**BENTHAM, COMMON LAW AND CODIFICATION**

Anne Brunon-Ernst

**Introduction**

Why is it that the English legal system does not have any written constitution? Why is it that the source of the civil branch of the law is to be found in case-law rather than in codes? Why is it that the common law has a system of binding precedents, which is not to be compared with the persuasive jurisprudence in the Continental legal systems? Why is it that English law is said to be judge-made? The present lecture aims to answer these questions by looking into the life and work of the legal philosopher and reformer Jeremy Bentham.

For those of you who know Bentham, you will be surprised at the choice of this particular philosopher to illustrate the specificities of the common law system. Indeed Bentham was a fierce critic of the common law at the end of the 18th c and at the beginning of the 19th c. Contrary to the English legal tradition, he advocated systematic codification of the laws, termination of a legal system based on case-law and rationalisation of the laws according to the principle of utility. This preliminary sketch of Bentham's ideas exemplifies a philosophy, which is poles apart from common law practice at the time when he wrote, and, to a certain extent, incompatible with even today's system.

Thus it would seem that Bentham is not a fitting example to illustrate the functioning of the English legal system. However, I hope to help you get a better grip on the debates about the common law system and a better understanding of the reforms and foundations of the system through the lens of an opponent of the common law.

To do so, I will use the time allocated for the lecture today to talk about three aspects of Bentham’s life and work in relation to codification.
1) Bentham's life and ideas
This first section will look into the historical and intellectual context of Bentham's life and works.

2) Codes in context
This second part will focus on Bentham’s relationship with the common law and the codification ventures on the Continent in the wake of the French Revolution.

3) Bentham's codes
This last part will explore Bentham’s codification projects

I. Bentham’s Life and Ideas
Bentham was born in 1748 and died in 1832 in London. His dates are of interest as his long life (84 years) spanned from the reign of the George II (and Louis XV in France) to the reign of Queen Victoria in Britain (and Louis-Philippe in France). Bentham was educated under the Ancien Regime, working by candlelight and travelling by horse-drawn coaches, at a time when the ideas of the Enlightenment were spreading all across Europe; and he ripened into old age in Victorian England, in a world lit by gas lamps, connected by steam railways, when JB Say’s and Ricardo’s economic theories had become mainstream economics, and Darwin and Marx were starting to devise theories which would change the way in which we conceive of human interpersonal relationships. The historical context in which Bentham’s long life unfolds is important to understand the ideas he advocates.

Bentham’s thought mirrors the times in which it was devised. His early influences include La Motte-Fénelon, Beccaria, Helvetius, Voltaire, Montesquieu etc and his late intellectual pursuits were exclusively focused on writing Codes. Bentham is both the last thinker of the Enlightenment and the first Victorian. Sometimes both influences coexist in his thought, as with the meaning of the term happiness or utility as we will see later.

Bentham was born in a well-off middle-class family. This allowed him to devote himself to intellectual pursuits exclusively without having to look for a patron,¹ or to find employment, especially after his father's death. This financial situation, coupled with...

¹ Notwithstanding the statement above, Bentham did have briefly some form of patronage in the Marquis of Lansdowne in the 1780s.
Bentham's intellectual precocity (he learnt Latin at the age of 3, he played Handel sonatas on his violin at the age of 5, and he started Queen’s College, Oxford at the age of 12, where he was deeply disappointed by the quality of the teachings) explains why Bentham enjoyed a 58-year long career as a writer. His career can be approximately dated from 1774 *The White Bull* (which is a translation of Voltaire’s French essay, with a preface) to the 1832 unfinished *Constitutional Code*. However, Bentham was not trained to be a philosopher, but a lawyer. He was called to the Bar in 1769, although he never formally practiced the law. His legal education made him vary of the laws in his countries: he was dismayed at the principles regulating the common law and he subsequently devoted his life in reforming them.

The combination of these three factors [financially independent/intellectual precocity/legal training] explain why Bentham wrote approximately 75,000 folios (pages size A3) over his career, most of which have never been (properly) published, on account of Bentham’s lack of time, interest in publication and sense of completion.

