The Role of Fictions in Law

Hume, Adam Smith and Bentham

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Law is the fundamental institution of every society and the very functioning of social life is dependent on its legitimacy. Therefore it should not be surprising that philosophers of law and moral and political theorists have always involved themselves in discussions about foundations and justification of law, its legitimacy, scope, form, its limits and obligationary force. And the notion of »fictions« plays a crucial role in these discussions: it is either used as an argument against theoretical opponents or its role in the normal functioning of law is considered in an analysis of legal theory and practice.

We will take a look at the arguments of three theorists of law, living and working in an age when the transformation of legal theory from early modern natural law theories to modern utilitarian legal theories was taking place. Hume reformulated the natural law theory and rejected ideas of social contract which were built on natural law, Smith provided new criteria for a science of natural jurisprudence, and finally Bentham has accomplished this transformation with his critique of existing legal institutions and proposals for their general reconstruction on utilitarian grounds.

All of them regard some of the central ideas of the natural law theory as inappropriate, as mere »fictions«, and to some extent we could say that their theories represent an attempt to come to terms with the »fictional« character of the natural law theories. The result of this attack on the »fictivity« of natural law is somewhat paradoxical; all of them have to acknowledge that »fictions« play a necessary role in legal theory and practice, although they articulate this role in a different ways. We will therefore try to outline their respective theories of »fictions« and their role in legal and wider philosophical theory.

In a sense, this critique of natural law and its »fictions« could also be understood as inherent transformation or reformulation of the natural law theories. The fact is that some basic natural law assumptions find their way into, and survive, in the theories of their critics. There is some truth in what Schumpeter remarks somewhere, namely that Bentham's utilitarianism is just another theory

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of natural law. And also it is true that many of the legislative efforts of utilitarian liberals consist of proposals to include in the body of law some basic natural law categories. This process has also been termed *Positivierung der Naturrects*, positivisation of natural law. Our own contemporary ideas about human and an individual's rights are of course heirs of these natural law ideas too. We understand them as being self-evident and we feel no need to prove them, just as the natural law theorists, our ideological ancestors, understood them.

So this inquiry into the criticism of the »fictional« character of natural law could help us to reflect upon our own understanding of political and legal theory and maybe even give some contribution to the open post-modern controversy. Discussion about »fictions« in political and social theory has indeed become fashionable. But still we have to be cautious in using this term. Even if we say that (political) authority »does not exist«, as Foucault did, and that it is a mere »fiction«, the question remains, why do those who understand authority as »fiction« attack or criticise it so strongly.

Accusations of legal »fictions« are not new or a privilege of a time or the authors who we wish to examine. Ideas on which religious and political authorities have found their case for earthly obedience to the law and a particular organisation of power, government, society and religious life and sanctions, have all been considered as »fictions« on the part of their opponents. Scholastic ideas of natural law, which were reformulated classical Roman ideas of natural law, were regarded in a similar way by their adversaries, early modern natural law theorists, such as Grotius. His ideas and those of his followers such as Hobbes, Selden, Pufendorf and Locke, have in turn exercised an important influence on social, political and legal theory during the following centuries, encouraging some of them, including Rousseau and Kant, to develop on this foundation theories of social contract, again to be recognised as »fictitious« by subsequent critics. I have examined some of these developments in my previous articles and this present one is intended as a continuation of this effort.[1]

Apart from natural law theories, the main reference of authors which I wish to examine here is Common Law as existing established legal theory and practice. Although some influence of the natural law theory was in previous times

[1] These articles were »Hobbes and the theory of social contract as the context for Kant's political philosophy«, *Filozofski Vestnik* 2, Ljubljana 1992; »Kant, razsvetljenstvo in razvoj ter iztek teorije družbene pogodbe«, *Filozofski Vestnik* 1, Ljubljana 1993; »Social Contract and Public Opinion – Two Political Concepts of the Enlightenment«, *Filozofski Vestnik* 2, Ljubljana 1993 and »Hugo Grotius in razvoj teorij naravnega prava«, *Filozofski Vestnik / Acta Philosophica* 1, Ljubljana 1994.

present even in Common Law circles, exercised for example by Selden's friend, Chief Justice John Vaughan, and even young Sir Matthew Hale before the Restoration,[2] Common Law was articulated, mainly in the works of Sir Edward Coke, Sir Matthew Hale and later Sir William Blackstone, as traditionalist, immemorial law, based on the reason of the centuries, expressed in his institution of case decisions and role of legal precedents as legal rules. It was interpreted as customary, unwritten law, expressing common rules and collective rationality, as opposed to statute law. Its nature was conventional and it was closely bound to legal practice.

