *law* then, as often as it occurs in the succeeding pages, is meant that ideal object, of which the part, the whole, or the multiple, or an assemblage of parts, wholes, and multiples mixed together, is exhibited by a statute ; not the statute which exhibits them<sup>14</sup>.

The idea for which I want to find an expression is that of so much the matter of which laws and statutes are made as constitutes one entire command or countermand and nothing more. [...] The idea of a law (in its primary sense) is the idea of an object which may be purely intellectual existing nowhere but in the mind of him who speaks of it: the idea of a statute is constantly the idea of a material object [...]. The idea of a law as thus determined is what must previously be formed in order to serve as a pattern to which the contents of a statute or any number of statutes may be reduced, and the several parts they consist of referred to the several stations they belong to in the system. Laws in short are the elements out of which statutes are composed, and into which in order to be understood they must be resolved<sup>15</sup>.

Bentham's point here is the search for a pattern or canonical form to which all the legal matter can be reduced. Only when a given manner of organizing, presenting and writing the legal matter is set, will it be possible first for the legislator to know if he has done his job, and second for the individuals to understand the law and then act accordingly<sup>16</sup>. The problematics of the individuation of law, i.e. the criteria to be used for the determination of what counts as a law – no less no more –, is included in the main topics of universal jurisprudence, and submitted to the same instrumental requirements. The concept of a law is to be constructed so as to allow for the building of a good utilitarian body of law.

I have thus far examined Bentham's reflections relative to his conception of jurisprudence and some of the subjects it has to deal with. These considerations – what the discourse of universal expository jurisprudence is, and the topics it has to deal with – were situated on a metalinguistic level, and Bentham's answer to this question, on a linguistic level *simpliciter*, is the next thing to examine.

<sup>13</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 282.

<sup>14</sup> *Ibid.*, p. 301; Id., *Of Laws in General*, H.L.A. Hart (ed.), London, The Althone Press, 1970, p. 299 n. b.

<sup>15</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 12.

<sup>16</sup> J. Bentham, *A General View of a Complete Code of Laws*, in *The Works of Jeremy Bentham*, J. Bowring (ed.), Edinburgh, W. Tait, 1838-1843, Vol. III, pp. 161-163, 171-174, 193, 209; Id., *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 207 n. e2; J. Bentham, *Of Laws in General*, *op. cit.*, p. 246.

## 2. *An Element of Bentham's Universal Jurisprudence: The Concept of a Law*

The evident primacy of the concept of command or imperative law in Bentham led many scholars to associate – or even to confuse – his reflections and those of his disciple. Nevertheless, a noticeable difference is to be noticed between the two authors. Bentham indeed offers some detailed reflections on the concept of power, whereas Austin does not.

### a. The Primacy of Commands in Bentham and Austin

Bentham's definition of a law is given on the first page of *Of Laws in General*, which has made him, for many readers, one of the clearest proponents of an imperative theory of law, along with Bodin, Hobbes, and Austin<sup>17</sup>. His definition of a law is the following:

A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question<sup>18</sup>.

Each of the elements of this definition is fully explained by Bentham. The direct or indirect source of every law is the sovereign, i.e. the person or persons which the individuals are in a habit and in a disposition to obey<sup>19</sup>. Bentham insists that the reference of his concept of a law is unusually wide. For him,

the definition being such as is applicable to various objects which are not commonly characterized by that name. Taking this definition for the standard it matters not whether the expression of will in question, so as it have but the authority of the sovereign to back it, were his by immediate conception or only by adoption: whether it be of the most public or of the most private or even domestic nature: whether the sovereign from whom it derives its force be an individual or a body: whether it be issued propter quid as the phrase may be, that is on account of some particular act or event which is understood to warrant it (as is the case with an order of the judicial kind made in the course of a cause); or without the assignment of any such special ground: or whether it be susceptible of an indefinite duration or whether it be suâ naturâ temporary and undurable: as is most commonly the case with such expressions of will the uttering of which is looked upon as a measure of administration: whether it be a command or a countermand: whether it be expressed in the way of statute, or of customary law. Under the term "law" then if this definition be admitted of, we must include a judicial order, a military or any other kind of executive order, or even the most trivial and momentary order of the domestic kind, so it be not illegal: that is, so as the issuing of it be not forbidden by some other law<sup>20</sup>.

