

Rights and Utilitarianism. John Stuart Mill's Role in its history⁵⁰⁷

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Ce texte présente un épisode de l'histoire des droits. Ils s'intéressent aux droits en général, à tous les droits, mais plus particulièrement aux droits méta-juridiques, antérieurs à la loi positive. Cette approche historique est d'autant plus pertinente qu'elle montre de façon concentrée les étapes importantes de l'évolution de la pensée juridique à propos de cette question, et du concept même de droit dans la Modernité. Le point de départ se situe dans la critique des droits naturels qu'effectuent Jeremy Bentham et James Mill. Cette critique s'accompagne d'un mépris envers la métaphysique et ne laisse aucune place à une argumentation méta-juridique sur la justice. John Stuart Mill, tout en soutenant un point de vue utilitariste, a permis d'avoir à nouveau recours à ce type d'argumentation et d'entrevoir la possibilité de construire, à sa suite, une théorie des droits supra-juridiques.

In 1816, immediately after Waterloo and at the beginning of the Bourbon restoration in France, Jeremy Bentham signed the death warrant of human rights. In fact, on that date the originator of legal positivism (and its most coherent and enthusiastic exponent) published for the first time, in French and in an edition due to Étienne Dumont of Geneva, his condemnation of the declaration of rights of the French Revolution. The work was *Falacias Anárquicas*, published in France as *Tactique des assemblées législatives suivie d'un traité des sophismes politiques*,⁵⁰⁸ which would not be published in English until its inclusion in Bowring's posthumous edition of Bentham's works between 1838 and 1843,⁵⁰⁹ although it was written in the 1790's.⁵¹⁰

In 1863, John Stuart Mill, the true heir of Benthamite utilitarianism, raised those rights from the dead, rights that since then have enjoyed rude health, despite the occasional crisis. More than in any other of his works, in *Utilitarianism*,⁵¹¹ published at that date, what he would call "moral rights" were revived, as the resurrection of a rejected idea. But what Mill did was no mere restoration, he could not undo what had been done, at most he could revive it.

Before beginning, I wish to clarify the terms used, at least minimally. In legal-political theory, in Bentham's time, human rights were not spoken of. He himself used the term "natural rights". This expression fell out of use, to be replaced by "human rights", still employed today, precisely to try to overcome the criticism led by Bentham. The occasion that gave rise to *Falacias Anárquicas* was the declarations of rights of the French Revolution, the *Declaration of the Rights of Man and the Citizen* in 1789-91, and of the *Constitution* of 1795. Those rights of man, as distinct from the rights of the citizen, are the lexical predecessor of our human rights. The semantic predecessor are natural rights. Human rights, then, are the result of a metamorphosis suffered by

⁵⁰⁷ An earlier version of this paper was published in Spanish as "La utilidad y los derechos. La pequeña revuelta de John Stuart Mill frente a Bentham", in M. Escamilla (ed.), *John Stuart Mill y las Fronteras del Utilitarismo*, Granada, 2004.

⁵⁰⁸ J. Bentham, *Oeuvres*, t. 1, trans. É. Dumont and B. Laroche, Darmstadt, 1969 (reprinted from Brussels' edition, 1829).

⁵⁰⁹ *Sophismes Anarchiques* has been published, with its original title, in the critical edition; see J. Bentham, *Nonsense upon Stilts, or Pandora's Box Opened, or the French Declaration of Rights prefixed to the Constitution of 1791 laid open and exposed. With a comparative Sketch of what has been done on the same Subject in the Constitution of 1795, and a Sample of Citizen Sieyès, in Rights, Representation and Reform. Nonsense upon Stilts and other Writings on the French Revolution*, ed. P. Schofield, C. Pease-Watkin & C. Blamires, Oxford, 2002, pp. 317 ff.

⁵¹⁰ J. Dinwiddy, *Bentham*, trans. E. Guisán, Madrid, 1995 (1989), p. 104.

⁵¹¹ In J. S. Mill, *Essays on Ethics, Religion and Society, Collected Works*, vol. X (ed. J. M. Robson), London, 2002 (1969), pp. 203 ff.

natural rights. Human rights are not the same as natural rights, but they originate from and owe some of their characteristics to them. Essentially, human and natural rights share the claim to precede positive law, its foundation (base for legitimating criticism or praise of it) and unavailable to it. To understand Bentham's criticisms of natural rights, in the version of the French and American revolutionaries,⁵¹² it is important to know if that criticism is applicable to human rights, which in turn is important, since the analytical, positivist and utilitarian criticism of natural rights (all of which Bentham's contribution involved) was rigorous and not to be taken lightly.

The story I want to tell is that of the attempt made by Bentham to eliminate what today we call human rights from political-legal argumentation, an attempt that responded to weighty reasons, and of John Stuart Mill's revival of this concept, a revival made with commitment and intellectual daring. The story is transcendent because it shows us the dangers that legal positivism detected in iusnaturalism, lest these dangers reappear; and, on the other hand, because the theoretical status that Mill gave to human rights still prevails, broadly speaking, in our days, a status that puts them as one of the fundamentals of the political and social order of the free world.

1. Bentham's reasons for rejecting natural rights

1.1. Historical reasons

These reasons arose from the contemplation of the events, contemporaneous with Bentham, that happened during the American, and even more during the French, revolutions. Bentham sympathised with the American Revolution because it appeared more as a struggle for colonial emancipation than as a civil war or a revolution, and thus it had to appeal more to the anti-imperialist convictions of a liberal. In any event, its Declaration of Rights had already had its answer from John Lind. The French Revolution, on the other hand, had awoken the hostility, naturally, of those spirits contrary to revolutions. Edmund Burke reacted violently to the Revolution from its first moments, both for its bloody excesses and its policy of economic confiscation, as well as for the universal and timeless abstraction of the rights it proclaimed. The bloodstained spectacle of the heads of the king's guards carried in triumph on pikes from Versailles to Paris caused a shudder of repulsion as electrifying as the confiscation of the properties of the church, the clergy and the nobles as a way of paying off the crushing national debt. That all this was done to defend some metaphysical rights merely confirmed the evil ways to which rationalist passion led when free from the counterweight of experience and common sense.

