



MASTER OF  
THE ROLLS

**LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS**

**SWINDLERS (INCLUDING THE MASTER OF THE ROLLS?) NOT WANTED:  
BENTHAM AND JUSTICE REFORM**

**BENTHAM LECTURE 2011**

**2 MARCH 2011**

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### **(1) Introduction**

1. Jeremy Bentham had a famously low opinion of judges and lawyers. As he saw it, in order to enrich themselves, lawyers ensured that English civil justice was ‘. . . a *system of exquisitely contrived chicanery which maximises delay and denial of justice*.<sup>1</sup>’. With a more recent UCL alumnus in mind, one might characterise him as an extreme Woolf reformer *avant la letter*.

2. Bentham didn’t always hold such a critical view. When – like Shakespeare’s Cleopatra – he was green in judgment<sup>2</sup>, he would, as one of his biographers put it, make a ‘daily pilgrimage to Westminster Hall.’ And why? ‘[To] worship Lord Mansfield.’<sup>3</sup> Perhaps not altogether an unreasonable occupation for a young barrister from Lincoln’s Inn, as

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<sup>1</sup> Bentham cited in Dillon, *Bentham’s Influence on the Reforms of the 19th Century*, in *Select Essays in Anglo-American Legal History*, Vol. 1, (1907, 1992 Reprint) (Boston, Little Brown & Company) (1907) Vol. 1 at 496.

<sup>2</sup> Shakespeare, *Anthony and Cleopatra*, Act 1, scene IV,

<sup>3</sup> Mack, *Jeremy Bentham: An Odyssey of Ideas 1748 – 1792*, (Heinemann) (1962) at 82.

Bentham was at the time. Mansfield was the greatest judge of his, and arguably any, age. In a remarkable 32 years as Lord Chief Justice, Mansfield was only reversed twice, and, as I can see, no judicial colleague who sat with him ever dared to dissent. A record which I can only dream of.

3. Particularly given Bentham's later feelings about the judiciary, there is a certain irony in the fact that the subject of those daily pilgrimages inspired him to poetry:

*"Hail, noble Mansfield! [he wrote] chief among the just,  
The bad man's terror, and the good man's trust!"<sup>4</sup>*

(I suspect you will agree with me in thinking that Bentham was wise to stick to philosophy.) No doubt as he got older, with a shake of his head, and a rueful smile, he would have echoed a 19<sup>th</sup> century Lord Justice, who said of one of his earlier decisions "Things do not appear to have appeared to me then as they appear to appear to me now."

4. Youthful enthusiasm soon gave way to a more critical, indeed acerbic, perception of lawyers and the law; views which, at least on one occasion, saw him bracket my predecessors with a host of dubious characters. As he put it, when criticising the judiciary's lack of reformist credentials,

*"It is a maxim with a certain class of reformists, not to give existence or support to any plan of reform, without the consent and guidance of those to whose particular and sinister interest it is to the strongest degree adverse . . . From this maxim, if consistently acted upon, some practical results, not unworthy of observation, would follow: -*

*For settling the terms of a code having for its object the prevention of smuggling in all its branches, - sole proper referees, a committee, or bench of twelve smugglers . . .*

*For a highway-robbery-preventative code – a committee of highway robbers.*

*For a pocket-picking-preventative code . . . – a committee of unlicensed pickpockets.*

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<sup>4</sup> Mack, *ibid.*

*For a swindling-preventative-code, or say an obtainment-on-false-pretences-preventative code, - a committee of swindlers, called swindlers, or of swindlers called Masters of Chancery, including the Master of the Rolls . . .”<sup>5</sup>*

5. Why did Bentham bracket my predecessors with highwaymen, pick-pockets, and smugglers, and see them as no more than swindlers? The answer was, of course, straightforward: vested interest. The nature of that vested interest was, inevitably, financial. The Artful Dodger or Fagin, if asked to draw up, or approve, reforms to prevent pick-pocketing would ensure those reforms were ineffective. Successful reform would have too great an adverse impact on his ability to achieve ill-gotten gains; on his pocket. For Bentham the same could be said of asking judges and lawyers to approve justice reforms.

6. As Bentham saw it, the justice system’s “*object [was] to put money into the pockets of the judges, [and the] other members of the firm Judge & Co.*”<sup>6</sup> (i.e. lawyers) through their “*union of fraud and extortion*”<sup>7</sup>. Accordingly, he concluded, there was no one who had ‘*any interest comparable in point of magnitude and intensity with that which an English judge has in preserving the rule of action from any change [as a consequence of] which human misery would be lessened, and his own profit, . . .reduced.*’<sup>8</sup> For Bentham, then, the judiciary weren’t just to be bracketed with pickpockets, smugglers and highwaymen: they were head and shoulders above those reprobates in the unenlightened self-interest stakes.