<sup>17</sup> See e.g. M.A. Cattaneo, *Il positivismo giuridico inglese. Hobbes, Bentham, Austin*, Milano, Giuffrè, coll. « Pubblicazioni della Facoltà di giurisprudenza. Serie economica », Vol. 7, 1962; W.G. Friedmann, *Legal Theory*, 5<sup>th</sup> ed., New York, Columbia University Press, 1967, p. 258; G. Fassò, *Histoire de la philosophie du droit. XIX<sup>e</sup> et XX<sup>e</sup> siècles*, Fr. trans. C. Rouffet, Paris, L.G.D.J., coll. « Bibliothèque de philosophie du droit », Vol. 20, 1976, pp. 18-24; H. Batiffol, *Problèmes de base de philosophie du droit*, Paris, L.G.D.J., 1979, pp. 22-23; J.W. Harris, *Legal Philosophies*, London, Butterworths, 1980, p. 25.

<sup>18</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 1. See also Id., *Chrestomatia*, Fr. trans., Intro. J.-P. Cléro, Paris, Cahiers de l'Unébévue, 2004, p. 249.

<sup>19</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 18; Id., *Sophismes anarchiques*, in *Œuvres*, E. Dumont (ed.), Bruxelles, L. Hauman et Cie, 1829-1830, Vol. I, p. 555.

<sup>20</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 3.

Austin's definition of a law is more restrictive. A law is a command<sup>21</sup>, addressed by a political superior to an inferior.

Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme<sup>22</sup>.

Austin's definition of the sovereign is not exactly the same as Bentham's<sup>23</sup>, which Austin criticizes<sup>24</sup>. The sovereign is a common and determinate individual or group whom the population habitually obeys, while this individual or group does not habitually obey any superior<sup>25</sup>. According to Austin, laws are rules: they constitute obligations for the whole community or for some classes of its members, and only obligations to classes of acts. He then rejects the concept of individual or concrete law<sup>26</sup>.

Bentham seems to admit of two types of laws: imperative and deimperative laws. "Every such manifestation [of the legislator's will with respect to such or such an act] is either a prohibition, a command or their respective negation; viz. a permission<sup>27</sup>." It is clear for Bentham that command and prohibition are the same thing, directed to a behaviour or a forbearance respectively: prescribing a given behaviour is not different from prohibiting the opposite behaviour. Permission only makes sense relatively to a command<sup>28</sup>. Bentham's logic of norms is also evidence of the possibility of a reduction of all laws to the pattern of commands<sup>29</sup>.

In a comprehensive and properly organised body of law, non-obligative norms are not necessary. They are implicit in the relative scope, limitations and exceptions of the obligative laws. As a consequence,

To have a clear conception however of the state of the whole system of legislation at any period it is upon the obligative laws alone that the spectator should fix his eye: it is by them that he should measure the number and extent, of the laws that are in force during a given period in a given state, and thereby of the obligations to which the members of that state are subject. It is owing merely to the changes which the will of the legislator is liable to undergo with respect to the same act at different periods that laws of the de-obligative kind are susceptible of any separate consideration: were it not for this, the effect produced by them might be produced in a better manner by more simple methods: where the primordial law or any determinate part of it is destroyed, declare it repealed and throw it out of the code: where the former is made to receive a qualifying clause, insert the clause in the same manner as if that and the rest of the law so qualified had from the very beginning made but one<sup>30</sup>.

Austin is even more drastic in this respect, for according to him, only commands exist. Permissions are not laws, or only in a metaphoric or figurative sense<sup>31</sup>.

