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ARTICLES

Bentham's *Laws in Principem* and his Command Theory: a Critique of Hart's Criticisms

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Abstract

When writing *Limits*, Bentham introduced the idea of laws *in principem*: they are duty-imposing commands, receiving determination from a sovereign, and prescribing to him what he shall do. Hart argues that Bentham's laws *in principem* are not duty-imposing, but power-conferring or disability-imposing, which courts accept as reasons for invalidating enactments conflicting with them. After presenting several major criticisms, he concludes that Bentham's idea of laws *in principem* cannot be reconciled with his command theory, and that a 'fundamental transformation' of the latter is required to accommodate the former. I show that Bentham correctly regards laws *in principem* as essentially duty-imposing, and that his command theory can easily survive Hart's criticisms. I conclude that it not only can accommodate laws *in principem*, but can better explain their nature and operation.

Keywords: Bentham; Hart; Laws *in principem*; Command; Duty-imposing

Introduction

It is a cliché that the command theory of law fails to explain legally limited sovereignty. This criticism may be true of Austin's command theory, which regards constitutional laws as rules of 'positive morality',[1] but the same cannot be said of Bentham's. In his earliest writings, Bentham denied that a sovereign could be legally limited.[2] But, when

[1]John Austin, *The Province of Jurisprudence Determined*, ed. by W. E. Rumble (Cambridge University Press, 1995), pp. 215, 194.

[2]Jeremy Bentham, *Preparatory Principles*, ed. by D. G. Long and Philip Schofield (Oxford University Press, 2016), p. 333; *A Comment on the Commentaries and A Fragment on Government*, ed. by J.H. Burns and H.L.A. Hart (The Athlone Press, 1977), pp. 56, 485–86, 494, 496–97; *Of the Limits of the Penal Branch of Jurisprudence*, ed. by Philip Schofield (Oxford University Press, 2010) [hereafter *Limits*], p. 38. But, Postema suggests that, even in his early writings, Bentham 'clearly regards them as having something of the character of law'. Gerald Postema, *Bentham and the Common Law Tradition* (Oxford University Press, 1986) [hereafter *BCLT*], p. 252.

writing *Limits*, he introduced the idea of laws *in principem*,[3] and contrasted them with laws *in populum*: the former regulate the sovereign and favour the liberties of the subjects,[4] whereas the latter restrict the people. With this new idea, Bentham started to consider constitutional laws as law, that is, a branch of laws *in principem*.[5]

Under Bentham's theory, the sovereign in a state is the 'rightful source' of its law, and a law is essentially a command of the sovereign;[6] the rightful source of a norm determines its legality or lawfulness,[7] and thereby its legal validity. Like laws *in populum*, Bentham writes, laws *in principem* 'receive determination' from a sovereign or several sovereigns,[8] and are duty-imposing commands:[9] they 'cherchent à obliger la puissance souveraine' (seek to obligate the sovereign power)',[10] and 'prescribe to the sovereign what he shall do'.[11] The sovereignty limited by laws *in principem* is a power under obligations; otherwise, it would be a 'power without obligation', which for Bentham is 'the very definition of despotism'.[12]

Against Bentham's thesis that a law *in principem* is a duty-imposing command, Hart raises two major criticisms. First, if a law is a sovereign's command, the sovereign cannot be limited by law.[13] Second, constitutional laws, or Bentham's laws *in principem*, Hart argues, are not duty-imposing, but power-conferring or disability-imposing, which courts 'accept' as authoritative reasons for annulling or refusing to enforce enactments which conflict with them.[14] Bentham's idea of laws *in principem,* Hart points out, cannot be reconciled with his command theory of law. A 'fundamental transformation' of

[3]Schofield, Editorial Introduction, in *Limits*, pp. xxi–xxiii. See also *Limits*, pp. 38, 86.

[4]*Limits*, pp. 38–40, 252–6; *Preparatory Principles*, p. 185; Bentham Papers, University College London Library [hereafter UC], Box xxxiii, fo. 79.

[5]See Gerald Postema, *Utility, Publicity, and Law: Essays on Bentham's Moral and Legal Philosophy* (Oxford University Press, 2019) [hereafter *UPL*], p. 279.

[6]See *Limits*, pp. 24, 32, 38, 45; *Comment*, pp. 7, 11, 23, 59, 62, 259; Bentham, Nomography; or the Art of Inditing Laws, in *The Works of Jeremy Bentham*, published under the superintendence of his executor John Bowring, 11 vols. (William Tait, 1838-43) [hereafter Bowring], iii, p. 233; Pannomial Fragments, in *Jeremy Bentham: Selected Writings,* ed. by S. G. Engelmann (Yale University Press, 2011), p. 241; UC lxx. 5; *Limits*, p. 45.

[7]I use 'legality' and 'lawfulness' interchangeably, as Hart and Thomas Adams do, see H. L. A Hart, *The Concept of Law* (Oxford University Press, 1994), pp. 208, 304; Thomas Adams, The Standard Theory of Administrative Unlawfulness, in *Cambridge Law Journal*, 76. 2 (2017).

[8]*Limits*, pp. 89, 87. See also Schofield's Editorial Introduction in *Limits*, p. xxii; Postema, *BCLT*, p. 252.

[9]*Limits*, p. 256.

[10]UC c. 64^{v2}. This manuscript is part of 'Projet d'un corps de loix complet' that Bentham wrote in 1782–6. For 'Projet', see Emmanuelle de Champs, *Enlightenment and Utility: Bentham in French, Bentham in France* (Cambridge University Press, 2015), pp. 55–91. I thank Philip Schofield and Emmanuelle de Champs for their guidance regarding the context of this manuscript.

[11]*Limits*, pp. 86, 89.

[12]Bentham, *Constitutional Code*, Vol. I, ed. by Fred Rosen and J.H. Burns (Oxford University Press, 1983), pp. 53–54. When citing this work hereafter, I will add '(CW)' after the title to distinguish it from another edition of *Constitutional Code* in Bowring, ix. CW is the abbreviation of '*The Collected Works of Jeremy Bentham*'.

[13]H. L. A Hart, *Essays on Bentham* (Oxford University Press, 1982) [hereafter *EB*], pp. 60, 109, 239–40.

[14]See Hart, *Concept*, pp. 26-49, 68-70, 247; Hart, *EB*, pp. 238-9. In *Concept*, Hart also uses 'constitutional rules' to refer to the rules of recognition (pp. 66, 70-71), or the rules concerning the manner and form of supreme legislation (pp. 68, 71). For Hart's conception of constitutional law here referred to, in contrast to his idea of the rules of recognition, see also John Gardner, *Law as a Leap of Faith* (Oxford University Press, 2012), pp. 103-05; Thomas Adams, Criteria of Validity, *Modern Law Review* (2024, early view), doi: 10.1111/1468-2230.12938.