7. Thanks, in part to Bentham’s reformist zeal, judges have long since ceased to have a vested interest in litigation not since the mid-19<sup>th</sup> century, after Bentham’s death, have judges received part of their salaries from court fees. I was told by a rather aggressive

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<sup>5</sup> Bentham, *Principles of Judicial Procedure*, in *The Works of Jeremy Bentham*, (Bowring edition, 1843) Vol. 2 (*Judicial Procedure*) at 13.

<sup>6</sup> Bentham, *Judicial Procedure*, at 7, 13, 48 – 49 and at 63.

<sup>7</sup> Bentham, *Judicial Procedure*, at 76.

<sup>8</sup> Bentham, *Judicial Procedure*, at 14.

acquaintance that, when he had first met Lord Bingham, he thought to challenge him by asking when English judges ceased to be corrupt; the reply from the great man was unhesitating: “The mid-19<sup>th</sup> century, when they were first paid properly.” A decent salary and an absence of interest in drumming up business to line their pockets have ensured that judges have had a longstanding absence of self-interest in the cost of litigation. Perhaps then Bentham wouldn’t object even to a Master of the Rolls talking about justice in this year’s lecture in his honour. Perhaps he wouldn’t think that I, unlike in his view my early 19<sup>th</sup> Century predecessors, speak from a position of self-interest. But then as Doris Day put it, ‘Perhaps, Perhaps, Perhaps.’

8. Notwithstanding any reasonable or unreasonable doubts I intend to talk about justice tonight. First, I want to talk about the nature of civil society. Then I want to examine Bentham’s theory of adjudication. Finally, I want to examine what lessons we can take from Bentham’s theory in order to develop our continuing commitment to civil society in the 21<sup>st</sup> Century.

## **(2) Civil Society: Litigation Bad – Litigation Good?**

9. My starting point is not Bentham, but another English Philosopher: James Harrington. In 1656 he published a book of political philosophy called the *Commonwealth of Oceana*. Oceana was a synonym for England. In it Harrington expressed the following view. Government, he wrote, ‘*is an art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest; or, to follow Aristotle and Livy, it is the empire of laws, and not of men.*’<sup>9</sup>

10. Today, Harrington’s book is not as well known as it deserves to be. It was however well known in the 18<sup>th</sup> Century. And it was certainly well-known to John Adams,

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<sup>9</sup> Harrington, *The Commonwealth of Oceana* (1656), Part I (<http://www.gutenberg.org/files/2801/2801-h/2801-h.htm>)

one of the founding fathers of the United States of America and its second President. In the seventh essay of his *Novanglus* he noted how,

*“The British government is still less entitled to the style of an empire. It is a limited monarchy. If Aristotle, Livy, and Harrington knew what a republic was, the British constitution is much more like a republic than an empire. They define a republic to be a government of laws, and not of men. If this definition be just, the British constitution is nothing more nor less than a republic, in which the king is first magistrate.”<sup>10</sup>*

Adams was so impressed with the notion of ‘a government of laws, and not men’ that he repeated it in his *Thoughts on Government*, ensured it found its way into Article 30 of the 1780 Constitution of the State of Massachusetts, where it remains today, and secured for it a place of fundamental influence in the development of the young America’s civil, democratic society.

11. Bentham, it has to be said, was not initially impressed with the American Revolution. One particular target for his disdain was the Declaration of Independence, not so much for what it was; his complaint was rather more focused. He was, of course, a fierce critic of the concept of unalienable natural rights. For him talk of such rights was ‘*nonsense on stilts*’ and ‘*terrorist language*<sup>11</sup>’. The Declaration’s reference to and reliance on such rights, the existence of which he doubted was self-evident in the slightest degree, brought on one of his more sarcastic rhetorical flourishes; he asked,

*“What is it they mean when they say all men are created equal? . . . Do they know of any other way in which men are created . . . in which they themselves were created than being born. . . . Is the child born equal to his Parents, born equal to the Magistrates in his country? In what sense is he their equal?”<sup>12</sup>*

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<sup>10</sup> [http://en.wikisource.org/wiki/Novanglus\\_Essays/No.\\_7](http://en.wikisource.org/wiki/Novanglus_Essays/No._7)

<sup>11</sup> Bentham, *The Anarchical Fallacies*, in *The Works of Jeremy Bentham*, (Bowring edition, 1843) Vo. II at 501.

<sup>12</sup> Bentham cited in Mack (1962) at 186.

Like jesting Pilate, Bentham, stayed not for an answer<sup>13</sup>.