When Bentham died, a first edition of his works was compiled by his secretary John Bowring. Unfortunately the edition was far from scientific, aggregating parts of manuscripts with others, publishing versions by unapproved editors, publishing English translations from French editions, omitting the most unpalatable writings on religion and ... sex. A second edition is now underway at the Bentham Project (UCL, London), publishing volumes directly from the manuscript sources. Since 1968, thirty volumes (of an anticipated 70 volumes) of the new collected works have been published. 30 volumes in 48 years. There is another 50 years of estimated work to be carried out before the final complete edition of Bentham's writings be made available to the wider public. Anyone wishing to study Bentham needs to be extremely careful with the sources he/she uses, the date when the piece was written (often not the same as when it was

---

published), as until the scientific edition is completed, the only accurate source of Bentham’s works is to be found in the manuscripts in the UCL or the British Library fund.

I have used the term utility several times. I need to explain the meaning of the word in relation to Bentham’s overall project. Bentham was a jurist, but a very particular type of jurist as he combined his legal upbringing with a radical stance on the ideological foundations on which a new society should be built. As Descartes before him, Bentham sought a founding principle, to build his new utopia on. He found it in the concept of utility, which is synonymous with happiness. In *An Introduction to the Principles of Morals and Legislation*, the only book whose publication Bentham overviewed personally, he explains the guiding principles of his action:

> The principle of utility is the foundation of the present work […]. By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government.

Utility or happiness should be the guiding principle of all actions. But what is happiness? Utility or happiness is made up of an excess of pleasures over pains. Bentham answers this question in the opening lines of the *Introduction*:

> Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to

---


7 By radical, I mean advocacy of radical reform, by going at the social, economic or political roots of a problem; radicalism was a political and/or a philosophical movement in the 19th c which advocated radical change in government (universal male suffrage, democratic ideals etc)


determine what we shall do. On the one hand the standard of right and wrong, on
the other the chain of causes and effects, are fastened to their throne. They govern
us in all we do, in all we say, in all we think: every effort we can make to throw off
our subjection will serve but to demonstrate and confirm it. In words a man may
pretend to abjure their empire: but in reality he will remain subject to it all the
while. The principle of utility recognises this subjection, and assumes it for the
foundation of that system [...].

Remember earlier on, we were talking of a philosopher astride two ages. Here again, in
the concepts Bentham uses, happiness is deeply rooted in the theories of the times in
which he writes (think about the phrase ‘Life, Liberty and the Pursuit of Happiness’ in
American Declaration of Independence of 1776). The concept of utility, if it is used by
writers before him (such as Beccaria which refers to the concept in numerous instance
in his works), nonetheless it is a concept, which will be widely taken up in 19th c.

Bentham did not invent utility, he was not the first to think that the aim of a government
is to promote the happiness of its subjects, but he was the first to take this theory to an
unprecedented pitch, systematically applying it to all realms of individual and collective
life.

---

10 Bentham, Introduction, op. cit., ch.1, §2
11 J. Priestley, An Essay on the First Principles of Government, and on the Nature of Political, Civil, and
Religious Liberty, including remarks on Dr. Brown’s Code of Education, and on Dr. Balguy’s Sermon on
For comments on the greatest happiness phrase, see R. Shackleton, ‘The Greatest Happiness of the Greatest
12 C. Beccaria, An Essay on Crimes and Punishment, Trans. From Italian, Dublin, 1767, p. 70, from
http://archive.org
13 D. Ricardo, On the Principles of Political Economy and Taxation, London, 1817, chap. 1, § 1, from
www.marxists.org
14 See A. Brunon-Ernst, Le Panoptique des Pauvres: Jeremy Bentham et la réforme de l’assistance en
Colloque international CERVEPAS/CREW, Université Paris 3, 24-25 January 2014, [full text at http://u-paris2.academia.edu/AnneBrunon].
There are several eras in Bentham’s long career. In the 1770s and 1780s, Bentham worked on legal reform, by looking into the applications of his principle to law and legislation. From the mid-1780s to the start of the French Revolution, Bentham became immersed in practical projects such as penology, public administration, social policy, and economics. It was at that time that he wrote his Panopticon schemes and his economic writings. The start of the French Revolution, with the help of his patron, the Marquis of Lansdowne, and his network of reformists in France (Mirabeau among others), was an opportunity to draft reforms for France and have them implemented. As it happens, the French revolutionaries already had their own ideas as to how they wanted to reform their own country. Bentham’s projects had little influence on the turn of events in France. Nonetheless Bentham was awarded the title of honorary citizen of France in 1792 for his work. With the beginning of the Terror in France, Bentham, with many other reformist fellow Englishmen, turned away from France and returned to his sometimes utopian projects (Panopticon) from 1795 before definitely abandoning them in 1803.

