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► **To cite this version:**

Guillaume Tusseau. Jeremy Bentham on Power-Conferring Laws. *Revue d'études benthamiennes*, 2007, 3, pp.48-77. 10.4000/etudes-benthamiennes.160 . hal-01021871

HAL Id: hal-01021871

<https://sciencespo.hal.science/hal-01021871v1>

Submitted on 9 Jul 2014

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Jeremy Bentham on Power-Conferring Laws¹⁴⁴

Guillaume Tusseau

Bentham est contraint par la manière dont il construit son concept de règle de droit de s'interroger sur la notion de pouvoir juridique. Comment une théorie juridique de type impérativiste peut-elle intégrer à son modèle de règle juridique des énoncés qui, loin d'imposer des obligations sous peine de sanction, confèrent la faculté de produire de nouvelles règles de droit ? En s'interrogeant de la sorte, Bentham soulève l'une des problématiques les plus débattues de la théorie juridique contemporaine. De manière remarquable, il est possible de reconstruire, à partir de ses écrits, toute la discussion actuelle. Il identifie à la fois les propositions qui ont cours, et les objections auxquelles elles s'exposent. Plus encore, il offre plusieurs orientations en vue de l'élaboration d'un concept de norme d'habilitation original. C'est ainsi une véritable théorie des concepts juridiques qu'il est possible d'entrevoir. Elle se fonde sur une thèse essentielle et incroyablement moderne : la relativité de l'ontologie juridique.

In a post-Philosophical culture it would be clear that that is all that philosophy can be. It cannot answer questions about the relation of the thought of our time – the descriptions it is using, the vocabularies it employs – to something which is not just some alternative vocabulary. So it is a study of the comparative advantages and disadvantages of the various ways of talking which our race has invented.

R. Rorty, « Introduction: Pragmatism and Philosophy », in Id., *Consequences of Pragmatism (Essays: 1972-1980)*, Minneapolis, University of Minnesota Press, 1982, p. xl.

Introduction

In a previous paper¹⁴⁵, I compared Bentham and Austin's positivisms. I showed that the difference between them mostly laid in their concepts of a law. The concepts of a law Bentham and Austin adopted drove them to very different positions as regards the possibility of a conceptualisation of legal powers. Whereas Austin's « imperative » theory does not allow for such a discussion, Bentham's « imperational¹⁴⁶ » theory imposes him this reflection. Austin only admits that the sovereign and, in very restrictive conditions, the judges can create laws. On the contrary, according to Bentham, the sovereign, judges, administrators, individuals in their private relations also produce laws. Thus the necessity to explain how they can have such a « normative power » or, in Bentham's terminology, « power of imperation ».

I suggested that the superiority of his positivism over his disciple's could be explained by the fact that only did Bentham raise, thanks to his concepts, new questions and more fruitful enquiries. Now, I would like to substantiate my demonstration at a more specific level, namely by showing different aspects of Bentham's relevance for the current debate about the concept of a legal power in contemporary legal literature. I will examine more specifically how Bentham apprehends the legal material that confers legal powers, in apparent opposition to the basic tenets of his concept of a law as a command.

¹⁴⁴ This text is part of a revised version of a paper presented at the Congress of the International Society for Utilitarian Studies, in Lisbon, 11-13 April 2003.

¹⁴⁵ G. Tusseau, « Positivist Jurisprudents Confronted: Jeremy Bentham and John Austin on the Concept of a Legal Power », in *Revue d'études benthamiennes*, n° 2, pp. 23-40.

¹⁴⁶ On the distinction between imperative and imperational legal theory, see D. Lyons, *In the Interest of the Governed. A Study of Bentham's Philosophy of Utility and Law*, Oxford, Clarendon Press, 1991.

Before studying Bentham's reflection, one precision is necessary. I will make clear a very important distinction Bentham draws between a statute on the one hand, and a law, on the other hand¹⁴⁷. This distinction is nowadays quite common among legal scholars, who distinguish sharply between the legal disposition, appearing in a text, and the legal norm, which is the former's directive signification for the behaviour of individuals¹⁴⁸. I assume Bentham's distinction between the physical entity, the statute, and the intellectual one, the law, may be fruitfully read this way. In this section, I will then show some of the different readings Bentham offers of empowering dispositions, i.e. parts of statutes that, according to a *prima facie* reading or interpretation, do not seem to agree with Bentham's construction of the concept of a law as a command. I thus focus on the ways in which Bentham intends to integrate those parts of statutes in his reading of the whole body of Law as an amount of laws¹⁴⁹.

I will first present the various readings of those dispositions offered by Bentham. I will then try to exemplify some ways in which we can make use of Bentham's writings in the contemporary debate about power-conferring laws.

I. The Various Readings of Power-Conferring Dispositions in Bentham

In the modern literature regarding power-conferring rules, four main conceptions are usually distinguished, each of which has prestigious proponents. Curiously enough, Bentham elaborates, more or less clearly, each of the four main concepts currently in use nowadays. Even if they are not clearly adopted in his writings, they can all be reconstructed from them. I will present successively each of these four concepts, with some textual evidence of Bentham's reflection on them. I will then try to explain how he can possibly hold such a variety of views as regards the concept of a legal power.

¹⁴⁷ J. Bentham *An Introduction to the Principles of Morals and Legislation*, J.H. Burns, H.L.A. Hart (ed.), London, The Althone Press, 1970, p. 301; Id., *Of Laws in General*, H.L.A. Hart (ed.), London, The Althone Press, 1970, pp. 12, 143-144, 154-155; Id., *Pannomial Fragments*, in *The Works of Jeremy Bentham*, J. Bowring (ed.), Edinburgh, W. Tait, 1838-1843, Vol. III, p. 215.

¹⁴⁸ See e.g. G.H. von Wright, *Norm and Action. A Logical Enquiry*, London, Routledge and Kegan Paul, 1963, p. 93; R. Guastini, « Disposizione vs. Norma », in *Studi in memoria di Giovanni Tarello*; Milano, Giuffrè Editore, coll. « Annali della facoltà di giurisprudenza de Genova », « Collana di monografie » n. 64, Vol. 2, 1990, pp. 235-251; Id., *Le fonti del diritto e l'interpretazione*, Milano, Giuffrè, 1993, pp. 17-28; Id., *Teoria e dogmatica delle fonti*, Milano, Giuffrè Editore, 1998, pp. 15-20; C. Grzegorzczuk, T. Studnicki, « Les rapports entre la norme et la disposition légale », in *A.P.D.*, Vol. 19, 1974, pp. 243-256; C. Grzegorzczuk « Le droit comme interprétation officielle de la réalité », in *Droits. Revue française de théorie juridique*, Vol. 11, 1990, pp. 31-34; M. Troper, *Pour une théorie juridique de l'Etat*, Paris, P.U.F., coll. « Léviathan », 1994, pp. 85-94, 318-319; C.E. Alchourrón, E. Bulygin *Sobre la existencia de las normas jurídicas*, Valencia, Universidad de Carabobo, Oficina latinoamericana de investigaciones jurídicas y sociales, 1979, p. 86; Id., *Análisis lógico y Derecho*, pról. G.H. von Wright, Madrid, Centro de estudios constitucionales, coll. « El derecho y la justicia », Vol. 24, 1991, p. 442; Z. Ziemiński, « Conditions préliminaires de l'application de la logique déontique dans les raisonnements juridiques », in *Etudes de logique juridique*, Vol. 4, 1970, pp. 113-114, 117-119; Id., « Norms of Competence as Norms of Conduct », in *Archivum Iuridicum Cracoviense*, Vol. 3, 1970, pp. 22-23; Id., « On so-called 'Permissive Norms' », in *Archivum Iuridicum Cracoviense*, Vol. 9, 1976, pp. 170-171; Id., « Le contenu et la structure des normes concédant les compétences », in G. di Bernardo (ed.), *Normative Structures of the Social World, Poznań Studies in the Philosophy of Science and the Humanities*, Vol. 11, Amsterdam, Rodopi, 1988, pp. 160-162; F. Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and Life*, Oxford, Clarendon Press, coll. « Clarendon Law Series », 1991, pp. 62-64.

¹⁴⁹ For the sake both of simplicity and of a theoretical opinion I cannot explain here (See M. Troper, *Pour une théorie juridique de l'Etat*, *op. cit.*), I disregard the question of customary law.

I.1. Exposition

I.1.1. Power-Confering Dispositions as Incomplete Laws

According to the most widespread opinion, Bentham's imperativism leads him to conceive of power-conferring dispositions as fragments of complete laws¹⁵⁰. This theory has been clearly proposed by Kelsen¹⁵¹. According to him, norms enjoy a conditional structure, such as « If a, then b ought to be ». In his theory, power-conferring dispositions, such as constitutional law, are not norms, but only fragments of norms, which integrate the conditional clause of every complete norm. The power conferring constitutional disposition « The Parliament may enact laws » is only part of every complete law, the simplified scheme of which is « If a Parliament has been empowered to enact laws, if he has enacted a law imposing sanction *s* in circumstances *c*, if a judge decides that individual *i* is in circumstances *c*, then sanction *s* ought to be imposed. » In Kelsen's words,

Certain norms of the constitution are frequently pointed out as legal norms which provide no sanction. [...] To this argument it may be answered that these provisions are not complete legal norms. They determine – like all provisions concerning the creation of law – only a certain condition common to all valid legal norms. [...] The norms that regulate the creation of law – and that is essentially what the system of norms we call the constitution does – are rather to be regarded as norms by which an element is determined which is common to all legal norms providing sanctions¹⁵².

Such an opinion can be supported by two arguments in Bentham's writings and in his command-theory of law.

First, laws that appear by adoption are « that of the legislator and the subordinate power-holder conjunctively, the legislator sketching out a sort of imperfect mandate which he leaves it to the subordinate power-holder to fill up¹⁵³. » Whereas laws by conception exist *in actu* as soon as the sovereign has acted, laws by adoption only exist *in potentia* until the act of the subordinate power-holder¹⁵⁴. Adoption allows to account for the existence of laws made by authorities, but also, in agreement with Bentham's concept of a law, for the laws that are produced by the individuals, e.g. contracts or wills¹⁵⁵. On this subject, Bentham faces the very same problem as Kelsen:

¹⁵⁰ See J.W. Harris, *Law and Legal Science. An Inquiry into the Concepts Legal Rule and Legal System*, Oxford, Clarendon Press, 1979, p. 26; H.L.A. Hart, « Bentham's *Of Laws in General* », in Id., *Essays on Bentham. Studies in Jurisprudence and Political Theory*, Oxford, Clarendon Press, 1982, pp. 121-122; Id., « Legal Rights », *ibid.*, p. 170; Id., « Bentham on Legal Powers », in B. Parekh (ed.), *Jeremy Bentham – Critical Assessments*, Vol. 3, *Law and Politics*, London and New York, Routledge, 1993, pp. 133-134; Id., *The Concept of Law*, Oxford, Clarendon Press, 1961, p. 239; R. Hernández Marín, *Historia de la filosofía del Derecho contemporánea*, 2ª ed., Madrid, Tecnos, 1989, p. 162; N. McCormick « Le droit comme fait institutionnel », in N. McCormick, O. Weinberger, *Pour une théorie institutionnelle du droit. Nouvelles approches du positivisme juridique*, Fr. trans. O. Nerhot, P. Coppens, Paris, L.G.D.J. – Story Scientia, coll. « La pensée juridique moderne », 1992, p. 64; J. Raz « Legal Principles and the Limits of Law », in *Y.L.J.*, Vol. 81, 1972, pp. 826-827; J. de Sousa e Brito, « Hart's Criticism of Bentham », in *Rechtstheorie*, Bd. 10, 1979, pp. 459-460; N.K. Sundby, « Bentham's betydning for vår tids rettstenking », in *Tidsskrift for Rettsvitenskap*, Årg. 86, 1973, pp. 699, 709; James 1993, 111-112; J.J. Moreso Mateos, « Cinco diferencias entre Bentham y Austin », in *Anuario de filosofía del Derecho*, Vol. 6, 1989, p. 358; K.K. Lee, « Hart's Primary and Secondary Rules », in *Mind. A Quarterly review of Psychology and Philosophy*, Vol. 77, 1968, p. 562; M.D. Bayles, *Hart's Legal Philosophy. An Examination*, Dordrecht, Boston, London, Kluwer Academic Publishers, coll. « Law and Philosophy Library », Vol. 17, 1992, p. 144; T. Spaak, *The Concept of Legal Competence. An Essay in Conceptual Analysis*, Engl. trans. R. Carroll, Aldershot, Dartmouth, 1994, p. 136.

