

BENTHAM: OUR CONTEMPORARY?

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ABSTRACT

This article aims to evaluate the contribution of Bentham's ideas to the jurisprudential debate in view of their relevance vis a vis their contemporary reception. The focus is on Bentham's revolutionary idea of publicity with its spill-over effects on contemporary debates on the rule of law and accountable and transparent governance. As far as the method is concerned, after having examined Bentham's ideas on the rule of law and the debate they raised, the focus in second section of this article is specifically on his conception of publicity. Some critical remarks then show that Bentham's focus on publicity and transparency has been rightly interpreted in the contemporary debate as an important contribution. However, it is their *justification* that it is judged to be problematic. In fact, the assessment of the fundamental importance of publicity for the rule of law and transparent and accountable governance leads to a critical engagement with contemporary readings of Bentham's scholarship, *in primis* that of Gerald Postema, with a development of the latter's republican interpretation. The direction of travel that is proposed is towards a more liberal republicanism. The article not only shows how Bentham's contribution should be revaluated in view of contemporary interpretations, but also proposes directions for further research developments according to which contemporary conceptions of regulation need to take a *reflexive* turn while aiming at *legitimate* legality at the same time.

KEYWORDS

Bentham. Rule of Law. Common Law. Publicity. Jurisprudence.

RESUMO

Este artigo tem como objetivo avaliar a contribuição das ideias de Bentham para o debate jurisprudencial em vista de sua relevância e recepção contemporânea. O foco está na ideia revolucionária de publicidade de Bentham, com seus efeitos colaterais nos debates contemporâneos sobre o Estado de direito e a governança responsável e transparente. Quanto ao método, após ter examinado as ideias de Bentham sobre o Estado de direito e o debate que elas suscitaram, o foco na segunda seção deste artigo é especificamente em sua concepção de publicidade. Algumas observações críticas mostram que a atenção de Bentham em publicidade e transparência foi corretamente interpretada no debate contemporâneo como uma contribuição importante. No entanto, é a *justificativa* delas que é considerada problemática. Verificou-se que uma avaliação da importância fundamental da publicidade para o Estado de direito e governança transparente e responsável leva a um envolvimento crítico com leituras contemporâneas das obras de Bentham, *principalmente* a de Gerald Postema, com um desenvolvimento da interpretação republicana deste último. O percurso proposto é em direção a um republicanismo mais liberal. No presente estudo, não somente demonstra-se como a contribuição de Bentham deveria ser reavaliada em vista das interpretações contemporâneas, mas também são propostas direções para novos desenvolvimentos de pesquisa, de acordo com as quais as concepções contemporâneas de regulação precisam tomar uma virada *reflexiva*, ao mesmo tempo que devem visar a legalidade *legítima*.

PALAVRAS-CHAVE

Bentham. Estado de direito. *Common Law*. Publicidade. Jurisprudência.

INTRODUCTION¹

Bentham’s contributions to philosophical and theoretical legal thinking are extensive and scattered: for example, his ideas have been crucial for having founded analytical jurisprudence (TINCANI, 2007, p. 201). As noted by Postema (2019a, p. 462) in his afterword of the new edition of *Bentham and the Common Law Tradition*, it is important to stress that “Bentham was not just a utilitarian and a positivist; he was a utilitarian positivist”. This means that

[...] despite what might be contrarily thought (and has been extensively held), Bentham’s upholding of the principle of utility (“the fundamental principle guiding all rational deliberation, the ultimate rational decision principle” [...]) is not incompatible with his (normative and anti-authoritarian, i.e. “anti-Hobbesian” and “anti-Austinian” [...]) positivist views (SILQUINI-CINELLI, 2020, p. 318).

¹ The authors are grateful to the anonymous referees as well as to Tony Ward, Gustavo Dalpupo de Lara and Márcio Eduardo Zuba for comments, and Gerald Postema, Thomas Bustamante and Thiago Lopes Decat for prompting our interest in writing this paper. Although this paper is the result of intense dialogue and of many years of collaboration, the first two sections were written mainly by Natalina Stamile, while the last two were written mainly by Gianluca Andresani.