Bentham's command theory, he contends, is required to accommodate laws *in principem*.[15]

Bentham had anticipated and responded to the first criticism. He is aware that laws *in principem* are the solution to '*quis custodiet ipsos custodes*', 'one of the most puzzling of political questions': 'the essential and characteristic feature' of laws *in principem*, Bentham states, consists in 'the quality of the parties who are respectively bound by them':[16] they are addressed to 'either the sovereign himself [. . .] or to his successors, or to the one as well as to the other'.[17] The challenging question is, 'by what means, then, can a law *in principem* be enforced and render'd efficacious?' How can a command that a man issues himself 'to any purpose be *effectual*'? Bentham does not think that a man addressing a command to himself is in itself absurd, but he admits that it is absurd when there is no force to guarantee the efficacy of this command: 'nor can a man, by his own single unassisted force, impose upon himself any effectual obligation: for granting him to have bound himself, what should hinder him on any occasion from setting himself free?' This is the difficulty facing laws *in principem*.[18] They cannot derive efficacy from the legal sanction in the same way as laws *in populum*.[19] The reason is that the legal sanction is already in the hands of the sovereign: 'within the dominion of the sovereign, there is no one who, while the sovereignty subsists, can judge so as to coerce the sovereign: to maintain the affirmative would be to maintain a contradiction'.[20] How can this difficulty be solved? Bentham turns to private transactions for inspiration. In a private transaction, a man can effectively bind himself by the assistance of the will and force of an exterior or third party, namely, the sovereign. The idea of self-bindingness is therefore not wide of the truth, provided that there is a third party who can enforce the self-binding rule. Thus, Bentham suggests, 'take into the account an exterior force, and by the help of such force it is as easy for a sovereign to bind himself as to bind another'.[21] For laws *in principem*, this third party indeed exists, and it is the public opinion tribunal (the POT hereafter), which is composed of all people across the whole world who happen to be interested in and capable of forming an opinion about the laws *in principem* in question.[22] Bentham's idea of the POT is original in that he conceptualises it in juridical terms. The POT is an 'unofficial judicatory' and '[i]ts power is judicial'.[23] It combines essential functions and powers belonging to an official judicatory. Laws *in principem* will

[15]Hart, *EB*, pp. 60, 109, 239–40.

[16]Bentham, General View of a Complete Code of Laws, in Bowring, iii, p.162; and *Panopticon versus New South Wales and other Writings on Australia*, ed. by Tim Causer and Philip Schofield (UCL Press, 2022), p. 230.

[17]*Limits*, p. 90.

[18]*Limits*, pp. 90, 87.

[19]UC c. 64^{v2}. See also 'General View', 162; *Limits*, pp. 168, 86–93, 39.

[20]*Limits*, p. 91.

[21]*Limits*, p. 90.

[22]*Limits*, p. 90; Bentham, *Political Tactics*, ed. by M. H. James, C. Blamires, and C. Pease-Watkin (Oxford University Press, 1999), pp. 29–34; *Securities against Misrule*, *Securities against Misrule and other constitutional writings for Tripoli and Greece*, ed. by Philip Schofield (Oxford University Press, 1990), p. 59; *An Introduction to Principles of Morals and Legislation*, ed. by J. H. Burns and H. L. A. Hart (Oxford University Press, 1996) [hereafter *IPML*], p. 35; *First Principles Preparatory to Constitutional Code*, ed. by Philip Schofield (Oxford University Press, 1989), p. 59.

[23]Bentham, *Constitutional Code*, in Bowring, ix, p. 43; *Constitutional Code* (*CW*), p. 35; and also see Lieberman, Economy and Polity in Bentham's Science of Legislation, in *Economy, Polity and Society: British Intellectual History 1750–1950*, ed. by Stefan Collini, Richard Whatmore, and Brian Young (Cambridge University Press, 2000), p. 129.

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be taken up by the POT and then become the very 'sort of law established and enforced' by the POT.[24]

The focus of this article is Hart's second criticism. I will first summarise Hart's main arguments (Section I), and then show that these arguments are either mistaken or based on mistaken readings of Bentham (Sections II to VI). My conclusion is that Bentham correctly regards laws *in principem* as essentially duty-imposing: his command theory of law not only can accommodate, but can better explain, laws *in principem*.

Bentham's theory of constitutional law has three parts: an analytical part, a sociological part and a normative part.[25] The normative part underwent two transformations: first from conservatism to radicalism and then to republicanism.[26] This paper belongs to the analytical part. Except for Bentham's change of view in *Limits* regarding the legal status of laws *in principem*, the basic framework of the analytical part remained largely consistent, despite his continuous refinements throughout his career. Drawing primarily upon Bentham's early writings in the 1770s and 1780s, this paper also uses his late writings in the 1820s and 1830s.

I Hart's criticisms

Hart thinks that Bentham mistakes laws *in principem* as duty-imposing rules, and he argues that they are power-conferring and that they impose disabilities.[27] This mistake, Hart says, results from Bentham's failure 'to disentangle the idea of legal validity and invalidity from the idea of legality and illegality or what is legally permitted and legally prohibited'.[28] He maintains that an act is liable to be set aside or annulled when it fails to conform to power-conferring laws and is therefore *ultra vires*;[29] and that it is illegal or unlawful when it is prohibited by a sovereign, and forms a breach of duty. Bentham's failure to disentangle invalidity and unlawfulness, Hart continues, arises from his command theory, that is, his attempt to explain different types of law in terms of the sovereign's command.[30] To understand Hart's criticism, a diversion into his theory of power-conferring laws is necessary.

The Concept of Law

In *The Concept of Law*, Hart's target is primarily the Austinian command theory of law. One of his major criticisms is that it fails to explain constitutional laws. One reason for this failure is that constitutional laws, like the laws of contracts or wills or marriages, are power-conferring laws, which the Austinian command theory is unable to explain. Hart's reasoning is as follows. A legal system consists of not just duty-imposing laws which resemble commands, but also power-confering laws which diverge widely from

[24]*Constitutional Code* (CW), p. 134, also p. 36.

[25]Philip Schofield and Xiaobo Zhai, Introduction, in *Bentham on Democracy, Courts, and Codification*, ed. by Schofield and Zhai (Cambridge University Press, 2022), p. 4.

[26]See Schofield, Intellectual Aptitude and the General Interest in Bentham's Democratic Thought, in *Bentham on Democracy*, pp. 25–27. For the 'continuity of Bentham's efforts to understand the place and status of constitutional law', see Emmanuelle de Champs, Constitution and the Code: Jeremy Bentham on the Limits of the Constitutional Branch of Jurisprudence, *The Tocqueville Review*, 32.1 (2011).

[27]Hart, *Concept*, p. 289.

[28]Hart, *EB*, p. 225, and also p. 239.

[29]Ibid., pp. 60, 224, 237, 241.

[30]Ibid., pp. 225, 212.