¹⁵¹ H. Kelsen, *General Theory of Law and State*, Engl. trans. A. Wedberg, Cambridge (Mass.), Harvard University Press, 1945, pp. 143-144.

¹⁵² H. Kelsen, *Law and Peace in International Relations. The Oliver Wendell Holmes Lectures, 1940-41*, Cambridge, Mass., Harvard University Press, 1942, pp. 19-20.

¹⁵³ J. Bentham, *Of Laws in General*, *op. cit.*, p. 26. The Everett edition of 1945 employed « issue » instead of « fill up », thus distorting the meaning. See also J. Bentham, *Of Laws in General*, *op. cit.*, p. 31.

¹⁵⁴ *Ibid.*, p. 26; Id., *A General View of a Complete Code of Laws*, in *The Works of Jeremy Bentham*, *op. cit.*, Vol. III, p. 182.

¹⁵⁵ J. Bentham, *Of Laws in General*, *op. cit.*, pp. 23-27, 79.

A great book for example is written about wills [...]. It says a great deal about the nature of a will: about the sort of persons who are empowered to make them: about the cases in which these persons may and those in which they may not exercise that power: about the different sorts of wills when made: about the number of witnesses which must attest them: about the places where they must be registered: about the construction that is to be given them, and so on for evermore: all this while without intimating a syllable about punishment. Has punishment however no concern in this? If that were the case the whole affair would amount to nothing. In fact all this is of no further use than as it serves to fix the application of punishment: distinguishing the one person who would *not* be punished in case of his meddling with and using that thing in question, from the multitude of other persons [...] who would. [...] All this holds equally good with regard to what may be called the constitutional branch of the law, or that which concerns the designation of persons invested with public trusts, and of the powers they are invested with. Are you a king? a judge? or general? Then upon your commanding me to do so and so, in case of my not obeying I am liable to be punished for it¹⁵⁶.

In a way similar to Kelsen's, Bentham restates these apparently non-imperative legal dispositions as fragments that are present in every genuine, i.e. prescriptive, law that mentions the term « will ». By no means can these « civil » or « constitutional » elements be considered as one law of their own.

Secondly, according to Bentham, the full amount of power of imperation in a given state breaks into shares. The legislature emanates general laws, exercising thus a « power of imperating *de classibus* », as opposed to a « power of imperation *de singulis*¹⁵⁷ ». It behoves to other authorities to determine what belongs to the general classes to which rights and obligations are associated. For example, the legislator determines generally the powers, duties and rights of judges. But another authority is to appoint such or such individual as a judge. The association of these two types of powers is necessary, for neither could amount to the totality of the power of imperation. The first cannot determine the belonging of individuals to given classes¹⁵⁸. The second cannot foresee future situations: only can they be foreseen in their species¹⁵⁹. Bentham calls the normative power of determining the belonging of a person, a thing, an act, a place or a time to a given class a « power of aggregation » or « accensitive power » or « power of investment ». In a sense, the general law is incomplete from a practical point of view until the accensitive power has been exercised¹⁶⁰. It is precisely this fact that allows for the existence of a normative power: once again, the power-conferring disposition is only a fragment of a complete law¹⁶¹.

I.1.2. Power-Conferring Dispositions as Indirectly Formulated Obligative Laws

Some authors have proposed a reconstruction of power-conferring dispositions as indirectly formulated commands. A disposition empowering a given subject to enact some norms applicable to a given population would only amount to an indirect formulation of a command to

¹⁵⁶ *Ibid.*, pp. 248-249.

¹⁵⁷ *Ibid.*, p. 82.

¹⁵⁸ *Ibid.*, pp. 81-92.

¹⁵⁹ *Ibid.*, pp. 91-92; Id., *A General View of a Complete Code of Laws*, *op. cit.*, p. 205.

¹⁶⁰ *Ibid.*, pp. 82-83; H.L.A. Hart, « Bentham on Legal Powers », *op. cit.*, p. 126; J. de Sousa E Brito, « Hart's Criticism of Bentham », *op. cit.*, pp. 454-456; H. Kelsen *Théorie générale des normes*, Fr. trans. O. Beaud, F. Malkani, Paris, P.U.F., coll. « Léviathan », 1996, pp. 59, 63-64, 404.

¹⁶¹ In his Lecture LV – Titles, Austin writes that the law cannot immediately confer nor impose rights and duties. It acts not upon determinate persons, but only insofar as they belong to classes. He mentions Bentham's reflections but prefers to keep the traditional terminology of « titles ». But he never elaborates on the power that may be conferred by investive facts, especially when this fact is a declaration of will from an individual. See J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Laws*, R. Campbell. (ed.), 12th impression, London, John Murray, 1913, pp. 347, 356, 357. *Contra*, see J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, pp. 263-264 n. r4.

this population to obey the norms that are to be enacted by the empowered subject¹⁶².

In some of his writings, Bentham proves to be aware of this possible reading of empowering dispositions¹⁶³. Thus he writes in *Of Laws in General* that:

It should be understood for example that a law which gives powers or authority of any kind exercisable over persons or over things that in the main are the property of other persons, adopts in effect all the acts of coercion that can be exercised by the persons in authority over the persons subjected to it without abuse of trust: and has therefore *pro tanto* the effect of an obligative provision. It is in this way that the law may incur the charge of tyranny merely by conferring powers: which indeed is the most formidable and vexatious kind of tyranny: and yet powers will upon this plan have been constituted, as may have been observed, rather by the exceptive, that is by the qualificative matter of the code than by the imperative¹⁶⁴.

More clearly, in his *Principles of a Civil Code*, he explains:

How confer upon me a right of command? By imposing upon a district, or a number of persons, the obligation to obey me¹⁶⁵.

In *Of Laws in General* again, Bentham distinguishes two equivalent manners of giving orders to one's servant:

by saying to him, 'Go and do so and so', mentioning what: or by saying to him, 'Go and do what Mr such-an-one bids you'. One of these ways is just as familiar as the other: the order you yourself give in the former case, is yours by conception: the order Mr such-an-one gives in the latter case is yours by adoption¹⁶⁶.

The power given to Mr such-a-one is no more than an obligation for the servant to obey the norms that Mr may happen to enact.

I.1.3. Power-Conferring Dispositions as Permissive Laws

The third understanding of empowering dispositions also enjoys a large audience¹⁶⁷.

¹⁶² See e.g. A. Ross, *On Law and Justice*, Engl. trans. M. Dutton, London, Stevens & Sons Limited, 1958, p. 32; A. Ross, *Directives and Norms*, London, Routledge & Kegan Paul, coll. « International Library of Philosophy and Scientific Method », 1968, p. 118; H. Kelsen *Théorie générale des normes*, *op. cit.*, pp. 135, 348-349; Z. Ziemiński, « Norms of Competence as Norms of Conduct », *op. cit.*, pp. 24-25; Id., « Le contenu et la structure des normes concédant les compétences », *op. cit.*, pp. 174-177; H.L.A. Hart, « Kelsen's Doctrine of the Unity of Law », [1968], in Id., *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, pp. 336-337; Id., « Commands and Authoritative Legal Reasons », in J. Raz (ed.), *Authority*, New York, New York University Press, coll. « Readings in Social and Political Theory », 1990, pp. 105, 111; J. Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System*, 2nd ed., Oxford, Clarendon Press, 1980, p. 166; N. Bobbio, « La norme », in Id., *Essais de théorie du droit*, pref. R. Guastini, Fr. trans. M. Guéret, C. Agostini, Paris, L.G.D.J. - Bruylant, coll. « La pensée juridique », 1998, p. 129; E. Pattaro, « Contributo al seminario 'Se la logica si applichi alle norme' », in *M.P.S.C.G.*, Vol. 16, 1986, p. 512; C.S. Nino, « Las limitaciones de la teoría de Hart sobre las normas jurídicas », in *Anuario de Filosofía Jurídica y Social*, Vol. 5, 1985, pp. 86-87; Id., « El concepto de derecho de Hart », in *Revista de ciencias sociales*, Vol. 28, 1986, pp. 44, 48; S.G. Jensen, « On Norms of Conduct and Norms of Competence », in S. Panon, G. Bozonis, D. Georgas, P. Trappe (ed.), *A.R.S.P., Supplementa Vol. 3, Theory and Systems of Legal Philosophy, I.V.R. 12th World Congress, Athens 1985*, 1988, pp. 16-22.

¹⁶³ See J.J. Moreso, *La teoría del derecho de Bentham*, Barcelona, P.P.U., 1992, pp. 184-185.

¹⁶⁴ J. Bentham, *Of Laws in General*, *op. cit.*, p. 238 n. d. See also *ibid.*, pp. 27-28.

¹⁶⁵ J. Bentham, *Principles of the Civil Code*, in Id., *Selected Writings on Utilitarianism*, *op. cit.*, p. 313.

¹⁶⁶ J. Bentham, *Of Laws in General*, *op. cit.*, p. 21 n. e.

¹⁶⁷ G.H. von Wright, *Norm and Action*, *op. cit.*, p. 192; C.E. Alchourrón, E. Bulygin, *Normative Systems*, Wien, New York, Springer Verlag, coll. « Library of Exact Philosophy », Vol. 5, 1971, pp. 73, 151; L. Lindahl, *Position and change*.

According to Bentham, some sorts of rights are created by permissions. Powers of imperation are considered as a sort of rights¹⁶⁸. So, it is possible to infer from this that power-conferring dispositions can be interpreted as permissive laws, directed to subordinate power holders so that they can enact the laws that the sovereign is in a disposition to adopt¹⁶⁹. Some of Bentham's writings can be used as evidence of such a conception.

In *Of Laws in General* e.g., he writes that

As to the form or manner in which the adoption may be performed. We have already intimated that it may be done by permission: that is by a legislative permission: [...] by a permission addressed in the first instance to the power-holder; a permission to issue the mandates which it is proposed to adopt¹⁷⁰.

As regards constitutional law, he says that:

The constitutional branch is chiefly employed in conferring, on particular classes of persons, *powers*, to be exercised for the good of the whole society, or of considerable parts of it, and prescribing *duties* to the persons invested with those powers.

The powers are principally constituted, in the first instance, by discoercive or permissive laws, operating as exceptions to certain laws of the coercive or imperative kind. [...] The duties are created by imperative laws, addressed to the persons on whom the powers are conferred¹⁷¹.

I.1.4. Power-Conferring Dispositions as Qualificatory Dispositions

A fourth conception of power-conferring dispositions regards them as constitutive rules¹⁷².

A Study in Law and logic, Engl. trans. P. Needham, Dordrecht, Boston, D. Reidel Publishing Company, coll. «Synthese Library», Vol. 112, 1977, pp. 212, 219, 229; Id., «Stig Kanger's Theory of Rights», in D. Prawitz, B. Skyrms, D. Westerstahl (ed.), *Logic, Methodology and Philosophy of Science IX, Studies in Logic and the Foundations of Mathematics*, Vol. 134, 1994, pp. 898-899; S. Kanger, H. Kanger, «Rights and Parliamentarism», in *Theoria. A Swedish Journal of Philosophy*, Vol. 32, 1966, pp. 87-88; R. Caracciolo, «Due tipi di potere normativo», It. trans. R. Guastini, in *Analisi e diritto*, 1995, pp. 199-218; P. Bailhache, *Essai de logique déontique*, Paris, Librairie philosophique J. Vrin, coll. «Mathesis», 1991; F. Gilliard, *L'expérience juridique. Esquisse d'une dialectique*, Genève, Paris, Librairie Droz, coll. «Travaux de droit, d'économie, de sociologie et de sciences politiques», No. 119, 1979, p. 120; J.-L. Gardies, *Essai sur les fondements a priori de la rationalité morale et juridique*, préf. M. Villey, G. Kalinowski, Paris, L.G.D.J., coll. «Bibliothèque de philosophie du droit», t. XIV, 1972, p. 153; Id., «Logique déontique et droit», in G. Kalinowski, F. Selvaggi (éd.), *Les fondements logiques de la pensée normative. Actes du Colloque de Logique déontique de Rome (les 29 et 30 avril 1983)*, Roma, Editrice pontificia Università Gregoriana, coll. «Analecta Gregoriana», 1985, p. 94; Id., «The Fundamental Features of Legal Rationality», in *Ratio Juris*, Vol. 1, 1988, p. 248; G. Kalinowski, «Logique et philosophie du droit subjectif», in *A.P.D.*, Vol. 9, 1964, p. 38.