Beyond that, from the beginning, one of the most discussed points of Bentham's theory was in relation to English common law and its defectiveness and inadequacy to make its institutions work in a non-arbitrary way². According to Postema (2019a, p. vii), Bentham “mercilessly and effectively attacked” the common law system, emphasizing that

“As a System of general rules, Common Law is a thing merely imaginary” (*Com.* 119). Common-law theory is incoherent; whatever it is a theory of, it cannot be a theory of some kind of *law*. Common-law theory is committed to what we might call the “corrigibility thesis” according to which, although judges are empowered to settle particular cases, any formulations of rules justifying their decisions, even those of the deciding judges themselves, are corrigible, open to challenge and reformulation. (Recall that Blackstone wrote that the *law* and *the opinion of the judge* are different things, because it is possible for the judge to mistake the law.) Common law exists not in the case or judicial opinion, but rather in shared practice. This thesis, Bentham charged, is incoherent (POSTEMA, 2019b, p. 167, emphasis in the original).

The reason is that it is impossible for anyone to know beforehand what the law establishes because it is something in progress and it is created during its own process and adjudication, which is contrary to the key function of law, i.e. to maintain stable expectations³. In other words: nobody is capable of establishing when a conduct or a behavior is lawful until a decision has been made by a judge. Hence, the English common law is like a “dog’s law”: only after the dog has acted, one could know if its action is permitted or prohibited. In this way, a legal system so structured is clearly useless for all including the judges⁴.

As Postema (2019b, p. 169 et seq.) puts clearly in evidence, in Bentham's *quasi-positivist* framework, in which utilitarian and legal positivist perspectives are merged, the common law does not allow the judges “to reason publicly” in such a way to ensure *security*.

Bentham readily agreed with Coke that the “reason” of the common-law bench and bar was “artificial,” but, to his mind, this in no way recommended it; on the contrary, it guaranteed that Common Law was “technical”, “absurd”, and ultimately “dishonest” (B iv. 498). Contrary to its orthodox doctrine, common law [...] was quite literally *nothing*, if not judge-made⁵. Who made the so-called unwritten law? “If not judges, then who ... [for] laws don't make themselves” (LW 124–6; see *Com.* 223). Such a system of judge-made law is unavoidably retroactive (“dog law”), he charged, and undermines responsible allegiance to the law (POSTEMA, 2019b, p. 165, emphasis in the original).

² See for example: FERRARO, 2009. As noted by the author, Jeremy Bentham is universally known as an opponent of common law, considered “sham law”, “judge-made law” or “ex-post-facto law” (esp. p. 453, but see ZHAI, 2017).

³ For the critiques to the Bentham's theory of adjudication cf. FERRARO, 2010, 2013. On the function of law being the maintenance of stable expectations see LUHMANN, 2008, 2016.

⁴ “‘When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*... they lie by till he has done something which they say he should not *have done*, and then they hang him for it.’ (B v. 235)” (POSTEMA, 2019b, p. 165, emphasis in the original).

⁵ See BENTHAM, 1962, III, p. 223-224; IV, p. 483-485; V, p. 546; VII, p. 539.

I.e., such a system undermines the rule of law: “Judge-made law secures obedience and social order only by playing on the blind fear of citizens, not by addressing clear directives to them and articulating the reasons for these directives (B i. 161; UC 69.151, 163)” (POSTEMA, 2019b, p. 165).

The judges decide according to – and apply – the judicial precedent, that is they reproduce the reasoning of previous judges and so “close own individual reason in the drawer” and a “certain “hardness of heart” becomes “predominant in the system” (BENTHAM, 1970, p. 194-195)⁶, due

[...] to the fact that a strict doctrine of binding precedent, for all its merits in underwriting citizen security and the predictability of the law, requires that judges and lawyers turn a blind eye to special circumstances and the harms done to particular parties by precedent-based rules (even when they are reasonable), in order not to lose the benefits of general perception in the community of adherence to predictable rules (*Com.* 195) (POSTEMA, 2019b, p. 166).