Burke, who was adopted (probably much against his will) as the standard bearer of the conservative reaction to the Revolution, did not take the Jacobin terror into account in his *Reflections on the French Revolution* (published in 1790), but he dedicated the rest of his life to combating Jacobinism, a combat which ended by uniting all the initial utilitarian critics, Bentham among them, appalled by the bloodcurdling spectacle offered by all France, and above all, by Paris: maddened crowds cheering on to their death carts full of people, a democracy reduced to a parliament led by demagogues devouring each other, the refinement of techniques of totalitarian control of the population through political and police terror, which would later be Lenin's inspiration: the law of the strongest under the banner of Reason.

European liberalism abominated the Revolution, as in the exclamation obsessively repeated by Hölderlin, with his mind already gone but still an unshakeable defender of freedom: "I do not want to be a Jacobin!"⁵¹³

⁵¹² This is not the first time that Bentham was concerned with this subject. He had already participated in the work of his friend John Lind, *An Answer to the Declaration of the American Congress*, London, 1776. (H. L. A. Hart, "1776-1976: Law in the Perspective of Philosophy", in *Essays in Jurisprudence and Philosophy*, Oxford, 1983, p. 145, n.). A detailed exposition of this story can be found in H. L. A. Hart, "The United States of America", in *Essays on Bentham. Jurisprudence and Political Theory*, Oxford, 1982, pp. 53 ff.

⁵¹³ F. Martínez Marzoa, *De Kant a Hölderlin*, Madrid, 1992, p. 146. On Hölderlin and the French Revolution, see A.

Bentham's epigrammatic objection to natural rights, the results of their effects in revolutionary France, was summed up in the title of the work in which he condemned them: anarchic fallacies, falsities warped with the desire to deceive and with terrible consequences, anarchy.⁵¹⁴

1.2. Epistemological reasons

These reasons are of three types. In the first place, they are reasons in line with the empirical attitude at the base of Benthamite theory. Natural rights precede positive law, prior to the order given by someone that the senses can perceive. They proceed from the Creator or Nature, from a nature personified and principled; natural rights are metaphysical in the old style, in the strong, pre-Kantian sense. The metaphysical either does not exist, or we cannot perceive it, which comes to the same thing. Natural rights are “nonsense upon stilts”, as Bentham would call them, or, as the phrase has been translated into Spanish,⁵¹⁵ in a version more in accord with our political-religious liturgy, “nonsense under the pallium”, absurdities that have been put into an eminent position for the people to admire, and to be amazed by them, without being able to distinguish their quality, real or phantasmagorical.

In the second place, Bentham had epistemological reasons for his rejection, that arose from the separation of be and ought to be established by Hume:⁵¹⁶ that things are in a certain way has nothing to do with how they ought to be; the physical and the moral are heterogeneous and their communication would generate a logical inconsistency.⁵¹⁷

Thirdly, there are reasons that result from the analytical method chosen by Bentham. An expression of the most genuine Enlightenment attitude, the analytical method demands that any reality is broken down into its simplest units, into its elements, and it cannot be divided further. This elemental unit must correspond to an empirically perceptible reality just as such a unit. If not, we do not have a reality in the true sense, but only in the figurative, a fiction.⁵¹⁸ For a man of the Enlightenment, a fiction is a dangerous thing, like old wives' tales, they produce a distorted, unreal vision, a deformation that usually covers up some spurious interest. It is the mission of the philosopher, even more of the social scientist, to reveal fictions, to tear away the veil of mystery that shrouds reality so that this appears just as it is. Natural rights are fictions.⁵¹⁹

1.3. Legal reasons

Now we come to the legal aspect. In this position, reasons do not deal with rights prior and superior to positive law, to law empirically provable, but what has traditionally come to be called, with notable tautology, “subjective rights”, and that the Anglo-Saxon doctrine, with greater clarity, above all in the light of the matter that concerns us, “legal rights”, or, better still, what we could call, with lexical but not semantic, redundancy, “juridical rights”.

From this point of view, we can consider law as the set of rights that the individuals of a country have (greater terminological precision is not necessary at the moment), or we can incline

Ferrer, *La reflexión del eremita. Razón, revolución y poesía en el Hiperión de Hölderlin*, Ch. IV, Madrid, 1993, pp. 95 ff.

⁵¹⁴ The expression “anarchical fallacies” is from Bentham himself, not from Dumont (P. Schofield, C. Pease-Watkin y C. Blamires, “Editorial Introduction”, in J. Bentham, *Rights, Representation and Reform*, p. li).

⁵¹⁵ R. Harrison, “Bentham, Jeremy”, in T. Honderich, *Enciclopedia Oxford de Filosofía*, trad. C. García Trevijano, Madrid, 2001, p. 113.

⁵¹⁶ Or the confusion between the two distinct meanings of the word *loi*; see F. Vergara, “Les deux acceptions du mot loi. Sur la critique que Mill fait à Montesquieu”, in J. S. Mill, *La Nature*, Paris, 1998, pp. 101 ff.).

⁵¹⁷ J. Montoya, “Bentham y los derechos humanos”, *Télos*, V, 1 (1996), pp. 17 ff.

⁵¹⁸ A clear and eloquent exposition of Bentham's position in this matter can be seen in J. Bentham, *Of Laws in General, Collected Works*, ed. H. L. A. Hart, London, 1970 (1782), Appendix B, 1 and 2, pp. 251-3.

⁵¹⁹ See W. Twining, “The Contemporary Significance of Bentham's Anarchical Fallacies”, *Archiv für Rechts- und Sozialphilosophie*, Bd. LXI/3 (1975), 325-356; especially 335 ff. R. Harrison, *Bentham*, London, 1983, pp. 77 ff.

towards the other logical possibility and assert that law is, in reality, a set of duties. For Bentham, rights and duties were two sides of the same coin,⁵²⁰ and both possibilities are equivalents from the logical point of view, but not so from the human or political. Logically, a right is nothing but a duty considered from the standpoint of the subject who is benefited by it; conversely, a duty is nothing but a right looked at from the subject who must satisfy it.⁵²¹ Humanly and politically, however, this equivalence disappears. A law that is considered as primordially based on duties is a objective right, centred on the sovereign, on the political authority from which it proceeds, and potentially, for social behaviour. One based on rights, on the other hand, starts from the subjects who are bearers of rights; it is intended as an instrument to serve individuals, as an aid to the development of projects vital to people; law, thus, is seen as the result of the initiative of individuals who model them as actions designed to make it (and the society that results) in its image; hence a subjectivised law.