¹⁶⁸ J. Bentham, *Of Laws in General*, *op. cit.*, pp. 84, 220 n. a.

¹⁶⁹ H.L.A. Hart, «Bentham on Legal Powers», *op. cit.*, pp. 131-133; L. Lindahl, *Position and change*, *op. cit.*, pp. 201-202; J.J. Moreso, *La teoría del derecho de Bentham*, *op. cit.*, pp. 184-185; T. Spaak, *The Concept of Legal Competence*, *op. cit.*, pp. 80-82; A. Halpin, «The Concept of a Legal Power», in *O.J.L.S.*, Vol. 16, 1996, pp. 134-135; D.W. Ruiter, «Eine rechtstheoretisch fundierte Typologie gesetzlicher Rechtsnormen», in *Rechtstheorie*, Bd. 17, 1986, p. 483 n. 6.

¹⁷⁰ J. Bentham, *Of Laws in General*, *op. cit.*, pp. 27-28.

¹⁷¹ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 307. See also *Anarchical Fallacies*, in Id., *Selected Writings on Utilitarianism*, R. Harrison (ed.), Ware, Wordsworth Classics of World Literature, 2001, p. 410: «All coercive laws, therefore (that is, all laws but constitutional law, and laws repealing or modifying coercive laws,) and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.»

¹⁷² A. Filipponio Tatarella, «Sulla teoreticità delle norme costitutive», in *R.I.F.D.*, Vol. 57, 1980, pp. 239, 248-252, 265; C. Alarcón Cabrera, «Sobre el concepto y tipología de las reglas constitutivas», in *Annuario de Filosofía del derecho*, Vol. 8, 1991, p. 279; A. Ross, *Directives and Norms*, *op. cit.*, pp. 130-131; D. Mendonca, *Las claves del derecho*, Barcelona, Gedisa Editorial, col. «Cla de ma – Derecho», 2000, p. 134; G.H. von Wright, «On the Logic and Ontology of Norms», in J.W. Davis, D.J. Hockney, W.K. Wilson (ed.), *Philosophical Logic*, Dordrecht, D. Reidel Publishing Company, 1969, p. 97; C.E. Alchourrón, E. Bulygin, *Análisis lógico y Derecho*, *op. cit.*, pp. 463, 496; H. Katchadourian,

Contrary to regulative rules, constitutive rules do not regulate behaviours but rather create new states of affairs or new forms of behaviour¹⁷³. Due to the ontological unsafe assumptions of such theories that rely more or less explicitly on some magical beliefs¹⁷⁴, they do not seem able to meet Bentham's strong nominalism and empiricism. But a somewhat sane version of this version has been proposed by a follower of Scandinavian realism, R. Hernández Marín. According to him, power-conferring dispositions are qualificatory dispositions, which qualify as « legal », « valid » or « correct » given dispositions¹⁷⁵. The utterances it so qualifies are those stemming from a given organ *O*, according to procedure *P* and concerning matter *M*¹⁷⁶. The specificity of such dispositions is the linguistic level to which they belong. They bear upon legal utterances, thus being metalegal dispositions¹⁷⁷. As they qualify, they do not prescribe anything¹⁷⁸, so that one cannot speak of their efficacy nor imagine a « conforming » or « obeying » behaviour¹⁷⁹.

Although it seems somewhat less evident than the former conceptions, some writings by Bentham can be interpreted in that way. At a superficial level, one could remark that one of the many bifurcations that allow Bentham to break into parts the whole body of law insists in distinguishing the « effective » branch of the law, which rules the individuals' behaviour, from the « constitutive » one, which determines empowered persons¹⁸⁰. More important, long before legal theory talked about « metanorms » or took into account the variety of the legal language, Bentham had noticed that some legal dispositions could perfectly well refer not primarily to behaviours, but to the law itself¹⁸¹. He also had noticed that many legal dispositions did not seem

« H.L.A. Hart's 'Primary' and 'Secondary' Legal Rules & the Institutional Character of Law », in S. Panon, G. Bozonis, D. Georgas, P. Trappe (ed.), *A.R.S.P., Supplementa Vol. 3, Theory and Systems of Legal Philosophy, I.V.R. 12th World Congress, Athens 1985*, 1988, pp. 204-213; N. McCormick, « Legal Obligation and the Imperative Fallacy », in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)*, Oxford, Clarendon Press, 1973, p. 115; C. Grzegorzczuk, « L'impact de la théorie des actes de langage dans le monde juridique : essai de bilan », in P. Amsselek (dir.), *Théorie des actes de langage, éthique et droit*, Paris, P.U.F., 1986, pp. 192-193.

¹⁷³ The basic distinction is provided by J. Rawls, « Two Concepts of Rules », [1955], in P. Foot (ed.), *Theories of Ethics*, Oxford, Oxford University Press, coll. « Oxford Readings in Philosophy », 1967, pp. 160-161; J.R. Searle, *Les actes de langage. Essai de philosophie du langage*, Fr. trans. H. Pauchard, Paris, Hermann, coll. « Savoir », 1972, pp. 72-73.

¹⁷⁴ A. Ross, « The Rise and Fall of the Doctrine of Performatives », in R.E. Olson, A.M. Paul (ed.), G.H. von Wright (Intro.), *Contemporary Philosophy in Scandinavia*, Baltimore, London, The Johns Hopkins Press, 1972, pp. 197-212; R. Guastini, « Teorie delle regole costitutive », in *R.I.F.D.*, Vol. 60, 1983, pp. 548-564; Id., « Cognitivismo ludico e regole costitutive », in U. Scarpelli (a cura di), *La teoria generale del diritto. Problemi e tendenze attuali. Studi dedicati a Norberto Bobbio*, Milano, Edizioni di Comunità, 1983, pp. 153-176; Id., « Six Concepts of 'Constitutive Rule' », in T. Eckhoff, L.M. Friedman, J. Uusitalo (Hrsg.), O. Weinberger (pref.), *Vernunft und Erfahrung im Rechtsdenken der Gegenwart, Rechtstheorie*, Beiheft 10, 1986, pp. 261-269; Id., « Norme che sono condizioni sufficienti del loro oggetto? », in *M.P.S.C.G.*, Vol. 16, 1986, pp. 213-222; Id., « Constitutive Rules and the Is-Ought Dichotomy », in G. di Bernardo (ed.), *Normative Structures of the Social World, Poznań Studies in the Philosophy of Science and the Humanities*, Vol. 11, Amsterdam, Rodopi, 1988, pp. 79-99.

¹⁷⁵ R. Hernández Marín, *Introducción a la teoría de la norma jurídica*, op. cit., pp. 310, 334.

¹⁷⁶ R. Hernández Marín, *El derecho como dogma*, Madrid, Tecnos, col. « Ciencias jurídicas », 1984, p. 40; Id., « Autoridad-Competencia », in E. Garzón Valdés, F.J. Laporta (ed.), *El Derecho y la justicia*, 2ª ed., Madrid, Trotta, col. « Enciclopedia iberoamericana de filosofía », 1996, p. 127; Id., *Teoría general del derecho y de la ciencia jurídica*, op. cit., pp. 162, 165; Id., *Introducción a la teoría de la norma jurídica*, Madrid, Barcelona, Marcial Pons, 1998, p. 316.

¹⁷⁷ R. Hernández Marín, *Teoría general del derecho y de la ciencia jurídica*, op. cit., p. 164. See also Id., « Autoridad-Competencia », op. cit., p. 127; Id., *Introducción a la teoría de la norma jurídica*, op. cit., p. 310.

¹⁷⁸ Id., *Introducción a la teoría de la norma jurídica*, op. cit., p. 314.

¹⁷⁹ R. Hernández Marín, *El derecho como dogma*, op. cit., pp. 37, 42, 52, 154; Id., *Teoría general del derecho y de la ciencia jurídica*, op. cit., p. 163; Id., « Autoridad-Competencia », op. cit., p. 129; Id., *Introducción a la teoría de la norma jurídica*, op. cit., pp. 249, 314, 319.

¹⁸⁰ J. Bentham, *Pannomial Fragments*, op. cit., p., 216.

¹⁸¹ J. Bentham, *Of Laws in General*, op. cit., pp. 93-94. This insight is also present in E. Zitelmann, « Geltungsbereich und Anwendungsbereich der Gesetze. Zur Grundlegung der völkerrechtlichen Theorie des Zwischenprivatrechts », in *Festgabe der Bonner Juristischen Fakultät für Karl Bergbohm zum 70. Geburtstag*, Bonn, Marcus, 1919, pp. 207-241. The concept of « metanorm » is now quite common in the apparatus of legal theory. See e.g. T. Mazzarese « Metanorme e linguaggio deontico. Un'analisi logica », in *M.P.S.C.G.*, Vol. 12, 1982, pp. 409-445; Id., « Metaregole », in *Nuova civiltà delle machine*, Vol. 3, 1985, n. 3-4, 1985, pp. 65-73; Id., *Logica deontica e linguaggio giuridico*, Padova, Cedam, coll. « Pubblicazioni della Università di Pavia. Studi nelle scienze giuridiche e sociali », Nuova serie, Vol. 58, 1989; Id.,

to prescribe any behaviour at all. Such is the case for what he calls expository and qualificative matter. E.g., the role of constitutional law is mainly that of

conferring, on particular classes of persons, *powers*, to be exercised for the good of the whole society, or of considerable parts of it [...]. The parts which perform the function of indicating who the individuals are, who, in every case, shall be considered as belonging to those classes, have neither a permissive complexion, nor an imperative¹⁸².

In such a case, the sovereign does not seem to be commanding, but rather describing under which conditions and which laws he will adopt. The same happens as regards the adoption of private conveyances. In terms not unsimilar to Hernández Marín's, Bentham writes that

All that [the legislator] can do, and all that it is requisite he should do is to describe in general terms such as he thinks proper to adopt, and thereupon explicitly or implicitly such others as he thinks proper not to adopt: in other words such as are deemed good or valid, and such as are to be deemed void¹⁸³.

Thus, Moreso's reading of Bentham, according to which

competence norms are expository provisions that attribute to some given persons the property of subordinate powers. These provisions are sometimes interpreted by Bentham as provisions that, by qualifying given persons as subordinate powers, qualify their dispositions as legal. [...] This interpretation appears where Bentham identifies the competence disposition and the preadopted law, and adds that the preadopted law is that which describes the empowered persons, the things, acts, places and times for which the power is conceded¹⁸⁴.

This power is especially of great avail in Bentham's constitutional writings¹⁸⁵, for most of the powers that are present there are powers of location and dislocation, i.e., powers to qualify as belonging or not to a given class¹⁸⁶.