But as noted by Postema (2019b, p. 155):

Furthermore, Blackstone and other common law jurists allow that some precedents can be set aside when the precedent in question is “against reason”, or there is very good reason for setting it aside (Bs Com I.71).⁷ This relative flexibility is due in part to the fact that, according to common law theory, established law rests on, and derives its authority from, a shared sense of the historical appropriateness and general reasonableness of the rules⁸. An eighteenth century judge, for example, wrote: “private justice, moral fitness, and public convenience, when applied to a new subject, make common law without precedent, much more when received and approved by usage.”⁹

The purpose of this article is to examine if and to what extent Jeremy Bentham should be considered our contemporary. Analytical jurisprudence originated from the debate that his ideas raised and still attract the attention of contemporary legal theorists. In this respect, he is one of the *most* contemporary of all modern legal theorists. Moreover, his critical straws thrown against the

⁶ Not included in BENTHAM, 1945.

⁷ “See generally Rupert Cross, *Precedent in English Law*, 3rd edn. (Oxford: Clarendon Press, 1977), 5, 8–11, 25, 28. This sentiment is echoed in the mid-nineteenth century by Lord St. Leonards: ‘You are not bound by any rule of law which you may lay down if upon a subsequent occasion you should find a reason to differ from that rule; that is, that this House, like every court of justice, possesses an inherent power to correct an error into which it may have fallen.’ *Bright v. Hutton* (1852), 3 H.L.C. 343 at 388 (quoted by Cross, *Precedent*, 23)” (emphasis in the original).

⁸ For more details on the concept of reasonableness in Law see STAMILE (forthcoming) in which the author analyzes different and possible definitions and uses of reasonableness in Law. See also STAMILE, 2015, esp. p. 222 in which the author highlights that “even if the concept of reasonableness has vague and ill-defined contours, it seems to have ‘two souls’, one deriving from case law while the other is of a more theoretical-philosophical nature”. Thus, particular attention is given to determining not only the nature and origins of reasonableness but also and especially to explaining the duality inherent in this concept.

⁹ “J. Willis, in *Millar v. Taylor* (1769), 4 Burr. 2303 at 2312 (quoted in Cross, *Precedent*, 26). See also the following passage from Blackstone: ‘The authority of these maxims rests entirely upon general reception and usage; and the only method of proving that this or that maxim is a rule of common law, is by showing that it hath been always the custom to observe it. [I]n our law the goodness of a custom depends upon its having been used time out of mind, or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority’ (Bs Com I, 68, 67)” (emphasis in the original).

common law tradition were conducive to subsequent attempts to build conceptions of the rule of law fit for the needs of the modern era. However, it will be argued that squaring the circle of enhancing the efficacy of transparency and accountability mechanisms through publicity while maintaining at the same time a *robust* conception of the rule of law will show the part of his thought which has to be reckoned as of a lesser contemporaneous relevance.

The structure of the paper is as follows. After having summarized in this first section the most relevant ideas of Bentham in relation to the rule of law, in the second section the issues related to publicity and transparent accountability are addressed in order to prepare the terrain for the discussion in the third section on the trade off with fundamental liberties, where the focus switches on the critical tensions in Bentham's ideas. The discussion is wrapped up in the concluding remarks with recommendations for further research.

1 BENTHAM ON THE PUBLIC CHARACTER OF LAW

In contemporary jurisprudence, following Hart' work, Postema's¹⁰ early reading of Bentham raised quite an interest in the institutional branch of the positivist tradition challenged by Joseph Raz (1979 [2009]). Postema's (2019a; 2019b) revisionist reading highlights the importance of Bentham's reflections on the foundations of law and adjudication for

[...] a jurisprudential debate of historic dimensions and fundamental philosophical significance. Bentham writings, and the tradition of debate which they originated, raise questions concerning not only the nature and tasks of law, but also the role of normative moral-political theory in the construction and defense of conceptions of the nature of law (POSTEMA, 2019a, p. vii)¹¹.

Law is a complex phenomenon that requires scientific rigor in the method of studying it. For this reason, Postema emphasizes that Bentham proposed the elaboration of the method called analytical jurisprudence with the aim of studying law scientifically, by distinguishing between *sein* and *sollen*. Bentham draws upon Hume, but he does not share his doubts about the belief in objective values. In fact, according to Bentham, utility has a value that is not only objective (ethical objectivism) and knowable (ethical cognitivism) but also quantifiable: utility could be calculated, so transforming morality into a science (BARBERIS, 2004, p. 98). In this way, utilitarianism could be considered as a form of "legal rationalism" that leads to positivism when it admits the thesis of the separability between law and morality (BARBERIS, 2004, p. 98), as summarized in the mentioned

¹⁰ See HART, 1982a; POSTEMA, 1989a.