Academics have been at pains to comment upon Bentham’s practical projects. Were they an unproductive interlude, which diverted Bentham from the task he had set himself as a jurist? Others argue that these years were far from barren, as:  

[T]he attention he paid to prisons, pauper management, and political economy helped to give an important new dimension to his thinking. [It] was during these years that he worked out most of the ideas on bureaucracy – and developed also the mastery of detail – that were to be features of the Constitutional Code, his principal exercise in substantive codification.

---


1808/9 was an important date in Bentham’s thought as it marked his transition to political radicalism, advocating universal (male) suffrage and democratic institutions more generally.

Now that you have a better understanding of Bentham’s theories and of the context in which they were written, we can turn to the more detailed study of his codification proposals. The turn of the century marked Bentham’s renewed interest in codes. However, he needed a nation ready to implement his utilitarian codes. He wrote to Madison, the American President on the topic (1811), as well as to different State legislatures, he got involved in the Spanish and Portuguese revolutions, and he wrote for Greece, to offer a new system of government in their emancipation from the Ottoman power. He was in correspondence with Presidents of Argentina and Columbia, to push forward his reforms. He was also in close contacts with Bolivar, the South American revolutionary. It was in South American that his ideas would find favourable soils to grow. Bentham has truly earned the right to be called ‘the Legislator of the World.’

II. Codes in Context

Codes are foreign to the English legal tradition. However, this does not mean that there was no debate in Britain about possible codification of the common law, especially at the beginning of the 19th c.

The English legal system, especially when Bentham started writing on the issue, was a common law system based on the rule of precedent, with little legislative intervention. This does not mean that Parliament did not pass both private member’s bills and public bills, quite the contrary, however legislative work was minor in quantity and scope, compared to today’s standards. In this section, I will first have a closer look at Blackstone’s reading of the common law, and at Bentham’s criticism of Blackstone’s endeavour. Then I will investigate other codification venture on the Continent, and in

---

particular the Code Napoleon, and Bentham’s opinion on these ventures. Lastly, we will look into the debates about codification in Britain at the beginning of the 19th c.

—A. Blackstone’s reading of the common law, and at Bentham’s criticism

William Blackstone (1723-1780) was an English academic (Oxford University), a practicing barrister (Middle Temple) and a Member of Parliament, Justice at the Court of King’s Bench, then at the Court of Common Pleas. His professional and financial success were derived from series of lectures on the common law he gave from 1753, some of which were published as Commentaries on the Laws of England, his most influential work. Bentham both attended Blackstone’s lectures and read his Commentaries.20

Indeed in 1765-1769, Blackstone wrote a four-volume treatise on the laws of England. The work deals with the rights of persons, the rights of things, private rights and public wrongs. The work was hugely influential both in Britain, in the American colonies and in the early United-States of America. The book was unique in that it aimed both to be exhaustive and to be accessible to non-legally trained members of the public.

The Commentaries were widely seen as a handy digest of the laws of England. However, because Blackstone tried to make the common law accessible to all, it was criticised at the time as an attempt to codify the common law. Nowadays historians criticise the Commentaries as an instance of Whig historiography, and stress the inconsistencies in the overall project: Blackstone both praises the excellence of the British form of government, and he emphasises that the optimal form of government lay in the English past.