Despite the different readings of empowering dispositions he offers, and but for an

« Metanorme. Rilievi su un concetto scomodo della teoria del diritto », in P. Comanducci, R. Guastini (a cura di), *Struttura e dinamica dei sistemi giuridici*, Torino, Giappichelli, 1996, pp. 125-158; M. Moritz, « Über Normen zweiten Grades (Supernormen). Eine Interpretation der Sätze 'Sollen impliziert können' und 'Geboten-sein impliziert erlaubt sein' », in *Ratio*, Bd. 10, 1968, pp. 81-93; H.T. Klami, « On the So-Called Metanorms in Criminal Law », in *Rechtstheorie*, Bd. 10, 1979, p. 143; R. Guastini, « Normas supremas », Cast. trans. J. Ferrer, in *Doxa*, Vol. 17-18, 1995, p. 258; Z. Ziemiński « Le contenu et la structure des normes concédant les compétences », *op. cit.*, pp. 174, 179-180; Id., « Norms of Competence as Norms of Conduct », *op. cit.*, pp. 26, 28; Å. Frändberg, *Om analog användning av rättsnormer. En analys av analogibegreppet inom ramen för en allmän juridisk metodologi*, Stockholm, P.A. Norstedt & Söners Förlag, 1973, p. 39; G.H. von Wright, « Norms, Truth, and Logic », in Id., *Practical Reason. Philosophical Papers Volume 1*, Oxford, Basil Blackwell, 1983, p. 137; V. Mathieu, « Sistemi logici e sistemi giuridici. Impossibilità di autofondazione formale », in *R.I.F.D.*, Vol. 47, 1970, p. 228. Acknowledging the widespread use of such a concept is not to accept it as a useful tool for analytical jurisprudence. On the contrary, in this respect, I share Weinberger's criticism in « Normological Inferences and the Generation of Legal Norms », in *Ratio Juris*, Vol. 8, 1995, pp. 261-270.

¹⁸² J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 307.

¹⁸³ J. Bentham, *Of Laws in General*, *op. cit.*, p. 180.

¹⁸⁴ J.J. Moreso, *La teoría del derecho de Bentham*, *op. cit.*, p. 185. The author refers to J. Bentham, *Of Laws in General*, *op. cit.*, p. 26.

¹⁸⁵ J. Bentham, *Of Laws in General*, *op. cit.*, p. 80.

¹⁸⁶ See e.g. J. Bentham, *Constitutional Code Rationale*, in Id., *First Principles Preparatory to Constitutional Code*, P. Schofield (ed.), Oxford, Clarendon Press, 1989, p. 239.

isolated exception¹⁸⁷, James' conclusion according to which « Bentham implicitly denies a separate identity for power-conferring laws¹⁸⁸ » seems to be correct, even though it disparages Bentham's ability to deal thoroughly with power-conferring dispositions. One necessarily wonders how come that Bentham can possibly maintain such a plurality of perspectives, and whether it can be a sound position. This leads to examine some elements of Bentham's theory of legal ontology.

I.2. Some Elements of Bentham's Theory of Legal Ontology

Two distinct questions have to be answered. First, is the fact that Bentham simultaneously proposes a handful of readings of empowering dispositions evidence of an incoherence or hesitation on his part, or is it an element of an articulated doctrine? Secondly, in case it is regarded as a doctrine, is it a defensible one?

I.2.1. The Elements of a Full Doctrine

It appears first that the various individuations of empowering dispositions are by no means casual nor inadvertently present in Bentham. Indeed, he seems to be perfectly aware of the various ways in which legal matter may be (a) organised in statutes and (b) reconstructed, without its normative signification being altered. This is one of the grounds of his codification proposals or his plan for a digestion of the common law. For it necessarily presupposes the possibility of rationally rearranging the legal matter enacted by the legislators. Bentham acts precisely in this way, e.g., when he takes the example of a statute about stolen cattle and reduces it from 628 to 46 words¹⁸⁹. For Bentham, the distinction between penal and civil law is not in the law itself but in the manner in which they are exposed¹⁹⁰.

Concerning the ways in which a legal power of imperation can be conferred on subordinates, Bentham claims that the process of adoption can take many forms.

Next as to the form or manner in which the adoption may be performed. We have already intimated that it may be done by permission: that is by a legislative permission: but it may also be done by mandate, by a legislative mandate: by a permission addressed in the first instance to the power-holder; a permission to issue the mandates which it is proposed to adopt; or by a mandate addressed immediately to those whom it is meant to subject to his power; a mandate commanding them to obey such and such mandates whensoever, if at all, he shall have thought fit to issue them.

This is perfectly clear evidence of Bentham's consciousness of his proposing simultaneously various ways of individuation of laws. He continues:

Whichever be the form, it comes exactly to the same thing: and the difference lies rather in the manner in which we may conceive the inclination of the sovereign to be expressed, than in the inclination itself¹⁹¹.

He admits that

¹⁸⁷ J. Bentham, *Sophismes anarchiques*, in Id., *Œuvres*, E. Dumont (ed.), Bruxelles, L. Hauman et Cie, 1829-1830, Vol. I, p. 556.

¹⁸⁸ M.H. James, « Bentham on the Individuation of Laws », in B. Parekh (ed.), *Jeremy Bentham – Critical Assessments*, Vol. 3, *Law and Politics*, London and New York, Routledge, 1993, p. 104.

¹⁸⁹ J. Bentham, *A Comment on the Commentaries and A Fragment on Government*, J.H. Burns, H.L.A. Hart (ed.), London, The Athlone Press, 1977, pp. 141-144.

¹⁹⁰ J. Bentham, *Of Laws in General*, *op. cit.*, p. 248.

¹⁹¹ *Ibid.*, pp. 27-28.

This is one way among innumerable others in which as will be seen hereafter, the complete power of imperation or de-imperation may be broken into shares¹⁹².

For Bentham, nothing material is altered by the expression of the will of the sovereign that is chosen.

Looking for a principle according to which he could define the unity of a law, Bentham writes:

By what circumstance determine the unity of the law? By the unity of the class of acts which it takes for its objects: by the unity of the offence.

But is this criterion satisfactory? Bentham immediately notes that

But classes of offences like any other classes of acts may be distinguished from one another *ad infinitum*. [...] taking this unity of the offence for the standard of unity in the law, the unity of a law is not naturally determinable. If determined then at all, it must be determined by some positive rule: and from whence should this rule be taken but from convenience¹⁹³.

Thus, one may conclude that Bentham is perfectly conscious of the various modes in which it is possible to organize the legal matter, and especially power-conferring dispositions. In his mind, there is no contradiction in this respect. But this is not to assume that such a doctrine is necessarily sound and useful from the point of view of legal theory.

I.2.2. Bentham's Legal Ontological Relativity

Modern philosophy of science is dominated by « conventionalism », inherited from Poincaré and Duhem¹⁹⁴, as opposed to « realism ». According to realism, theories identify objects and processes that really exist, thus giving information on the true nature of the world. According to conventionalism, theories are decided by men, and are to serve as instruments to classify, predict and act upon phenomena. Their worth is to be measured by their usefulness¹⁹⁵. As a consequence, it has generally been acknowledged that ontologies bear a stipulative character. That means, in a nutshell, (a) that no description of reality can do without a previous mode of « cutting » into the mass of empirical events the pertinent elements; and (b) that this mode of breaking the world into parts is by no means necessarily imposed on anyone, but stems from a decision. For example, Quine writes that « If you take the total scattered portion of the spatiotemporal world that is made up of rabbits, and that which is made up of undetached rabbit parts, and that which is made up of rabbit stages, you come out with the same scattered portion of the world each of the three times. The only difference is how you slice it¹⁹⁶. » It is thus possible to deal with the same raw matter in three different ways. Three distinct descriptions, equally complete and true, are possible, according to the concept – rabbit or undetached rabbit part or rabbit stage – that has been adopted to deal with it.

In contemporary legal theory, the stipulative character of ontology is also commonly

¹⁹² *Ibid.*, p. 26 n. h.

¹⁹³ *Ibid.*, pp. 170-171. See also Id., *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 305.

¹⁹⁴ E. Picavet, *Approches du concret. Une introduction à l'épistémologie*, préf. J.-P. Sérés, Paris, Ellipses, 1995, p. 25. For a global account of modern debates, see H.P. Zwirn, *Les limites de la connaissance*, Paris, Odile Jacob, 2000.

¹⁹⁵ L. Soler, *Introduction à l'épistémologie*, préf. B. d'Espagnat, Paris, Ellipses, coll. « Philo », pp. 109-110.

¹⁹⁶ W.V.O. Quine, *Ontological Relativity and Other Essays*, New York, London, Columbia University Press, 1969, p. 32.

admitted¹⁹⁷. Remarkably enough, Bentham seems to be aware of this fact, especially when he notes that

the unity of a law is not naturally determinable. If determined then at all, it must be determined by some positive rule: and from whence should this rule be taken but from convenience¹⁹⁸.

That is the reason that can ground his admission of different modes of understanding power-conferring dispositions. Moreover, Bentham seems to suggest that the legal configuration resulting from any such choice can be understood, thanks to some kind of translation, from the point of view of another such choice¹⁹⁹. E.g., Bentham states that

this is one way among innumerable others in which as will be seen hereafter, the complete power of imperation or de-imperation may be broken into shares²⁰⁰

or that

the modes of expressing imperation [...] are indefinitely numerous. Of these many are indirect and have nothing of imperation upon the face of them²⁰¹.

That is the reason why I would like to surmise briefly and tentatively a parallel between Bentham's reflection on the variety of the possible divisions of legal matter, especially relative to empowering dispositions, and Quine's thesis of ontological relativity.

According to Quine, the choice of a given ontology in the empirical sciences is guided by, and can be evaluated from the point of view of, the search for a « real explanatory power²⁰² » by which « we reduce the complexity of our stream of experience to a manageable conceptual simplicity²⁰³. » He suggests that various theories can give an account of the same stock of sense data. They can be empirically equivalent, however different as far as their presuppositions are concerned²⁰⁴. It is possible to change one's ontology, that is to interpret a given ontology in terms of another, without changing the informational content²⁰⁵.

¹⁹⁷ See e.g. M. Troper, « Pour une définition stipulative du droit », in *Droits*, Vol. 10, 1989, pp. 101-104; O. Pfersmann, « Arguments ontologiques et argumentation juridique », in O. Pfersmann, G. Timsit (dir.), *Raisonnement juridique et interprétation*, De Republica – 3, Travaux de l'École doctorale de droit public et de droit fiscal, Université de Paris I (Panthéon – Sorbonne), Paris, Publications de la Sorbonne, 2001, pp. 16-17; P.R.S. Visser, T.J.M. Bench-Capon, « A Comparison of Four Ontologies for the Design of Legal Knowledge Systems », in *Artificial Intelligence and Law*, Vol. 6, 1998, pp. 27-57.; L. Favoreu, P. Gaïa, R. Ghevontian, J.-L. Mestre, A. Roux, O. Pfersmann, G. Scoffoni, *Droit constitutionnel*, Paris, Dalloz, coll. « Précis. Droit public Science politique », 1998, pp. 75-77.

¹⁹⁸ J. Bentham, *Of Laws in General*, *op. cit.*, pp. 170-171. See also Id., *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 305.

¹⁹⁹ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 227; Id., *Of Laws in General*, *op. cit.*, pp. 26-28, 178-183, 198.

²⁰⁰ J. Bentham, *Of Laws in General*, *op. cit.*, p. 26 n. h.

²⁰¹ *Ibid.*, pp. 178-179.

²⁰² W.V.O. Quine, « On What There Is », in Id., *From a Logical Point of View. 9 Logico-Philosophical Essays*, 2nd ed. revised, Cambridge (Mass.), Harvard University Press, 1964, p. 10.

²⁰³ *Ibid.*, p. 17; *ibid.*, pp. 15-16: « Now how are we to adjudicate among rival ontologies? [...] Our acceptance of an ontology is, I think, similar in principle to our acceptance of a scientific theory, say a system of physics: we adopt, at least insofar as we are reasonable, the simplest conceptual scheme into which the disordered fragments of raw experience can be fitted and arranged. »

²⁰⁴ W.V.O. Quine, *La poursuite de la vérité*, Fr. trans. M. Clavelin, Paris, Seuil, coll. « L'ordre philosophique », 1993, p. 60.

²⁰⁵ P. Gochet, « L'empirisme relatif de Quine », in M. Meyer (dir.), *La philosophie anglo-saxonne*, Paris, P.U.F., coll. « Premier cycle », 1994, p. 344; W.V.O. Quine, *La poursuite de la vérité*, pp. 137-139.