¹¹ See also POSTEMA, 1989a, 2020b.

distinction between *sein* and *sollen*¹². However, Postema's revisionist reading challenges such a distinction. What the law establishes is not neatly severed from issues of justice: the evaluation of justice is subsumed under the "master value", i.e. utility¹³. Traditional and current positivist approaches have neglected this aspect according to Postema. In fact, having neglected this aspect and under the influence of Hume and his distinction between the cognitive sphere and the normative sphere, the separation thesis was formulated by Hart, as it is known today¹⁴.

The analytical jurisprudence of Bentham introduced many distinctions inside legal theory. In this vein two types of jurisprudence emerged, and they are useful to uncover the origins of the analytical philosophy of positive law (TINCANI, 2017, p. 205-206): the first called expository jurisprudence, which focuses on the descriptive dimension of law, that is on how the law is. Inside expository jurisprudence, it is also possible to distinguish authoritative jurisprudence (expository jurisprudence produces legal direct effect) from no-authoritative jurisprudence (it does not produce legal effect or not directly)¹⁵. Furthermore, inside the non authoritative expository jurisprudence, it is possible to distinguish local jurisprudence (the description of national specific legal systems) from universal jurisprudence (in the sense of legal concepts that are common to every legal system as characteristic of the law itself) (CHIASSONI, 2016, p. 9). The second, called censorial jurisprudence, emphasizes the normative aspect of law, i.e. how it should be (BENTHAM, 1776). This distinction was the terrain of culture for methodological positivism that would be elaborated a couple of centuries after Bentham's writings. Norberto Bobbio, for instance, refers to methodological positivism (the study of law as based on the *Wetfreiheit* principle, i.e. on a non-evaluative method), as distinct from theoretical positivism (as a set of positivist theses and theories) and ideological positivism (as based on the normative thesis that law must be obeyed)¹⁶. By the same token, a similar approach can be found in Carlos Alchourrón and Eugenio Bulygin (1971) when they assert that the legal validity of a norm does not imply necessarily its moral validity and so moral validity does not imply necessarily

¹² It is important to stress that utilitarianism will become the dominant normative ethics in the Anglo-Saxon world in the twentieth century and it will meet in John Rawls one of its most formidable adversaries.

¹³ See POSTEMA, 2019, especially the second part.

¹⁴ For the analysis of the contributions and tensions in legal positivism, see NAVARRO, 2001, p. 133-163, 2005. See also POSTEMA, 2011.

¹⁵ Tincani connects the distinction between authoritative jurisprudence and not authoritative jurisprudence to the distinction between jurisprudence and doctrine; but he highlights that this is not the real intention of Bentham, who had in mind the difference between the discourse of the legislator and the discourse of the jurist. See also CHIASSONI, 2016.

¹⁶ See BOBBIO, 1961, 1972, esp. p. 101-126. For more details about the importance of this distinction in the analytical legal philosophical debate see also SCARPELLI, 1965.

its legal validity¹⁷. So, if Bobbio's distinction is adopted, the legal positivism expressed by Bentham seems to be characterized by ideological positivism because he is interested especially in the maximization of collective utility, and in his criticism of the common law the scientific observation is instrumental to its substitution with another system of law, inspired by the utilitarian principle. Furthermore, the Hobbesian doctrine has been almost universally adopted by legal positivism. It is particularly direct in John Austin, founder of "Analytical Jurisprudence", the utilitarian and empiricist Anglo-Saxon version of legal positivism, established on the European continent, and also by Bentham. The latter, despite being influenced by the enlightenment and his political radicalism, develops a "vaguely" realistic and legal positive conception of law. In fact, according to Bentham, law is

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 (BENTHAM, 1945, p. 88).