Some of these features of Common Law have already led Hobbes to involve himself in controversy with Common Law theorists, opposing them from his rationalist and positivist view of rational and written law. Latterly radicals have returned to natural law arguments to attack the Common Law tradition. Hume afterwards defended the basic premises of the Common law framework, Smith has provided new normative criteria for jurisprudential reform, and finally Bentham bitterly attacked Common Law as utterly »fictitious«, demanding statute law to take its place.

We have outlined the basic developments in legal theory of that time and we can now turn to examining Hume's moral and political theory.

Hume

Hume's well-known scepticism allows him to clearly see the elements of »fiction« in the theories of his opponents and predecessors. He has rejected some of their »fictitious« ideas, but accepts others and in a sense has, as Buckle argues, grounded natural law theory on his new moral psychology.[3] He does not deny the influences of, and links with, the natural theory and he even says that his theory of the origin of property is basically the same as that of Grotius.[4]

He wanted to avoid some of the excesses of natural law rationalism and therefore regards rules of justice as conventions, justice itself being artificial, not natural virtue, therefore the product of development of legal and social institutions. He defends existing social institutions, because he regards them as

[2] These influences are examined in Richard Tuck, *Natural Rights Theories*, Cambridge University Press, Cambridge 1979, p. 111 *sq*.

[3] Stephen Buckle, *Natural Law and the Theory of Property. Grotius to Hume*, Oxford University Press, Oxford 1991, p. 295 *sq*.

[4] David Hume, *Enquiry concerning the Principles of Morals*, in *Enquiries concerning Human Understanding and concerning the Principles of Morals*, ed. L. A. Selby-Bigge, rev. P. H. Nidditch, Clarendon Press, Oxford 1975, p. 307 n.

being beneficial to all members of society and as a precondition for the improvement of arts and advancement of human relations.

He also defends Common Law as a legal frame for existing social institutions and interactions of citizens, although, as we will see, he gives it a different philosophical explanation and justification from that of the mainstream Common Law theorists. His idea of rules of justice being the unintended result of human moral actions was extremely influential in the following centuries, being adopted by many important social theorists, including some contemporary ones. Although this very idea could itself be regarded as »philosophical fiction«, it remains a fact that it is a very productive, fruitful and widely accepted »fiction«.

Postema is therefore right to see Hume in the context of Common Law theory,[5] as a theorist who gave this theory a new expression. Hume also rules out ideas of the state of nature as being »fictitious«, because man's first condition is already social, he does the same with ideas of social contract as »fictions« of convening *de novo*, he defends legal precedents as sufficient reasons for new judicial decisions and he demands perfectly inflexible rules of justice in order to thwart sensible knave who regard only his own benefits, even if it could be achieved by transgression of the rules of justice.

His argument against rationalist philosophers is founded on his basic insight that the role of reason in social and everyday life is strictly limited. Reason, according to Hume, cannot bring about the making of an agreement between people. Imagination must do the job and move us to action. And again, imagination is closely connected with »fiction«. These assertions about reason have of course developed against the background of Hume's theory of passions which direct human actions. This theory is developed in Hume's *Treatise*,[6] the third book, where specifically Humean understanding of justice is also developed.

Hume's aim in it is to answer the question, How could morality arise as a social, public and objective category from natural passion which is something private and subjective, and therefore how is the common world created out of private elements. But from the beginning he treats man in a social context and within the framework of social science, his approach is both psychological and social.

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[5] Gerald J. Postema, *Bentham and the Common Law Tradition*, Clarendon Law Series, Oxford 1986, p. 81 *sq*.

[6] David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, rev. P. H. Nidditch, Clarendon Press, Oxford 1978.

Therefore we can reject the arguments that his other important work on moral theory, namely the second *Enquiry*, represents a sharp break with his previous theory of passions. It is indeed a fact that his theory of passions is declared unnecessary and abandoned in *Enquiry*, but this work also treats reason and sentiment as passions, and the concept of sympathy, which now has a wider meaning, is connected here with *artificial virtues*, not just with passions. But apart from this, basic elements of Hume's moral theory remain the same, and he confirmed this by republishing a short version of the *Treatise* argument under the title *A Dissertation of the Passions* after *Enquiry*.

For Hume, morality as a social category could only be accounted for in terms of an *observer*. We take someone's behaviour as a clue to his *character*, which is the real object of moral evaluation, based on the observer's sympathy. But we can also judge the character of a person with regard to the *imagined* effects of his actions, that which would become possible if actual external hindrances to his actions were removed. So we must produce *habitual rules* about connections between motives and behaviour. And when we judge we are, in order to communicate our evaluations, under the influence of actual spectators forced to approach the standpoint of an *independent* spectator.