In the legal field, Bentham seems precisely to acknowledge a similar fact. The global presentation of the law offered by different individuations of the legal matter can be equivalent, however different their decisions as to the criteria and proceedings of the individuations. Just as theories are, in Quine, empirically determined, so is the presentation of the law determined by the same amount of empirical phenomena: the practices of legal actors. The only changing things are e.g. the internal structure of every law, the various types of laws admitted, the relations they have. As a consequence in Bentham's legal theory, different codifications of the very same legal material are possible. Thus, the criterion that allows to choose between various possibilities of individuation of laws cannot be the quantity of information given, but only on the quality of the giving of this information²⁰⁶. In Bentham's codification perspective, the important thing will be the suggestive power of the legal writing that aims at guiding people's behaviour, and the easiness with which it can be dealt with by the law's addressees.

One explanation of Bentham's plurality of understandings of power-conferring dispositions is what I would call his radical instrumentalism in the field of the individuation of laws. I believe this perspective can only be readily approved of. It shows that many divisions of the legal matter are possible, and that it is essentially a matter of positive choice and not of nature of things. This fact allows for critical spirit as to the conceptual choices that are made relatively to the individuation of laws. Being something chosen, the division of the legal matter is open to criticism, reform and progress²⁰⁷. Bentham, both as a general jurisprudent and as a great codicator, shows that questions of individuation do not only happen at a theoretical, doctrinal level, e.g. when a scholar is trying to get a manageable presentation of a given legal matter, but also at the level of the legislation itself²⁰⁸.

These perfectly sane assumptions about legal ontology allow Bentham to offer various concepts in order to understand empowering dispositions. Moreover, Bentham's conceptual creativity proves to be perfectly sound, as he has in mind most of the concepts that are currently in use in legal theory, and constitute its basic apparatus²⁰⁹.

Bentham's stress on the decisions that are to be made here is one of the aspects of his disbelief in the existence of any natural or eternal or necessary form of the legal matter. But it is not situated at the linguistic level of the law itself, but on a metalinguistic level. This can be seen as another, epistemological, aspect of Bentham's positivism.

A brief survey of Bentham's reflection on the concept of a legal power proves much about his central place in legal theory. But this is not only to make a historical claim, showing how much Bentham foreshadowed, more cleverly than Austin, most of the basic tools of contemporary legal theory. This is most of all to suggest the usefulness of his reflection about a concept about which discussion is far from being peaceful in contemporary legal theory. The consciousness of the freedom as regards the individuation of the legal matter is only one of the many aspects of Bentham's universal jurisprudence, but it is not a minor one. It allows first to restate the position of legal theory and to insist on its freedom as to the conceptual apparatus it builds for itself. It also invites new questions, namely, whether this apparatus is useful or not, i.e. whether it is possible to make use of Bentham's writings in the contemporary debate.

²⁰⁶ C.E. Alchourrón, E. Bulygin, *Normative Systems*, *op. cit.*, p. 80.

²⁰⁷ See e.g. L. François, *Le problème de la définition du droit. Introduction à un cours d'évolution de la philosophie du droit à l'époque contemporaine*, Liège, Faculté de Droit, d'Economie et de Sciences Sociales de Liège, 1978, p. 18.

²⁰⁸ Disregarding this point is, according to me, one of the main criticisms that can be addressed to A.M. Honoré, « Real Laws », in P.M.S. Hacker, J. Raz (ed.), *Law, Morality and Society. Essays in Honour of H.L.A. Hart*, Oxford, Oxford University Press, 1977, pp. 99-118, and to some reflections of Hernández Marín's inscriptionist theory of law.

²⁰⁹ More generally, see G. Tusseau, *Jeremy Bentham et le droit constitutionnel. Une approche de l'utilitarisme juridique*, Paris, L'Harmattan, coll. « Logiques juridiques », 2001.

II. Making Use of Bentham in the Contemporary Debate Regarding Power-Conferring Norms

Being a matter of choice, any individuation has to be justified and can be criticized. In the contemporary literature relative to competence norms, a handful of criticisms have become quite commonplace regarding each of the different readings of empowering dispositions. It is remarkable to note that Bentham was pretty conscious of most of those defects. When this is not perfectly clear from his writings, one can nevertheless reconstruct some basic insights that are useful in underscoring major defects in some particular legal theories. I will first examine successively the four main conceptions of empowering dispositions listed above and underline their shortcomings, through Bentham's reflections. Accordingly, I do not expect to give a full account of those defects, but only of some of them that can be perceived through Bentham's reflections and preoccupations²¹⁰. I will then emphasize the fact that Bentham's work is not only destructive, but also constructive.

I.1. *Pars Destruens*: Criticisms of the Various Readings of Power-Conferring Dispositions

I.1.1. Power-Conferring Dispositions as Incomplete Laws

Regarding power-conferring dispositions as incomplete laws has various defects for legal scholars. Bentham is aware of the fact that individuating complete norms according to this pattern results in an enormous and complex « monster-norm²¹¹ ». He even admits the impossibility of giving a complete example of such a law²¹². A law including each of the conditions for its validity is not a manageable whole, for any complete law necessarily includes an important part of the entire legal order, e.g. the most insignificant contract includes constitutional dispositions empowering Parliament, legislative dispositions empowering the individuals to pass contracts. Breaking the legal system in more manageable units seems necessary²¹³. Moreover, every single complete law has in common with every other a great amount of its content. As a consequence, these huge complete norms are repetitive. No purpose can be served by such a formulation, and Bentham knows it²¹⁴. He notes that

Of the expositive matter belonging to the law against wrongful occupation a great part belongs in common to the law correlative to the other offences against property²¹⁵.

or

To consider the several laws separately without regard to the exigencies of the whole, without regard to the form into which it might be necessary to cast them, for the sake of the form which is requisite to be given to the whole, the natural course to take would seem to be as follows: to take each law by itself beginning suppose with the law against personal injuries, and under the head of that law to insert all the words whatsoever and how many soever they be which are

²¹⁰ For a more detailed view, see G. Tusseau, *Les normes d'habilitation*, préf. M. Troper, Paris, Dalloz, coll. « Nouvelle bibliothèque de thèses », Vol. 60, 2006.

²¹¹ R. Walter, « Las normas jurídicas », Cast. trans. M. Atienza, H. Cordes, in *Doxa*, Vol. 2, 1985, p. 112.

²¹² J. Bentham, *Of Laws in General*, *op. cit.*, pp. 177, 179.

²¹³ J. Raz, « Legal Principles and the Limits of Law », *op. cit.*, pp. 831-832; P.M.S. Hacker, « Hart's Philosophy of Law », in P.M.S. Hacker, J. Raz (ed.), *Law, Morality and Society. Essays in Honour of H.L.A. Hart*, Oxford, Clarendon Press, 1977, p. 21; G.C. Christie, *Law, Norms and Authority*, London, Duckworth, 1982, p. 30; Walter 1985, 112; R. Guibourg, *El fenómeno normativo. Acción, norma y sistema. La revolución informática. Niveles del análisis jurídico*, Buenos Aires, Editorial Astrea, col. « Filosofía y derecho », Vol. 14, 1987, p. 163; N. MacCormick « Le droit comme fait institutionnel », *op. cit.*, pp., 64-65.

²¹⁴ J. Bentham, *Of Laws in General*, *op. cit.*, pp. 181, 197.

²¹⁵ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, p. 181.

requisite to give a clear expression of the various ideas that enter into the composition of that law. This plan shews mighty fair upon the first opening; but before a man had got to the end even of this single title he would find, perhaps to his no small surprise, that after a due attention paid to the several limitations and exceptions which the case requires, he would before he had got to the end of this single title have set down matter enough to fill a volume. When after having got thus far he came to consider that the title upon which he had bestowed a volume was but one out of perhaps some hundreds which remain, how great would be his amazement and despondency? 'At this rate', he would say to himself, 'hundreds of such volumes may have been travelled through, and yet the work not done.'

If however after this it would be possible for him to muster up courage enough to go on with the next offence, he might be as much surprised perhaps another way: he would find that with the exception of a page or two he would have that same volume to write over again and insert under this second title. This being the case it would naturally enough occur to him, that there could be no use in inserting those same words twice, either to himself who was to write or to the people who were to read them: but that to both parties it would on the contrary be equally irksome and inconvenient²¹⁶.

One has to notice a contradiction between such a proposal for the analysis of power-conferring dispositions and one of Bentham's tenets. His will to individuate one law per class of legally-guided act is perfectly sound. That is why he is perfectly right in distinguishing two laws – one for the individual and one for the judge²¹⁷ – where Kelsen would only – counter-intuitively – distinguish one single law, addressed to the organ²¹⁸. But conceiving empowering dispositions as fragments of norms runs counter this assumption. Indeed, the empowering disposition is addressed to an authority's behaviour, and not to the behaviour of the final subject of the norms that are to be created²¹⁹. Then it seems necessary to individuate two (complete) laws and not to speak of « fragments » of norms.

Bentham had wisely noticed some of the difficulties of the fragment-reading of empowering dispositions:

To consider the several laws separately without regard to the exigencies of the whole, [...] after a due attention paid to the several limitations and exceptions which the case requires, he would before he had got to the end of this single title have set down matter enough to fill a volume. [...] If however after this it would be possible for him to muster up courage enough to go on with the next offence, he might be as much surprised perhaps another way: he would find that with the exception of a page or two he would have that same volume to write over again and insert under

²¹⁶ J. Bentham, *Of Laws in General*, *op. cit.*, p. 197.

²¹⁷ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, *op. cit.*, pp. 302-303; Id., *Of Laws in General*, *op. cit.*, pp. 139-142; Id., *A General View of a Complete Code of Laws*, *op. cit.*, p. 160; Id., *Pannomial Fragments*, *op. cit.*, p. 216; Id., *A Comment on the Commentaries and A Fragment on Government*, *op. cit.*, p. 72.

²¹⁸ R. Moore, *Legal Norms and Legal Science. A Critical Study of Kelsen's Pure Theory of Law*, Honolulu, The University Press of Hawaii, 1978, pp. 132, 146-147; H.L.A. Hart, *The Concept of Law*, *op. cit.*, pp. 38-40; N. MacCormick, *H.L.A. Hart*, London, Edward Arnold, coll. « Jurists: Profiles in Legal Theory », 1981, p. 168 n. 55; R. Hernández Marín, *Teoría general del derecho y de la ciencia jurídica*, *op. cit.*, pp. 71-76; R. Guastini, « Metateoria degli atteggiamenti normativi », in *M.P.S.C.G.*, Vol. 12, 1982, pp. 174-175; E. García Máynez, *Lógica del juicio jurídico*, México, Buenos Aires, Fondo de cultura económica, col. « Publicaciones de Dianoia. Anuario de filosofía », 1955, pp. 30-37; Id., *Lógica del concepto jurídico*, México, Buenos Aires, Fondo de cultura económica, col. « Publicaciones de Dianoia. Anuario de filosofía », 1959, pp. 158-163; J.W. Harris, *Law and Legal Science*, *op. cit.*, pp. 102-107; N. Bobbio, « La norme », *op. cit.*, pp. 107-139; C.E. Alchourrón, E. Bulygin, *Normative Systems*, *op. cit.*, pp. 148-153.

²¹⁹ H.L.A. Hart, *The Concept of Law*, *op. cit.*, p. 41: « The reduction of rules conferring and defining legislative and judicial powers to statements of the conditions under which duties arise has, in the public sphere, a similar obscuring vice. Those who exercise these powers to make authoritative enactments and orders use theses rules in a form of purposive activity utterly different from performance of duty or submission to coercive control. »

this second title²²⁰.

The distinction he drew between civil and penal law was aimed at avoiding the defects of redundancy and excessive unintelligible length in a sane codification proposal²²¹. It is more convenient to collect the elements that are common to several laws in an independent part of the complete code²²². Complete laws prescribe behaviours, i.e. create offences. Their common matter composes the civil code, while what is specific to each offence integrates the penal code²²³.