In contrast to H.L.A. Hart and Karl Olivecrona, who claim that Bentham's legal positivism would consist in the scientific and non-evaluative observation of law as it is (such that it is distinct from how the law should be)¹⁸, Postema (2019b, p. 73) highlights that

Bentham suggested it is possible to construct a powerful ethical deliberating machine capable of churning out precise, determinate, and publicly verifiable judgments and prescriptions for all moral occasions, both private and public. On this view, once we make a precise and determinate assessment of the quantities of pleasure and pain of each of the persons affected by some range of actions or policies open to us, we can calculate their relative hedonic sums for each individual and from them for the community as a whole. The principle of utility requires that we choose the action or policy that comes out on top.

Postema notes that his reading of Bentham acknowledges his concept of law as imperative and its connection with a sanction. However, the revisions that Postema indicates emphasize the "constitutive" power of "establishing and overseeing government institutions" (POSTEMA, 2019b, p. 136), i.e. the discursive and argumentative dimensions of the law. Law's ruling is based on mutual accountability, with a focus on its interpersonal rather than impersonal dimension, making in this way the connection with the sanction much less stringent, since it relies on being *transparent*: i.e. publicly accountable and subject to *moral* sanction (POSTEMA, 2019b, p. 199, 2019a, p. 246). Bentham's negative judgment about the common law is in fact based on the risk of leading to arbitrary i.e.

¹⁷ See also POSTEMA, 2019a, p. 226. This claim is made also by Hans Kelsen, Alf Ross, and H.L.A. Hart, as well as N. Bobbio.

¹⁸ See FERRARO, 2009, esp. p. 453. For more details see also CRUZ, 2000; HART, 1982b; OLIVECRONA, 1975, p. 95-110.

unaccountable decisions. This convinced Bentham of the necessity to elaborate the concept of a system.

Bentham's radical critique of common law theory and practice revealed a theme that runs deep through all his jurisprudential writings: law is an enterprise of public rules, procedures, and institutions the primary task of which is to define and structure social relationships and thereby coordinate social interaction. The ultimate end, of course, is to promote the welfare of the community as defined by the principle of utility. Bentham came to see that the most fundamental problem that utilitarian universal jurisprudence had to address was the problem posed by the ever-present tension between the need for stability and certainty of the law, on the one hand, and its ability to respond flexibly and reasonably to constantly changing particular circumstances, on the other (POSTEMA, 2019b, p. 171).

As Postema highlights, this critique has been recently reformulated and retaken by Peter Birks (1996, p. 5), who also regrets "the absence of system" in contemporary common law¹⁹. Together with his emphasis on its ethos, the systemic dimension is at the heart of his conception of the rule of law. Nevertheless, contrary to Bentham's views²⁰, Birks does not want to destroy the common law to construct a code or to realize a codification, but he is convinced that:

The doctrine of precedent has lost much of its rigour. The one hope now is to tighten up its reasoning, founding stability on a sophisticated rationality. There is as yet no crisis, only a cloud on the horizon. The shape and nature of the cloud can just be detected. If the common law cannot install new mechanisms against intellectual disorder, it will come under increasing criticism and, if it then manages to escape a radical politicisation, it will not be able to resist the next wave of enthusiasm for codification. More attention must be urgently paid to the rational strength of the law. The search for principle must be conducted more vigorously. That means more logic and less experience, more system and less empiricism. Improved taxonomy is essential. Dependence on the alphabet has encouraged disorderly and conflicting categories. The common law has failed to organise the categories of its thought. That is what is meant by the absence of system (BIRKS, 1996, p. 5).

In addition, Postema (2020a) argues that this approach still doesn't take sufficiently into account the instances or the exigencies deriving from the rule of law's ethos²¹. Furthermore, he

¹⁹ For more details about the concept of system see ALCHOURRÓN; BULYGIN, 1971; LOSANO, 2002.

²⁰ Postema affirms that "[t]he tensions he highlighted in common-law jurisprudence were, in his own view, tensions deep in law. He was convinced that English common law exacerbated them and his codification proposal, and constrained adjudication under the codes, went a long way toward resolving them, but could not ultimately eliminate them". For more details cf.: POSTEMA, 2019b, p. 174. See moreover POSTEMA, 1989a, p. 191, 260-62 where Hart's claim that Bentham's doctrine of popular sovereignty is a radical departure from his earlier views is criticized. Also, ZHAI, 2017, p. 529.