As many other philosophers before him, Blackstone contends that human laws are founded on the law of nature21 and the law of revelation.22 Human reason is not

---


21 Laws of nature are said to be inferred from Nature and binding upon individuals, in conjunction or not with human laws.

22 Laws of revelation, also called divine law, are said to be the laws revealed to man by God in the judao-christian-islamic tradition.
completely excluded from law-making, but its role is confined to discovering the rules of Providence:

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover [...] what the law of nature directs in every circumstance of life: by considering, what method will tend the most effectually to our own substantial happiness.\(^{23}\)

From what we have seen so far on Bentham, you will not be misled by the common use of the term happiness, as the term does not mean the same thing for both writers. You will also understand better that, (1) contrary to many (but not all) legal writers at his time, Bentham’s laws are founded on two universal sensations (pleasures and pains), and (2) the gap between a traditional judao-christian-islamic construction of the law (as based on divine law) and Bentham reliance on reason.

Blacktine’s praise of the English legal system (which is included in the phrase ‘English liberty’) is based on a reverence for tradition, which can be seen in the following comment: ‘the goodness of a custom depends upon having been used time out of mind’.\(^{24}\) Now you all know that what is good for Bentham, is not tradition, but the ability for a law to produce more pleasure than pain, to the greatest number of people.

Blackstone adds:

And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.\(^{25}\)

Customs can only be a valid basis for the organisation of society if they are not arbitrary, that is, if they derive their force from the consent of the people (‘voluntary consent’). However, this consent, which is presented as probable here is in fact presented as a theoretical (rather than historical) necessity elsewhere is the book:


\(^{24}\) Blackstone, *op. cit.*, Introduction, section 3.

\(^{25}\) Blackstone, *op. cit.*, Introduction, section 3.
the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very associating together.26

The assumptions at the root of Blackstone’s justification for the reverence of tradition are thus flawed.

Blackstone was part of the Establishment. Brought up in a middle-class background, academic, lawyer, judge. It was in his interest to uphold of the values of the system which made him wealthy and famous. Blackstone’s deference to the ability of judges to judge fairly is also unfounded. He writes:

How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositories of the laws. [...] For it is an established rule to abide by former precedents, where the same points come again in litigation [...] it is not in the breast of any subsequent judge to alter or vary from [a permanent rule], according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

Judges (and lawyers) are the only one to know these customs, which are part unwritten, and part reported. This knowledge being bestowed on a single player does not allow for checks and balances of this power. Bentham calls this the ‘sinister interest’27 of Judges & Co, that is the system, which has grown from the complexity of procedure and substantive laws in England.

Bentham will rebel against this 4-volume praise of the status-quo, tradition, and of institutions protecting vested interests. Blackstone ends up praising a system, which is

26 Blackstone, op. cit., Introduction, section 2.

27 Sinister interest is a phrase coined by Bentham to refer to the vested interest of certain powerful members of society, who therefore used their power to undermine the general good. On the phrase, see R. Greenstein, « Sinister Interest – quelques problèmes de traduction », Revue d’études benthamiennes [En ligne], 2 | 2007, mis en ligne le 01 mars 2007, consulté le 06 février 2014. URL: http://etudes-benthamiennes.revues.org/131
eminently flawed in the eyes of Bentham. The best example lies in the fictional case *Jarndyce v. Jarndyce* in the Court of Chancery as told by Charles Dickens in *Bleak House* (1852-1853). The case deals with a large inheritance, and when the case is finally decided after several decades of litigation, the legal costs swallows up the whole inheritance. Bentham was well aware of the Kalfkaian nature of his justice system, as in the only instance when Bentham had to give legal advice as a lawyer, he discouraged his clients from taking action. Bentham would not have been a very successful lawyer.

