

THE INFLUENCE OF BENTHAM IN THE TEACHING OF PENAL LAW IN CHILE *

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1. *Another line for the research work of the Committee*

Twenty years ago the Bentham Committee was founded at University College, which owns most of Bentham's manuscripts. Its major program (the *Bentham Project* itself) has been during all these years preparing the editions of Bentham's works in "definitive versions... based, wherever possible, on the original manuscripts" so as to offer to the scholars texts "for the first time... in Bentham's authentic words"¹ and by this means reach the true characteristics of Bentham's thought, often deformed by editors and translators. Six impressive volumes, three of correspondence and the other three, edited by Professor Burns and Professor Hart, under the common epigraph of *Principles of legislation*, have already been published. The last of these, the edition of the *Comment on the Commentaries*, that involved numerous difficulties of different kinds, is, as far I can see, the best model of a critical edition which a scholar can seek. An extensive group of volumes, entrusted to able specialists, will soon increase the series that we know by its general title of *Collected Works*².

The texts referring to Spain, Portugal and Latin America, are under the responsibility of Professor Pedro Schwartz of the University of Madrid, with the collaboration of Miss Claire Gobbi. Professor Schwartz's intelligent researches in the Iberian Peninsula and in the American countries, besides fulfilling the specific task

* Comunicación presentada a la First Bentham Studies Conference celebrada en el University College, Londres, entre el 9 y el 10 de julio de 1979.

¹ The quotations belong to the "General Preface" by Professor Burns to the C. W.

² J. R. DENWIDDY, *The Bentham Project*, in *The Bentham Newsletter*, May 1978, 31-33.

of preparing the edition of Bentham's pertinent writings, that will enter the main *Project*, have shown a different line of study which will no doubt interest the Committee: it is Bentham's influence in the countries speaking Spanish or Portuguese. Obviously this influence acted mainly through second hand texts, the editions of Etienne Dumont and their Spanish translations, which did not, in some cases, express Bentham's authentic thought. However these editions were the vehicle by which the name of Bentham acquired great notoriety, and his ideas gained weight in several fields. The knowledge of these facts is up to this moment far from satisfactory: it consists only of the certainty of Bentham's correspondence with several Spanish and American statesmen and scholars and of *data* about the presence of his writings and of their having been put to some use. I believe a deeper investigation will reward us with surprises. An example: one of the important matters which should be carefully examined is the impact of Bentham's ideas on the shaping of Hispanic American jurists who achieved the codification during the XIX century. An outstanding case, assuredly the most important, is that of Andrés Bello, who was during a period heavily influenced by utilitarianism: he read and studied with extreme care Bentham's works, chose the Englishman's explanations for his own lessons of law and reached a perfect achievement in the codification of the civil part of law. Of course we can suppose that his thought went through a stage during which the influence of Bentham brings him to an intelligent legalist positivism, which leaves him ready to receive subsequently the influence of the German Historical School, because the success of the Chilean Civil Code is based on its historicistic realism³. In order to explain these facts I have asked myself a question: what was Bentham's juridical philosophy? I have worked on this subject and hope to be able to offer a correct answer in the future; it will not be a philosopher's answer but that of the historian of law which I am.

For the time being this short essay will deal with the knowledge of Bentham's work in Chile and how Andrés Bello employed it for the teaching of penal law.

2. *How Bentham got to be known in Chile.* Copies of the *Traité de législation*, published in 1802, soon reached America: Blanco White says that a friend of his who, before the Napoleonic invasion of Spain was a magistrate in an American country, star-

³ ALAMIRO DE AVILA MARTEL, *Bello y el derecho romano*, in *Estudios sobre la vida y obra de Andrés Bello*, Santiago, 1973, 79-97.

ted translating into Spanish the *Traité*s⁴. In spite of this I think that the real incentive to a wide knowledge of the juridical ideas of Bentham was caused in our countries by the reading of *El Español*, the monthly periodical published by Blanco White, who was personally acquainted with Bentham and was a friend of Dumont, and an enthusiastic admirer of their work. *El Español*, which forty seven issues make eight thick volumes, was published in London from 1810 to 1814. It was forbidden in Spain and circulated extensively in the Spanish American cultured groups. In September 1810⁵, Blanco White gives a short information about the proceedings of the House of Commons, as a model for the newly established *Cortes* of Spain, and immediately afterwards publishes a review of a book he calls *Tactique des assemblées politiques* by Bentham, not published yet, which manuscript Dumont has provided him; he praises its technique, much more useful for newly established assemblies, remote from the British tradition. Soon after, in January 1811⁶, he makes known a project referring to the basis for establishing the freedom of press which Bentham has given him in manuscript. In the issue of February 1814⁷ we read an extensive review of the *Théorie des peines et des récompenses*. Blanco White emphasizes the progress in the field of penal law that the ideas of Bentham show compared with those of Montesquieu and Beccaria, and translates into Spanish several pasages about punishment. Finally, in the last but one issue of his periodical April 1814⁸, he gives his own translation of the *Principes politiques et économiques sur les colonies*, section of the second volume of the mentioned work.

El Español reached Chile with promptitude. Several collections of this magazine are still available in libraries⁹, although since the end of 1814, when the patriots lost and the Spanish rule was imposed again, this and other printed matter were destroyed and their owners prosecuted. This period we call the "Reconquista" lasted till February 1817, when, after the battle of Chacabuco, O'Higgins was elected chief of the new state. During his government (1817-1823) we find the work of Bentham was well known: Camilo Henríquez, who had been appointed director of the Na-

⁴ *El Español*, VIII, 34, footnote.