²¹ In addition, if one takes in consideration modern legal positivism, validity marks the boundaries of the legal order through norms. In Postema's revisionist (or *quasi*-)positivism (POSTEMA, 2019b, p. 300), the central point is to establish when the norm is valid (POSTEMA, 2019b, esp. ch 9). The author affirms that "[i]t might appear that Bentham's critique of common-law theory and practice begs the most important question between positivist and common-law conceptions, viz., whether law should be conceived of on the model of discrete, publicly articulated rules made or posited by an authorized or authority-bearing law-maker. However, I think Bentham's commitment to this model is not presupposition, but consequence of a deeper assumption about law which he assumes he shares with common-law jurists" (POSTEMA, 2019b, p. 169). For more details about validity, efficiency and the legal system see BULYGIN, 1995; MORESO; NAVARRO, 1993; NAVARRO, 1990, 2016, 2017.

affirms that law is necessarily a matter of common public standards and “[c]ommon-law fails, most fundamentally, not because it fails to fit the model of command, or because its maker cannot be manifestly identified, but rather that anything it puts forward as candidates for legal norms fails on this publicity test” (POSTEMA, 2019b, p. 169).

Amongst the contemporary readings, Postema’s revisionist interpretation of Bentham is the most refreshing. The importance of combining publicity and transparency (ANDRESANI; STAMILE, 2018) with the more formal, legality aspects (ANDRESANI; STAMILE, 2019, forthcoming) in upholding the rule of law have already been emphasized and in what follows by drawing on previous work some critical remarks to the discussion of Bentham’s ideas are proposed.

2 CRITICAL TENSIONS

The literature on Bentham occupies entire libraries and innumerable works have been written about his thought. He is considered one of the most influential philosophers of the 18th and 19th centuries. Jeremy Bentham is primarily known as the originator of the school of utilitarianism. However, it is important to stress that in this regard there are many and strong criticisms. John Stuart Mill, Bentham’s pupil, controversially describes the materialistic conception of Bentham as characterized and justified on the basis of a serious philosophical myopia. Furthermore, Mill pointed out early on the gap in Bentham’s conception of human need and desire:

[m]an is never recognized by him as a being capable of pursuing spiritual perfection as an end of desiring, for its own sake, the conformity of his own character to his standard of excellence, without hope of good and fear of evil from other source than his own inward consciousness (MILL, 1968, p. 34)²².

More incisive are the criticisms formulated by Karl Marx, who focuses on the lack of originality in Bentham’s thought. In *Capital* (MARX, 1887, p. 24-25), he states:

Bentham is a purely English phenomenon. [...]. The principle of utility was no discovery of Bentham. He simply reproduced in his dull way what Helvétius and other Frenchmen had said with esprit in the 18th century. To know what is useful for a dog, one must study dog-nature. This nature itself is not to be deduced from the principle of utility. Applying this to man, he that would criticise all human acts, movements, relations, etc., by the principle of utility, must first deal with human nature in general, and then with human nature as modified in each historical epoch. Bentham makes short work of it. With the driest naiveté he takes the modern shopkeeper, especially the English shopkeeper, as the normal man.

²² For more details about the analysis of Mill on Bentham see CHIASSONI, 2016; MCPHERSON, 1982; NUSSBAUM, 2004; TINCANI, 2009. Nevertheless, it is useful to stress that Mill’s ideas are coherent and fits into the utilitarian tradition and for some versions it is possible to consider them as a kind of development of Bentham’s theses. In this regard see e.g. MILL (2006).

So, Bentham seems to appear “a genius in the way of bourgeois stupidity” (MARX, 1887, p. 25).

Beyond these reflections, Bentham’s legacy is undisputed and remarkable. For example, John Rawls (1971 [1999]), one of the most important political philosophers, in laying the foundations of his procedural theory of justice analyzes and discusses Bentham’s utilitarianism. Perhaps this is enough to demonstrate how Benthamian utilitarianism has constituted and continues to constitute a key passage in the elaboration of philosophy and also an useful instrument for understanding contemporaneity²³.