On numerous occasions, Bentham wrote against Blackstone. He did so in two published volumes: *The Comment on the Commentaries*, which is a sustained critical comment of Blackstone, only first published in 1928; and in *A Fragment on Government*. The last work was published in 1776. It helped Bentham to acquire some fame, and brought him within the network of the influential Lord Shelburne (to be Marquis of Lansdowne). But later manuscript sources, even as late as the 1820s, show Bentham still involved in a critical debate with his long-time opponent.28

Let us stop a moment at the *Fragment*. The aim of his essay is to undermine Blackstone’s contractual theory of government to introduce the principle of utility. Bentham voices his criticism against both the form of Blackstone’s work (layout, absence of definition, style etc) and its substance (inconsistency of the contractual theory). Bentham is also very critical of the lack of distinction in Blackstone between the work of a *censor*, i.e. critic of a system, as opposed to the work of an *expositor*, ie. person who describes the functioning of a system. Both functions are not clearly distinguished in the *Commentaries*, according to Bentham, thus creating in the minds of the readers confusion between the law as it *is* and the law as it *ought* to be. Of course, Bentham accused Blackstone of slyly keeping readers into the ignorance of the distinction, to persuade them that the laws of England are as they *ought* to be.

Against all odds, Blackstone is both hailed as the jurist who presented a concise presentation of the common law, and one who, in the attempt, has undermined the power of judges as both ‘depositories of the laws’ and their ability ‘to maintain and

expound the old [law]' through their own pronouncements; thus codifying the laws of England in a fixed form.

—B. Code Napoleon, and Bentham’s opinion

A generation later, Codes drafted on the Continent both had more success and were more clearly codification experiments.

One of the first experiments\(^\text{29}\) was carried out by the French in the aftermath of the French Revolution. What is known as the Napoleonic Code is the French Civil Code established under Napoleon I in 1804.

Bentham praised Napoleon’s attempt. In the 1820s, he wrote in manuscript sources that the Napoleonic codes [were] ‘to the French nation a treasure of unspeakable value’\(^\text{30}\) and that ‘the Augean stable [of French Law], though he has not purified altogether, [Napoleon] has ridden of no small part of its filth: and by this title alone, had he no other, Bonaparte would have been a Hercules.’\(^\text{31}\) When we know the filth Bentham piled on Blackstone, Bentham’s praise, although not unqualified, still shows the respect for the Napoleonic regime’s imperfect venture.

However, at the time when Bentham was writing this praise, there was growing distrust for the Napoleonic Codes, on grounds that the intelligence of one man (in the case of the French Civil Code, of a group of men (François-Denis Tronchet, Jean-Etienne-Marie Portalis, Félix-Julien-Jean Bigot de Préameneu and Jacques Maleville) could to substitute itself to the wisdom of a nation. It was thought that these codes were imperfect and could only be doomed to failure.\(^\text{32}\) The rationale for the criticism rested in the assumption that the Napoleonic utopia reduced laws to geometrical demonstrations. All

\(^{29}\) Other Codes were drafted on the Continent at the end of the 18\(^\text{th}\) c (among which Bavaria, Prussia and parts of Austria). However, the interest in the Napoleonic Code was that it was widely enforced in Continental Europe in the wake of the Napoleonian wars.


\(^{31}\) Bentham manuscript sources, University College, box 113, folio 145v (dated 21\(^\text{st}\) June 1821), quoted in Schofield, 'Jeremy Bentham: Legislator of the World', \textit{op. cit.}, p. 115.

other sources of law were inoperative and the valued role of judges in the common law
to ever-changing circumstances was negated.33

The Napoleonic experiment generated contradictory assessments. However it
contributed to the debate on the codification of English laws in the 1820s.

—C. Codification in Britain

In the 1820s, Britain had moved away from the praise of the common law system as
could be found in Blackstone’s Commentaries to embrace the need for change. As a
commentator wrote: 'vulgar prejudice of the British to revere habit, something which
may be very pious, but which is very impolitic.'34 Bentham, and many other radical and
moderate reformers in his time, contributed to the change in perspective. The question
was now: What reform?