<sup>21</sup> J. Austin *The Province of Jurisprudence Determined*, D. Campbell, P. Thomas (ed.), W.L. Morison (Intro.), Dartmouth, Ashgate, 1998, p. 1.

<sup>22</sup> *Ibid.*, p. 6.

<sup>23</sup> J. Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System*, 2<sup>nd</sup> ed., Oxford, Clarendon Press, 1980, pp. 6-7; H.L.A. Hart, « Sovereignty and Legally Limited Government », in Id., *Essays on Bentham. Studies in Jurisprudence and Political Theory*, Oxford, Clarendon Press, 1982, pp. 220-242; A. Loche, « Limite e controllo della sovranità in Jeremy Bentham », in *M.P.S.C.G.*, Vol. 30, 2000, pp. 323-348; G. Tusseau, *Jeremy Bentham et le droit constitutionnel*, *op. cit.*, p. 153.

<sup>24</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, p. 159.

<sup>25</sup> *Ibid.*, pp. 148-151.

<sup>26</sup> *Ibid.*, pp. 15-18.

<sup>27</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 206 n. e2.

<sup>28</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 157.

<sup>29</sup> *Ibid.*, pp. 93-132.

<sup>30</sup> *Ibid.*, pp. 169-170.

<sup>31</sup> J. Austin *The Province of Jurisprudence Determined*, *op. cit.*, pp. 20-21, 132.

For both authors, the concepts of right, power, obligation, duty, service, etc. can all be reduced to that of obligation<sup>32</sup>. These concepts are not autonomous. “These products, so opposed in their nature, are simultaneous in their production, and inseparable in their existence. The law cannot confer a benefit, without at the same time imposing a burthen somewhere; – it cannot create a right, without at the same time creating an obligation – and if that right be of any value, even a numerous train of obligations<sup>33</sup>.” In even cruder terms, Austin states the correlativity between right and obligation: “Every legal right is the creature of a positive law: and it answers to a relative duty imposed by that positive law, and incumbent on a person or persons other than the person or persons in whom the right resides<sup>34</sup>.” Sometimes, a permission is no other than the inexistence of an obligation<sup>35</sup>.

For the founders of *analytical jurisprudence*, be it in a refined or in a brutal way, the whole body of law can be restated under the form of obligative laws<sup>36</sup>. “Whatever business the law may be conversant about, may be reduced to one sort of operation, viz: that of creating duties<sup>37</sup>.” Nevertheless, Bentham has had some interest in the concept of power, the first he mentions in the list of concepts to be the proper object of universal expository jurisprudence.

#### b. Bentham's Reflections on the Concept of Power

A law being considered as a command, and the power of the sovereign being considered as a factual matter<sup>38</sup>, there seems to be little space left in Bentham's legal theory for a concept of *legal power*.

Despite this undeniable imperativism in Bentham's theory, he is also noticed for being the first to offer a thorough reflection on the concept of a legal power. Following his well-known method of bifurcations, he distinguishes power of contractation and power of imperation<sup>39</sup>. The first can be exercised over the passive faculties, i.e. those which are common to animated and inanimate beings. It is a strictly factual power, such as, e.g.,

<sup>32</sup> *Ibid.*, pp. 20, 22, 117, 196-197; Id., *Lectures on Jurisprudence or the Philosophy of Positive Laws*, R. Campbell. (ed.), 12<sup>th</sup> impression, London, John Murray, 1913, pp. 160-162, 165, 176-177, 192-193; J. Bentham, *Principles of the Civil Code*, in Id., *Selected Writings on Utilitarianism*, R. Harrison (ed.), Ware, Wordsworth Classics of World Literature, 2001, pp. 313, 315; Id., *A General View of a Complete Code of Laws*, *op. cit.*, pp. 159, 181, 195; Id., *Pannomial Fragments*, *ibid.*, pp. 217-218, 220-221; Id., *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, pp. 206 n. e2, 212; Id., *Of Laws in General*, *op. cit.*, pp. 57-58, 63, 99, 220, 249 n. b, 276-277, 294; Id., *Theory of Fictions*, C.K. Ogden (ed.), London, Kegan Paul, 1932, p. 93.