II.1.2. Power-Confering Dispositions as Indirectly Formulated Obligative Laws

Conceiving of empowering dispositions as indirectly formulated obligations also raises some difficulties.

First, if the competent authority does not use its competence, how is the obligation imposed on its subjects to be analysed? Is it really proper to say that they are obliged to anything? How is their behaviour to be guided? This very prescription seems to lack any prescriptive significance²²⁴.

No fewer difficulties arise if the authority uses its competence, and gives some content to the subjects' obligation. If it enacts a non-prescriptive disposition, i.e. a permission, a definition, or another empowerment, how is the obligation to obey to be understood? Doesn't such a legal analysis seem absurd?²²⁵

One could reply that any of those *prima facie* non-prescriptive dispositions is to be properly reduced to prescriptions. And this is precisely what the proponents of such a doctrine do²²⁶. But even if we accept such a charitable reading, new difficulties arise. If the competent authority actually emanates a prescription, the obligation to obey it imposed by the empowering disposition does not add anything²²⁷. The new prescriptions prescribe for itself, without any need of another norm prescribing that it should be obeyed. The legal doctrine, when facing the violation of a legislative prescription will never consider that another, constitutional prescription

²²⁰ J. Bentham, *Of Laws in General*, *op. cit.*, p. 197.

²²¹ M.H. James, « Bentham on the Individuation of Laws », *op. cit.*, pp. 115-116; J. Bentham, *A General View of a Complete Code of Laws*, *op. cit.*, p. 208.

²²² J. Bentham, *Of Laws in General*, *op. cit.*, pp. 198, 200, 205.

²²³ Only Ross also seems to be aware of the defects of this position, which he embraces, see A. Ross, *On Law and Justice*, [1953], Engl. trans. M. Dutton, London, Stevens & Sons Limited, 1958, pp. 209-210; Id., *Directives and Norms*, *op. cit.*, p. 114.

²²⁴ R. Caracciolo, « Some Remarks about Empowering Norms », Paper at the 5th kelsenian Symposium under the directorship of L. Gianformaggio, 1993, pp. 5-6; J. Ferrer Beltrán, *Las normas de competencia. Un aspecto de la dinámica jurídica*, pról. R. Guastini, Madrid, Centro de estudios políticos y constitucionales – Boletín oficial del Estado, col. « El Derecho y la Justicia », 2000, pp. 38-39.

²²⁵ R. Hernández Marín, *El derecho como dogma*, *op. cit.*, pp. 37-38; Id., *Teoría general del derecho y de la ciencia jurídica*, Barcelona, P.P.U., 1989, pp. 159-160; Id., *Introducción a la teoría de la norma jurídica*, *op. cit.*, pp. 309-310; Id., « Autoridad-Competencia », *op. cit.*, p. 123; J. Raz, « Voluntary Obligations and Normative Powers », in S.L. Paulson, B. Litschewski-Paulson (ed.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, Oxford, Clarendon Press, 1998, pp. 460-461; Id., *Practical Reason and Norms*, London, Melbourne, Sydney, Auckland, Hutchinson & Co. (Publishers) Ltd., 1975, pp. 105-106; C.E. Alchourrón, E. Bulygin, *Sobre la existencia de las normas jurídicas*, *op. cit.*, p. 36.

²²⁶ Z. Ziemiński « On so-called 'Permissive Norms' », in *Archivum Juridicum Cracoviense*, Vol. 9, 1976, pp. 169-178; Nino 1985, 84-87; Nino 1986, 46; Ross 1957; Id., *On Law and Justice*, *op. cit.*, pp. 170-188; Ross 1958b; Id., *Directives and Norms*, *op. cit.*, pp. 116-124; Z. Ziemiński, « Le contenu et la structure des normes concédant les compétences », *op. cit.*, pp. 159-160; Gardiès 1988, 245; R. von Jhering, *L'évolution du droit*, 3^e éd., Fr. trans. O. de La Meulenaere, Paris, librairie A. Marescq, Aîné, Chevalier – Marescq & Cie, Editeurs, 1901, p. 225.

²²⁷ A. Ross, *On Law and Justice*, *op. cit.*, pp. 141-142; Id., « Validity and the Conflict between Legal Positivism and Natural Law », in *Revista jurídica de Buenos Aires*, Vol. 4, 1961, pp. 62-64, 80; C.E. Alchourrón, E. Bulygin, *Análisis lógico y Derecho*, *op. cit.*, p. 450; R.A. Caracciolo, « Sistema jurídico y regla de reconocimiento », in *Doxa*, Vol. 9, 1991, pp. 295-309, 305; R. Guastini, « Normas supremas », *op. cit.*, p. 265; R. Hernández Marín, *Introducción a la teoría de la norma jurídica*, *op. cit.*, pp. 262-263, 310; J. Ferrer Beltrán, *Las normas de competencia*, pp. 89, 95; H.L.A. Hart, *The Concept of Law*, *op. cit.*, p. 246.

stating that the legislation should be obeyed, has also been violated. No one would consider that a burglar has violated two norms: the first empowering the legislator to make laws, the second prohibiting theft. At this point, it is to be noted that Bentham had understood this state of affairs. According to him, if one conceives of empowering dispositions as indirect prescriptions, the prescriptive norm enacted by the empowered authority is to be deemed « reiterative²²⁸ » of the sovereign's command. Even if he did not precisely draw all the criticism that such a reading of empowering dispositions raises, he was quite aware of some of the consequences of such a position.

Such a conception also enjoys a justificative dimension. The appearance is that only the sovereign prescribes behaviour, for all the power he might delegate only means that he orders to obey other individuals. Then, the real role and decision of the subordinate are dissimulated. The subordinate thus finds in such a reading a powerful way of hiding and justifying his power. This doctrine also has the persuasive effect of apparently locating all normative power in the sovereign. It contributes to the dissimulation of the discretionary power that exists at every level where norms are produced. This runs counter to Bentham's contribution to the uncovering of political and legal fallacies.

II.1.3. Power-Confering Dispositions as Permissive Laws

Bentham does not seem to have been aware of the difficulties of this reading of power-conferring dispositions. In fact, the consequences of this reading have been a ground for very strong criticisms. Nevertheless, the very fact that those criticisms are well-grounded allows to highlight that Bentham has thoroughly inferred the consequences of this reading of empowering dispositions, which most of authors are reluctant to do. His writings thus allow us to understand the very defects of this conception.

In contemporary legal theory as well as in Bentham's writings, the terms « permission » or « right » have been characterized as polysemic and fulfilling various functions²²⁹. Three main functions are generally attributed to permissive dispositions, each of which Bentham was aware of. They can limit or abrogate an obligative norm²³⁰. They can prevent the birth of an obligation,

²²⁸ J. Bentham, *Of Laws in General*, *op. cit.*, p. 28.

²²⁹ M. Moritz, « Permissive Sätze, Erlaubnissätze und deontische Logik », in H. Bratt, S. Duner, M. Moritz, H. Regnell (ed.), *Philosophical Essays Dedicated to Gunnar Aspelin*, Lund, C.W.K. Gleerup, 1963, pp. 108-121; G. Kalinowski, « Logique et philosophie du droit subjectif », *op. cit.*, p. 38; J.W. Lamb, « Some Definitions for the Theory of Rules », in K. Lehrer (ed.), *Analysis and Metaphysics. Essays in Honor of R.M. Chisholm*, Dordrecht, Boston, D. Reidel Publishing Company, coll. « Philosophical Studies Series in Philosophy », Vol. 4, 1975, p. 278; R. Moore, « Legal Permission », in *A.R.S.P.*, Vol. 59, 1973, pp. 337, 341.

²³⁰ U. ScarPELLI, « I modi deontici e la completezza degli ordinamenti normativi », in Id., *L'etica senza verità*, Bologna, Il Mulino, coll. « Saggi », No. 222, 1982, p. 244; R.A. Guibourg, D. Mendonca, « Permesso, garanzie, e libertà », It. trans. P. Comanducci, in *Analisi e diritto*, 1995, pp., 281, 290; O. Weinberger « Logica delle norme e domini logici », It. trans. F. Castellani, in G. di Bernardo (a cura di), *Logica deontica e semantica. Atti del Convegno tenuto a Bielefeld 17-22 marzo 1975*, Bologna, Il Mulino, coll. « Temi e disussioni », « Pubblicazioni dell'Università degli studi di Trento », 1977, p. 134; O. Weinberger, « Der Erlaubnisbegriff und der Aufbau der Normenlogik », in *Etudes de logique juridique*, Vol. 5, 1973, p. 127; Id., « The Expressive Conception of Norms: An Impasse for the Logic of Norms », in S.L. Paulson, B. Litschewski Paulson (ed.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, Oxford, Clarendon Press, 1998, p. 430; Id., « The Role of Rules », in *Ratio Juris*, Vol. 1, 1988, p. 232; L. François, *Le problème de la définition du droit*, *op. cit.* p. 130; J. Raz, *The Concept of a Legal System*, *op. cit.*, pp. 172-175; Id., *The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon Press, 1979, pp. 18, 57, 65, 67; M. Atienza, J. Ruiz Manero, « Sobre permisos en el derecho », in *Doxa*, Vol. 15-16, 1994, pp. 828, 833; Id., *A Theory of Legal Sentences*, Engl. trans. R. Zimmerling, Dordrecht, Boston, London, Kluwer Academic Publishers, coll. « Law and Philosophy Library », Vol. 34, 1998, pp. 102, 106; C.E. Alchourrón, E. Bulygin, *Analisis lógico y Derecho*, *op. cit.*, pp. 235, 242, 243-244, 146-149; N. Bobbio, *Teoria della norma giuridica*, Torino, Giappichelli 1958, pp. 152-153; Id., « La norme », *op. cit.*, p. 124; T. Mazarese, « Permesso forte e permesso debole: note a margine », in *Analisi e diritto*, 2000, p. 123; H. Kelsen, *Théorie pure du droit*, 2^e éd., Fr. trans. C. Eisenmann, Paris, Dalloz, coll. « Philosophie du droit », Vol. 7, 1962, p. 75; Id., *Théorie générale des normes*, *op. cit.*, pp. 128-129, 522-523; Z. Ziemiński, « On so-called 'Permissive Norms' », *op. cit.*, pp., 173, 176-177; G. Williams, « The Concept of Legal Liberty », in *Columbia Law Review*, Vol. 56, 1956, pp. 1130-1131; A. Squella,

i.e. limit the competence of an authority or prohibit it to enact some specific norms²³¹. More rarely, they are considered as useful to ascertain the normative status of some behaviours, or to remove doubts²³².

The ambiguity of permissive dispositions should make one careful about using the category of permissive norms to understand empowering dispositions. Moreover, there seems to be a considerable difference between permitting a given behaviour and empowering the creation of a given type of norm²³³. Empowering dispositions govern a very specific type of behaviour, i.e. normative behaviour. This distinction is intuitively shared by many authors²³⁴. It is not totally alien to Bentham, for he carefully distinguishes power of imperation, i.e. normative power, and power of concretion, i.e. strictly factual power²³⁵. Nino writes that «It is necessary to distinguish permissive-rights or liberty-rights from power-rights by the fact that the latter do not merely allow a physical conduct but ascribe to it legal normative consequences – like obligations, or other rights and responsibilities, for the agent and other people²³⁶. » Anyone would agree that such a distinction is by no means irrelevant or unimportant for legal activities. Conceiving of empowering dispositions as a kind of permissive norms is very risky, for it involves some confusion between very different types of behaviours. That is not to say that empowering dispositions change the empowered individual's capacity of action, nor that a given act now has a magic property of calling norms into existence. This is only to say that some behaviour have the

« ¿Cumplen funciones meramente permisivas las normas de competencia? », in *Anuario de filosofía jurídica y social*, Vol. 4, 1987, pp. 235-237; J.-M. Février, « Remarques sur la notion de norme permissive », in *D.*, 1998, chr., pp. 273, 274.