Nevertheless, it would be quite difficult to overestimate the revolutionary importance of the publicity test (POSTEMA, 2019b, p. 266). Bentham reckons in fact that transparent governance, at both the international and national level, would operate in such a way that “would be fully public, open to a freely operating press and relying ultimately on the power of public opinion, of nations and individuals, to secure compliance with its decisions” (POSTEMA, 2019b, p. 298). He “designed an extraordinary array of formal and informal devices to secure transparency” (POSTEMA, 2019b, p. 299)²⁴.

Postema (2019b, p. 235) is right to point out that the discursive and public justification of rights must be embedded in actual polities rather than being the result of hypothetical agreements. This brings the discussion to the limits of Bentham’s account. First of all, it neglects issues of conflict, especially of principle (POSTEMA, 2019b, esp. ch. 9 and p. 10). In fact, “it gives too much weight to the role of consensus”²⁵ (POSTEMA, 1989b, p. 55) *instrumentally*, i.e. *conventionally*, achieved. Postema is right in critiquing Bentham’s account of law for focusing “exclusively on the ability of laws to *settle with finality* problems of principled as well as interested conflict”²⁶ (POSTEMA, 1989b, p. 59). A robust conception of the rule of law would have to be embedded in the discursive practices

²³ E.g., there are many interesting debates against utilitarianism but also critical of Rawls’s (Political) Liberalism as well as the Republican tradition. Susan Moller Okin (1989) argues that a foundational assumption is incorrect because of a faulty perception of gender or family relations. More broadly, according to Okin, the modern theories of justice (such as those of Rawls, Nozick, MacIntyre, Walzer, etc.) focus on a male perspective that wrongly assumes that the institution of the family is just. Okin highlights that the family perpetuates gender inequalities throughout all of society, particularly because children acquire their values and ideas in the family’s sexist setting, then grow up to enact these ideas as adults. If a theory of justice is to be complete, Okin asserts that it must include women and it must address the gender inequalities that are prevalent in modern-day families. Most recently, Nancy Fraser has criticized Rawls’s theory of justice. She argues that justice can be understood in two separate but interrelated ways: distributive justice (in terms of a more equitable distribution of resources), and the justice of recognition (the equal recognition of different identities/groups within a society). See FRASER, 1998, and also FRASER; HONNETH, 2003.

²⁴ See also “a demand for *transparency* which mobilized a public discipline for accountability-holding and a demand for *reasons* which mobilized public deliberation” (POSTEMA, 2019b, p. 299, emphasis in the original).

²⁵ Even if consensus is conceptualized as just a regulative ideal, see Postema 2019b, p. 242, and especially ch. 9 and 10.

²⁶ See also Postema 2019b, ch. 9.

as well as in the history of existing pluralistic and complex polities in order to *realistically* address the issue of deep disagreement about problems of principle which would not result in ‘only temporary’ solutions which are *instrumental* to the *transparent* aggregation of individual preferences/desires (POSTEMA, 2019b, ch. 9)²⁷. At the heart of a deliberative democratic conception which aims at “protecting liberty, enlisting fairness” (POSTEMA, 1989b, p. 59) and relies on “the principle of equal political power” (POSTEMA, 2019b, p. 246) security as stability of expectations requires robust *formal* mechanisms of legality which are the result instead of preferences/desires *modifiable* by *reasoned* public deliberation. Consensus on matters of fundamental rights that a polity ascribes to itself cannot be “temporary” (POSTEMA, 2019b, ch. 9). The French that Bentham mocked have indeed learned from their history so that when they decided on 4 October 1958 to change their constitution they went through a difficult and lengthy process of in-depth deliberation which has given *security* to the Fifth Republic ever since. Bentham’s problem is that he interprets the public character of law “as strict conventionality” (POSTEMA, 1989b, p. 61), and that his republican perspective is not liberal enough²⁸. The new constitutionalism²⁹ has rightly emphasized that legality as *legitimacy* is required because the lesson from the second world war is still there for everyone to learn from. To avoid the risk of the repetition of history, formal mechanisms must be put in place to guarantee “genuine public deliberation” (POSTEMA, 2019b, p. 246) and avoid the ever recurrent allure of the sirens of demagoguery as well as the risk, for instance, of the (ab)use of emergency powers, covert data harvesting and mass surveillance³⁰.