For Bentham's aims, a law based on duties is more desirable; the greater objectivity squares better with his scientific pretensions (something similar later happened to Hans Kelsen). Basing himself on the idea of orders, and the sovereign from whom they emanated, was moreover important for someone, like him, formed in the first Enlightenment and who, in consequence, had a utopia to realize; the first half of his life, as with many of the men of the Enlightenment, was taken up with the reforming possibilities of despots. And this political view (substantially coinciding with the Jacobinism he so virulently loathed) would be maintained throughout his life and work, with only the correction imposed by the democratic current that he would later follow,⁵²² and so he sought to make his liberalism on the edge more coherent.

Whether or not one agrees with Bentham's orientation towards duties, it does not seem that the educational principles that can be drawn from them should be despised: First, that one should distrust all legal rights that cannot be translated into legal duties –probably, it is not a true right;⁵²³ secondly, juridical knowledge that starts from rights is less scientific than that that starts from duties, less rigorous, as we would say today, so that one has to be more careful when entering in this field; subjectivity pays the price of its authenticity in analytical evanescence.⁵²⁴

Other juridical reasons for Bentham's disdainful attitude to rights have to do with a different aspect of them. When the demands are made not against other individuals but against the sovereign power itself, that is the source of law; rights as "securities". Rights as securities are thus a vivid expression of the most complete phase of law, when it struggles against the authority that created and limits it; the law of a state in which the rule of law exists. Bentham was very consistent and continued directing his gaze toward the sovereign; it is not, then so much a question of rights as against the sovereign, but rather of guarantees, immunities, securities that he gives us, although with a censorious view we could think that he owes us them. Securities, instead of rights.⁵²⁵ And more "securities" than the more traditional English concept of leeway, of "freedoms", as a result of this conception of Bentham, who was liberal to the marrow in this

⁵²⁰ "A man's condition or station in life is constituted by the legal relation he bears to the persons who are about him; that is [...] by duties, which, by being imposed on one side, give birth to rights or powers on the other." (J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *Collected Works*, ed. J. H. Burns & H. L. A. Hart, University of London, 1970 (1780), XVI, 38, p. 234.

⁵²¹ These ideas are set up in detail in J. Bentham, *An Introduction to the Principles of Morals and Legislation*, pp. 205-7, n.

⁵²² On the extent of Bentham's democratic ideas, see F. Rosen, "Jeremy Bentham and Democratic Theory", *The Bentham Newsletter*, December, 1979, pp. 46 ff. Also, Rosen's "Libertad constitucional y democracia representativa", trans. E. Guisán, *Télos*, I, 2 (1992), pp. 93 ff., where he contrasts Bentham's ideas of democracy with Montesquieu's option for freedom through the limitation of the state power.

⁵²³ "Whatever business the law may be conversant about, may be reduced to one sort of operation, viz: that of creating duties. (It is by creating duties and by nothing else that the law can create rights. When the law gives you a right, what does it do? It makes me liable to punishment in case of my doing any of those acts which would have the effect of disturbing you in the exercise of that right." (J. Bentham, *Of Laws in General*, Appendix A, 8 and n., p. 249).

⁵²⁴ J. Bentham, *Of Laws in General*, Appendix C, 15 and 16, pp. 293-4.

⁵²⁵ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, XVI, 42, p. 241.

point, freedom is eminently security.

1.4. Political reasons

There are only two possibilities for the ordering of the polis: either we base it on what is just, or we do it on what is useful. The latter was certainly Bentham's option. The one and only end of government (also, as a consequence, of law) must be the greatest happiness of the greatest number,⁵²⁶ which brings utilitarianism within the scope of consequentialism. Political actions must be assessed exclusively according to their consequences, not –as the justice option would argue– according to their agreement with some given principles. The guide for correct action in politics (in law) does not come from the effort to honour the past, but rather to build an honourable future, although it is certainly true that there can be no honourable future if commitments contracted are not respected nor the law obeyed. But these are complications to be borne in mind later. Initially, the utilitarian option is the pragmatic one; it does not question what one ought to do, but rather what needs to be done in the light of the results one wants to achieve. The line of action will be marked out according to the possibilities.

Pre-legal rights, natural ones, on the contrary, are contrasts of political correctness that demand justice. A political action that assumes them as the criterion will not be based on reasons of opportunity, but on its consistency with what are considered non-negotiable principles, that cannot be discounted, that cannot be compromised to achieve no matter what objective. It is not a question now of reaching certain goals however altruistic they are, but of maintaining a constant position from which there can be no retreat. A consequentialist cannot defend taking laws into consideration and claim to be consistent. The strict logical-systematic conception of Benthamist scientism stops Bentham from having it both ways or from accepting temporary arrangements unsuitable for a social Newtonian: all the fabric of law and state must be established as rigorously derived from a unique principle, a founding rock in whose immobility lies its uniqueness. That principle, that of utility, would not admit cohabitation with rights, by definition heteromorphous.

2. Mill's clarifications

In his essay *Jurisprudence*,⁵²⁷ one of the articles James Mill wrote for the *Supplement to the Encyclopaedia Britannica*, we find interesting clarifications of the utilitarian approach to the subject of rights. First and foremost, rights trump duties and are in the foreground of the science of law and, therefore,

The object and aim of the science distinguished by the name of jurisprudence is that of the protection of rights.⁵²⁸

It may seem a mere detail, this difference between putting rights in the foreground or putting duties there, as Bentham did, but what is at stake is the difference between a modern vision (individualist) of law, that is to say, liberal and totally consistent, and that fundamentally liberal vision but with an unpleasant aftertaste, *ancien*, that we get when we focus on duties.