²³¹ J. Bentham, *Of Laws in General*, *op. cit.*, p. 99; L. François, *Le problème de la définition du droit*, *op. cit.* pp. 130-131; U. Scarpelli, « I modi deontici e la completezza degli ordinamenti normativi », *op. cit.*, p. 244; T. Mazzarese, « Permessio forte e permessio debole: note a margine », *op. cit.*, pp. 125-127; R.A. Guibourg, D. Mendonca, « Permessio, garanzie, e libertà », *op. cit.*, pp. 274, 282, 291-292, 296-297; C.S. Nino, *Introducción al análisis del derecho*, Barcelona, Ariel, col. « Derecho », 1999, p. 66; A. Ross, *Directives and Norms*, *op. cit.*, pp. 123-124; J. Raz, *Practical Reason and Norms*, *op. cit.*, p. 87; Id., *The Authority of Law*, *op. cit.*, pp. 65, 67; C.E. Alchourrón, E. Bulygin, *Sobre la existencia de las normas jurídicas*, *op. cit.*, pp. 93-94; Id., *Análisis lógico y Derecho*, *op. cit.*, pp. 137, 236-237, 244-246; J. Ferrer Beltrán, *Las normas de competencia*, *op. cit.*, pp. 62-64; M. Atienza, J. Ruiz Manero, « Sobre permisos en el derecho », *op. cit.*, pp. 820, 833; Id., *A Theory of Legal Sentences*, *op. cit.*, pp. 94, 98, 105-106, 111; Kelsen, *Théorie pure du droit*, *op. cit.*, p. 60; D. Lyons, « The Correlativity of Rights and Duties », in *Noûs*, Vol. 4, 1970, pp. 50-51; O. Weinberger, « Logica delle norme e dominî logici », It. trans. F. Castellani, in G. di Bernardo (a cura di), *Logica deontica e semantica. Atti del Convegno tenuto a Bielefeld 17-22 marzo 1975*, Bologna, Il Mulino, coll. « Temi e discussioni », « Pubblicazioni dell'Università degli studi di Trento », 1977, p. 134; Id., « The Role of Rules », *op. cit.*, p. 232.

²³² J. Bentham, *Of Laws in General*, *op. cit.*, p. 99; L. François, *Le problème de la définition du droit*, *op. cit.* p. 130; M. Atienza, J. Ruiz Manero, « Sobre permisos en el derecho », *op. cit.*, pp. 833, 836, 837; Id., *A Theory of Legal Sentences*, *op. cit.*, pp. 105, 109, 110; O. Weinberger « The Expressive Conception of Norms: An Impasse for the Logic of Norms », *op. cit.*, p. 430.

²³³ R. Hernández Marín, « Autoridad-Competencia », *op. cit.*, p. 124.

²³⁴ See e.g. G. Jellinek, *System des subjektiven öffentlichen Rechte*, 2. Aufl., [1905], Aalen, Scientia Verlag, 1979, pp. 47-49; W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, W.W. Cook (ed.), A.L. Corbin (Foreword), Westport (Conn.), Greenwood Press, 1978, p. 58; A. Ross, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law* [1934], Engl. trans. A.I. Fausbøll, Copenhagen, Einar Munksgaard, 1946, pp. 165, 185-188; Id., *Directives and Norms*, *op. cit.*, p. 131; D. Makinson, « On the Formal Representation of Rights Relations. Remarks on the Work of Stig Kanger and Lars Lindahl », in *Journal of Philosophical Logic*, Vol. 15, 1986, p. 408; T. Spaak, *The Concept of Legal Competence*, *op. cit.*, pp. 80-87; G.C. Christie, *Law, Norms and Authority*, *op. cit.*, p. 161; J.-L. Gardies « The Fundamental Features of Legal Rationality », *op. cit.*, p. 247; R. Caracciolo, « Due tipi di potere normativo », *op. cit.*, pp. 200-201; J.R. Searle *La construction de la réalité sociale*, Fr. trans. C. Tiercelin, Paris, Gallimard, coll. « NRF essais », 1998, pp. 133-134; P.M.S. Hacker, « Hart's Philosophy of Law », *op. cit.*, p. 19 n. 21; M.D. Bayles, *Hart's Legal Philosophy*, *op. cit.* pp. 30-31; C. Wellman, *A Theory of Rights. Persons under Laws, Institutions and Morals*, Totowa, New Jersey, Rowman & Allanheld, 1985, p. 44; A. Squella, « ¿Cumplen funciones meramente permisivas las normas de competencia? », *op. cit.*, pp. 221-238; H. Kelsen, *Théorie générale des normes*, *op. cit.*, pp. 133-135, 432; H.L.A. Hart, « Legal Rights », in Id., *Essays on Bentham*, *op. cit.*, pp. 188-189; L. François, *Le problème de la définition du droit*, *op. cit.* p. 131; A. Brinz, *Lehrbuch der Pandekten*, Erster Band, 2^e Aufl., Erlangen, Verlag von Andreas Deichert, 1873, p. 211-212.

²³⁵ J. Bentham, *Of Laws in General*, *op. cit.*, pp. 18 n. b, 81, 137-139 n. h.

²³⁶ C.S. Nino, « Introduction », in Id. (ed.), *Rights*, Aldershot, Hong Kong, Singapore, Sydney, Dartmouth, coll. « The International Library of Essays in Law and Legal Theory », 1992, p. xvi. See also Sir J. Salmond, *Jurisprudence*, 10th ed., G.L. Williams (ed.), London, Sweet & Maxwell, 1947, p. 245.

signification of a norm, whereas others do not. And this distinction is to be made from the point of view of legal theory.

In legal analysis, other difficulties arise if one is to adopt such a reading of empowering dispositions.

If the empowering disposition is interpreted as a permission, being permitted makes a norm valid. If a norm is invalid, that means that it is forbidden to enact it²³⁷. As von Wright puts it, « the authority *may* issue norms of a certain kind, but *must not* issue norms of certain other kinds. It may be argued that norms, the issuing of which is not expressly permitted to the authority, are in fact forbidden to him to issue²³⁸. » Bentham when proposing such a reading was perfectly consequent. Without resorting to the concept of validity, he very clearly stated « Take any mandate whatsoever, either it is of the number of those which he allows or it is not: there is no medium: if it is, it is his; by adoption at least, if not by original conception: if not, it is illegal, and the issuing it an offence²³⁹. »

This consequence relies on a confusion between invalidity and illegality Hart rightly criticized²⁴⁰. Bentham has no doctrine of validity or voidability of laws²⁴¹. Austin also contemplates invalidity as a kind of sanction. But the respective consequences of disregarding a prescription and disregarding an empowering norm have nothing in common. Violating a norm of behaviour is to commit an offence, the consequence of which is a sanction, e.g. a term of prison or a sum of money. On the contrary, if an authority violates competence norms, no offence is committed: it simply fails to achieve the goal it was pursuing. The consequence is not a sanction, but a nullity, an invalidity²⁴². In legal practice, the distinction is very important, for the competent courts, the applicable procedures, the available arguments, the actors' reasonings are different.

The permissivist thesis cannot understand some very frequent legal phenomena. It is not infrequent for an authority to have an obligation to exercise its power. E.g. State members of the European Union have an obligation to use their normative competences so as to transpose EU law, the French administrative authorities can perfectly have an obligation to make use of their normative power, e.g. so as to abrogate illegal administrative acts²⁴³, or to take specified acts²⁴⁴. But this cannot be accounted for by the permissivists. Whatever its definition, a permission is always conceived as opposed to an obligation or a prohibition. Then, a posterior obligation or prohibition seems to nullify a previous permission. But according to the law of many countries, an individual is competent to sell a stolen object, and in this case he produces a valid contract.

²³⁷ G.H. von Wright, *Norm and Action*, *op. cit.*, p. 197: « We shall say that a norm is invalid if the issuing of that norm by a certain authority is forbidden to this authority by virtue of some higher-order norm »; *ibid.*, pp. 200, 201; Id., *An Essay in Deontic Logic and the General Theory of Action*, Amsterdam, North-Holland Publishing Company, coll. « Acta Philosophica Fennica », Fasc. 21, 1968, p. 94; P. Mullock, « The Permissiveness of Powers », in *Ratio*, Vol. 16, 1974, p. 79; C.E. Alchourrón, E. Bulygin, *Normative Systems*, *op. cit.*, p. 73; Id., *Sobre la existencia de las normas jurídicas*, *op. cit.*, pp. 42, 73.

²³⁸ G.H. von Wright, *Norm and Action*, *op. cit.*, p. 193.

²³⁹ J. Bentham, *Of Laws in General*, *op. cit.*, p. 22. See also *ibid.*, p. 19.

²⁴⁰ H.L.A. Hart, « Bentham on Legal Powers », *op. cit.*, pp. 131-133; Id., « Sovereignty and Legally Limited Government », in Id., *Essays on Bentham*, *op. cit.*, p. 241.

²⁴¹ I assume, however, that due to some of *Of Laws in General's* developments, an embryonic theory of the validity of law is present. See J. Bentham, *Of Laws in General*, *op. cit.*, pp. 25-26, 180. The idea of validity also recurs in Bentham, so that Hart's criticisms might be called in to question. I cannot focus on this point here.

²⁴² C.E. Alchourrón, E. Bulygin, *Análisis lógico y Derecho*, *op. cit.*, pp. 462, 490; T. Spaak, *The Concept of Legal Competence*, *op. cit.*, p. 84; J. Ferrer Beltrán, *Las normas de competencia*, p. 67; R. von Jhering, *L'évolution du droit*, *op. cit.*, pp. 319-320; G. Carcaterra, *Il normativismo e la forza costitutiva delle norme*, 2^a ed., Roma, Bulzoni Editore, 1988, p. 88.

²⁴³ See e.g. Conseil d'Etat Sect. 10 janvier 1930 *Despujol*, *Rec.* 30; Conseil d'Etat Ass. 3 février 1989 *Compagnie Alitalia*, *Rec.* 44.

²⁴⁴ See e.g. the obligation for a police authority to take the necessary measures for the good order Conseil d'Etat 23 octobre 1959, *Doublet*, *Rec.* 540.

Nevertheless, such a behaviour is prohibited²⁴⁵. One is to note that Bentham examines precisely this situation²⁴⁶. The hypothesis of valid-forbidden normative acts is by no means rare or exotic²⁴⁷. Conceiving empowerments as permissions cannot explain such situations, where the same act is both empowered – i.e. permitted – and forbidden. In the terms of this theory, this is a contradiction. Distinguishing the concepts of permission and empowerment would allow to understand such situations. It is necessary to distinguish on the one hand the empowering norm, and on the other hand the norms that regulate the exercise of this competence²⁴⁸ to assess precisely their legal consequences. Whereas failing to comply with the conditions for producing norms results in invalidity, failing to comply with an obligation or a prohibition results in a sanction or a responsibility²⁴⁹.

II.1.4. Power-Conferring Dispositions as Qualificatory Dispositions

The main defect of such a conception is that it admits dispositions that do not regulate human behaviour but rather create or attribute properties. Moreover, it is most of the time ontologically compromised, for it is likely to hypostasise the qualifications, i.e. to disregard their purely fictional nature. Scandinavian realism has fought such confusion as, e.g. considering rights as things. It is not to be denied that legal current discourse speaks of rights, powers, obligations, as if they were things. But one is not to believe in those rhetoric devices that are aimed at justifying the ruling power and inducing obedience²⁵⁰. Though his empiricism and his method of paraphrases should have prevented Bentham from such mistakes, he seems to be also vulnerable on this point, as regards the ontological consistency he gives to « status ». At once, Austin seems superior to him, for he is perfectly clear that legal status are nothing but sets of rights and obligations²⁵¹.

Be it by the remarks he makes or by the mistakes he commits, Bentham provides many conceptual insights that are of use if one is to underline the defects of current conceptions in legal theory. Nevertheless, this destructive power does not exhaust one's interest in reading him.