Moral approval or disapproval are the names for *indirect* passions of love or hatred, arisen in the observer of moral actions, and they are *calm passions* (as opposed to violent ones).

Among the qualities subject to moral evaluation, those which are useful to others are termed *artificial virtues* and they are especially important because they include *justice*. And one of the most important questions in moral theory for Hume is the question of what are the motives for justice? The answer should explain the question of origin and the development of justice.

To avoid circular justifications of justice which refer to the sense of duty, which already presupposes the existence of justice, Hume searches for further answers. He respectively rules out the ideas that this motive could be *self-love*, *regard for public interest*, *benevolence towards mankind* or *benevolence towards* a particular *person*, as inappropriate, as »fictions«. The first is directly contrary to justice, the second, regard for public interest, is rejected, because there is no natural connection between justice and public interest, but only an artificial one, some acts of justice are only concern of two individuals, not public interest, and people in fact do not have public interest in mind while they consider their behaviour. Benevolence towards mankind does not exist, because we cannot sympathise with mankind in general. And the last idea, benevolence towards a particular person, is contrary to the main demand of justice, that it should be shown to friend and foe alike.

Because there is, therefore, *no natural motive* for justice, Hume concludes, »the sense of justice and injustice is not deriv'd from nature.«[7]

Therefore justice is an *artificial* virtue. It »arises artificially, tho' necessarily from education, and human conventions.« While passions emerge from nature, society generates artificial virtues.

Justice is necessary for social life and its origin is connected with the establishment of property and stability of property, but it is not naturally relevant to man. It became such because of his particular circumstances: exchangeability and scarcity of external objects and qualities of the human mind, dominated by selfishness and limited generosity.

Here again we come across »fictitious« ideas – philosophers have developed four »fictional« ideas that should illustrate the origin of justice. These are the idea of complete *abundance* in everything and the idea of the extreme *generosity* and *benevolence* of human nature; the other two are the direct reversals of the former two – a *shipwreck* situation, where seizing the means of one's safety regardless of the property limitations is no longer a crime, and the idea of a *society of ruffians*, where justice is no longer of any use and only violence can guarantee self-preservation. The first two ideas represent »the *poetical* fiction of the *golden age*«, which can only serve the fanatic ideas of enthusiasts, whereas the latter two represent »the *philosophical* fiction of the *state of nature*«. And both are »an idle fiction«.[8]

Hume has therefore affirmed his position on the conditions necessary for the development of justice by rejecting these ideas. He then proceeds with an argument that people's recognition that infringement and violation of someone else's property causes so much trouble, makes them abstain from such practice and *redirect* their *interested* passions, which may have previously led them to such acts of violence. Hume maintains that only passion or affection could control and counter-balance another passion.

This led people to enter a *convention* about stability of property, and justice arises out of such conventions. But these conventions are not explicit, rather they consist of a great number of individual just actions, followed and imitated by similar ones by other people. Justice is therefore a slow growth, it is developed through the ages, it arises gradually, by slow progression.

It is true that Hume oscillates a bit here between two different views on the establishment of conventions, contractual and evolutionary. Nevertheless, he still articulates his distinctive and innovative view about the origin of justice.

[7] *Treatise*, p. 483.
[8] *Treatise*, pp. 493-4.

The establishment of justice contains a certain paradox. Being an *artificial* virtue, justice has a strong, »natural« tendency towards public and private good in general, but need not be beneficial in every case (in contrast with *natural* virtues which are beneficial in any case) and could even be directly contrary to both public and private good in some individual cases. Hume explains this in the following example:

»*Judges take from a poor man to give to a rich; they bestow on the dissolute the labour of the industrious; and put into the hands of the vicious the means of harming both themselves and others. The whole scheme, however, of law and justice is advantageous to the society, and to every individual.*«[9]

If men were led only by their regard for public good, they would not adopt these rules and restrain themselves by them precisely because of this reason, because of their knowledge of particular nonbeneficial effects of justice. Although rules of justice are result of human rational designs and their moral actions, they are *not* their *intended result*, says Hume in a famous passage:

»*Those rules, by which property, right, and obligation are determin'd ... have all of them a direct and evident* tendency *to public good, and the support of society. This last circumstance is remarkable upon two accounts. First, because tho' the cause of the establishment of these laws* had been *a regard for the public good, as much as the public good is their natural tendency, they wou'd still have been* artificial, *as being purposely contriv'd and directed to a certain end. Secondly, because, if men had been endow'd with such a strong regard for public good, they wou'd never have restrain'd themselves by these rules; so that the laws of justice arise from natural principles in a manner still more oblique and artificial. 'Tis self-love which is their real origin; and as the self-love of one person is naturally contrary to that of another, these several interested passions are oblig'd to adjust themselves after such a manner as to concur in some system of conduct and behaviour. This system, therefore, comprehending the interest of each individual, is of course advantageous to the public;* tho' it be not intended for that purpose by the inventors.«[10]