12. But he did fairly quickly overcome his initial hostility, and came round to the view that the United States was ‘*a rousing success . . . [and] the model of a working democracy.*<sup>14</sup>’ One of the reasons why it was, and why it remains, a rousing success is its commitment (if at times a rather idiosyncratic commitment) to being a civil society founded on the government of law, which Harrington and Adams championed. Such a society has a number of fundamental elements. It has well-founded, just substantive laws, which Bentham had much to say about. It has a democratically elected legislature, which promulgates those just laws. An executive which implements the law, and then acts within it. And an independent judiciary, which interprets and upholds the law.

13. Civil society is not however a matter of bare institutions. Any state can create institutions and just substantive laws, just as any country can draft and adopt a fine-sounding constitution. It is one thing to proclaim a commitment to the government of laws not men; it is another thing entirely to turn that into a reality. One way in which members of such a society ensure that it truly becomes a civil society is through taking part in free and fair elections. Another is by taking an active part in the justice system. Sitting on a jury is, for instance, a fundamental aspect of that: not least because through the development of jury nullification, the idea that a not guilty verdict cannot be challenged, society, through its representatives on the jury, can pass its judgment on the justice of the law: bad laws can be rendered null by juries refusing to convict. And as such civil society develops through its citizens calling the attention of its legislators to penal laws which they understand to be inimical to life in a fair and just society.

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<sup>13</sup> Bacon, *Essays of Truth*, Works, Book IV

<sup>14</sup> *Ibid* at 187.

14. Perhaps the most fundamental element of any civil society though is that its citizens are bearers of rights; of legal rights – or, as I would prefer to express it, of civil liberties. Bentham would not have demurred. Today as citizens we are all bearers of many such rights. And we are now very conscious of those rights at a time when, compared with 200 years ago, society has become far more sophisticated and diverse, statute law has grown enormously in volume and reach, and the sources of law have expanded from Parliament and the English courts to the Supreme Court, Brussels and Strasbourg, not to mention Edinburgh, Cardiff and Belfast. As befits its role, the common law is and has been in a constant state of development, in the light of such changes. We live in a world of legal complexity that Bentham could only have imagined – probably, he would say, in his worst nightmares.

15. This increased complexity renders our legal rights, and concomitant responsibilities all the more important. Those rights arise in many different ways – in statute, contract or tort for example, and between many types of party, such as individuals, corporations, and Government Departments.

16. But rights which cannot be enforced are rights bereft of meaning. A legal right is a sham if it cannot be vindicated in court, and enforced once established. As already mentioned, it is one thing to create bare institutions; to create a justice system, but it is another to render it effective and accessible to all citizens. In our modern consumer, market-based society, with its multiplicity of laws and rights, and its increasing scope for legal disputes, it is more important than ever that we have effective, accessible institutions of law. If not laws go unenforced. They cease to be rights, but rather become privileges for those select few who can afford them. Where this happens society ceases to be a civil society; one founded on the government of laws. Where this happens we have the enforcement of arbitrary rule rather than the rule of law.

17. If we are to remain a civil society we cannot tolerate the situation where legal rights become in practice unenforceable; out of reach. For many though the very idea of litigation is a bad thing. It is costly. It is time-consuming. And it is stressful. As Bentham remarked knowingly,

*'Vexation, expense and delay – [are] burthens [which] constitute, in their aggregate, the price paid for the benefits they derive from the substantive branch of the law.'*<sup>15</sup>

18. Litigation must be carried out efficiently, and its vexations reduced. But, while vexation, expense and delay must be kept to a minimum, the cost of litigation will be ever present. And the irreducible cost of a genuinely accessible and truly effective legal system has to be paid if we wish to remain a civil society; a society where those legal, civic, rights which we have are genuine ones. Properly minimised those costs are the price we pay to live in a civil society. They are not optional extras; luxuries for better times. The price we pay for justice is the price we pay for a civil society.

19. Listening to me, Bentham may very well have taken the Mandy Rice-Davies view 'Well, he would say, that wouldn't he.' He might say I speak from self-interest. If he did, he would be right. I speak from the self-interest of someone who wants to live in a society governed by laws not men, where legal rights can be enforced, so laws are observed; where our commitment to the rule of law continues to be a reality not a slogan.