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and cannot be reduced to commands; the latter do not impose duties, but define the conditions for valid exercises of private or public powers.[31] The failure to conform to power-confering laws results in nullity of the exercises of powers, not punishment of the nonconformer. Nullity is different from punishment.[32]

Hart criticises two arguments designed to show that power-conferring laws are fundamentally identical to duty-imposing laws. The first is to extend the idea of sanction to include nullity, and Hart argues that this is 'a source (and a sign) of confusion'.[33] On the one hand, 'in many cases, nullity may not be an "evil"' to the person failing to satisfy conditions of legal validity.[34] On the other hand, 'the provision for nullity is part of [a power-conferring law] itself in a way which punishment [. . .] is not [part of a duty-imposing law]'. A duty-imposing law can exist without its provision for sanction, whereas a power-conferring law cannot exist if failure to comply with it does not entail nullity.[35]

The second argument is that power-conferring laws are 'really incomplete fragments' of duty-imposing laws. This argument has two versions. The extreme version asserts that all genuine laws, including both duty-imposing and power-conferring laws, are, and can be restated as, 'conditional orders to officials to apply sanctions'.[36] Hart's criticism of this version should not concern us, because Bentham does not hold it. The less extreme version claims that laws are commands directed to ordinary citizens *and* officials, and that power-conferring laws need to be recast as duty-imposing laws backed by the threat of sanctions.[37] Hart argues that both versions of this argument fail because '[a] law without sanction is perfectly conceivable',[38] and that both versions distort the different social functions of different types of laws. Against both versions, Hart says,

> If we look at all law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. [. . .] [P]ossession of these legal powers makes of the private citizen, who, if there are no such rules, would be a mere duty-bearer, a private legislator.[39]

Hart argues that duty-imposing laws and power-conferring laws are 'thought of, spoken of, and used in social life differently', 'valued for different reasons' and should be recognised as distinct from each other. Duty-imposing laws define kinds of conduct as to be avoided or performed by those to whom they apply, 'irrespective of their wishes', while power-conferring laws enable or facilitate individuals or officials to realise their

[31]Hart, *Concept*, 26–29, 31.
[32]Ibid., pp. 33–35.
[33]Ibid., p. 34.
[34]Ibid.
[35]Ibid., p. 35.
[36]Ibid., p. 36.
[37]Ibid., p. 38.
[38]Ibid., p. 38.
[39]Ibid., p. 41.

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wishes, and thereby confer upon them amenity: they are 'one of the great contributions of law to social life'.[40]

Essays on Bentham

About ten years after publishing *CL*, Hart admitted that he 'attempted no close analysis either of the notion of a power or of the structure of the rules by which they [powers] were conferred'.[41] In *EB*, Hart provides this analysis by developing his criticism of the command theory. He offers the most detailed explication of Bentham's analysis of legal power, and emphasises that it is 'far subtler and more plausible' than Austin's analysis.[42] However, he thinks that Bentham's explanation of private powers is a dangerous mistake. In Hart's view, Bentham fails to distinguish the power to issue commands and prohibitions and the power to enter into transactions.[43] He says that Bentham

> misrepresents as a mere legal permission to issue commands or prohibitions [. . .] something conceptually quite distinct from this and of great importance: namely the recognition by the law that certain acts of individuals in certain circumstances suffice to bring themselves or others within the scope of existing laws (or of exceptions to them) and so control their incidence.[44]

'This mistake', Hart says, 'springs from two connected faults'.[45] The first is Bentham's failure to disentangle the idea of invalidity from that of illegality. As a result of Bentham's command theory, 'legality and illegality, legally permitted and legally prohibited . . . had come to appear as the only legal dimensions in which law-making operations need to be assessed'. He believes that this explains why 'Bentham seems curiously reluctant to use these terms [i.e. "legally valid or invalid"] or synonyms for them such as "legally effective" or "void"'.[46] Hart reiterates that the idea of invalidity cannot be subsumed under that of illegality, and that the latter is conceptually irrelevant to the former.[47] First, that invalidity 'does not necessarily follow from' illegality:[48]

> In many countries it is illegal to sell stolen goods but the sale if made in a shop or market may be legally valid conferring rights on the purchaser and obligations on others. Similarly in some countries a *polygamous marriage* may be recognied as valid even though it is a punishable offence and so illegal to enter into.[49]

Second, that a lawful act may be invalid:

[40]Ibid., pp. 27, 41; also pp. 28, 31–2.
[41]See Hart, *EB*, p. 196.
[42]Ibid., p. 201, also pp. 197, 208–09, 215–16.
[43]Ibid., pp. 212, 206, 213.
[44]Ibid., pp. 213–14, also p. 212.
[45]Ibid., p. 212.
[46]Ibid., pp. 224–25.
[47]Ibid., p. 214.
[48]Ibid., p. 212.
[49]Ibid., p. 241, and also p. 212.

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> If a person who has no legal power to dispose of property or enter into a contract purports to do these things by executing the standard forms, the purported disposition or contract will be invalid or 'void' though his acts may constitute neither a criminal nor a civil offence, and so may be legally permitted.[50]

In the final paragraph of his chapter 'Legal Powers', Hart repeats that power-confering laws 'guide those who exercise powers in ways strikingly different from the way in which rules imposing duties guide behavior', and 'are distinct from duty-imposing rules in their normative function'.[51]

Hart's criticisms of the command theory (including both Austin's and Bentham's versions) aim to establish that power-confering laws are different from and cannot be reduced to duty-imposing laws, and that Bentham's effort to explain the fomer in terms of the latter is essentially flawed. If Hart's criticisms were valid, they would form a solid foundation for his further argument that laws *in principem*, as power-conferring laws, cannot be accommodated in Bentham's command theory. I now offer some responses on Bentham's behalf to Hart's criticisms. I will argue that Bentham's command theory can easily survive all these criticisms. Considering that Bentham's understanding of the relationship between the nature of law, that of power, and the function of law is different from Hart's, the order of my responses does not strictly correspond to that of Hart's criticisms.

II Power-confering laws as illusions

Law and sanction

The point of law, for Bentham, is to guide people's conduct by changing their motives. Laws can be classified as either primordial or parasitic: the latter revoke in whole or in part the former.[52] All primordial laws, Bentham argues, are essentially duty-imposing commands. 'Every primordial law that is efficient is a command: every legal command imposes a duty'.[53] Law without sanction or punishment is inconveivable, although it should be noted that, for Bentham, the sanctions capable of giving binding force to law are much wider than for Hart, and that they can be either political or popular sanctions.[54] Hart writes, 'only if we think of power-conferring rules as designed to make people behave in certain ways and as adding nullity as a motive for obedience, can we assimilate such rules to orders backed by threats'.[55] Bentham would answer Hart that all laws, including power-conferring laws, are of course 'to make people behave in certain ways': how could they not be so?

Power and duty

According to Bentham, 'in the practice of the law, it is upon punishment that every thing turns. [. . .] Take away the idea of punishment, and you deprive them [i.e. obligation, duty, right, power, title] of all meaning';[56] 'neither Rights nor Powers are created but by

[50]Ibid., p. 212, and also p. 241.
[51]Ibid., p. 219.
[52]Bentham, *IPML*, p. 302.
[53]Bentham, *Limits*, p. 80.
[54]Ibid., pp. 145, 142, and *IPML*, p. 34.
[55]Hart, *Concept*, p. 34.
[56]Bentham, *Limits*, p. 145, and also pp. 143, 79–80; and *Preparatory Principles*, pp. 70, 102, 187.