The first issue raised was that of the scope of the reform. Some, the Benthamites among
them, wished for a reform of all branches of law: civil and criminal. Another issue raised
was that of the extent of the reform: how far should it go towards codifying the law. In
order to answer these questions a certain number of Commissions were set up to
investigate the ways and means of reform.

On the issue of the reform of the criminal law, a real commission on criminal law was set
up to investigate whether the common law and statutory crimes could be united in one
code. Among the Commissioners were Justice Wightman, Henry BELLENDE KER,
Thomas Starkie, Andrew Amos, John Austin, who were influenced by the ideas of
Bentham. There were dissenting opinions on the Commission, but, on the whole, the
proposals made in the 8 reports, which spanned from 1833 to 1845, were very
conservative: a digest of criminal law should be made, without being of a binding nature.

33 F. Ferraro and F. Poggi, 'The Nature of Law. Bentham as a Legal Realist', in What (a) law is : Essays on
Jeremy Bentham’s Of the Limits of the Penal Branch of Jurisprudence, dir. G. Tusseau. London: Routledge,
2013, p. 212.
In the area of civil law, the commissions were even less willing to suggest changes. In the field of the law of property, for example, the real property commission decided that the area was too complex for codification. The language used in the field was archaic, but amending it might raise more issues than solve problems. The commission suggested to reform and consolidate the rules of conveyancing and inheritance.

Some very complex procedures were also scrapped, such as real actions and original writs. Unfortunately, the downside was that some cases were lost on technicalities.

In the end, moderate reformers won the day. They followed Peel's comments in Quarterly Review in 1828, which advocated for piece-meal change. Criminal law was most in need of reform, with antiquated Statutes, lacking coherence and proportionality, where the judge often had to substitute himself to the legislator, to avoid gross injustice, rather than in accordance with the law. In the field, a codified document of an authoritative value was suggested. As regards civil law, if some reforms were suggested, the common law remained the repository of substantive law.35

If spur of the reforms was given by radical and moderate reformers, if some Benthamites were members of the Commission, if Bentham and others strongly advocated for change in the press, especially the Edinburgh Review,36 the way in which the reforms were finally carried out were a far cry from Bentham's codifications projects. As David Lieberman explained, if codification failed, consolidation had a major role in the reforms in England:37

35 Lobban, op. cit.
37 List of successful and failed attempts at codification/consolidation at the beginning of the 19thc:
—1826 Criminal Law Act (consolidation of acts related to criminal procedure)
—1827 Larceny Act, 1827 (consolidating ninety-two statutes)
—1827 Malicious Injuries to Property Act (consolidating forty-eight statutes)
—1828 Offences against the Person Act (consolidating fifty-six statutes)
—1830 Forgery Act (consolidating 120 statutes)
—1848 Criminal Law Consolidation Bill (failed)
For the historian, these statements are a useful reminder that legislative reform in England was never solely the story of the failure of one important legislative program: codification. It was additionally the story of the successful realization of an alternative, older and more limited legislative project: statute consolidation.\(^{38}\)

### III. Bentham’s Codes

The English term codification was invented by Bentham. It was first used in a letter he wrote to his brother on 20-22 August 1806 about a guest he had entertained a couple of days before: ‘You may remember, or not remember, the flamingness of his zeal for preaching Codification’.\(^{39}\) As seen earlier in this lecture, when Bentham coins the term codification, the practice of codification is well underway, both on the Continent and in Britain, although codification in a milder form as consolidation.

---

### A. Legislator of the World

Bentham’s zeal was never aimed at England. As early as in the 1770s, his first codifications attempts targeted the Russian Emperess Catherine II for which he wrote a draft of an introduction to a Penal Code in French. As in many instances in Bentham’s career, the Code was not finished, but the draft of the introduction was later published in English in 1789 as *Introduction*.\(^{40}\) As we saw earlier, in the 1790s, he wrote extensively for the French Revolution.