20. What would Bentham have had to say about this?

### **(3) Justice through Bentham's Eyes**

21. Bentham would perhaps have had something to say about how the justice system should operate. He certainly spent a significant time considering justice reform, and he had

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<sup>15</sup> Bentham, *Rationale of Judicial Evidence* in *The Works of Jeremy Bentham*, (Bowring edition, 1843) Vol. 6 335



a lot to say about how the justice system should operate effectively. That is clear from the very titles of his publications - *The Principles of Judicial Procedure*, the *Letters on Scotch Reform*, *The Rationale of Evidence*, *The Constitutional Code*, and *The Introductory View of the Rationale of Judicial Evidence; for the use of non-lawyers as well as lawyers*. It is therefore hardly surprising that, across his many works, Bentham developed a theory of adjudication, which, as Professor Postema put it, represents, with one recent exception, ‘*the only sustained attempt in the English language ... at a philosophical account of the law of procedure.*’<sup>16</sup>

22. Bentham’s theory had three main elements: utilitarianism; substantive law; and adjective law. Utilitarianism is, of course, the principle that actions, and institutions, should be judged according to their ability to maximise general utility – i.e., by their ability to secure the greatest happiness for the greatest number, whilst minimizing harm. Substantive law needs no explanation. By adjective law Bentham meant: procedural law, the law concerning enforcement of judicial decisions, the provision of legal aid – the introduction of which Bentham advocated through his call for the creation of a ‘helpless litigants’ fund to be partly funded by fines imposed on those who pursued litigation inefficiently or in bad faith<sup>17</sup>’ (an idea that the present government may well want to revisit). What was the relationship between these three elements of his theory?

23. The relationship comes out quite clearly in this extract from his *Principles of Judicial Procedure*,

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<sup>16</sup> Postema, *The Principle of Utility and the Law of Procedure: Bentham’s Theory of Adjudication*, Georgia Law Review (11) (1976 – 1977) 1393 at 1393.

<sup>17</sup> Bentham, *Judicial Procedure* at 23: ‘*The helpless litigants’ fund, or fund for the defraying the expense necessary to effect the forthcomingness of such evidence as the suit may happen to furnish: a fund partly composed of fines, or say mulcts, inflicted for pursuits accompanied with temerity or evil consciousness.*’

*“Of the substantive branch of the law, the only defensible object or end in view, is the maximization of the happiness of the greatest number of the members of the community in question.*

*Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law.<sup>18</sup>”*

Substantive law had one aim: to facilitate general utility. Adjective law also had one aim: to give proper effect and execution to substantive law. That, as Bentham put it, was ‘*not only a use . . . but the only use*<sup>19</sup>’ for it. As such it too facilitated general utility. For Bentham then both substantive and adjective law were like ‘every [other aspect and] measure of government’ and had to be judged by reference to their propensity to promote general utility, whilst minimising harm<sup>20</sup>. The overarching commitment to general utility had a number of consequences.

24. First it meant that, as an institution, the judiciary had to be designed consistently with the commitment to promoting general utility. This meant that procedural law, and all other laws concerning the courts and judiciary, had to be designed to secure general utility. Given the seemingly remorseless growth in size of the CPR since 1999, and Bentham’s critical views regarding technical procedure and idealisation of simple forms of legal process<sup>21</sup>, we can make an educated guess what he would have had to say about that.

25. The creation of bare institutions consistently with his theoretical commitment to securing general utility was not sufficient. Bentham’s view thus reflected the point I made earlier regarding the creation, and maintenance, of a civil society. Well designed institutions are necessary conditions, but they are not on their own sufficient conditions, for securing either a civil society, or for Bentham, a society committed to securing general utility. On the

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<sup>18</sup> Bentham, *Judicial Procedure*, at 6.

<sup>19</sup> Bentham, *Judicial Procedure*, at 6; Postema (1976) at 1396.

<sup>20</sup> Bentham in Mill (1962) at 34.

<sup>21</sup> Bentham, *Principles*, at 169ff

assumption then that the judicial branch of government, as with the executive and legislative, and the adjective law was designed consistently with his utilitarian ideals, a duty fell on litigants, lawyers and judges.

26. Litigants and lawyers would have to ensure that they conducted litigation consistently with the promotion of general utility, and the minimization of harm. Appropriately for these post-Woolf days, they were under a duty to conduct litigation in as economical and expeditious way as possible. The task assigned to the judiciary by Bentham was somewhat Herculean: they would have to ensure that law and the justice system, operated consistently with promoting general utility. The judges were responsible for ensuring that ideal design was matched by effective operation. They were to do this in two ways.

27. First, they were secure what Bentham called justice's direct end, which was no more than deciding a case according to the law and the evidence and in doing so arrive at right decisions<sup>22</sup>; at justice on the merits by applying right law to right fact. In this way the proper application of adjective law gave proper effect to substantive law, and maximized general utility. The judges were also required to secure what Bentham called justice's collateral ends. Thus, the direct end had to be achieved so as to minimize any harm to which it would give rise through litigation cost, delay and vexation<sup>23</sup>. So far, you might say, motherhood and apple pie.

28. Why would securing justice's direct and collateral ends place a Herculean task on judges? We seem to manage with active case management today, in which we ensure (in theory at least) that litigation is conducted economically and efficiently. Well, the difference

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<sup>22</sup> Bentham, *The Constitutional Code* in *The Works of Jeremy Bentham*, (Bowring edition, 1843) Vol. 9 at 25 – 26.