Naturally, the rights of which James Mill spoke are only legal rights; he could never conceive the existence of pre-legal rights, that can only be metaphysical, and so in open contradiction with Bentham's theory on the matter:

Right, therefore, is factitious and the creature of the will. It exists only because the society, or those who wield the powers of the society, wills that it should exist; and before it was so willed, it

⁵²⁶ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, I, pp. 11 ff.

⁵²⁷ J. Mill, "Jurisprudence", in *Political Writings*, Cambridge, 1992, pp. 43-93.

⁵²⁸ London, 1819-1823. See T. Ball, "A note on sources", in J. Mill, *Political Writings*, p. xxxvii.

had no existence.⁵²⁹

James Mill is also consistent with Bentham's approach in situating those legal rights, as an entire legal system of which they form part, under the auspices of the utilitarian principle, the maximum criterion of political correctness.⁵³⁰ Those juridical rights, then, are characterised by Mill as signs, which is totally coherent with the analytical method and the distrust of fictions of classic utilitarianism. In Mill's preceding paragraph we could almost be reading Alf Ross. Rights are mere signs that express a meaning to which they serve as an abbreviation: and this meaning is the juridical powers that are behind them, be they powers over people or over things.⁵³¹ Nothing that is not granted by one of these regulatory powers can be denominated by the term juridical power, if we want to maintain the minimum clarity of expression necessary.

We shall now turn to the second of Mill's clarifications, which is very interesting, albeit often ignored, the confusion of desire with reality, a very dangerous extreme in politics since, sooner or later, it causes the frustration of unfounded social hopes. The clarification in question takes us back to the subject of the relation between rights and duties, but approached from an unusual point of view:

Rights, it must be remembered, always import obligations [...]. If one man obtains a right to the services of another man, an obligation is, at the same time, laid upon this other to render those services. [...]. It thus appears that it is wholly impossible to create a right without at the same time creating an obligation.

[...] Every right is a benefit; a command to a certain extent over the objects of desire. Every obligation is a burden; an interdiction from the objects of desire. The one is in itself a good; the other is in itself an evil. It would be desirable to increase the good as much as possible. But, by increasing the good, it necessarily happens that we increase the evil. And, if there be a certain point at which the evil begins to increase faster than the good, beyond that point all creation of rights is hostile to human welfare.⁵³²

We shall not be speaking of rights, even if we use that term, when there is no specific duty, assigned to a specific subject bound by it, whatever its content. In the absence of duty, we may be talking of a declaration of principles, or political intentions, or of good desires, the enunciation of an action programme, but not of a right. When the current Spanish Constitution speaks of the right to work or to housing, and yet does not indicate against whom to claim; or when Argentinean theorists, anguished at the sad economic and social situation of their country, argue for a "right to an income", these are false rights, surely proclaimed with the best of intentions, but with perverse social and political effects, aggravating, or at the least frustrating, situations they should apparently resolve.

But there is more; rights, which are a good, are not a net but rather a gross good, for the ill they produce in the form of duties must be discounted. If we increase rights, in that very action we are increasing good and ill in variable proportions. At a certain moment in the relation between good and ill, between rights and duties, the latter will start to grow exponentially. If, from the desire to do good, we grant too many rights, we shall come to establish a tyrannical regime in which we shall live subjected to an astonishing set of duties. James Mill warns of the inevitable correlation between rights and duties against the clamour of those ceaselessly claiming rights. Every time a right is created, at the very least, a corresponding duty is created. Those who demand ever more rights, at first sight as a means of augmenting social happiness, well-being,

⁵²⁹ J. Mill, "Jurisprudence", p. 47.

⁵³⁰ Ibidem.

⁵³¹ J. Mill, "Jurisprudence", p. 48.

⁵³² J. Mill, "Jurisprudence", pp. 48-49.

freedom, equality or whatever they want to achieve with these rights, do not realise (or, if they do, they do not care) that an increase in rights in any society, by increasing duties disproportionately, after a certain stage, leads fatally to an exponential diminution of the net level of happiness, well-being and liberty. That society is not free, nor happy, nor does it enjoy social well-being when it is overwhelmed by duties, by rights.

As can be seen, James Mill's view of rights did not significantly differ from that of Bentham, but his highlighting of rights as against duties meant that he put the question in terms that predated the position of John Stuart Mill. At the same time, he gave a valuable warning about the emancipating and felicitic potential of rights.

3. Rights and utility, according to John Stuart Mill

In his complete study on law in John Stuart Mill's work,⁵³³ José García Añón drew up a convincing chronology of the evolution of Mill's theory on rights, in which he set out three stages with great precision.⁵³⁴ In the first stage, until 1826, Mill agreed substantially with the approaches of Bentham and James Mill: rights are the work of the law that determines what rights exist and what circumstances give rise to and put an end to them; obedience to law cannot be subordinate to considerations of justice; with Bentham, he preferred to call them "securities".

In the second stage (from 1827 to 1844), Mill had established the bases of the distinction between legal rights and moral rights, separating out two dimensions of their existence, validity and efficacy: the existence of a right and its protection by the state did not have to be joined. There could be universally valid rights even though they did not enjoy universal protection, since this was the obligation of the state. Against Bentham's rationalist universalism, here we see romantic particularism. Those moral rights are characterised as claims and liberties. And are based on interests (as Bentham had already done, long before Ihering) that had awoken expectations that must not be defrauded.

Mill consolidated the difference in his position from that of Bentham and James Mill from 1845 onwards. Subjective rights are the essence of justice and make up a single reality, in which legal rights can be distinguished from moral ones, concerning ourselves exclusively with their respective institutionalisation. In any event, rights, legal or moral, are always a social artifact.

This evolution over time enables us to appreciate Mill's final position, in a matter in which he had first identified his approach with that of Bentham and James Mill, inevitably enough since they were his *alma mater*. Knowing the evolution, we must now ask ourselves the reasons for it.