<sup>33</sup> J. Bentham, *Pannomial Fragments*, *op. cit.*, pp. 220-221; Id., *Principles of the Civil Code*, *op. cit.*, p. 313; Id., *Of Laws in General*, *op. cit.*, p. 84; Id., *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, pp. 290-294; *A General View of a Complete Code of Laws*, *op. cit.*, p. 159: « The ideas of law, offence, right, obligation, service, are therefore ideas which are born together, and which are inseparably connected. These objects are so simultaneous that each of these words may be substitutes the one for the other. The law directs me to support you – it imposes upon me the *obligation* of supporting you – it grants you the *right* of being supported by me – it converts into an *offence* the negative act by which I omit to support you – it obliges me to render you the *service* of supporting you. [...] The distinction between rights and offences is therefore strictly verbal – there is no difference in the ideas. It is not possible to form the idea of a *right*, without forming the idea of an *offence*. »

<sup>34</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, pp. 196-197. See also *ibid.*, p. 117; Id., *Lectures on Jurisprudence or the Philosophy of Positive Laws*, *op. cit.*, p. 192; J. Bentham, *Of Laws in General*, *op. cit.*, pp. 84, 249 n. b, 254; Id., *Principles of the Civil Code*, *op. cit.*, p. 315.

<sup>35</sup> J. Bentham, *A General View of a Complete Code of Laws*, *op. cit.*, pp. 159, 181; Id., *Pannomial Fragments*, *op. cit.*, pp. 217-218; Id., *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 212; J. Austin *The Province of Jurisprudence Determined*, *op. cit.*, p. 192; Id., *Lectures on Jurisprudence or the Philosophy of Positive Laws*, *op. cit.*, p. 165.

<sup>36</sup> M.H. James, « Bentham on the Individuation of Laws », in B. Parekh (ed.), *Jeremy Bentham – Critical Assessments*, Vol. 3, *Law and Politics*, London and New York, Routledge, 1993, pp. 95-117, 114; J. de Sousa e Brito, « Hart's Criticism of Bentham », in *Rechtstheorie*, Bd. 10, 1979, p. 460; J. Raz, *The Concept of a Legal System*, *op. cit.*, p. 75.

<sup>37</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 249.

<sup>38</sup> *Ibid.*, p. 18 n. b.

<sup>39</sup> *Ibid.*, pp. 18 n. b, 81, 137-139 n. h.

the power which a man exercises over the land he walks over or cultivates: the bread he bakes or eats: the coat he wears of brushes: the child or the servant he feeds, beats or reprimands: in public dominion, the power of the soldier over the persons, and occasionally over the property, of those whom he is commanded or allowed to treat as enemies. Of the executioner or other inferior ministers of justice over the persons and properties of those who come under the control or censure of the law: and indirectly the power of the public gunsmith, the public gunpowder maker, the public storekeeper, and so forth, over the things they make or keep or use for the benefit of the public<sup>40</sup>.

On the contrary, the power of imperation can only bear upon active faculties, i.e. the faculties that belong to animated beings. It may more clearly be called “normative power”. Bentham distinguishes different classes of power of imperation, power of imperating *de singulis* (which he parts into accensive or aggregative and dislocative power) and power of imperating *de classibus*, offering concepts that are relevant both to private and public law, i.e., to Bentham’s universal project of codification in all its branches (civil, penal, procedural, constitutional law)<sup>41</sup>.