<sup>23</sup> Bentham, *Rationale of Judicial Evidence* in *The Works of Jeremy Bentham*, (Bowring edition, 1843) Vol. 6 at 212 – 213; *Judicial Procedure* at 6 – 8.

lies in Bentham's utilitarianism. For Bentham, each action had a utility value: would it contribute to general utility or would the harm it caused reduce general utility. Assume a particular law was drafted consistently with the general principle of maximizing utility whilst minimizing harm. As Bentham rightly recognised, no law is self-enforcing, so at some time either through accident or deliberate design someone would fail to abide by it. Enforcement of that law will have an inevitable cost, and what if that cost outweighs the value gained from enforcement?

29. The answer to this conundrum is answered by the direct application of the most unhappy element of Bentham's utilitarian theory: that is to say through the application of what Baroness Warnock, described as the felicific calculus<sup>24</sup>, which was based on Bentham's list of seven elements, each of which had to be weighed up in order to assess the utility or disutility value of an action or an institution. As Bentham put it,

*' . . . the value of a pleasure or pain . . . will be greater or less, according to seven circumstances . . .*

1. *Its intensity.*
2. *Its duration.*
3. *Its certainty or uncertainty.*
4. *Its propinquity or remoteness.*
5. *Its fecundity.*
6. *Its purity.*
- ...
7. *Its extent; that is, the number of persons to whom it extends; or (in other words) who are affected by it.*<sup>25</sup>

Utility was to be determined by each of these factors being assessed and weighed. He later elaborated on this general statement<sup>26</sup>, saying this:

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<sup>24</sup> Warnock in Mill, *Utilitarianism*, (Fontana Press) (1962) at 19.

<sup>25</sup> Bentham in Mill at 65 – 66.

<sup>26</sup> Bentham *Introduction to the Principles Morals and Legislation*

*“ . . . for the maximization of the aggregate good, and the minimization of the aggregate evil, [the judge] will settle in his own mind, and make public declaration of the reasons by the consideration of which his conduct has determined; which reasons will consist in the allegation of so many items in the account of evil, on both sides: magnitude, propinquity, certainty, or say probability, and extent, - being in relation to each head of good and evil taken in account.<sup>27</sup>”*

30. The correct application of adjective law therefore required judges to become felicific calculators. They were expected to sit in court and assess claims according to Bentham's seven criteria.

31. Bentham, of course, did not offer an explanation how judges were to assess the magnitude, propinquity etc of good and evil arising in legal proceedings. As such it raises the question whether he ever considered that his reasoned criticism of inalienable natural rights could equally be applied to his felicific calculus. H.L.A. Hart best summed up that reasoned criticism, when he explained how

*‘Bentham insisted that no political principles with the rigidity of the doctrine of inalienable specific rights could have any application in the real world in which men have to live their lives. Such principles belong to Utopia: that is nowhere or an imaginary world.’<sup>28</sup>*

32. I would challenge the practical viability of judges applying Bentham's felicific calculus when determining the rights of individual litigants, even though we are well used to weighing competing claims, inconsistent evidence, and opposing arguments. The open-ended and subjective nature of each of Bentham's factors and the profound differences of reasonable opinion which would arise in assigning quantitative, never mind qualitative, values to them, militate against the practical application of his theory.

33. Assuming though, that judges are all-knowing and wise and can achieve the seemingly impossible task of operating the felicific calculus, we are left with the counter-intuitive

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<sup>27</sup> Bentham, *Judicial Procedure* at 63.

<sup>28</sup> H.L.A. Hart, *Essays on Bentham: Jurisprudence and Political Theory*, (Oxford) (2001) at 15.

consequence that the principle of utility can legitimately require adjective law to be applied so that substantive law goes unenforced. Bentham was all too aware of this possibility. At the very beginning of the *Principles of Judicial Procedure*, he acknowledged that there was an ‘*all pervading and perpetual*<sup>29</sup>’ conflict between the pursuit of utility maximization and of harm minimization. Where that conflict saw the inevitable cost, delay and vexation of litigation ‘*exceed the value of the benefit*’ then, for Bentham the consequence was inevitable: ‘*In such a case, as he said in the Rationale of Judicial Evidence, ‘the price ought not to be paid: the law ought to remain unexecuted.*<sup>30</sup>’

34. I can only imagine that Bentham would also have concluded that where a country’s institutions and laws were designed consistently with his theory, and were operated accordingly, that it would only be on a rare occasion when the law ought to remain unexecuted. If that were not the case, and it was a common occurrence, it would call into question either institutional design, the nature of substantive law or the design and operation of the adjective law. Without endorsing Bentham’s overarching commitment to utilitarianism, it seems to me that we can take some important lessons from his understanding of adjective law, its relationship with substantive law and the relationship they both had with a higher ideal or commitment. They are lessons which bear on contemporary attitudes to justice and our commitment to civil society and the rule of law. It is to those I now turn.