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Command, enforced by Punishment'.[57] Powers, in Bentham's view, are constituted by 'exceptions' to imperative laws, that is, by 'discoercive or permissive laws, operating as exceptions to certain laws of the coercive or imperative kind'.[58] A so-called power-conferring law, Bentham says, issues to the empowered party 'a Permission: to every one else … a Prohibition': it 'authorizes a certain person to do a thing contrary to a [coercive] law',[59] and exempts him from a duty when he deals with another person in a probably disagreeable manner.[60] For example, a law that confers the power over a loaf of bread to Jack restrains acts of other persons over this loaf, and excepts Jack from the restraint.[61] 'To give to A power over B' is 'to command all persons to forbear opposing A in acting after a given manner upon B'.[62]

Hart rightly points out that, for Bentham, 'the view that there are separate laws which confer powers is an illusion',[63] and that the so-called power-conferring laws are not a type of law independent of and separate from duty-imposing laws. A power-conferring law, in Bentham's view, consists of (implicitly, if not explicitly) a combination of duty-imposing laws for correlative parties: a power is constituted by 'prescribing duties' or 'commanding acts' 'on the part of persons other than him to whom the power is given'.[64] Bentham states:

> It is on the penal [part] that every proposition which can be found in a book of law depends for its obligative force. When the imperative clause or clauses to which a clause that is not imperative relates is traced out and understood, the true nature and efficacy of such clause is clearly understood.[65]

In Bentham's view, apparently power-conferring clauses – if they are not nonsensical – are and should be capable of being paraphrased into duty-imposing clauses.

According to the degrees of perfection, power can be classified into three types. The lowest-degree power is 'where it is not made any body's duty to oppose you in case of your going about to exercise it'. The middle-degree power is 'where not only it is not made any body's duty to oppose you in case of your going about to exercise it, but it is made every body's duty not to oppose you in case of your going about to exercise it'. The highest-degree power is 'where not only it is made every body's duty not to oppose you in case of your going about to exercise it, but in case of your meeting with any obstacle to the exercise of it, … it is made the duty of such or such persons to enable you to overcome such obstacles'.[66] Depending upon its degrees of perfection, a so-called power-conferring law may be composed of one or more duty-imposing laws in various

[57]Bentham, *Preparatory Principles*, pp. 78, 80.

[58]Ibid., p. 97; *IPML*, p. 307.

[59]Bentham, General View, p. 195.

[60]Bentham, *Limits*, p. 277; and *Preparatory Principles*, p. 77. See also Andrew Halpin, The Concept of a Legal Power, *Oxford Journal of Legal Studies*, 16. 1 (1996), pp. 131–36; Guillaume Tusseau, Jereremy Bentham on Power-Conferring Laws, *Revue d'études benthamiennes*, 3 (2007), doi: http://journals.openedition.org/etudes-benthamiennes/160.

[61]Bentham, *Preparatory Principles*, pp. 75, 253, 180–82; *Limits*, pp. 82, 291.

[62]Bentham, *Preparatory Principles*, p. 100, also pp. 115, 380.

[63]Hart, *EB*, p. 215. See also M. H. James, Bentham on the Individuation of Laws, in *Bentham and Legal Theory*, ed. by M. H. James (Banbridge Chronicle Press, 1974), p. 102.

[64]Bentham, *Limits*, p. 315, and also pp. 296, 50–51, 256; *Preparatory Principles*, pp. 293, 281.

[65]Bentham, *Limits*, p. 221.

[66]Ibid., p. 314, also pp. 291, 296, 299–300; *Preparatory Principles*, p. 101.

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combinations; and the power-conferring function of a duty-imposing law, as I will argue in Section V, represents one of three aspects in which a duty-imposing law presents itself to its parties.[67]

Private power

Bentham does not distinguish between the power to issue commands and the power to enter into transactions, but this does not involve any confusion on his part. In his view, all normative powers are made possible by duty-imposing rules, including the type of power which 'seems at first sight very unlike' that of issuing commands,[68] and by means of which a person varies his or other persons' legal position. Imperative power is either *de classibus* or *de singulis:* the former is the power of making general commands, and the latter that of making particular arrangements concerning identifiable individual persons, things, and acts, such as that of appointing judges, and of making contracts and alienating property. They are 'but two different ways of exercising *the same power*. ... Neither of them of itself includes the power of doing everything that is to be done by commanding and countermanding. ... To form the compleat power of imperation, there needs be the union of both theses powers'.[69]

The power by means of which a person P varies his or other persons' legal positions, according to Bentham, is the power of imperating *de singulis,* which is permitted by a general command, and by means of which an individual person, thing or act is aggregated to corresponding classes referred to in the general command, and thereby brought within its scope, although without being directly commanded. In this way, the person P becomes a sharer in the legislative power.[70] Bentham was perhaps the first in the history of legal philosophy who put forward this important and interesting thesis.

III Legality and validity: a defence for Bentham

Validity is a key term in Bentham's jurisprudence. He frequently applies 'legally valid or invalid' to not just contracts but also surbordinate legislation, although not to the sovereign's legislation.[71] The statement that an arrangement is legally valid, for Bentham, means that it exists in law and is legally binding or obligatory; in contrast, if the arrangement is legally invalid, null or void, it has no existence in law and 'ought not to be considered as binding', and the execution of it calls for resistance.[72] Bentham does not confuse the validity of an act and its legality. For him, the validity of an act of a non-sovereign power holder is in principle grounded in its legality,[73] whereas an act of a sovereign can be illegal and therefore punishable, but cannot be annulled (see Section VI). For an act of a subordinate power-holder, the sovereign is the legality-giver and thereby

[67]See Bentham, *Limits*, pp. 75–93; *Preparatory Principles*, p. 171.

[68]See Hart, *EB*, p. 202.

[69]Bentham, *Limits*, p. 104. Emphasis added.

[70]See Ibid., *pp.* 45–53, 100–14; and General View, p. 187; and Nonsense upon Stilts, in *Rights, Representation, and Reform*, ed. by Philip Schofield, C. Pease-Watkin, and C. Blamires (Oxford University Press, 2002), p. 342.

[71]Bentham, *IPML*, p. 6; *Limits*, pp. 47–51, 103; *Fragment*, pp. 486–87; Principles of the Civil Code, in Bowring i, p. 331.

[72]Bentham, *Fragment*, pp. 445–46, 487; *Comment*, pp. 54–55, 230; Swear Not at All, in Bowring v, p. 206; *Limits*, pp. 47–48, 103, 267; Nonsense, pp. 324, 327, 334-6, 338, 341, 347.

[73]Bentham, *Fragment*, p. 487; Swear Not at All, pp.194, 206.