3.1. The new place of rights

In reality, utilitarian argument had not even disappeared. As we have seen, it had not done so in Bentham and much less so in James Mill: but John Stuart Mill is speaking of something qualitatively different, of meta-legal rights. This type of right had been discarded for reasons we have seen, which can be summed up as their inability to withstand Bentham's analytical rigor. Mill considered this one of the most admirable characteristics of Bentham's theory, so it could not be renounced because of the achievements it had made possible:

It is a sound maxim [...] that error lurks in generalities. [...] that abstractions are not realities *per se*, but an abridged mode of expressing facts, and that the only practical mode of dealing with them is to trace them back to the facts (whether of experience or of consciousness) of which they are the expression. Proceeding on this principle, Bentham makes short work with the ordinary modes of moral and political reasoning. These, it appeared to him, when hunted to their source, for the most part terminated in *phrases*. In politics, liberty, social order, constitution, law of nature, social compact, &c., were the catch-words [...]. Such were the arguments on which the gravest

⁵³³ J. García Añón, *John Stuart Mill: Justicia y Derecho*, Madrid, 1997.

⁵³⁴ J. García Añón, *John Stuart Mill: Justicia y Derecho*, pp. 297 ff.

questions of morality and policy were made to turn; not reasons, but allusions to reasons; sacramental expressions, by which a summary appeal was made to some general sentiment of mankind, or to some maxim in familiar use, which might be true or not, but the limitations of which no one had ever critically examined.⁵³⁵

Mill then faced the need of creating a theory of rights that could withstand that analytical rigor, that could not be reduced to mere slogans, so that the first thing he had to do was find a true meaning for the word “right”:

I have, throughout, treated the idea of a right residing in the injured person, and violated by the injury, not as a separate element in the composition of the idea and sentiment, but as one of the forms in which the other two elements clothe themselves. [...]. When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion.⁵³⁶

We already know what it means to have a right. It is very similar to something James Mill had said, but with an important difference. Rights claim their protection by society “through the law”; therefore, rights exist before law does, and it can be demanded that law be changed in a certain direction. We have, then, certain meta-legal rights that can be the deontological authority of law. Consistency with Bentham’s irrenouncible analytical rigor demands a further caution, and it is to be able to situate those rights in an undeniably positive, not metaphysical, sphere. It is a question of finding a position for rights so that we can use them as trumps against the state (outside positive law, then), even against a democratic state that takes its decisions by a majority of legitimate representatives of the citizens, as long as by doing so, we do not fall again into the metaphysical sin.⁵³⁷ We are dealing with certain rights, not within the law, so that they can be thrown in the legislator’s face. But they cannot be those rights inherent in human nature, with which we were born, rights that allow them to build and not merely destroy, as did the natural rights in the revolutionary era:

This mode of thought reached its culmination in Rousseau, in whose hands it became as powerful an instrument for destroying the past, as it was impotent for directing the future.⁵³⁸

Dissect the human body and no rights will be found there. The only possible place to situate a-legal (prior to and contra-legal) right without going back to the old metaphysical ways is in morality that, in Benthamite terms, overflows law, it was a beyond (a circle with law but with a greater radius), but it was a positive reality, perceptible through the senses, a fact, if we reduce it to a morality existing in the social convictions of a given time and place:

Justice is a name for certain classes of moral rules, which concerns the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and of the notion which we have found to be the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation.⁵³⁹

⁵³⁵ J. S. Mill, *Bentham*, in *Essays on Ethics, Religion and Society, Collected Works*, vol. X, ed. J. M. Robson, London, 2002 (1838), p. 84.

⁵³⁶ J. S. Mill, *Utilitarianism*, ed. Mary Warnock, Glasgow, 1979 (1861), p. 309.

⁵³⁷ Although he comes very close of falling into it: “Although his reasons are drawn from experience and not *a priori* knowledge, the propositions themselves are very like those defended on metaphysical grounds by the traditional upholders of the doctrine of natural rights.” (I. Berlin, “John Stuart Mill and the ends of life”, in *Four Essays on Liberty*, Oxford, 1969, p. 190).

⁵³⁸ J. S. Mill, *Auguste Comte and Positivism*, in *Essays on Ethics, Religion and Society, Collected Works*, vol. X, ed. J. M. Robson, London, 2002, (1865), p. 299.

⁵³⁹ J. S. Mill, *Utilitarianism*, pp. 315-316.

Individual rights⁵⁴⁰ are the essence of justice and justice is a part of morality;⁵⁴¹ an empirically evident morality but that, happily for our author, has revealed itself to be much less malleable in the hands of the legislator than Bentham expected. It is a question, then, of a morality that can enter into conflict with legality, but, except in the most extreme cases will not lead one to predict the dissolution of the government,⁵⁴² the re-assumption by individuals of their natural rights, the restoration of primitive anarchy, of the law of the strongest, to the elevation of the individual conscience as the supreme judge for want of impartial institutionalised judges.⁵⁴³ This is a morality that allows free criticism but only very exceptionally disobedience, for that civil disobedience is such an extreme recourse, resorted to in really essential matters, that only a Ghandi or a Martin Luther King would do it; thus it does not become something useless or trivial. So it is a consensual morality, based on the conventions that a society establishes as to what ought to be, a relative, historical morality, therefore.

But a fully consensual morality is, by definition, conservative; for this reason attention must be given to one of its sectors that is most immediately connected to law, namely, justice. There can be found those rights that inspire law, and it is the place where empirically evident, conventional morality interacts with the demand to make of it the best possible version, in accord with the impulse given and demanded by the spirits, by enlightened thinkers desirous of perfecting themselves and in so doing, perfecting humanity. A humanity that must never be used as a means and that, in consequence, cannot be directed towards the ideals dreamed of by learned minds but only towards its greater happiness, better said, towards the purest expression of the most noble of what it is. There is much of Rawls in Mill.

Moral rights are, then, the contents of justice. And justice is the part of morality bound to legality; superior to law but not totally disconnected from it.