#### **(4) 21<sup>st</sup> Century Justice – voices crying in the wilderness**

35. The first thing we might take from Bentham is a general point about the fate of civil justice reformers. For most of the 19<sup>th</sup> Century Bentham was a ‘voice crying in the

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<sup>29</sup> Bentham, *Judicial Procedure* at 6.

<sup>30</sup> Bentham, *Rationale* at 335.

wilderness<sup>31</sup>, insofar as law reform was concerned. Those who are interested in contemporary attitudes to justice, and reform, cannot afford to suffer the same fate. Nor should they suffer the even worse fate of seeing their reforms introduced, only to find that they do not work; or worse again, that they produce more harm than good. To avoid such a fate they and we may wish to consider the following.

36. The second and substantive point we can take for Bentham is that our justice system – for him adjective law – has only one use or purpose: enabling the effective execution and enforcement of just substantive law. And so the justice system, and access to it, must be judged by an overarching criterion: its ability to secure the rule of just law; and thereby to secure for us a civil society. In order to do so we need to consider how we approach justice reform. For Bentham adjective law, substantive law and their overarching aim were all linked together. Consideration of one meant consideration of all. A point recently noted by Professor Genn in her recent, impressive, Hamlyn lectures (which should be read with care by those interested in reform), when she said this about the central, manifest failure of past justice reform.

*“In all these reports (civil justice reviews from around the world), the discussion of fundamental reform proceeds with little acknowledgment of any link between procedure, fairness and substantive outcome.”<sup>32</sup>*

Bentham would have, I am sure, said as they say in the Court of Appeal: I agree. As do I.

37. Calls for the reform of civil justice over the past few years have been based on various assumptions which need to be examined a little more carefully than the proponents of reform often acknowledge or even realise. Myths abound and they must be answered. Otherwise they mislead and undermine confidence in the rule of law, and hence our civil

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<sup>31</sup> Sunderland, *The English Struggle for Procedural Reform*, Harvard Law Review, 39 (1925 – 1926) 725 at 728

<sup>32</sup> Genn, *Judging Civil Justice*, (Cambridge) (2010), at 68

society. Reform based on myth is unlikely to work, and that then not only brings reform into disrepute, but it further undermines respect for the rule of law. Clear evidence and coherent argument are the ways to challenge myths, and they provide the basis on which reform can progress. And such argument and evidence should first identify the real problems which need to be solved, and their causes. Bentham would have agreed.

38. So what myths am I talking about? First, there is the myth that if there is a problem, all the Government needs to do is to legislate against it and the problem is solved. It is a myth which seemed to be particularly prevalent over the past twenty years. We have had a welter of legislation from the 1991 Dangerous Dogs Act to the creation of a new statutory crime every day to deal with any perceived or imagined problem. As Bentham's utilitarian ideals would suggest, legislation enacted to deal with a particular problem should be carefully considered, clearly expressed, easy to apply in court, and easy to enforce out of court. Legislation passed in a hurry under pressure of yesterday's and tomorrow's headlines is likely to satisfy none of these requirements, but it is often pressed on with by the Government on the basis that it is thereby seen to be dealing with the problem identified in the headlines.

39. I call this the Mikado delusion. You may recall the scene: Koko is explaining why, despite the Mikado's command to decapitate him, Nanki-Poo has been allowed to escape. He says:

*"It's like this : when your Majesty says, 'Let a thing be done,' it's as good as done, practically, it is done, because your Majesty's will is law. Your Majesty says, 'Kill a gentleman,' and a gentleman is told off to be killed. Consequently, that gentleman is as good as dead; practically, he is dead, and if he is dead, why not say so?"*

And the Mikado says: *"I see. Nothing could possibly be more satisfactory!"*

40. (To the Chancery lawyers among you, it is worth pointing out that if this has shades of equity treating as done that which ought to be done, it is not surprising: WS Gilbert was a



barrister, and *The Mikado* was written in 1883, the year after *Walsh v Lonsdale*<sup>33</sup> was decided.) But, unlike the court in *Walsh v Lonsdale*, the Mikado was quite wrong:., far from nothing being most satisfactory, nothing could be less satisfactory. A deluge of legislation, quite a lot of it so misconceived that it is repealed before it even comes into force, creates the problem of law which is difficult to understand, uncertain in its effect, expensive and time consuming to apply, and unsatisfactory in its outcome. This brings the law into disrepute, as it makes the rule of law, in terms of making laws, in terms of interpreting laws, and in terms of enforcing laws, appear ineffective or worse. As Bentham might have put it: think of the consequences before you enact. The attempts of the current Government to simplify the law are, at least in principle, to be welcomed, in my view.