Therefore self-interest of individuals gave rise to the development of the rules of justice, indeed in its »enlightened« form, as redirected self-interest, as redirected interested passions. Individuals have their own interests at heart, says Hume, but approbation of the rules of justice which they establish reaches far beyond their intentions. Out of pursuit of individual self-interest, public interest is achieved and maintained and Hume has thus establish congruence

[9] *Treatise*, p. 579.
[10] *Treatise*, pp. 528-9.

between public and private interest. Now he can say that »public utility is the *sole* origin of justice.«[11]

Although this idea was first presented by Mandeville, Hume develops it at full length. The whole theory of Smith's »Invisible Hand« was already developed by Hume.

But still more important is his idea of rules of justice being *unintended consequences* of human actions and design. This idea could be regarded as one of the *great moves* in the history of philosophy of law, as Haakonssen remarks.[12] With it Hume avoids the dangers of excessive rationalism replacing traditional natural law with *secular* and *empirical* conception of fundamental law or rules of justice.

But he did even more, as Haakonssen argues on, with his idea of the *»unintended consequence«* phenomenon, he theoretically establishes and recognises a third category between natural and artificial phenomena as elements of the old distinction between nature and artifice, known at least from Hobbes on. He distinguishes between natural phenomena which should be explained in terms of efficient causes, and artificial phenomena, which can be explained in terms of final causes.[13]

But the *»unintended consequence«* phenomena resembles both elements of the old distinction, *natural* and *artificial* phenomena, being unintended and having efficient causes, but still being the result of human rational action. He indeed may not have seen all of the consequences of his theoretical achievement, and this fact could be explained partly with regard to the circumstances in which he has to strongly defend his understanding of the artificiality of justice against his opponents and therefore some passages in his work sound rather rationalistic and this in turn causes problems for the interpreters.

However, he has successfully replaced the old idea of artifice which involved *constructive* reason, and has developed his own coherent evolutionary theory of justice. He presents the full theory of what Schumpeter would term an »automatic mechanism«, and Hayek would later, in his »return to Hume«, take his idea of »spontaneously developing social order« as a foundation of his

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[11] *Treatise*, p. 496.

[12] Knud Haakonssen, *The Science of a Legislator. The Natural Jurisprudence of David Hume and Adam Smith*, Cambridge University Press, Cambridge 1981, p. 20 *sq*. See also his article »The structure of Hume's political theory« in *The Cambridge Companion to Hume*, ed. David Fate Norton, Cambridge University Press, Cambridge 1993, pp. 182-221.

[13] This distinction was later taken from him by Kant, who used it in formulating his famous antinomies in *Critique of Pure Reason*.

counter-attack on *constructivist rationalism*. Hirschman in his most famous book[14] also recognised Hume's great theoretical achievement.

Although this idea of the »unintended consequences« of human actions can be regarded by its critics as »philosophical fiction« and some elements be accused of expressing »cynical reason« (as Sloterdijk would probably do), it remains one of the most convincing ideas about the functioning of society and an individual's moral life.

Now let us examine Adam Smith's contribution to modern jurisprudence and moral theory.

Adam Smith

Adam Smith is deeply influenced by Hume's ideas and he develops his moral and legal theory on the foundations which Hume laid for them. He also makes wide use of Hume's idea of »unintended consequences« which has now been given the name of »Invisible Hand«. But apart from this, Smith tries to solve some of the difficulties of Hume's theory. Hume's sympathy mechanism could not explain how we could sympathise with those who benefit from the useful tendency of artificial virtues, including justice, because we could only sympathise with concrete individuals. This is the reason why Hume has abandoned the theory of sympathy and replaced it with fellow-feelings in *Enquiry*. The latter does not require a relation with concrete individuals.

Smith's »situational propriety« can be seen as a solution to this Humean problem, and this enables him to connect theories of the origin of justice and its moral value, two theories which Hume developed independently. Hume's theory met problems in its attempt to answer the question regarding how the spread of just practice is possible. A question also remains, how is it possible to account for the moral value of justice, if accounting in terms of sympathy does not allow sympathy with »anonymous« individual, and accounting in terms of fellow-feeling is evidently too optimistic and rationalistic and couldn't be ascribed to ordinary men being rather *philosopher's speculation*. Smith has therefore succeed in finding elements of philosophical »fiction« even in Hume's sceptical moral theory.

Smith like Hume, regards as »fictions« natural rights which are understood as man's property. But he even thinks that Hume's moral theory was a »philosopher's construction« which did not capture human morality as it is.