Later, in the 1820, although the idea (but not the practice) of codifying the English law was gathering momentum, Bentham seemed to be right when he wrote: ‘in that country not any so much as the faintest expectation of finding any such acceptance [of a code] could in his position be consistent with mental sanity’.\(^{41}\)

---

\(^{38}\) [www.rieti.go.jp](http://www.rieti.go.jp)


This does not mean that the rest of the world was not embracing codification. The French/Napoleonian example was quoted earlier. The 19th c. is also an era of democratic and ethno-nationalist revolutions. In Europe and in the Middle–East, countries shook off the yoke of Ottoman domination. In Latin America, former European colonies were freeing themselves from the Spanish and Portuguese authority. All these new countries were in need of principles to govern themselves. Bentham saw an opportunity to become a writer of codes for all civilised nation in the world.

Bentham truly saw himself as ‘The Legislator of the World’, and his position as a universal codifier is certainly unique in history. The example of the opening page of the Constitutional Code is telling. The endeavour to codify the rules organising life in communities along rationalised utilitarian principles is a 19th c. trend. However, the universality of the attempt, as his codes are to be applied indiscriminately to all civilised nations, is deeply rooted in the cosmopolitan ideals of the 18th c. Nonetheless, this comment needs to be qualified by other earlier writings such as Bentham’s Essay in the Influence of Time and Place in Matters of Legislation where Bentham makes amends for character, geography and manners to justify differences in systems of law (especially in relation to India):

Of the circumstances which make the laws that would be expedient in one country ineligible in another, some are grounded in nature, some in prejudice: some depend on the state and condition of objects that are extrinsic with regard to the mind of man, some on the state and condition of the mind of man itself.

I would be therefore untrue to see in Bentham an indiscriminate codifier who devised one size-fit all constitutions.

—B. Codes for All

---

42 See note 18.


As seen earlier, Bentham’s codes were written within a radical perspective of offering democratic institutions for all. In order to achieve this aim, Bentham devised codes, which would prevent abuse of government power. Bentham goes about affording securities against misrule, as he calls them, by a certain number of procedural rules:

- publicity of government action (legislative and executive branch), through sessions open to the public and publication of proceedings of government action
- free press, which Bentham calls the Public Opinion Tribunal and which includes the press, but also any member of the public interested in a given political topic
- nomography, which is the science of writing legislation, which teaches how to write clearly. It deals with methodology, definition of key-terms, lay out of information, syntax, organisation of the material (numbering paragraphs etc)

---

46 For the theoretical foundations of the theory of separation of powers, see Montesquieu, C., The Spirit of Laws (Chicago: Encyclopaedia Britannica, 1952), p. 70-84. For implementation at the time of Bentham, see the American Constitution (1789), whose first three articles deal with the executive, the legislative, and the judicial powers respectively. The term 'counterforce', which is found in Bentham, finds an echo in the system of checks and balances implemented in the former thirteen Anglo-American colonies (For other occurrences of the term 'counterforce, see, among many other references: Bentham, 'Economy as Applied to Office', in First Principles preparatory to the Constitutional Code, ed. P. Schofield, The Collected Works of Jeremy Bentham, Oxford: Clarendon Press, 1989, p. 28; the term 'check' is also used, see, for e.g. Bentham, Securities Against Misrule, ed. P. Schofield, The Collected Works of Jeremy Bentham, Oxford: Clarendon Press, 1990, p. 45). At the time of the American revolution, John Lind, with the help of Bentham, wrote on the guiding principles of the revolution, mainly criticizing the rights-based approach (See J. Lind, Remarks on the principal acts of the Thirteenth Parliament of Great Britain. By the author of Letters concerning the present state of Poland...Vol. I. Containing remarks on the acts relating to the colonies. With a plan of reconciliation, (London, 1775)). In his later writings, Bentham praises many aspects of the American republic as a model (or, the Anglo-American system, as he calls it). See, for e.g. Bentham, Securities Against Misrule, op. cit., p. 88.

47 By the term Public Opinion Tribunal, understand a fictitious entity – a fictitious tribunal the existence of which is, by the help of an analogy, feigned under the pressure of inevitable necessity for the purpose of discourse to designate the imaginary tribunal or judiciary by which the punishments and rewards of which the popular and moral sanction is composed are applied’ in Bentham, ‘Constitutional Code Rationale’, in First Principles, op. cit., p. 283.