3.2. Why rights again?

We could say that Bentham put an end to the anti-metaphysical criticism initiated by David Hume. If Hume discredited the metaphysical approach in political philosophy with his irrefutable critique of the notion of the social contract as the foundation of the theory of the state, Bentham did the same in philosophy of law by discrediting the notion of natural rights as the foundation of the theory of law. It was not a capricious undertaking by either author. The social contract and natural rights were the entry gate for subjectivity in the political-legal field; a subjectivity cloaked in objectivity thanks to the metaphysical conception of nature and of political power. That apparently objective subjectivity was the making of the prejudiced mind, the main

⁵⁴⁰ Since individual rights are the only substantive ones: “M. de Montesquieu, comme la plupart des écrivains politiques, me semble avoir confondu deux choses: la liberté et la garantie. Les droits individuels, c’est la liberté: les droits sociaux, c’est la garantie. L’axiome de la souveraineté du peuple a été considéré comme un principe de liberté: c’est un principe de garantie. Il est destiné à empêcher un individu de s’emparer de l’autorité qui n’appartient qu’à l’association entière; mais il ne décide rien sur la nature et les limites de cette autorité. (...) La liberté n’est autre chose que ce que les individus ont le droit de faire, et ce que la société n’a pas le droit d’empêcher.” (B. Constant, *Principes de Politique. Applicables à tous les gouvernements représentatifs et particulièrement à la Constitution Actuelle de la France*, Chap. Premier, n. 2, in *Écrits Politiques*, Paris, 1997 (1815), pp. 793-4).

⁵⁴¹ H. L. A. Hart, “Natural Rights: Bentham and John Stuart Mill”, in *Essays on Bentham. Jurisprudence and Political Theory*, Oxford, 1982, p. 88.

⁵⁴² “The second ambiguity is that of confounding a right, of any kind, with a right to enforce a right by resisting or punishing a violation of it. Men will say, for example, that they have a right to a good government; which is undeniably true, it being the moral duty of their governors to govern them well. But in granting this, you are supposed to have admitted their right or liberty to turn out their governors, and perhaps to punish them [...]; which far from being the same thing, is by no means universally true, but depends upon an immense number of varying circumstances, and is, perhaps, altogether the knottiest question in practical ethics.” (J. S. Mill, *Use and Abuse of Political Terms*, in *Essays on Politics and Society, Collected Works*, XVIII, ed. J. M. Robson, London, 2001 (1832), p. 10).

⁵⁴³ J. Locke, *An Essay concerning the True Original, Extent and End of Civil Government* (Second Treatise), in *Two Treatises on Government*, Cambridge, 1988 (1689-90), § 219 & 220, pp. 410-1.

enemy of the enlightened mind, the begetter of haughty and despotic ignorance.

To remove speculation about law from the field of empty speculation, from unforeseeable subjectivity in order to place it in the sphere of calculable, predictable objectivity, that was what Bentham intended to do when he substituted the utilitarian principle for natural rights or any other not empirically evident point of departure. That was then enormously positive, and Mill recognised it as such. That is the world that Mill found so triumphantly settled; and that is the world that he found himself forced to impugn, without being able to limit himself to tearing it down without more. He had to overcome the deficiencies of that world but could not dispense with it. No longer is it possible to return to the metaphysical past; the return to the past is never possible for we are not who we were. Nor is it possible to remain in this rationally established and omnisciently far-sighted present to see what is to come, for the future is to be built, it is not given. The eras pass so rapidly, and Mill's era was already that of Romanticism. We can understand Mill's revolt against Bentham, in effect, as an episode in the war of the Romantics and the Enlightened;⁵⁴⁴ as one of the great battles of that war. A brilliant student of Romanticism, Dr. Lázaro Paniagua, has said that "the Romantics gave liberty strength and argument, as against the formulary of Enlightened reason", and this is something that seems to be in accord with our subject. Freedom is to be used; it is not a vacuum. Freedom is to be employed in the only task worthy of the Millian hero: self-construction as a complete human being. Bentham's freedom allowed behaviour to be scientifically forecast and, to the extent that the legislator is a scientist, to be controlled. Mill's freedom is the call to action of a fighter who no longer has to propose the discovery of his homeland, as Hölderlin did, his homeland is himself; each of us.⁵⁴⁵

As is well-known, Mill's main reproach of Bentham was precisely his rationalist coldness when considering human nature. For Mill, Bentham only saw half of human nature, calculating reason, but did not take into account the other half, the feelings. And this is because he needed reason for his universalist project (as an Enlightened man); the sphere of feelings is that of particularism,⁵⁴⁶ that of incommunicable, individual perception.⁵⁴⁷ In this sense, Mill's conception of human nature is closer to the complexity of Adam Smith. Mill also did the same with Montesquieu when insisting on the importance of different national characteristics against the rationalist universalism of Bentham's legal theory.⁵⁴⁸

Mill, as compared with Bentham, is then the complete man, complex, unique against uniform abstraction. Bentham sacrificed natural rights to avoid the tricks that try to gain political power at the price of human submission to one or other despotism: reason, on some basic data, empirically obtained, places utilitarianism as the final reference for justice. Subsidiary principles, moral arithmetic, thorough institutional examination try to make the light cross, as in the panopticon, all the structures of the social edifice. Mill does not want to renounce illuminating rationality, but he knows that this cannot explain everything: that, in spite of everything, an indescribable stronghold is constitutive of individuality, a reservation he does not want to give explanations for, and if he could, he would not. If for a moment we abandon the sphere of legal-

⁵⁴⁴ "Stuart Mill shall know no longer which card to play; his mind is Benthamite, but his heart, moved by the lyricism of the lake poets, was contaminated by social romanticism." (D. Negro Pavón, *Liberalismo y Socialismo. La Encrucijada Intelectual de Stuart Mill*, Madrid, 1975, p. 67.

⁵⁴⁵ "(That in Mill) did not become an alibi by which society and the state could ignore conducts that under the appearance of liberty, in practice covered up situations of semi-slavery; that is, all those situations in which the exercise of individuality is limited to choosing the only possible option." (A. de Miguel Álvarez, "Autonomía y conducta desviada: el problema del paternalismo en la obra de John Stuart Mill", *Télos*, III, 2 (1994), p. 70).