This is another illustration of Bentham’s modernity, for the discussion about power-conferring norms is very important nowadays. Once more, this proves the fullness of Bentham’s thought, for he not only showed the perspective and problematics of general jurisprudence, but he defined it in a very precise and fruitful manner. He also worked most of the problems that occupy nowadays scholars in this field: the concept of legal norm, the concept of legal order, the possibility and construction of deontic logic, the theory of argumentation, all this with a very powerful analytic, philosophical, logical, linguistic apparatus he himself had elaborated for most of its elements.

One has to reflect upon the reasons why the concept of power has been considerably elaborated by Bentham, and not by Austin. A simple argument, insisting on Bentham’s general superior intelligence and fruitfulness would prove very little, and it is not my aim to dismiss Austin in such a way. Nor will I insist that Austin primarily had a pedagogic aim, based on some “simplifying assumptions<sup>42</sup>”, intending only to set the limits of a proper field of study<sup>43</sup>. Such an argument would be insufficient, for it is quite intuitive that the concept of power is important in the legal field, even for a basic presentation of this field of study. I want to suggest another approach, allowing to explain why the reflection upon the concept of power is far richer in Bentham than in Austin’s work.

## **B. Bentham's Concentration on the Concept of a Legal Power**

I will try to show how, due to the internal constraints of the theories the two authors are building, Austin could do without a concept of power, whereas Bentham had to build one.

### *1. The Absence of any Concept of a Legal Power in Austin*

The absence of any concept of a legal power in Austin’s writings must be explained relatively to the sovereign and to the subordinate power-holders.

#### a. The Sovereign's Power

Austin’s reflection on this topic is constructed in empirical terms. The sovereign’s power is a strictly factual phenomenon.

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<sup>40</sup> *Ibid.*, p. 138 n. h.

<sup>41</sup> *Ibid.*, pp. 80-92.

<sup>42</sup> W.L. Morison, « Introduction », in J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, p. xiii.

<sup>43</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, pp. 2, 8, 234-235; W.L. Morison, *op. cit.*, p. xiii.

Taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes<sup>44</sup>.

This power is not taken as resulting from a law. According to Austin, every law is a command of the sovereign. If he established rules for himself, they could not be laws, but only positive morality, which is the status to which Austin reduces constitutional law<sup>45</sup>. No one can address a command to himself or grant rights to himself: one can only have some right through the might of another<sup>46</sup>. So, if the power of the sovereign was a legal power, it would necessarily have been conferred to him by someone else. But in order to be able to create law, this someone else must be the sovereign. But then, the empowered sovereign is no more sovereign, which is contrary to the premise. In the terms of Austin's theory of law, it is radically impossible to understand the sovereign's power as a legal power<sup>47</sup>, unless one is ready to give up the adopted definition of law or the quality of sovereign. The sovereign precisely enjoys a power that is not conferred to him. That is the reason why, in agreement with Blackstone<sup>48</sup>, this power is illimitable: if it were, it would mean that the sovereign is subordinated to a superior, i.e., that he is not sovereign.

The very structure of Austin's reflection on the normative power of the sovereign does not allow him to think of a law conferring that power. Let's thus turn to the subordinate power holders.

#### b. The Subordinate Legal Powers

Austin admits that courts can create law:

All judge-made law is the creature of the sovereign or state. [...] When judges transmute a custom into legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence<sup>49</sup>.

A command can be express or tacit, which allows to account for legal custom:

When custom are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits his ministers to enforce them: and it therefore signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as law to the governed'. [...] It appears then that the positive law styled *customary* as well as all positive law made judicially, is established by the state directly or circuitously, and therefore is *imperative*<sup>50</sup>.

Such an argument is very rapid indeed<sup>51</sup>. It only accounts for the normative power of judges in terms of the sovereign's tacit commands, without elucidating the concepts of power and power-conferring law. Moreover, the judicial validation of custom is explained with the

<sup>44</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, p. 18.

<sup>45</sup> *Ibid.*, pp. 183-187.

<sup>46</sup> *Ibid.*, pp. 197, 232, 249.