41. My second myth is the insidious idea that litigation is actually a bad thing; and that other, more consensual means of resolving disputes are necessarily good things. Nobody would quarrel with the idea that, whenever reasonably possible, people should seek to resolve their disputes amicably. In this sense the development of mediation as a means to resolve disputes amicably has been, and will continue to be important and valuable. But, and this is a big but, for both Bentham and for a civil society, those alternative mechanisms cannot be the norm, or approach the norm.

42. Given Bentham's notion that in some cases substantive law should properly go unenforced because the cost of enforcement was too great a price to pay, he may well have thought that an amicable, mediation settlement in such cases had a positive utility value. And indeed in some cases facilitating a mediated settlement will be the right thing to do. But, ultimately, our civil society is not based on a commitment to utility. It is based on the rule of law, as Lord Bingham so powerfully, so clearly, and so convincingly, demonstrated in his last, deceptively simple-seeming, book, with that very title.

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<sup>33</sup> (1882) LR 21 Ch D 9

43. In a society based on the rule of law, it is essential that all its citizens have fair and equal access to justice. Despite his scepticism about the law, I am sure Bentham would not have disagreed. Access to the courts is not a privilege but a fundamental right. But it is not merely fundamental principle which requires citizens to have access to the courts. Practicality demands it as well. You cannot force people to mediate, and what if the party in the wrong refuses to mediate, or refuses to do so in good faith, or declines to be reasonable, or is simply badly advised, or takes an over-optimistic view of his case? The only way the party in the right can get what he deserves, can vindicate his rights, is to go to court, and any civilized system should ensure that he is able to do so. If he cannot, then justice is either not done or he must resort to violence to achieve a sort of justice. Either way, the rule of law dies.

44. Quite apart from this, if there is no effective access to the courts, the fundamental underpinning to all forms of dispute resolution systems, such as mediation, and even arbitration, falls away. The only reason the strong and the rich will negotiate, arbitrate or mediate with their weaker and poorer opponents is the knowledge that ultimately there is the authority and power of the justice system standing behind the arbitration and mediation systems. Furthermore, unless there is a healthy justice system, with judges developing the law to keep pace with the ever accelerating changes in social, commercial, communicative, technological, scientific and political trends, neither citizens nor lawyers will know what the law is. As Bentham would have agreed: if the law is to be effective it must be known and must be equally accessible to all. Access to justice, like the rule of law, is not just a slogan: it is a fundamental requirement of a modern civilized society.

45. I turn to the third myth: despite what is said to the contrary, we do not in fact live in a society which is imbued with a compensation culture. We may live in a society where in some cases, the foolish distort the law and the venal seek to take improper advantage of it, and there are occasional odd decisions, but it was ever thus. In that the legal system reflects

human nature. In any event, such cases remain the exception, notwithstanding the profile they may get in the press. As Lord Young concluded in his report *Common Sense, Common Safety*,

*“The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.”<sup>34</sup>*

With his avowed distrust of those who argue from self-interest, Bentham, a harsh critic of myths, fallacies and self-interest, would have applauded this conclusion.

46. The fourth myth is that our legal system is very expensive. Legal Aid was for many years the primary means through which those who could not afford justice from their own means, gained access to it. And very important it was too, as Bentham, an early supporter of such a scheme, would have agreed. Legal Aid, which is presently subject to a wide-ranging government consultation, is said to consume a lot more public money than in other countries. Now, it is no part of my function to defend lawyers’ fees, although I would say that, unless you pay lawyers properly, you won’t attract able people to the legal profession, and if you don’t attract able people to the legal profession, you will undermine the rule of law. Bentham might, again, say that, as a lawyer, I would say that wouldn’t I, but it ought to be what Jane Austen would call a truth universally acknowledged.

47. My point is that, while I, like any other taxpayer, applaud any attempt by the Government to cut down wastage, the notion that the legal aid budget is excessive needs to be examined very critically. It is certainly not made out by comparisons with other countries. The United States is a lousy example: we do not want to disenfranchise the poor as they do. As for mainland Europe, its inquisitorial system means that lawyers’ costs of court proceedings tend to be lower than here, but that is because it involves much more judges’

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<sup>34</sup> Lord Young, *Common Sense, Common Safety*, at 15 ([http://www.number10.gov.uk/wp-content/uploads/402906\\_CommonSense\\_acc.pdf](http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf)).

work, so that their judiciary costs are far higher than ours. For instance, in 2008, the courts in England and Wales are recorded to have received an annual budget of 0.12% of per capita national GDP. Out of 38 jurisdictions, which responded to a Council of Europe study, only the courts in Denmark, Azerbaijan, Ireland and Norway received less. The claim that the legal aid budget in England and Wales for the same year was the third highest as a percentage of GDP (0.15% of per capita GDP) for those jurisdictions takes on a different hue<sup>35</sup>. When the entire budget spent on the courts, legal aid and prosecution services are combined the budget allocation in England and Wales was 0.33% of per capita GDP, which places us equal 17<sup>th</sup> out of 38: pretty well average – if anything very slightly cheaper per capita than average<sup>36</sup>.