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the validity-giver: 'any subordinate public or a private act of power may be said to be void, when it is such to which the superior Judicial Court will not lend the sanction of the supreme power'.[74] Contrary to Hart, I think this thesis of Bentham's is correct: the illegality of an act may not always lead to its invalidty or voidability; it may only lead to other types of punishment; but the reason for its invalidity or voidability is aways some type or degree of illegality, often severe illegality. I will provide a defence for this thesis.

Hart thinks that treating an act as a nullity is withholding legal recognition from it,[75] and Bentham would agree with him. The difference between them is that, for Hart, the withholder is the court, which may or may not be the sovereign, depending upon the constitutional systems; but, for Bentham, the withholder is the sovereign: an arrangement from which legal recognition is withheld by the sovereign is one prohibited by the sovereign: in Bentham's view, it lacks legality and thereby validity.

Invalidation (treating an act as invalid or annulling a voidable act) in Bentham's theory is a technique that helps to realise the ideal of legality, that is, the conformity of people's – especially officials' – conducts with law. In Bentham's view, as a general rule, the validity of an act of power is based upon its legality: the illegal act of *subordinate* power-holders will generally be invalidated or punished.This general rule has been widely enshrined in legal texts. A cliché in public law scholarship is that, as a general rule, the exercise of public power, if it is not in conformity with law, will be invalid or voidable or punishable.[76] The same rule controls the exercise of private power. As Flume puts it, 'individuals can only form legal relations in ways permitted by law, even in the domain of private autonomy'.[77] In private transactions, individuals will have more freedom than officials exercising public power, but Hart is mistaken in stating that 'certain acts of individuals in certain circumstances [alone] suffice' to change their rights and duties. In Bentham's view, they can have this effect, because the sovereign permits them to have it.

'When courts take a hand'

The general rule of legality-grounding-validity, Hart says,

> is acceptable only [when] the courts would take no hand in enforcing the subordinate's orders or punishing those who disobeyed them, but would be concerned only with the question whether the subordinate's act in issuing or in enforcing orders was permitted by the law or was an offence [. . .] But where questions of the validity of the subordinate's orders arise, [. . .] the mere fact that the subordinate is permitted to issue the orders [. . .] is not in itself the important consideration. What is important is that the subordinate's act in issuing the orders is recognised by the law [. . .] as a criterion of their validity. [. . .] What most needs to be stressed as a corrective to Bentham's account is that the fact that a

[74]Bentham, *Preparatory Principles*, pp. 359, 413.

[75]Hart, *Concept*, p. 34.

[76]See Timothy Endicott, *Administrative Law* (Oxford University Press, 2011), pp. 396–97; Lawrence Baxter, *Administrative Law* (Juta, 1984), p. 355. Jean Rivero and Jean Waline, *Droit Administratif* (Dalloz, 2004), pp. 16, 24; H. J. Wolff, Otto Bachof, and Rolf Stober, *Verwaltungsrecht*: Band 2 (Verlag C. H. Beck, 2000), pp. 81–83; Otto Mayer, *Deutsches Verwaltungsrecht* (Verlag von Duncker & Hunblot, 1924), pp. 94–96; Hartmut Maurer, *Allgemeines Verwaltungsrecht* (Verlag C. H. Beck, 1999), pp. 241–42.

[77]Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts. Band 2: Das Rechtsgeschäft* (Springer-Verlag, 1979), pp. 1–6; Joseph Raz, *The Concept of a Legal System* (Oxford University Press, 1980), p. 220.

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> person or body of persons is legally permitted [. . .] to issue orders is not equivalent to the recognition of the issue [. . .] of such orders as a criterion of their validity or enforceability. [. . .] Even if members of a legislature were punishable [. . .] for issuing orders which are *ultra vires* and void, the fact that in issuing such orders they have done what is not permitted [. . .] must be distinguishable from the fact that they have produced orders which are legally invalid.[78]

Hart here argues that legally prohibited orders must be distinguished and separated from legally invalid or voidable orders, because courts are independently responsible for the latter. This is not correct for three reasons.

First, in Bentham's view, the judiciary should serve as 'la bouche de la loi'. Given this, it is not easy to see what the real difference is that Hart emphasises between being permitted by law and being recognised by law (or courts), or how Hart has proven mistaken Bentham's thesis that, as a general rule, the legality (ie legal permissibility) of an act of power grounds its validity, considering that an act of power is essentially constituted or made possible by acts of duty, as has been shown in Section II.

Second, if the judiciary (mistakenly, Bentham would argue) has the power of judicial review, the orders of the legislator may not be enforced as law by the courts. This, however, does not mean that validity is not grounded on legality. Bentham could say that in this situation, the judiciary is the sovereign – the final decider of legality, and as Schofield points out, in Bentham's theory, the sovereign is not necessarily a legislator, and the judiciary is not necessarily subordinate to the legislator.[79] Besides, the judiciary, Bentham could argue, is a component branch – the negative branch – of a conjunctive sovereign, who has the final say on the issue of legality.[80]

Finally, *ultra vires*, Bentham could argue, is a type of illegality (or unlawfulness): not to make *ultra vires* decisions is a typical legal duty.[81] As Endicott says, '[i]t is obviously unlawful for a public authority to do something that it has no lawful power to do. Such an action is *ultra vires*'.[82] An *ultra vires* act is liable to be invalidated because it is illegal.[83]

Illegal but valid

One of Hart's criticisms of Bentham's general rule that legality grounds validity is that there are acts which are illegal but valid:

> In many countries it is illegal to sell stolen goods but the sale if made in *a shop or market* may be legally valid conferring rights on the purchaser and obligations on others. Similarly in some countries a *polygamous marriage* may be recognized as valid even though it is a punishable offence and so illegal to enter into.[84]

[78]Hart, *EB*, pp. 213–14.

[79]See Schofield, *Utility and Democracy*, pp. 225–26.

[80]Bentham, *Fragment*, p. 487.

[81]See A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (Pearson Education Limited, 2007), p. 729; Raz, *Legal System*, p. 153.

[82]Endicott, *Adminstrative Law*, p. 56.

[83]See S. J. Shapiro, *Legality* (Harvard University Press, 2011), p. 90.

[84]Hart, *EB*, p. 241, and also p. 212.

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Köpcke points out that 'a danger inherent' in the argument that an act can be both prohibited and legally valid is 'that the sheer existence of prohibited but valid acts is taken to prove too much'.[85] Bentham can fully explain the phenomenon of illegal validity.

First, Bentham's opinions are that the reason for the validity of an act is its legality, that the reason for the invalidity or voidability of an act is its illegality of some type or degree, and that the invalidity or voidability (a type of punishment (Section IV)) of an illegal act is one technique, among others, to pursue the ideal of legality. There are other techniques (say other types of punishment) by means of which the ideal of legality can be achieved. Bentham would be happy to accept the claim that the illegality of some type or degree of an act does not always result in its invalidity or voidability.

Second, there are cases where the illegality of an act leads to neither punishment nor the invalidity or invalidation of the act. These cases, however, do not show that Bentham's general rule of legality grounding validity is mistaken.