<sup>47</sup> A similar argumentation is offered by R. von Jhering, *L'évolution du droit*, 3<sup>e</sup> éd., Fr. trans. O. de La Meulenaere, Paris, librairie A. Marescq, Aîné, Chevalier – Marescq & Cie, Editeurs, 1901, pp. 220-223.

<sup>48</sup> Sir W. Blackstone, *Commentaries on the Laws of England*, 3<sup>rd</sup> ed., Oxford, Clarendon Press, 1768-1769, Vol. I, p. 49.

<sup>49</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, p. 23.

<sup>50</sup> J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Laws*, *op. cit.*, pp. 19-20.

<sup>51</sup> See also J.J. Moreso Mateos, « Cinco diferencias entre Bentham y Austin », in *Anuario de filosofía del Derecho*, Vol. 6, 1989, pp. 355-357.

concept of tacit permission. But in Austin's views, permission is either an imperfect law or the correlative of an obligation. It seems then very difficult to understand how Austin conceives of the concept of normative power. Without intending to elucidate an eventual legal mechanism, Austin explains in a similar way the norm-creation by individuals: they only are "circuitous commands" of the sovereign<sup>52</sup>. Austin radically rejects any individual's normative power, and reduces it to the power of the State or of the sovereign, which is in turn explained in factual terms.

The only – but still unconvincing – attempt to elucidate the notion of normative power is to be found in the analysis of the exercise of powers by the delegates of the sovereign in big states<sup>53</sup>. "A *power* delegated by the State implies a promise that on the power being exercised by the party entitled, the State will give a *right*. The power itself is a species of right *in rem* implying by a short train of consequences duties on persons generally<sup>54</sup>." The explanation is thus in terms of promises. But a promise is basically, an autonomous obligation, which seems incompatible with Austin's concepts of sovereign and law.

I would like to suggest that Austin's difficulties here can also be explained in reference to the framework of his concept of a law. For him, laws are "eminently general<sup>55</sup>", i.e. general both as regards their addressees, and the actions to be accomplished. But, it is of course very rare, in Austin's view, that courts or individuals in their transactions create such laws. Only the sovereign can produce such laws, without, as it has been shown, his power being possibly conferred on him. In the terms of Austin's theory, the question of power-conferring norms did not – or rather could not – really arise.

On the contrary, his concept of a law compelled Bentham to ponder over the concept of power, and to construct a concept of legal power.

## 2. Bentham's Reflection on the Concept of a Legal Power

According to Bentham,

Power may be defined to be the faculty of giving determination either to the state of the passive faculties, or to that of the active faculties, of the subject in relation to and over which it is exercised<sup>56</sup>.

He first elaborates on the "power of contraction", consisting in physical interference with things or persons, e.g., a policeman arresting somebody, or a man cultivating a land. These powers are constituted by permissions. Bentham's "power of imperation" consists in making people obey some commands or prohibitions by furnishing them with motives influencing their will<sup>57</sup>. This second concept allows to account for both the sovereign's and the subordinate's powers.

### a. The Sovereign's Power

In Bentham as in Austin, the sovereign is constituted by some empirical phenomena. But Bentham's concept of a sovereign is somehow peculiar. First, sovereignty need not be the property of a unique and perfectly identified person or group of persons. Several entities can perfectly well be paid obedience to, as regards different classes of acts, and then, be both

<sup>52</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, pp. 103-104; Id., *Lectures on Jurisprudence or the Philosophy of Positive Laws*, *op. cit.*, p. 261.

<sup>53</sup> J. Austin, *The Province of Jurisprudence Determined*, *op. cit.*, pp. 166-170.

<sup>54</sup> J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Laws*, *op. cit.*, pp. 408-409.

<sup>55</sup> G.H. von Wright, *Norm and Action. A Logical Enquiry*, London, Routledge and Kegan Paul, 1963, p. 83.

<sup>56</sup> J. Bentham, *Pannomial Fragments*, *op. cit.*, p. 222.