²⁴⁵ T. Spaak, *The Concept of Legal Competence*, *op. cit.*, p. 83; H.L.A. Hart, « Sovereignty and Legally Limited Government », *op. cit.*, p. 241; C.F.H. Tapper, « Powers and Secondary Rules of Change », in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)*, Oxford, Clarendon Press, 1973, pp. 244-245, 261, 272-273; J.J. Moreso, « El encaje de las piezas del derecho (segunda parte) », in *Isonomía*, Vol. 15, p. 166; J. Raz, « Voluntary Obligations and Normative Powers », *op. cit.*, p. 454.

²⁴⁶ J. Bentham, *Of Laws in General*, *op. cit.*, p. 280.

²⁴⁷ J. Raz, « Voluntary Obligations and Normative Powers », *op. cit.*, pp. 451-470., 454; C.E. Alchourrón, E. Bulygin, *Análisis lógico y Derecho*, *op. cit.*, p. 489; A. Sériaux, *Droit canonique*, Paris, P.U.F., coll. « Droit fondamental. Droit politique et théorique », 1996, p. 699; P. Valdrini, J.-P. Durand, O. Echappé, J. Vernay, *Droit canonique*, 2^e éd., Paris, Dalloz, coll. « Précis droit privé », 1999, p. 387 n. 1; J. Ferrer Beltrán, *Las normas de competencia*, *op. cit.*, p. 66.

²⁴⁸ J. Ferrer Beltrán, *Las normas de competencia*, *op. cit.*, pp. 69, 92-93 n. 161; C.E. Alchourrón, E. Bulygin, *Normative Systems*, *op. cit.*, pp. 151-152; Id., *Análisis lógico y Derecho*, *op. cit.*, p. 489; R.A. Guibourg, D. Mendonca, « Permesso, garanzia, e libertà », *op. cit.*, pp. 291, 299 n. 72; D. Mendonca, *Las claves del derecho*, *op. cit.*, p. 136; M. Atienza, J. Ruiz Manero, « Sobre permisos en el derecho », *op. cit.*, p. 830; Id., *A Theory of Legal Sentences*, *op. cit.*, pp. 103, 110; R. Hernández Marín, *Introducción a la teoría de la norma jurídica*, *op. cit.*, pp. 314, 330; A. Ross, *On Law and Justice*, *op. cit.*, pp. 167, 204, 207; Id., *Directives and Norms*, *op. cit.*, p. 131.

²⁴⁹ A. Ross, *On Law and Justice*, *op. cit.*, pp. 167, 204; A. Ross, *Directives and Norms*, *op. cit.*, pp. 131-132; R.A. Guibourg, D. Mendonca, « Permesso, garanzia, e libertà », *op. cit.*, p. 291.

²⁵⁰ See, as regards Scandinavian realism, A. Ross, « Tû-Tû », in *H.L.R.*, Vol. 70, 1957, pp. 812-825; Id., *On Law and Justice*, *op. cit.*; Id., « Definition in Legal Language, in *Logique et analyse*, Vol. 1, 1958, pp. 139-149. See also the French school of legal realism: M. Troper *Pour une théorie juridique de l'Etat*, *op. cit.*; Id., *La théorie du droit, le droit, l'Etat*, Paris, P.U.F., coll. « Léviathan », 2001; V. Champeil-Desplats, *Les principes fondamentaux reconnus par les lois de la République. Principes constitutionnels et justification dans les discours juridiques*, préf. M. Troper, Paris, Economica, Aix-en-Provence, P.U.A.M., 2001; C. Agostini, *Les normes non valides. Contribution à une théorie générale de l'annulation juridictionnelle des normes*, PhD. Paris-X Nanterre, 2000.

²⁵¹ See J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Laws*, *op. cit.*, pp. 354-355.

II.2. *Pars Construens*: Towards a Concept of Empowering Norm

Bentham's critical power is by no means strictly destructive. His rigour is a model for analytical jurisprudence nowadays. But is that to say that there is nothing left of all those readings of competence dispositions? Not at all. A few strategies can be in order to use Bentham in a constructive way. I will first examine two of those strategies (a) (b), with respect to which two remarks are in order. First, I do not claim that these authors explicitly rely on Bentham: I just want to highlight that they are able to propose a way in which to use concepts that are present in Bentham. Second, my presentation of the thesis does not imply that I entirely approve of them as perfect tools for legal analysis²⁵². I will end suggesting what are according to me, some of Bentham's insights that are to be of use in order to elaborate a specific and fruitful concept of power-conferring norm (c).

II.2.1. Guastini's Thesis: the Variety of Rules on the Production of Rules

Resorting to analytical distinctions that are familiar to the Italian school, Guastini offers a strategy that allows to keep all the readings of empowering dispositions altogether, and to make use of them in legal analysis.

He criticizes the tendency to conceive of rules relative to the production of rules as forming a homogeneous class. He distinguishes several types of rules about the production of rules²⁵³:

(a) Power conferring rules ascribe to a given subject a normative power to create a specific legal source.

(b) Procedural rules regulate the exercise of a normative power. They are behaviour rules directed to normative authorities and concerning enactment of rules.

(c) Competence rules define the scope of the normative power, the range of social relationships it can affect²⁵⁴.

(d) Rules about the content of rules prescribe or prohibit given normative contents to a power-holder.

Guastini makes use of these distinctions in order to analyse different legal defects, which result in the invalidity or the inexistence of a given source of law or a given norm. I will not deal with this here, but I will examine his conception of each of those rules.

According to him, power-conferring rules fulfil two functions: (a) they ascribe a competence. They can thus be considered as permissive norms²⁵⁵; (b) they lay down necessary conditions for the existence of a given source of law, and contribute to the definition of this very source. They can thus be considered as definitions, constitutive norms or qualifying norms²⁵⁶.

Procedural rules are also commands that can be violated. But they also contribute to define the source²⁵⁷.

According to him, it is also true that the citizens have an obligation to obey the norms that are enacted according to such norms²⁵⁸.

Thus Guastini is able to dismiss the whole discussion about *the* character of competence norms, and to use the various readings of power-conferring dispositions that are present in Bentham so as to proceed to a precise dogmatic analysis of the positive law.

²⁵² See G. Tusseau *Les normes d'habilitation*, *op. cit.*

²⁵³ R. Guastini « Invalidity », in *Ratio Juris*, Vol. 7, 1994, pp. 213-215.

²⁵⁴ *Ibid.*, pp. 214-215.

²⁵⁵ *Ibid.*, p. 223.

²⁵⁶ *Ibid.*, pp. 223-224.

²⁵⁷ *Ibid.*, p. 224.

²⁵⁸ R. Guastini, « In tema di norme sulla produzione giuridica », in *Analisi e diritto*, 1995, p. 310.

II.2.2. MacCormick and Aguiló Regla's Thesis: Resorting to the Concept of Praemiary Sanction

MacCormick and Aguiló Regla have both offered very important and very promising reflections concerning empowering norms. I would just like here to focus on a specific aspect of their proposals, namely, the link they establish between norms concerning the production of norms and the idea of a sanction. This link, resulting in a confusion of invalidity and illegality has been rightly criticized by Hart, but those two authors have another, astute, idea.

For MacCormick, people respecting the procedures laid down in order to produce norms achieve to secure a specific kind of sanction.

The substantial monopoly of force disposed by public officials in modern states makes it the case that a very significant reward is held out to those private persons who contemplate whether or not to make their transactions valid in law. The reward available is to have their transactions backed and enforced by those who have a substantial monopoly in the use of force. In a word, the reward for achieving legal validity, even at the price of burdensome formalities and heavy legal expenses, is a reasonably secure expectation that transactions will be honoured or sanctions exacted²⁵⁹.

This exhibits the 'sanction' which attaches to the procedural and other prerequisites for the validity of contracts and voluntary obligations generally. The facility which the law offers is not the bare ability to undertake obligations, but the ability to undertake enforceable obligations. The price of this facility is the observance of the legal prerequisites in question. The case is a classic case of one of Bentham's 'praemiary' sanctions – reward as a sanction²⁶⁰.

Similarly, Aguiló Regla writes that:

Validity can be considered as a positive sanction, for it eventually results in the law coercively backing the empowered individual. [...] Though nullity cannot be considered [...] as a negative sanction, it can be regarded as the negation or the absence of a positive sanction, because nullity appears in the end as a negation to provide the coercion of the state²⁶¹.

This is no other than a praemiary sanction, of which Bentham had spoken. Bentham distinguishes two parts in a law, namely the directive and the incitative²⁶². The various possible incitative parts of a law can be subdivided in comminative, i.e. where the motivation is to be furnished by punishment, and invitative, i.e. where the motivation relies on reward²⁶³. The power of imperation, which acts upon active faculties relies on threat of punishment and offers of rewards.

Once again, Bentham's concepts prove useful in the contemporary debate about power-conferring norms. I want now to suggest in a very tentative way some guidelines that may be found in Bentham for the elaboration of an original concept of empowering norm.

II.2.3. Bentham's Guidelines for the Elaboration of an Original Concept of Empowering norm

Even though he never explicitly admits of such a specific concept, I believe Bentham

²⁵⁹ N. MacCormick, *H.L.A. Hart, op. cit.*, p. 86. See also *ibid.*, pp. 83-84 ; Id., « Voluntary Obligations and Normative Powers », in *Aristotelian Society. Supplementary Volume*, Vol. 46, 1972, pp. 60-62, 75-76; Id., « Voluntary Obligations », in Id., *Legal Right and Social Democracy. Essays in Legal and Political Philosophy*, Oxford, Clarendon Press, 1982, pp. 209-210.

²⁶⁰ N. MacCormick, « Voluntary Obligations », *op. cit.*, p. 210. See also Id., *H.L.A. Hart, op. cit.*, p. 86.

²⁶¹ J. Aguiló Regla, « Sobre 'Definiciones y normas' », in *Doxa*, Vol. 8, 1990, p. 281.

²⁶² J. Bentham, *Of Laws in General, op. cit.*, p. 134.

²⁶³ *Ibid.*, pp. 134-137.

offers some clues towards the individuation of a specific concept of empowering norm. These clues or guidelines are the following, which leave much to the imagination of contemporary legal theory in order to build functional concepts of power-conferring norms:

(a) Laws guide behaviour and one law is to be distinguished for every class of guided behaviour.

(b) One is to get rid of fallacious ontological assumptions.

(c) One must carefully distinguish power of contraction from power of imperation.

(d) Bentham insists on the role played by the will of the empowered subject and on the fact that power-conferring disposition guide the behaviour of legal actors.

(e) One can imagine different patterns of laws, so that it is by no means necessary for a law to be coercive. It can guide human behaviour relying on auxiliary sanctions²⁶⁴, such as the disposition to obey, which can be linked to the idea of legal validity.

I believe that the few guidelines I have mentioned, which are by no means the only ones to be found, allow to imagine a new concept of competence norm that would perfectly be understood as a norm properly so-called, i.e. a rule regulating behaviours, grounded on ontologically safe assumptions, discriminating sharply between different types of behaviours the signification of which is the creation of a norm and others. Such are some of the principles I have tried to use in a study on power-conferring norms²⁶⁵.

As an examination of his reflection on the concept of legal power proves, Bentham is very clear that legal concepts are by no means natural or necessary, but only the result of human decisions that are guided by considerations of, and assessable in terms of, utility. This is another aspect of his legal positivism at the metalinguistic levels.

The concepts Bentham constructs prove to be those that form the basis of the conceptual apparatus of legal theory. Underlying this fact may lead contemporary legal theory to a greater level of self-consciousness. Many of the concepts it uses are Bentham's. I think, among very numerous other concepts, of the following: a law, a legal system, deontic logic, different classes of permissive norms, competence norms, the problematics of individuation, disposition *v.* law, the classification of legal disciplines.

Apart from such a historical or genetic claim, grasping a full appreciation of the conceptual accuracy of most of Bentham's reflections is a factor for the continued development and improving of universal expository jurisprudence and juristic reflection. Being aware of the many conceptual and epistemological choices that lawyers do is also one of the most important teachings of Bentham, which forces one to justify and discuss no less than the very tools of thought.

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²⁶⁴ *Ibid.*, p. 156.

²⁶⁵ G. Tusseau, *Les normes d'habilitation*, *op. cit.*

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