(a) Acts of public power

The fact that an illegal act may be unpunishable and treated as valid is more common in public law than in private law. An act by a subordinate public authority, unless obviously and gravely unlawful, will be treated as unpunishable and valid until it is officially certified as unlawful and punishable or invalidated by a superior authority, normally a court.[86] This phenomenon does not refute Bentham's theses that legality grounds validity and that invalidity or voidability is the result of unlawfulness of some degree or type. In public law, the unlawfulness of an act of power is distinguished into two types: obvious and grave illegalities,[87] and ordinary illegalities which are objectively unlawful but maintain 'certain color or appearance of legality'.[88] The former leads to the invalidity of the act, whereas the latter leads to the voidability of the act.[89] An unlawful act of public power which does not involve obvious and grave illegalities will be considered as valid until being officially certified as unlawful and annulled by a court. Its validity here is *presumed* validity. Hauriou terms this presumbed validity as '*le privil ge du préalable* (the right to act first and be questioned later)', which is considered a foundational principle of public law.[90] This principle does not contradict Bentham's thesis that legality in general grounds validity, because the unlawfulness of the act is the ground for its voidability, and its presumed validity derives from the '*veritable présomption de légalité*' (real presumption of legality) or

[85]Maris Köpcke, *Legal Validity: The Fabric of Justice* (Bloomsbury Publishing, 2020), p. 32.

[86]See Adams, The Standard Theory, *Cambridge Law Journal*, 76. 2 (2017), p. 301.

[87]See Mayer, *Deutsches Verwaltungsrecht*, pp. 95-96. For examples of 'obvious and grave unlawfulness', see *German Administrative Procedure Act of 1976* (amended 2008), § 44; *Law of Administrative Punishments of the PRC of 1996* (amended 2021), Art. 38; and also C. S. Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996), p. 195.

[88]Nino, *Deliberative Democracy*, p. 194.

[89]See Adams, Criteria of Validity; and The Standard Theory.

[90]See Bertrand Seiller, *Droit adminisratif, Vol. 2. L'action administrative* (Champs Université, 2011), p. 108; Rivero and Waline, *Droit administratif*, 364–5; H. C. H. Hofmann, G. C. Rowe, and A.H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2011), pp. 174, 629. The translation in the brackets is from John Bell and François Lichère, *Contemporary French Administrative Law* (Cambridge University Press, 2022), p. 166.

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'*conformité au droit*' (conformity to the law) of it.[91] The same principle applies in EU law, according to which acts of public power 'are in principle presumed to be *lawful* and *accordingly* produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn'.[92]

(b) The complexity of the legality of an act

In many cases, the legality of an act of power is multifaceted and multifactorial, and its criteria of validity do not follow 'a strict, all-or-nothing logic'.[93] Hart's formulation of the examples of acts of power is insufficient to debunk Bentham's general rule of legality grounding validity, partly because it does not do justice to the complexity of the legality of an act, which has at least three dimensions.

First, an act of power may comprise several simple acts (say X, Y and Z), some of which (say X and Y) might be lawful, and some (Z) unlawful. This is the case of the transaction of stolen goods, which comprises the thief's illegal sale of stolen goods and the buyer's *bona fide* and lawful purchase of the goods. The legality of the act is complex[94] and it is not straightforwardly unlawful.

Second, an act of power may have more than one dimension, for example procedural (or formal) and substantive.[95] One dimension (say the procedural) may still be complex in that it may include more than one step. It may therefore be governed by many laws, protecting interests of different types or of different degrees of importance: some of which may be concerned with its validity or voidability, whereas others may be based on regulatory policies and do not render invalid or voidable the legally defective act but only provide that it will be punished.[96] Lawyers frequently talk about obvious and grave violations of important laws versus ordinary legal defects: the fomer may result in the invalidity or voidability of the act of power, but the latter may not. The unawlfulness of one dimension of an act of power, or its violation of one law, does not negate the lawfulness of other dimensions of the act, or its conformity with other laws. A sovereign may not allow Jack to do X, but adopts or does not invalidate Jack's doing X once he has done X, but at the same time inflicts some punishment on Jack for having done X. In this case, it is reasonable to say that Jack's doing X is ultimately not unlawful (although it is apparently so), or that its lawfulness outweighs its unlawfulness, and therefore his doing X is valid. Paraphrasing Suarez, Köpcke says, 'the law-giver may favour an act in terms of its validity and effect, despite not favouring it in terms of its malice. So the act may be valid even though it is wrong to perform it'.[97] This can explain that in some jurisdictions a polygamous marriage or a usurious contract may be partially unlawful and therefore punished but remain valid.

Third, the evaluation of the lawfulness of an act is often not a one-off operation done by one authority. Its lawfulness can be indeterminate for some period of time. An act

[91]Jacques Chevallier, Le droit administratif, droit de privil ge? *Revue Pouvoirs*, 46 (1988), pp. 60-61. Seiller, *Droit administratif*, vol. 2, p. 109; vol. 1, p. 207; and also Rivero and Waline, *Droit administratif*, pp. 354–55; Hart, *Concept*, p. 30.

[92]See Case C-137/92 P *Commission v BASF and others* [1994] ECR I-2555, para 48. And also Hart, *Concept*, p. 30.

[93]Köpcke, *Legal Validity*, p. 113.

[94]For an example, see *German Civil Code*, § 116.

[95]See Adams, Criteria of Validity.

[96]See Maris Köpcke, *A Short History of Legal Validity and Invalidity* (Intersentia, 2019), pp. 77–78.

[97]Köpcke, *A Short History*, p. 102.

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that is unlawful and invalid or voidable at a given time can be converted into lawful and valid at another time by being imbued with new elements, say the consent or confirmation of some parties. It also happens that a *prima facie* lawful act is invalidated or punished by a court, unlawful treated as valid or not punished; but, if the decision of the court is not revoked by the sovereign, it can be said to have been adopted by the latter, who can in turn be assumed to have accepted that the *prima facie* lawful act is actually unlawful and should be punished or invalidated, or that the *prima facie* unlawful act is actually lawful, and should be valid and upheld.

These complexities of the legality of an act mean that its legality can be multifaceted and multifactorial, or a matter of degree. Depending upon their graveness or triviality, not all the illegalities of an act result in its invalidity or voidability, and some may result in fines or perhaps imprisonment of the agent, without the act being invalid or voidable. This possibility does not show that the legality and validity of an act are separate, rather it shows that they are necessarily related in that the ground for the validity of an act is always its legality which might be multifaceted and multifactorial, and the ground for its invalidity or voidability is always some type or degree of its illegality. This general rule has a long history[98] and is evident through many contemporary examples. Hart's criticism of Bentham in this aspect cannot stand.

IV Nullity as punishment

Bentham considers invalidation as sanction or punishment. He says repeatedly that nullity is a type of punishment, and that 'making void' an act of power is a 'penalty'.[99] There are two arguments for this in his writings.