[14] Albert O. Hirschman, *The Passions and the Interests. Political Arguments for Capitalism before its Triumph*, Princeton University Press, Princeton, New Jersey 1977, p. 25 *sq*.

Smith regards man as a social being from the beginning and so his ideas take shape in a social context. Because we draw our ideas, for example our idea of personal beauty, from the appearance of others, our first moral criticisms are also exercised upon the conduct of other people.[15] Others of course judge us in the same manner. Thus we became aware of ourselves as persons with a moral appearance, subjected to moral evaluation. This perception of other people's evaluations makes as conscious of our own mind. Smith concludes that without society the human conscience could not be developed.

The desire of agreement with others drives us to try to judge ourselves as we imagine others would. We have to act *as spectators of ourselves*, when we are at the same time *agents*. At this point Smith explains in a famous passage how a person in his moral evaluation of his own behaviour divides himself into two persons:

»*When I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represents a different character from that other I, the person whose conduct is examined into and judged of. The first is the* spectator, *whose sentiments with regard to my own conduct I endeavour to enter into, by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view. The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavouring to form some opinion. The first is the judge; the second the person judged of.*«[16]

We try to judge our own behaviour by the same standard which we judge the behaviour of others by, that is the standard of its propriety. We naturally strive to bring our moral evaluations into agreement with that of others, and although perfect mutuality and agreement of sympathy is impossible and can only be imaginary (containing an element of »fiction«), moral sentiments can at least be brought in concord, which is enough to give us satisfaction. Therefore moral subjectivism is avoided and Smith maintains that in this way operations of mutual moral sympathy rather *unintendedly* produce *common* social and moral standards, sufficient for the functioning of society. So the mutual sympathy mechanism is an efficient cause that brings about common moral standards.

But the question still remains as to how moral *ideals* emerge from this social

[15] Adam Smith, *The Theory of Moral Sentiments* (*TMS*), ed. D. D. Raphael and A. L. Macfie, Oxford University Press, Oxford 1976, III, I, §§ 4, 5.

[16] *TMS*, III, I, § 6.

moral propriety and how they gain independence from socially accepted standards.

Smith answers this question with the following argument: *propriety*, with which we judge moral behaviour, is the aptness of action and its *motive* to its situation. Although the judgement of others of our own actions starts us to judge ourselves, we soon move from the question of whether others would find our behaviour proper, to the question of whether it is *in fact* proper and so we judge ourselves with a *standard different from the opinion of others*. But we could achieve this by not only taking the position of a *spectator of ourselves*. We must take the position of an *impartial spectator*, »a third person«, which is a moral *ideal* for both agent and spectator. Apart from social propriety, position of an impartial spectator enables us to see »absolute« propriety in given situation, and we use it to judge our own behaviour.

In this way morality is internalised and man's *conscience* gains its independence. When we are regulated by it, we can talk of our *self-command*, which for Smith is a meta-virtue, a foundation for all other virtues.

So the relation between man's conscience and society reflects a relation between the *actual* and *ideal*, impartial spectator. It is the very disagreement between our evaluations of our own behaviour and evaluations of others, that make us search for an impartial point of view, equidistant from both former views. Smith maintains that seeking social approval in itself has a strong tendency of becoming a search for an impartial position. This search may indeed never be completely successful, but it is *the search* itself that matters, this search is common to all or at least to a majority and it makes social life possible. And this process also adjusts our behaviour to common standards, still leaving a place for the independence of moral judgement and actions. Smith emphasises the role of education in this process and also the limited usefulness of social customs – a socially and morally unacceptable practice cannot become a custom.

Smith's *science* of morals therefore understand the general rules of morality as the *unintended* outcome of individual moral evaluations, and those rules, when internalised, create a sense of duty. Although this theory of obligation is based on the descriptive theory, it has great *normative* importance as well.

We judge human actions from two different aspects: according to their motive or intention and according to their effect or proposed end. According to motives we judge the *propriety* of actions, according to effects we judge about their *merit*. Smith makes a contrast between the moral judgements of philosophers and that of ordinary people. Philosophers mainly judge the effects, while common people judge both aspects of the moral actions.

But the two judgements are not on a par or a supplement to each other; the judgement in terms of motive of moral action is fundamental, and the other one is dependent upon it.[17]

Of course moral evaluations of men in everyday life differ to some extent from Smith's *ideal* moral judgement which should primarily consider the motive and intentions of the moral agent, that is the propriety of action, but should also take into consideration the situation in which the action was performed, to judge from its *situational propriety*, and also consider its effects.