<sup>57</sup> J. Bentham, *Of Laws in General*, *op. cit.*, pp. 18 n. a, 81, 137-139 n. h.

sovereign<sup>58</sup>. Secondly, the sovereign is not necessarily legally unlimited. Full-blown laws can be addressed to him:

there are laws to which no other persons in quality of passible subjects can be envisaged than the sovereign himself. [...] The business of this transcendent class of laws is to prescribe to the sovereign what *he* shall do. [...] Laws of this latter description may be termed, in consideration of the party who is their passible subject, laws *in principem*: in contradistinction to the ordinary mass of laws which in this view may be termed laws *in subditos* or *in populum*<sup>59</sup>.

Thus, Bentham does not regard constitutional law as positive morality of law improperly so-called. Like Austin, Bentham rejects the possibility of auto-obligation<sup>60</sup>. It cannot account for constitutional law. However much he may be regarded as an imperativist, it is to be noted that Bentham's concept of a sanction is far more subtle and allows far more promising developments than Austin's<sup>61</sup>. Moreover for Bentham a law is not defined by its containing a sanction, but by the sovereign's trusting on the expectation of certain events that should act as a motive<sup>62</sup>. The specificity of constitutional law is thus to rely on the religious and popular sanctions<sup>63</sup>.

The essential function of Constitutional law is to empower: "The constitutional branch is chiefly employed in conferring, on particular classes of persons, *powers*, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing *duties* to the persons invested with those powers<sup>64</sup>." The "lawness" of constitutional law is then a fundamental aspect of Bentham's legal theory, which make it far richer than Austin's. Nevertheless, no precise insight is given as to the properties of power-conferring laws as far as the sovereign is concerned.

#### b. The Subordinate Legal Powers

Just as Austin's lack of reflection on the concept of legal power stems from his concept of a law, Bentham's reflection on this topic does. The sovereign is the ultimate source of all laws and all powers<sup>65</sup>. But he does not directly exercise the full amount of power of imperation. Indeed, Bentham's concept of a law includes many things. Especially, he admits the existence of individual norms. This very concept of a law compels Bentham to ponder over the individuals' and the subordinate authorities' – judges, administrations – participation to the production of the many types laws he admits of. He immediately links the questions of the definition of a law and the power to produce it<sup>66</sup>.

<sup>58</sup> *Ibid.*, pp. 18-19, 69. This allows Bentham to explain the system of confederations.

<sup>59</sup> *Ibid.*, p. 64.

<sup>60</sup> *Ibid.*, pp. 67-70: « Nor can a man by his own single unassisted force impose upon himself any effectual obligation [...] On the other hand, take into the account an exterior force, and by the help of such force is as easy for a sovereign to bind himself as to bind another. [...] The force which binds, depends indeed upon the will of a third person [...]. By what means then can a law *in principem* be enforced and rendered efficacious: what force is there in the nature of things that is applicable to this purpose? [...] The force of the political sanction is inapplicable to this purpose: by the supposition within the dominion of the sovereign there is no one who while the sovereignty subsists can judge so as to coerce the sovereign: to maintain the affirmative would be to maintain a contradiction. But the force of the religious sanction is as applicable to this purpose as to any other [...]. The same may be said of the force of the moral sanction. Now the force of the moral sanction as applied to the purpose in question may be distinguished into two great branches: the which may be exerted by the subjects of the state in question acting without, and perhaps even against, the sanction of political obligations, acting in short as in a state of nature; and that which may be exerted by foreign states. »

<sup>61</sup> In *Jeremy Bentham et le droit constitutionnel*, *op. cit.*, I have considered Bentham's concept of sanction as one of the very keys to his concept of law, and of his *theory* of constitutional law, as distinguished from his constitutional *politics*.

<sup>62</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 1.