⁵⁴⁶ Individualist particularism. Also romanticism gave rise to a collectivist particularism (of the nation, social class or race). Collective particularism, to the extent that it supplanted individuality, was anti-liberal and led, by the irresistible force of the nature of things, to the totalitarianisms of the 20th century.

⁵⁴⁷ J. S. Mill, *Bentham*, pp. 92 ff.

⁵⁴⁸ J. S. Mill, *Bentham*, p. 92 ff.

political philosophy and go to literature, we shall lose exactness in the expression, but perhaps we shall gain an intuitive clarity that is often more illuminating than philosophy itself in certain areas (and very limitedly: it does not give us an unhurried and detailed vision, more a flash). In Herman Melville's brief novel, *Bartleby, the Scrivener*, the main character, when faced with the constant requirements considered normal in any working activity, and even those considered unavoidable for the most elemental precautions, time and again, persists in a categorical and reserved, but courteous "I would prefer not to". He gives no reasons, offers no alternatives, only the defence of a stronghold, more and more extended –of a non-negotiable absorption. I think this blindness to rationality and even to reasonableness make up an important dimension of human rights and an explanation of the ultimate reasons for a return to rights, despite all rational criticism. The self-absorbed stubbornness of one who has no reason to defend certain vital positions that he considers non-negotiable, the lack of an ultimate base that gives a foundation to rights, is a distinctive note of human rights, although the demands of the advance of the times makes Mill situate them in a historical morality, empirically determinable, and not in a timeless nature, undefendable because ethereal:

To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask, why it ought? I can give him no other reason than general utility.⁵⁴⁹

We have to return to this mixture of rights and utility; for the moment, Mill's defence of rights is the conclusion of his individualism, of the option for people instead of the whole. As everyone counts, we all are the Homeland, nobody can be excluded, sacrificed. Nor did Bentham sacrifice anyone, but that was as a result of a calculation, a consequentialist wisdom. With Mill, on the other hand, it is a question of principles, of rights, because that is his method to confront the dangers of democracy. Bentham had resorted to a democracy radical and respectful of the minority to avoid sacrificing people to the "the sinister interests of the ruling few". But for Mill, democracy is not the ultimate solution to the problem, but rather a new problem, albeit, without doubt, the least problematic of the solutions. For Mill, democracy is a lesser evil; an evil that must be mitigated by preventing the combined action of democracy and public opinion (the indispensable ally of democracy) from putting an end to individuality, imposing a uniformity that results in individual talent (intellectual, moral, artistic) losing its identity.⁵⁵⁰ Democracy must be controlled, limited; the existence and force of the opposition by minorities must be guaranteed, it is necessary to insist upon counterweights and on what in his inspired theory, Bentham would describe as "interest and duty junction principle" as a way to ending the "interests begotten prejudices", as the most powerful intellectual tool of the "the sinister interests of the ruling few". Democracy⁵⁵¹ (and a free Public Opinion Tribunal) is essential to ensure that the sinister few (the governing and the corporative –*Judge & Co.*–) do not suffocate dissident minorities and eccentric individuals. But those have as much to fear from the dictatorship of the majority as from the dictatorship of the few. Together with the exposed means (institutional counterweights, the union of interest and duty), Mill convoked individual rights as the recognition and guarantee of the wealth that resides in eccentric individuality. Rights so important that they must pre-date and be above the law.⁵⁵²

⁵⁴⁹ J. S. Mill, *Utilitarianism*, p. 309.

⁵⁵⁰ J. S. Mill, *Bentham*, pp. 107-8.

⁵⁵¹ J. S. Mill, *Bentham*, p. 109.

⁵⁵² J. García Añón, "Una aproximación el concepto de derecho a la intimidad en John Stuart Mill", *Télos*, II, 1 (1993), pp. 17 ff.

3.3. Rights and utility

There are two important characteristics in Mill's design of rights, because they are the two characteristics that show the subtlety of the adjustment between rights and utilitarianism that he made. The two ideas are that rights are indissolubly bound to duties and that justice, superior to law, is in turn subordinate to utility, which remains the supreme criterion of morality.

We shall look at these two ideas shortly. For the moment, it is necessary to know why he had to make that fine adjustment. The Benthamite version of utilitarianism, for Mill, had entailed a great advance in morality and in the science of morality. He had done it, precisely, because he had transformed morality into an empirical science, he had based it on an objective foundation, distinct from the hidden arbitrariness of the metaphysical focus. Now, the utilitarian principle was, for the demands of its own situation as the supreme criterion of what was and was not correct, and at the beginning "of the chain of cause and effect", excessively abstract, even in its final and purest formulation of "the greatest happiness of the greatest number". That abstraction, the generality of its principle made a concrete expression immediately necessary if it were not to be the source of the very dangers of arbitrariness that it was intended to avoid.⁵⁵³

Mill does not tell us what is the use, the purpose of that concrete expression that Bentham called "subsidiary principles" (subsistence, abundance, equality and security),⁵⁵⁴ nor why he did not take into consideration the very important theoretical development made by Bentham in the analysis of the typology, quantification and comparison of utilities, and that has served as a solid foundation for refined and thorough theoretical propositions in economic theory and political science. To quote but one, admittedly significant, example, Mill does not mention as a clarification of the principle of the greatest happiness Bentham's study of the principle of decreasing marginal utility that led him to substantially egalitarian political conclusions.⁵⁵⁵ For Mill, it is as if the utilitarian principle had been left by Bentham as an essential guide, almost an oracle, although succinct, of political and moral judgement. Going more deeply into Bentham's hedonistic nature, the temptation to resort to simplicity to define his theory disappears. And yet, Mill, who knew his work so well, more than most, did just that.

We must not make a trial of intentions; we must limit ourselves to setting out Mill's substitution of all those elements that made the Benthamite theory complex by his proposal of moral rights and trying to elucidate its theoretical significance.