3 CONCLUDING REMARKS: PRIVACY vs PUBLICITY

In this paper many interpretations of Bentham’s contribution to jurisprudence have been reviewed. In particular, there has been a focus on Gerald Postema’s reading which puts particular emphasis on transparency, accountability and publicity, as distinct from the formal characteristics of the rule of law or legality (POSTEMA, 2020a). In this article his decades long contribution to

²⁷ See ANDRESANI; WARD, 2020; BENHABIB, 2011; RAWLS, 1971 [1999]. See also POSTEMA, 1982, 2008.

²⁸ POSTEMA, 2019b, ch 9. See also ZHAI, 2017.

²⁹ For the debate see e.g. HIRSCHL, 2007; STONE SWEET, 2000. For further details, see also ALEXY, 2015; FERRAJOLI, 2007; MORESO, 1997, 2002, 2009; POZZOLO, 2001; STAMILE, 2019.

³⁰ Which are increasingly becoming the hottest contemporary issues, e.g. Facebookgate after the Cambridge Analytica scandal, see also ANDRESANI; STAMILE, 2019. Postema’s critique (2019b, p. 246, see also POSTEMA, 1995a, 1995b) might not be very distant from the alternative version of republicanism which has been proposed in our article just cited in this footnote.

Bentham's scholarship has been a precious treasure for the proposed lines of further research development.

In fact, fundamental rights such as privacy are not necessarily linked to an individualistic or indeed neoliberal worldview (BERNAL, 2014; TAYLOR; FLORIDI; VAN DER SLOOT, 2017) and privacy as well as all fundamental liberties can be justified from *inside* the republican tradition. The present reflections agree with Postema (2019b, ch.11) that open, transparent and accountable governance arrangements would not necessarily require trumping or a trade off with other (fundamental) rights such as privacy *provided* that the co-originality thesis is accepted³¹.

The main claim of this article is in fact that the status of the right to privacy as well as all fundamental legal rights (FLRs) can be fully acknowledged by switching to a different, i.e. reflexive paradigm of law where the emphasis should be squarely put on the "reflexive" and "legitimate" application of procedures which would guarantee and protect the ongoing self-creation of constitutional rights. Such a conception of law is *reflexive* because the focus is on the *formal* application of procedures to procedures. It is also *legitimate* because citizens themselves would be required to participate in the deliberation about which rights to ascribe to themselves. Bentham's longsighted vision is still built on the *instrumental* (Humean) conception of society in which a form of *proto*-democracy can be achieved by aggregating the preferences/desires of the greatest number of (a restricted group of: male, wealthy, etc.) citizens in the polity³². The reflexive conception relies instead on democratic deliberation taking the form of an ongoing process of constitution formation, with FLRs such as the right to privacy, as their *stable* but still changeable outcome. Such a system of rights, once constituted, would legitimize the unfolding of the deliberative democratic process. That is why the violation of such FLRs – including privacy – would undermine citizens' capacity to participate effectively in democratic politics (see also ANDRESANI; STAMILE, 2019, forthcoming).

There is empirical evidence of the pitfalls of relying on *public* and *transparent* but *unreflexive* and *non-deliberative* procedures: as Osrecki (2015, p. 337-364) has shown in relation to anti-corruption measures, policies violating privacy might actually have the unintended consequence of leading to sub-optimal outcomes as well as risking of being subject to arbitrary power due to lack of accountability *and* of the protection of fundamental liberties. To mention just another example, another value closely related to privacy, such as opacity, as discussed by Lucy (2017), who theorizes

³¹ That is: the *republican* thesis that there is no *deliberative* democracy without *legitimate* legality, i.e. without protection of fundamental rights. See ANDRESANI; STAMILE, 2019; HABERMAS, 1996.

³² For more details about the theoretical paradigm of Hume see POSTEMA, 1982, 2011; SPECTOR, 2014, p. 47-63.

it as the opposite of transparency, would be affected, with pernicious consequences not only for guaranteeing the rule of law as *legitimacy* but also other fundamental (legal) values such as dignity, equality and community as well as fairness. An interesting development of such an analysis, which future work will have to take up, would be to closely compare privacy and opacity.

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