<sup>63</sup> This pattern of law is described *ibid.*, p. 156. For a more precise demonstration, see G. Tusseau, *Jeremy Bentham et le droit constitutionnel*, *op. cit.*

<sup>64</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 307.

<sup>65</sup> J. Bentham, *Of Laws in General*, *op. cit.*, p. 139 n. h.

<sup>66</sup> *Ibid.*, pp. 3-4, 80. I believe the same reasons explain why the *Stufenbaulehre*, invented by A.J. Merkl and popularised by H. Kelsen, had to resort to a concept of empowering norm. The inner structure of their concept of a legal order

A law directly created by the sovereign belongs to him in the way of conception<sup>67</sup>. It can also emanate from another individual and be adopted by the sovereign<sup>68</sup>. Adoption can take place *a posteriori*. That is how the sovereign generally adopts all the laws that existed under the reign of the previous sovereign. Adoption can also be made in advance, being then termed “pre-adoption”. The sovereign announces his will to adopt the laws that are to be created by some specified individuals. In this last case, the question of normative power arises, for according to Bentham,

where the sovereign holds himself thus in readiness to adopt the mandates of another person whensoever they shall happen to have been issued, he may thereby be said to invest that person with a certain species of power, which may be termed a power of imperation<sup>69</sup>.

Thus one can realize how two “positivists”, in spite of the similarities between their concepts of jurisprudence and the contents of their respective legal theories, can hold very opposite views. It can be said that the concepts of a law Bentham and Austin adopted drove them to very different positions as regards the possibility of a conceptualisation of legal power. Whereas Austin’s cruder and more simple theory does not allow for such a discussion, Bentham’s more refined and subtle theory imposes him this reflection. This is why one can oppose Austin’s strictly “imperative” legal theory to Bentham’s more subtle “imperational” legal theory<sup>70</sup>. The latter’s thought is more likely to admit of other concepts than that of a prescriptive law. This is why Bentham can be said to be superior to Austin. From a conceptual point of view, his writings raise more problematics for lawyers, and compel one to new, more specific, and more promising enquiries.

Bentham’s definition of universal expository jurisprudence is thus a seminal moment in the history of legal thought, from an epistemological, i.e. metalinguistic, point of view. His impressive and suggestive reflections on the concept of a legal power are the specific mark of the framework of his legal positivism as a theory of law, i.e. at the level of the object language. It is now necessary for another paper to examine specifically how Bentham apprehends the legal material that confers legal powers, in apparent opposition to the basic tenets of his concept of a law as a command, and how he can meet the challenge of giving fruitful answers to the questions he is able to raise.

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as a hierarchy of general and individual norms compelled them to account for the production of each level. Every normative act appears both as the creation of a new « inferior » norm and as the application of a previous « superior » norm. The explanation of how an act – i.e. a phenomenon of *Sein* in which the actors’ will plays an important part – could « create » a new norm – i.e. a *Sollen*, needed the concept of an empowering norm. Merkl quite rapidly came to this conclusion, in a way not unsimilar to Hart. On the contrary, Kelsen maintained, all his life, a considerable ambiguity, not to say incoherence, between his static sanction-theory of legal norms, elaborated during the 1910s, and the dynamic theory of law he had integrated in his original theory in the 1920s. Only in his last works did he seem to be conscious of the radical discrepancies between the two perspectives, and did he admit a specific concept of empowering norm. This is the matter of another, forthcoming, text about « Dynamic Theories of Law ».

<sup>67</sup> *Ibid.*, p. 21.

<sup>68</sup> *Ibid.*, pp. 1, 21, 26.

<sup>69</sup> *Ibid.*, p. 21. See also Id., *Anarchical Fallacies*, in Id., *Selected Writings on Utilitarianism*, *op. cit.*, p. 418.

<sup>70</sup> On the distinction between imperative and imperational legal theory, see D. Lyons *In the Interest of the Governed. A Study of Bentham’s Philosophy of Utility and Law*, Oxford, Clarendon Press, 1991.

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