We return, then, to the two important characteristics of Mill's design for rights mentioned previously. The first of these was the close connection between rights and duties. In reality, as indicated at the beginning of this essay, this had already been emphasised by Bentham, and James Mill, too, had explained its main implications. In Bentham, rights are primarily composed of duties, given their imperative nature. If we were to contemplate that primary reality of duty from the point of view of who is benefited by it, we would have rights, which did not pass, thus, as a mere *flatus vocis*, a mere play of light and shadows in a cave projected by the fact of the sovereign's will. In John Stuart Mill, moral duties and rights were at the centre of the argument; they were no longer treated simply in passing, as corollaries of the fundamental idea. They mark out nothing more nor less than the border between justice and beneficence, which is the rest of morality. If we do not practice beneficence, it may be immoral but as it is not the failure to fulfil a duty, leaves no right unsatisfied, there is no injustice there. On the other hand, when one fails to

⁵⁵³ J. S. Mill, *Bentham*, pp. 110 ff.

⁵⁵⁴ J. Bentham, *Principes du Code Civil, Oeuvres*, tome 1, chap. II, pp. 56-7. See F. Rosen, "Individual Sacrifice and the Greatest Happiness: Bentham on Utility and Rights", *Utilitas*, 10, 2, pp. 136-7; and J. Dinwiddy, *Bentham*, pp. 128-140.

⁵⁵⁵ On this matter, the best works continue to be those of A. J. Ayer ("The Principle of Utility", in G. W. Keeton y G. Schwarzenberger, eds., *Jeremy Bentham and the Law. A Symposium*, Westport, Conn., 1970) and F. Rosen (*Jeremy Bentham and Representative Democracy. A Study of Constitutional Code*, Oxford, 1983, especially pp. 201 ff.). I dealt with this subject in "Utilitarismo e Igualdad. El principio de igualdad en la teoría de Jeremy Bentham", *Anuario de Filosofía del Derecho*, t. V (1987), pp. 153 ff.

fulfil a moral duty, one causes harm to another, to the holder of the unsatisfied right and, as there is harm to another, there is injustice. Thus moral justice keeps that legality that confers on it its normative character and that allows it to become a claim not against another particular individual, but rather against the authorities, including the highest, the legislators and against their legally crystallised will. Justice is, then, that part of morality whose contents are duties or (since in Mill the individual focus takes priority over objectivism as in Bentham or Mill *père*) rights.

Moreover, rights have another important function for justice: they rationalise the instinctive feelings that are its origin and, by rationalising them, they let justice enter to form part of morality; in morality, they allow the union between reason and passion that is so characteristically human:

[...] the idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule. There is involved, in addition, the conception of some definite person who suffers by the infringement; whose rights (to use the expression appropriated to the case) are violated by it.⁵⁵⁶

4. The useful and the just

It remains for us to consider the connection between justice (moral rights) and utility. Justice depends on utility, it is subordinate to it.⁵⁵⁷ But this subordination is not, as is usual, in only one direction. Justice, moral rights, as we saw, ground utility, they make it operative. But it also has potentiality in the opposite direction. This potentiality has two aspects; on one hand, it allows rights to be ordered, to establish their precedence:

If utility is the ultimate source of moral obligations, utility may be invoked to decide between them when their demands are incompatible. Though the application of the standard may be difficult, it is better than none at all [...].⁵⁵⁸

Moral rights are not absolute; we have criteria available for their co-ordination and interpretation. But nor does the appeal to rights exhaust the possibilities of rational discourse on what ought to be done in society, with which the recourse to force is reduced, the field of rationality simultaneously extending itself.

By extending that field of rationality, Mill does exactly the contrary to Bentham in the same situation, since the latter starts from a great widening of the field in the definition of what ought to be done in politics (all the widening of the field that he gives having situated the principle of utility as the supreme criterion of what ought to be), only to immediately reduce that amplitude by means of the subsidiary principles. These principles, although Bentham treats them as part of the civil law, in reality, define the aims and procedure for distributive justice. If we join the expansive force of distributive justice in a utilitarian climate with the basic role of civil law, the subsidiary principles become the general means to explain the principle of utility, reducing their scope. Moreover, because of their contents, subsistence, abundance, equality and security are equivalent to Mill's moral rights.

When Mill reaffirms the importance of meta-legal rights, articulating the category of moral rights, and putting them under the seal of utility as the great engine of the moral universe, he is doing something very similar to what Bentham had done on exalting, as the point of

⁵⁵⁶ J. S. Mill, *Utilitarianism*, p. 308.

⁵⁵⁷ "It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being." (J. S. Mill, *On Liberty*, in *Essays on Politics and Society, Collected Works*, XVIII, ed. J. M. Robson, London, 2001 (1859), p. 224).

⁵⁵⁸ J. S. Mill, *Utilitarianism*, p. 277.

departure of his theory and of the moral universe, the principle of utility, in order to limit it through the concrete expression given by the subsidiary principles, a form of summary of certain meta-legal rights.

Naturally, these then are differences of emphasis and point of view: individual against order, freedom against authority, feelings against reason.... Those differences are very important, who can deny it? But the summit of the legal-political pyramid is so similar...

The useful and the just remain united, in Mill and in Bentham, expressing the two dimensions that define the correctness of the system of co-existence. But its articulation, the submission of rights to utility, is still lacking from the point of view of a fully consequentialist theory of human rights:

He is therefore committed to a criterion for the identification of moral rights which has two components: essential individual good and the general utility of legal or social enforcement. If his theory is to avoid contradiction, it must be shown not merely that these two halves of the criterion may coincide but (exceptions for particular cases apart) that they cannot diverge, so general utility must always require general rules providing legal or social protection of such forms of individual good for all men.⁵⁵⁹

The useful and the just, in the form of rights, must be united, but these rights, when they are fundamental, when they express essential individual goods, must have priority, they must trump utilitarian or consequentialist considerations in general. But this would be something that only the twentieth century could give; the nineteenth had enough with what Bentham and Mill had done.

⁵⁵⁹ H. L. A. Hart, "Natural Rights: Bentham and John Stuart Mill", p. 96. For Hart, Mill failed to solve the problems presented by Bentham's theory of rights. See H. L. A. Hart, "Lecture on a Master Mind: Bentham", *Proceedings of the British Academy*, 48, (G. J. Postema (ed.), *Bentham: Moral, Political and Legal Philosophy*, vol. I, Aldershot, 2001), pp. 314 ff.