Smith knows that our evaluation of motives is independent of the realisation of intended effects and that consequences of moral acts are dependent on fortune, but he also know that we can not have full knowledge of man's motives for his moral actions. This knowledge is only accessible to God and man's own conscience. So on the subject of penal law he remarks:

»*Sentiments, designs, affections, though it is from these that according to cool reason human actions derive their whole merit or demerit, are placed by the great Judge of hearts beyond the limits of every human jurisdiction ... That necessary rule of justice, therefore, that men in this life are liable to punishment for their actions only, not for their designs and intentions, is founded upon this salutary and useful irregularity in human sentiments concerning merit and demerit, which at first sight appears so absurd and unaccountable.*«[18]

From the same standpoint Smith, who claims, as we have seen, that situational propriety is the most important aspect of a moral action, could also point at Hume's »Philosopher's mistake«, his idea of moral judgement about human characters. It neglects the context and situation of every given moral action of the character in question and is therefore only a »speculative philosophical construction«.

Smith therefore succeeds in building, on the theoretical grounds of Hume's moral theory, a fine dialectics of human social and moral life, successfully balancing between the normative, ideal and descriptive and explanative dimension of his theory. He explains connections, relations and contrasts be-

[17] We know that Kant, who admired Smith's *Theory of Moral Sentiments*, has taken this distinction from Smith and used it in his *Critique of Practical Reason*, although he absolutely rejected moral judgements according to the effects of human actions and strictly held judgements according to motive as the only proper moral judgements. This has led him into certain serious difficulties, of which the most important is perhaps the fact that what he would call an »absolutely evil« action could also be performed with a nonpathological motive. This one-sidedness of Kant's moral theory was later criticised by Hegel.

[18] *TMS*, II, iii, 3, § 2.

tween ideal and common morality, as well as their origin and functioning. His whole theoretical building is based on a central idea of the »*impartial spectator*« which, being an ideal entity, could indeed be regarded as »fiction«, but a »fiction«, necessary for the foundation of every philosophical system, and at the same time one of the most productive »fictions« for the explanation of human moral life and one of the greatest achievements in moral theory.

And on this basis Smith could explain his views on jurisprudence and develop jurisprudential proposals in outline of »the art of a legislator«. But the course of our examination now leads us to Bentham and his role in the development and transformation of modern legal theory and his contribution to the theory of »fictions«.

Bentham

Although Bentham would deny this, Hume's reflections on justice and law have shaped his own and he silently follows him in posing the problems in legal theory. So in his early years Bentham, like Hume in his time, defends Common Law as a case law and its institution of *judicial precedent*, the principle that former law decisions are established as legal rules. He made the case for observing precedents as legal rules, that is for *stare decisis*, on the grounds that legal practice, organised this way, guarantees stability and security of the rule of law.[19]

But later in his career Bentham strongly and directly attacks the very practice of English Common Law. He accuses the whole legal system of being based on »fictions«, he even says that it is »doubly fictitious« and demands its replacement by written statute law. He proposes normative standards for law and demands it to be guided by the principle of utility. But it remains true that the motivation for this attack on Common Law originates in Bentham's specifically legal concerns and ideas about legal reform and the codification of law, because his general theory of »fictions« which he also developed, would allow him, as Postema rightly remarks, a much more sympathetic account of Common Law.

While Hume's evolutionary view on the development of law was very close to the Common Law tradition, Bentham in a rationalistic manner understands law as a command, taking this view from Hobbes. In open contradiction to Hume he completely rejects the inflexibility of the rules of justice. But his

[19] Such views are defended in Bentham's early manuscripts, deposited in University College, London Library.

emphasis on a normative character of legal theory, and his understanding of it as a science, to a certain extent connects him with Smith.

One of the principal targets of Bentham's attack on Common Law was its retrospective, retroactive character. Common law is a collection of judge-made laws, says Bentham, and »on each occasion, the rule to which a judge gives the force of law, is one which, on this very occasion, he makes out of his own head.«[20] But judges succeed in making laws only if they can convince other judges and people that they are not doing so. People are therefore bound by laws which they could not have known and to which they could not have conformed their behaviour to before the judicial decision. With this *ex post facto* law making the basic virtue of law, the security the law should guarantee, is undermined. Therefore, according to Bentham, it is impossible to abide by the law. He concludes that this is not a law for a man living in a well organised society, but a law for beasts, a »Dog law«, as he calls it.

»When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do ... *they lie by till he has done something which they say he should not* have done, *and then they hang him for it.«*[21]

Men, because of their dignity as human beings, deserve to be ruled by Statute Law, says Bentham. Instead of rational obedience to the law, according to which citizens would freely censure the law by their own lights of rational reason while obeying punctually, English law is based on blind obedience and maintained through terror, and such law introduces tyranny and slavery instead of securing liberty. Bentham's views become more comprehensible if we know that in the eighteenth century English penal law indeed became extremely restrictive and brutal and a wide range of criticism arose.