First, as Hart agrees, an act of power is a purposive activity:[100] a person exercising a power expects his arrangement to be valid, and to be legally protected. He will suffer the pain of disappointment if his arrangement is invalidated.[101] For Bentham, the pains that 'are capable of giving a binding force to any law or rule of conduct' are punishments.[102] Besides, people who act in virtue of the invalid or annulled arrangement would be punishable.[103]

Second, Hart argues that the annulment of a judge's order is not punishment for the judge, because the judge may be 'indifferent' to it,[104] but Bentham disagrees. To legalise a custom *in foro*, he says, 'it is to appearance sufficient' that 'the command of the non-conforming Judge be [. . .] reversed by a Judgement of a superior Court'.[105] The reversal is not the punishment of the inferier judge only 'to appearance in the 1st instance', and it is in truth the punishment of him, because,

> if the inferior Judge proves refractory, and persists in the enforcing his order, it is plain that ultimately it is his punishment that will be necessary in order to make the

[98]See Köpcke, *Legal Validity*, pp. 58, 113, 134; and *A Short History,* pp. 17–18.

[99]Bentham, General View, p. 187, and also p. 200; Principles of Penal Law, in Bowring, I, p. 555.

[100]Hart, *Concept*, pp. 40–41; Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999), p. 103.

[101]Bentham, *Rationale of Judicial Evidence*, in Bowring, vi, p. 518; *IPML*, p. 46. Hart is aware of this, see *Concept*, p. 33.

[102]Bentham, *IPML*, p. 34.

[103]Bentham, *Fragment*, p. 487.

[104]Hart, *Concept*, p. 34.

[105]Bentham, *Comment*, p. 183.

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> custom he would depart from binding on him [. . .] [A]t bottom it is unquestionable, that by the prospect of his own punishment only can a man be bound.[106]

For the inferior judge, to have his decision reversed by a superior judge, Bentham believes, indeed constitutes punishment or generates the prospect of his punishment:

> in the mind of a Judge subject to feel incessantly the controul of a superior Judge, the ideas of a counter-command by such a superior and the punishment annexed to the non-observance of it are so intimately associated, that the first is understood to have the same effect upon the inferior Judge to make his custom binding on him, as the prospect of a specific punishment has upon the ordinary subject.[107]

Hart says, 'only if we think of power-conferring rules as designed to make people behave in certain way and as adding nullity as a motive for obedience, can we assimilate such rules to orders backed by threats'.[108] Bentham would respond to Hart by asking what else the design of all laws —including power-conferring laws— could meaningfully be if it is not to make people behave in certain way. Bentham clearly says that the performance of certain tasks is 'rendered obligatory' by 'pain of nullity or by punishment in any other shape', and that 'the principle of nullity, pain of nullity [. . .] is the moving power that by legislators [. . .] has been commonly, not to say universally, employed: pain of nullity, applied in the character of an inducement, a motive, to the will'.[109]

V Points of view and functional differences

Bentham does not, as Hart criticises him, 'look at all law simply from *the point of view of the persons on whom its duties are imposed*'. Instead, he points out that a party is affected by a law in three ways:

> 1. by being bound or coerced by it; 2. By being exposed at least to suffer by it; 3. By being favoured or intended to be favoured by it. [. . .] [O]n the one hand, there must necessarily be one or more persons concerned in all these three ways; on the other hand, [. . .] there are no other ways in which any person can be concerned in it.[110]

He emphasises that 'these various relations which may be born[e] to various parties by the same law must all of them be present to a man's mind before the true nature and influence of it [the law] can be understood by him'.[111]

For example, in an arrangement regarding a piece of field *f* with F as the fiduciary and B as the beneficiary, Bentham says, there are two laws. One *permits* F to gather the produce of *f*, and the other *commands* him to do so:

[106]Ibid., p.184.
[107]Ibid.
[108]Hart, *Concept*, p. 34.
[109]Bentham, *Rationale of Judicial Evidence*, pp. 513, 517.
[110]Bentham, *Limits*, p. 75, and also p. 84.
[111]Ibid., p. 85.

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> In the former law, mankind in general were the parties *bound*; and the obligation was of the negative stamp; and F alone was the party [excepted and] *favoured* [in point of agency]: by the latter law F alone is the party bound; the obligation is an affirmative one, and B alone is the party favoured [in point of interest].[112]

The parties bound are imposed a duty, and the parties favoured are conferred a right, liberty, or power.[113]

Bentham is therefore fully aware of the facilitating function of Hart's so-called power-conferring law. According to him, power-conferring is one effect of a law, a major way in which favour is shown to a party by a law.[114] The power-conferee is favoured in point of agency,[115] and he may also be favoured in point of interest:

> When a man is favoured by a law in point of agency, it may be either for his own sake or for that of another party. In the first case, the power or the right of which he is left in possession is of the beneficial kind; in the latter case, of the fiduciary kind[:] … [he is] left free to act in such or such a manner in order that, through his acting, the other may reap a benefit. … [This law] is sufficient to empower the trustee to render the services in question to the beneficiary.[116]

Bentham does not conceal or obscure the power-conferring or facilitating function of law. He says that all laws confer benefits on some person or persons. 'To suppose the contrary is to suppose the legislator to act without a motive. […] [N]o effect without a cause: no act, no law, without a motive'.[117] Meanwhile, Bentham emphasises that a law with the power-conferring function has the primary function of imposing duty upon a correlative party, and it fullfils its power-conferring function through its duty-imposing function:[118]

> On the circumstance of there being a party whom it binds, a law depends for its *essence*: on the circumstance of there being a party whom it is designed at least to favour, it depends for its cause: on both together it depends for the sum total of its efficacy: without the last it never exists; without the first, it could not so much as be conceived.[119]

A law affects different parties in different ways. Bentham would criticise Hart that he sees only the favouring effect of a power-conferring law on some parties, namely, its 'cause' or 'motive', and mistakes its cause as its essence, and thereby blinds us to its duty-imposing essence.

[112]Ibid., p. 83, and also *Preparatory Principles*, p. 253.
[113]See Halpin, Legal Power, pp. 131–36.
[114]Bentham, *Preparatory Principles*, pp. 171, 378.
[115]Ibid., p. 150.
[116]Bentham, *Limits*, p. 81; also *Preparatory Principles*, p. 253.
[117]Bentham, *Limits*, p. 77.
[118]Ibid., p. 79, and also p. 76.
[119]Ibid., p. 85. Emphasis added.