48 Bentham, Nomography, Works of Jeremy Bentham, ed. J. Bowring, 1838-1843, vol. 3, p. 242: ‘Hence, not only is the individual prevented from knowing and understanding what on this and that occasion the meaning of the legislator is, or was when he wrote, -but in a certain sense the legislator is himself prevented from understanding what he himself is doing while he writes. What may or may not have happened to him is, to know what is own meaning, wish and intention is at the time: -but that which is
—C. Redefining Codes

Bentham thinks of two types of organisations for his codes. First, codes organised according to the targeted readership of the code. There would be codes for builders, butchers, teachers, children, employees etc, laying out clearly the law to every profession and every status in life.⁴⁹ This division participates in the publicity of the law.

Second, Bentham’s code would fall within the traditional three-tier distinction between criminal, civil and constitutional codes. However, the similarities with this traditional division is misleading, as the contents of Bentham’s codes differ from the traditional codes.

Bentham’s allocation of the contents of his codes depends on his study of the nature of the law. Bentham investigates the nature of the divisions between penal/criminal, civil and constitutional codes. He asks:

What is a penal code of laws? What is a civil code? Of what nature are their contents? Is it that there are two sorts of law, the one penal, the other civil, so that the laws in a penal code are all penal laws, while the laws in a civil code are all civil laws? Or is it, that in every law there is some matter which is of a penal nature, and which therefore belongs to the penal code and at the same time other matter which is of a civil nature, and which therefore belongs to the civil code? Or is it that some laws belong to one code or the other exclusively, while the others are divided between the two?⁵⁰

Bentham raises this question at the end of Introduction and tries to find an answer to it in Limits. His discussion in Limits centres on what a law is, but in his analysis he focuses

⁴⁹ Bentham, Constitutional Code, op. cit., p. 7.
on offences, which are penal in essence, to leave aside the building stones of civil law, which are rights and obligations. His opening statement in *Limits* exemplifies this analysis:

> Now an offence is an act prohibited, or (what comes to the same thing) an act of which the contrary is commanded, by the law: and what is it that the law can be employed in doing, besides prohibiting and commanding?\(^{51}\)

If every act is addressed as an offence, what about civil law in such an organisation? For Bentham, civil law does not deal with punishment. He writes:

> That book belongs to the penal branch which dwells most upon the subject of punishment: that, to the civil, which, without making any mention, or at least without making much mention, of the article of punishment, dwells most upon cases in which punishment is or is not to be applied.\(^{52}\)

Civil statements are qualificative or expositive, and penal are imperative or commutative. The criminal branch cannot operate without the expositions of the legal duties and obligations provided by the civil branch.

> The civil code would consist chiefly of mere masses of expository matter. The imperative matter, to which those masses of expository matter respectively appertained, would be found – not in that same code – not in the civil code – nor in a pure state, free from all admixture of punitive laws; but in the penal code – in a state of combination – involved [...] in so many correspondent punitory laws.\(^{53}\)

A telling example is the offence of theft, which is commonly described in a penal code. However prevention and punishment of this offence cannot be effective without the description of what a title to a good consists in, that is, provisions contained in a civil code. Bentham’s penal code is a list of offenses to which are appended punishments. Bentham’s civil code ends up being a dictionary of offenses, rights and duties. And his constitutional code deals with rights and duties in the allocation of power in a government.

---

\(^{51}\) *Limits*, op. cit., p. 3.

\(^{52}\) *Limits*, op. cit., p. 241.

Conclusion

Bentham appears as a legal reformer both in tune with his times (Enlightenment and a Victorian democratising Europe) and as a writer at odds with the legal tradition of his country. He is a man who spent his career writing codes, in a country, which consolidated statutes instead of codifying. Bentham's very peculiar position in his times cast a new light on the common law tradition in England, which did not fully embrace the ideas of Bentham.