The institution of legal precedent also didn't escape Bentham's bitter attack. He claims that it establishes a rule that every decision which judges make is justified, therefore that:

»Whatever is, is right – *(whatever is – that is to say, whatever, by men in the situation in question, has been done) – being tacitly assumed as a postulate, – the rectitude of doing the same thing, on any and every subsequent occasion deemed a similar one, is stated and acted upon, as a necessary consequence. This is called* following precedents.«[22]

[20] Jeremy Bentham, *The Works of Jeremy Bentham. Published under the Superintendence of ... John Bowring*, 11 vols., Edinburgh 1838-43, V, p. 546.

[21] *Works*, V, p. 235.

[22] Jeremy Bentham, *A Comment on the Commentaries*, in *A Comment on the Commentaries and A Fragment on Government*, eds. J. H. Burns and H. L. A. Hart, London 1977, p. 322.

Again Bentham was not alone in his opinions. So his contemporary, Jonathan Swift, one of the most important and popular writers of the age wrote:

»*It is a maxim among these lawyers that whatever had been done before may legally be done again, and therefore they take special care to record all the decisions (formerly) made against common justice and the general reason of mankind. They produce these, under the name of precedents, as authorities to justify the most iniquitous opinions, and the judges never fail of decreeing accordingly.*«[23]

Therefore in his opinions Bentham joined the English Opposition thinkers, among which Swift was one of the leading figures. But he also made serious remarks about the inflexibility of the Common Law legal rules and so he observes with anger:

»*One other capital imperfection /of Common Law is/ ... the* unaccommodatingness *of its rules. Every decision that is given is spun out of some vague maxim, conceived in general terms without exceptions, and without any regard to times and circumstances. ... Even when it aims at utility, which perhaps is now and then, it either falls short of the mark or overshoots it. A sort of testimony in recognition of this truth is contained in the magnificent and well-known adage,* fiat justitia ruat coelum.«[24]

Common lawyers would therefore, according to Bentham, make and execute their decision even if, as a consequence, the sky would fall upon us. Common law is therefore incoherent, it represents no body of law and it is not *real* at all, but »doubly fictitious«, it is a *no-law*.

So Bentham, who considered himself to be an Enlightenment critic, searches for a new model and foundations for law and proposes an outline of utilitarian legal positivism. His general theory of law is divided into the *theory of laws*, consisting of the *formal* criteria of general propositions of law and the utilitarian theory of legislation, concerned with the *content* of law; and a *theory of adjudication*, consisting of constitutional theory and theory of judicial procedure and an account of practical judgement.

Bentham rejects the liberal theory of constitution with its ideas of division of powers and independence of judiciary, developed by Montesquieu. He thinks that such a system would paralyse officials and take all effective power from them, as well as lead to the irresponsibility of judges. He demands a strong central government subjected to the possibility of public criticism and judiciary responsible to the body of the people, working under the conditions of

[23] Jonathan Swift, *Gulliver's Travels*, Bk. 4, ch. 5.

[24] Jeremy Bentham, *Of Laws in General*, ed H. L. A. Hart, London 1970, XV. 12 n. 1.

publicity. His view of democracy emphasises the role of the »public opinion tribunal« and elections, but he sees no need for the extended participation of people in the performance of the government, his concept of representation is rather Burkean. Public opinion should have a *judicial* function and judge the work of public officials and, if needed, demand their recall, and its main medium of expression must be the press.

Bentham's project of legal reform is part of the European legal codification movement, although Bentham, in contrast with its other representatives, rejects the natural law theory. Defending his idea of an »art of legislation«, he says that:

»With a good method, we go before events, *instead of following them; we govern them instead of being their sport. A narrow-minded and timid legislature waits till particular evils have arisen, before it prepares a remedy; an enlightened legislature foresees and prevents them by general precautions.«*[25]

Events of course can not be individually foreseen, but they may be foreseen in their species, says Bentham. A good plan for the organisation of law will leave no *terrae incognitae* in the field of the law. To achieve this, the principle of utility must become our guidance and utility, not the regard of rules, a *decision* principle of judges in legal practice.

But such utilitarian demands are not compatible with Bentham's views on legal positivism. In order to reconcile them, Bentham made a distinction between theories of law and adjudication, but in so doing he cannot avoid their *conflict*. His theory of adjudication undermines his general theory of law.

The code of laws namely enjoys public confidence only so far as its laws are fixed. But if judges, who are allowed their flexible interpretation according to the utilitarian principle, change them at leisure, and the public become aware of discrepancies, Bentham's strategy fails. He wants to avoid the »paradox of inflexibility« of legal rules, but now he meets the »paradox of (their) flexibility«. In his view, officials are *not bound* to adhere strictly to the legal code, but this contradicts the demands of his general theory of law and undermines the legitimacy of the legal system. So the coherence of his legal theory is lost.