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VI The Sovereign's Void Laws: 'the vilest of nonsense'

Laws *in principem* are no exception to the above propositions (Sections II to V). Apparently power-conferring or disability-imposing, they are essentially duty-imposing for the sovereign: they 'seek to obligate the sovereign power',[120] and thereby empower subjects by giving them liberties.[121] Postema says that 'Bentham may in some cases [. . .] confuse the limitations on sovereign authority with obligations'.[122] This is questionable: Bentham does not confuse, but correctly identify, the former with the latter. And he thinks that a sovereign can breach its duties imposed by laws *in principem* and thereby commit offences.[123]

It has to be pointed out that one difference between laws *in principem* and *in populum*, according to Bentham, is that the breach of the fomer cannot be invalidated, as no one has the authority to do so:[124]

> Look w[h]ere I will, I see but too many laws the alteration or abolition of which would, in my poor judgment, be a public blessing. I can conceive some [. . .] to which I might be inclined to oppose resistance [. . .] But to talk of what the law – the supreme legislature of the country, acknowledged as such – *can* not do! – to talk of a *void* law, as you would of a void order or a void judgment! – the very act of bringing such words into conjunction is the vilest of nonsense.[125]

This is a vital difference between acts of subordinate power-holders and those of a sovereign, in that the former's powers are conferred by a sovereign, and the exercise of them can be invalidated by the sovereign. But the latter's power is constituted by the people's disposition to obey, and the exercise of it cannot be invalidated by anyone, although it could be 'illegal', i.e. not conforming to laws *in principem*.[126]

Postema correctly says that '[i]t is not at all implausible for Bentham to believe that many limitations on the sovereign power will also be "corroborated" by obligations on the sovereign backed by the moral sanction'. However, he then writes,

> it is also conceivable that the actions of the sovereign could be regarded as divestitive events. Certain actions performed by the sovereign could then be regarded, according to the constitutive practice of the community, as having the legal effect of invalidating the legislative activity of the sovereign. This would be true, for example, if the sovereign attempted to legislate on matters of religious practice. [. . .] And so it is possible clearly to distinguish in theory the invalidity of a sovereign act from its being liable to moral sanction.[127]

[120]UC c. 64^{v2}.

[121]Bentham, *IPML*, p. 307; *Limits*, p. 256.

[122]Postema, *BCLT*, p. 259.

[123]Oren Ben-Dor, *Constitutional Limits and the Public Sphere* (Hart Publishing, 2000), p. 163. See also *IPML*, pp. 143–45, 203.

[124]Bentham, *Preparatory Principles*, p. 359; *Fragment*, pp. 485–86; *Limits*, p. 103.

[125]Bentahm, Nonsense, p. 328.

[126]Bentham, New Wales, in *Panopticon versus New South Wales*, p. 16; A Plea for the Constitution, in *Panopticon versus New South Wales*, p. 384; Equity Dispatch Court Bill, in Bowring, iii, p. 359; *Constitutional Code* (CW), pp. 41, 45, 156.

[127]Postema, *BCLT*, p. 258.

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Postema thinks that 'constitutional immunities protecting individual rights impose disabilities on the legislature', and that 'violations of provisions of a Bill of Rights are [. . .] regarded as constitutionally void'.[128]

I do not think that Bentham could accept this reading. Postema may be correct if we take judicial review as the archetype of legally limited sovereignty, but Bentham does not think so. He does not think that a supreme legislator limited by a supreme court is a legally limited sovereign. Instead, he would regard the legislator and the court together as composing a conjunctive sovereign that is legally unlimited.[129] In fact, Postema seems not to think of judicial review as the archetype of legally limited sovereignty. The question then for Postema is, who has the authority to invalidate a sovereign's illegal (that is, not conforming to laws *in principem*) act without itself becoming another sovereign? In a word, a violation of a law *in principem* by the sovereign can be declared 'anti-constitutional', but in Bentham's view, it is incapable of being annulled, or 'treated or spoken of, as being null and void'.[130]

A sovereign's command cannot be illegal if being illegal means not conforming to laws *in populum*, but, according to Bentham, it can be illegal if being illegal means not conforming to laws *in principem*. Once made, a sovereign's command, even if illegal or unconstitutional, exists and will continue to exist, and is thereby valid and incapable of being invalidated, until the sovereign is no longer a sovereign. It cannot be invalidated, no matter how illegal it is;[131] however, because of its illegality, the sovereign will be punished by the public opinion tribunal, may lose the populace's obedience, or be overthrown – this is how laws *in principem* obtain their efficacy. The so-called invalidation that Postema refers to is not invalidation strictly speaking, but the result of the sovereign's loss of sovereignty.

Conclusion

Hart thinks that laws *in principem* are power-conferring, to be implemented by judicial invalidation of the sovereign's breaches of them. It has been shown that Bentham correctly believes that all apparent power-conferring laws, including laws *in principem,* are essentially duty-imposing: they do not directly impose duties upon the power-conferee, but they necessarily impose duties upon related correlative parties; and that the validity of an act of power is grounded upon its legality, that invalidity or voidability is one of a number of techniques of achieving the ideal of legality, and that it is a type of punishment. It has also been argued that a law's function, according to Bentham, is distinct from its essence, and that all laws have the function of benefiting or enabling some parties.

The limitations imposed upon a sovereign by laws *in principem*, in Bentham's view, are not disabilities,[132] but essentially obligations. Bentham does not *confuse* the legal limitations on a sovereign with obligations of the sovereign; instead, he thinks that the former are essentially the latter. So long as the sovereign is still a sovereign and thus the object of the people's general obedience, its commands, Bentham would argue, exist, are valid, and cannot be invalidated, despite their illegality. Laws *in principem* are

[128]Ibid., p. 259.
[129]Bentham, *Preparatory Principles*, p. 65; *Fragment*, pp. 485, 488; *IPML*, p. 263; *Limits*, pp. 91–92.
[130]Bentham, *Constitutional Code* (CW), p. 45.
[131]Bentham, *Fragment*, p. 486.
[132]See Bentham, *Constitutional Code* (CW), p. 45.

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efficacious, not because an apex court might invalidate the commands of the sovereign that violate them, but because the sovereign's violations of them will be regarded as reprehensible, and criticized and punished by the public opinion tribunal: they will potentially constitute reasons for the people's resistance. In his recent writings, Postema seems to agree to the reading offered here, and says that 'Bentham treated constitutional constraints on the power of the sovereign – he called them "laws *in principem*" – as *matters of legal duty*' and 'they impose *legal duties* [. . .] by virtue of their enforcement by the social or "moral" sanction of public opinion'.[133] The conclusion is that Bentham's command theory of law not only can accommodate laws *in principem*, but can better explain their nature and operation.

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[133]Postema, *UPL*, p. 199. Emphasis mine.

It is worth noting that Bentham has two concepts of sovereignty. The sovereign to be limited by laws *in principem* is a *de facto* sovereign, constituted by the people's disposition to obedience, 'issu[ing] from the nation . . . in the ordinary implied manner'; whereas popular sovereignty is a legal conception, constituted by the laws of a *de facto* sovereign, 'issuing from the nation in a express manner' or 'having been conferred by the nation by a formal act' (Nonsense Upon Stilts, p. 338), and it needs to be exercised according to these laws. See also Hart, *EB*, p. 228. As a legally constituted entity, the sovereign people is legally limited in the same way as a subordinate power-holder is. Besides, the sovereignty that is '*given*' to the people by Bentham's ideal constitutional code is only the supreme constitutive authority, that is, the authority to appoint and remove the members composing the legislative authority. The sovereignty to be limited by laws *in principem*, however, consists of both the supreme constitutive and operative authority in a political society. *Constitutional Code* (CW), pp. 21, 25-6; *First Principles Preparatory to Constitutional Code*, pp. 6, 167.

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