48. Fifthly, there is what Bentham would no doubt have seen as the most pernicious type of myth: the myth of self-interest. Self-interest fuels many myths. And is perhaps the greatest of all siren songs, pulling us all towards disaster. At the present time there are many such myths being presented about the Jackson costs recommendations. Myths founded on self-interest. The answer Bentham, would have said, was to rely on the only valid song of self-interest: the self-interest we all share in securing the maintenance and continuance of our civil society. No doubt Harrington and Adams would have agreed. And that tells us this. The great strength of the Jackson review is that it was based on evidence. Its conclusions are conclusions drawn in light of evidence.

49. Some say the Jackson recommendations were drawn in light of partial evidence. But the question then to ask is: why did those who complain now about lack of evidence, not supply it during the costs review's year long consultation. Bentham would, with a wry smile, no doubt have concluded that the answer to that was self-interest. The real point though is this,

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<sup>35</sup> Council of Europe, *European Judicial Systems: Efficiency and quality of Justice* (CEPEJ) (2010) at 22 and 33.

<sup>36</sup> *Ibid* at 42

the Jackson recommendations are based on a critical, unbiased, assessment of robust evidence. They are not based on self-interest. Nor do they favour any particular interest group. They favour society as a whole. The only valid criticism of his proposals is equally unbiased criticism, which favours society as a whole and which, most importantly of all, is based on sound and robust evidence. No doubt the Government when it considers the responses to its Jackson review consultation will proceed on that very basis.

50. The final myth I'd like to mention tonight is one fostered by Conditional Fee Agreements: that litigants need not have a proper interest in the prosecution of their rights. As the Jackson review says, CFAs, success fees and after the event insurance policies have created a culture where for a large number of litigants there is no financial interest whatever in the proper prosecution of their claims. In particular, they have no interest in the level of fees and costs which their lawyers are charging or incurring. Our civil society is founded just as much on individual responsibilities as on individual rights. Part of that individual responsibility is having a proper interest in deciding to litigate and in ensuring that one's claim is properly litigated. It is a very important feature of Lord Justice Jackson's recommendations that he seeks to reverse the trend towards a lack of responsibility on the part of litigants. Increasing access to justice and to reducing costs are fundamental goals. But they cannot properly be achieved by absolving individuals of either the responsibility of considering the serious step that choosing to litigate is, or of ensuring that their claims are properly prosecuted. It seems to me that it is only those with interests to protect who could complain that the Jackson reforms place those responsibilities firmly in the hands of individual litigants.

## **(5) Conclusion**

51. In conclusion then, Bentham it seems to me tells us a number of things. He reminds us that all our institutions of governance are only justified insofar as they secure a wider goal. For him that wider goal was the maximisation of the greatest happiness for the greatest

number. For us the more realistic goal of securing a civil society, one committed to the rule of just law and the enforcement of that through an effective and readily accessible judicial branch of the State. Insofar as they support the rule of just law our institutions and laws provide a firm foundation for our civil society. Insofar as they support the rule of law, they ensure our society is one governed by laws not men. And insofar as they are reformed, as reformed from time to time they must be; reform is only ever legitimate when it isn't based on self-interest; it is only valid insofar as it facilitates the continued rule of law and, with it, the continued strength of our civil society.

52. I started my lecture though with a reminder that Bentham did not always have a low opinion of judges, and that his early years were spent in admiration of Lord Mansfield. Mansfield was himself, in some ways, a great law reformer. Some of his reforms ran ahead of their time. His attempts to introduce equity into the law might have been less than successful, but they foreshadowed the great reforms of the 19<sup>th</sup> Century. Bentham may well have become disillusioned with Mansfield and with judges and lawyers generally as he got older. But I think even the older Bentham would have agreed both that it is fitting that I give that great judge the last word tonight and with the words themselves. '*A speech*', he once said, '*is like a love affair. Any fool can start it, but to end it requires considerable skill.*'

53. This lecture series was started by Lord du Parcq in 1949, when I was a year old, and so I cannot take credit for starting the love affair. Equally, as I expect it to continue for many more years to come, I'll leave the skill involved in ending it to others. But before signing off, it is fitting for me to pay tribute to another UCL man, John Sorabji, who has, as so often in the past, and, I hope, will continue in the future, helped enormously with preparing this evening's talk. Thank you.

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