Bentham's project cannot achieve the aims it set and is therefore fundamentally mistaken. He also *privatised* justice and adjudication with his proposals that judges should only mediate between two private parties in individual cases, therefore losing sight of public interest as a basic concern of the law.

All this is not surprising given his general views on human individual and his

[25] Jeremy Bentham, *General view of a Complete Code of Laws*, in *Works*, iii, p. 205.

relation to society. He wants to preserve the sovereignty of individual's rational judgement and its role in social life, but at the same time deny, or overlook, the possibility of conflicts between the judgements of different individuals and individual interests.

And so his contemporary, Adam Ferguson, rightly criticised such a view which loses sight of the »public spirit« of the people.[26] Even Bentham's »public opinion tribunal« has no efficient means of expressing the demands which the government should follow. And in the same manner, Bentham unquestionably presupposes that the legal system should be based on consent, but this could, as we have seen, easily fail to be realised in practice.

He fails to see that the role of the law is to provide a *matrix* and *forum* for constant debate and forging of consensus. Because legal justice is never likely to match *ideal* justice, it must be open to challenge and reformulation.

But still Sir Henry Maine was right when he attributes to Bentham and Hobbes a fundamental achievement of a divorce of law from traditionally history, a divorce which is distinctive for the emergence of modern societies in which traditional history is replaced by notions of sovereignty and (statutory) Law.[27]

In contrast, analytical legal theorists and advocates of legal positivism which Bentham initiated, are not justified in pointing at the incompatibility of normative grounds of Bentham's legal theory and his legal positivism. As Postema argues, there is no internal incoherence in using normative grounds for an analysis of law, and this is what Bentham is doing. Analytical jurisprudence in its understanding of language mistakenly assumes that legal concepts could be purified of their everyday meaning and overlooks the dependence of their meaning on our »legal sensibility«.

Bentham also developed his general theory of »fictions«[28] in which he first wanted to completely rule out »fictions« and »fictitious« terms, only leaving room for real terms with existing referents, that is the thing to which a term refers, but later he recognises that »fictions« play a necessary role in every theory as well as in everyday thinking.

Bentham, as we have seen, attacked the whole existing legal theory and practice as »fictitious« and delineates proposals for their complete reform. But his main »fictions« remain the idea of one and unquestionable social utility and the idea that private utility could be treated separately from its social context.

[26] Adam Ferguson, *An Essay on the History of Civil Society*, ed. D. Forbes, Edinburgh 1966, pp. 165-6, 263-4.

[27] Sir Henry Maine, *Lectures on the Early History of Institutions*, London 1875, pp. 396-7.

[28] See C. K. Ogden, *Bentham's Theory of Fictions*, Kegan Paul, London 1932.

Bentham's legal theory was extremely influential and gave rise to the development of legal positivism, but perhaps it was even too successful in so far as Hayek must later return to Hume's position in his political and moral theory.

Conclusion

We have come to the end of our examination of the development of theories of »fiction« from Hume to Bentham and conceptualizations of the role of »fictions« in legal theory. Given that legal theory is the cornerstone of common interpretation of social reality and that reality itself is discursively structured, that its perception is dependent upon our everyday legal, political and social concepts, we can recall Lacan's famous saying that *the truth (itself) has the structure of fiction.* We have seen how Hume and Smith have attempted to reveal the »true« functioning of society with their theories of »unintended consequences« of human actions, and how Bentham tried to give legal concepts their »true« form, that is the form they should have. However, the truth is, as we all well know, never complete.

Their respective theories of »fiction« were also successful. Some »fictions« which they criticised have successfully been replaced, others were misinterpreted as such by them and have remained firmly in place. All three of these authors have criticised modern (abstract) ideas of natural law and we have much to learn from their ideas if, as Hayek suggests, we removed some of their rationalistic edge.

Basic elements of their doctrines are still present today and their examination can help us to understand current political, social and moral theories and contribute to open post-modern debate. Our examination can teach us that our fundamental ideas and concepts which we use to orientate ourselves in social, moral and political life, are but »fictions«, but at the same time necessary fictions, without which we would lose every possible compass. But they are not fixed in time or unchangeable, they are not even solid or absolutely reliable, but open to critical examination and necessary adjustment. Whether cynicism of this post-modern era has unjustly and shamelessly made a virtue out of opportunistic adaptation to such altered and changeable circumstances, or whether these new circumstances bring about the possibilities of human emancipation and improvement and are benevolent and beneficent, remains an open question.