⁵ *El Español*, I, 411-437.

⁶ *El Español*, II, 329-334.

⁷ *El Español*, VIII, 23-37.

⁸ *El Español*, VIII, 109-146.

⁹ The success of *El Español* was so remarkable, that Blanco White had to reprint in 1813 the first volume, copies of which are conserved in Chile.

tional Library, makes a list of urgently needed books, which includes: *Principles of legislation* by Jeremy Bentham, published by Dumont in French¹⁰. The same Henríquez was the editor of the first specialized cultural periodical there has been in Chile, called *El Mercurio de Chile*, which was published in 1822 and 1823. In the first issue, in a section of bibliographical news referring to "useful books", he mentions two by Bentham. He comments the *Principles of legislation* edited by M. Dumont in French. This "matchless book—he says—is being translated into Spanish. Doctor Villanueva had already done so partly, including the plan of the Panopticon, and the Spanish "Cortes" have recommended his translation to the government, praising it very much". Henríquez adds that "the project of Penal Code that the 'Cortes' are studying is based on the principles of Bentham, as far as they seem suitable to the Spanish state of affairs". He ends his comment by saying: "Bentham is one of the most illustrious jurists of England; we owe him several other very celebrated works like the *Tactique des assemblées législatives*, published in French". A review of this book is published in the second issue of the periodical; at the same time, in the notice about useful books he mentions the *Tactique* again, and besides the *Plan for a parliamentary reform* and the *Théorie des peines et des récompenses*. Apropos of these he comments: "Nothing is more useful than Bentham's works in the century in which the representative system and the correction of old wrongs make prodigious progress all round the world".

It has been said traditionally that Bentham wrote to O'Higgins offering to prepare a general code of law. We have not found till now this document: it may come to light sooner or later, or it may have been destroyed. Among Bentham's papers at University College¹¹ there is a long rough draught of a letter addressed to O'Higgins by him, containing the said offer. This letter must have been written in 1822. We know that in May of that year codification was

¹⁰ The list accompanies a letter of Henríquez to Manuel de Salas, of February 1st 1822, published by Raúl Silva Castro, *Los primeros años de la Biblioteca Nacional de Chile (1813-1824)*, in *Revista de historia de América*, 42, México, 1956, 394-397. The title that Henríquez mentioned, should certainly correspond to the *Traité de législation*, which first volume comprises a reduced edition of Bentham's *An introduction to the principles of morals and legislation*, published in 1789.

¹¹ U. C., Ix, Bowring, X, 500-513. A reference to the letter in Elie Halévy: *La formation du radicalisme philosophique. II. L'évolution de la doctrine utilitaire de 1789 a 1815*, Paris, 1901, 277. A Spanish translations of the draught, from the manuscript of U. C., has been published by Patricio Estellé in *Historia*, 12, Santiago, 1975, 375-381.

discussed in Chile¹²; O'Higgins, in his message to the newly established Assembly in July, suggests the adoption of the Napolen codes¹³. Thus, if Bentham's letter reached him, it must have been at the end of the year, since he did not answer it, maybe for lack of time: his government came to an abrupt end on January 28th 1823¹⁴.

During the following years, till 1828, find frequent mentions of Bentham in the press, both in the periodicals and in the abundant pamphlets. The Spanish translation of the *Traité de législation* by Ramón Salas had been published, in eight small volumes, in Paris in 1823. We have written evidence that in January 1826 the library of the "Instituto Nacional", the most important college in Santiago, owned those eight volumes¹⁵. The copies of Salas' translation are abundant in Chile: we find them in all the libraries of the XIXth century¹⁶; during decades it was a best-seller, frequently imported by the merchant, because it would surely be sold easily like the other books by Bentham in French or in Spanish translation.

At the end of the 1820's the presence in Chile of two men had been personally acquainted with Bentham deepens the influence of his ideas. In 1828 José Joaquín de Mora arrived. He had been a disciple, friend and correspondent of Bentham in Spain during a long time. The following year it was Andrés Bello who settled in Chile. He had a curious relationship with Bentham who was an enthusiast of the South American revolution and a good friend of Francisco de Miranda: en 1810, before Miranda's departure to America, Bentham had started to write a projet of a general code for the first independent government; Miranda handed the manuscripts to Bello, who lived with him at that time, so that he could edit and translate them into Spanish. The defeat of Miranda's revolution did not allow Bello to fulfill this task. It could be on the other hand, that Bello never started it, because Bentham might have

¹² *El Mercurio de Chile*, 1.

¹³ *Sesiones de los cuerpos legislativos de la República de Chile*, VI, Santiago, 1899, 28.

¹⁴ Among Bentham's papers, very well kept by himself and later in the British archives, this answer has not been found.

¹⁵ An inventory of the books belonging then to the Instituto is published by Domingo Amunátegui Solar: *Los primeros años del Instituto Nacional (1813-1835)*, Santiago, 1889, 689-691.

¹⁶ For instance in the library of the jurists Juan and Mariano de Egaña, that was the most abundant private library in Santiago during the first half of the XIX century, we find two copies of Salas' translation and one of the second edition of the *Traité*, Paris, 1820. Besides there are seven other books Bentham (*Catálogo alfabético i por materias de las obras que contiene la Biblioteca Nacional Egaña de Santiago de Chile*, Santiago, 1860).

never written anything but the forty one fragmentary sheets that Miranda had given him¹⁷. Bello used to remember, when he was very old, that his friend James Mill, with the scope of helping him in a period of hard poverty, perhaps towards 1815 or 1816, has entrusted him the difficult task of transcribing some manuscripts by Bentham¹⁸. Bello had no other direct contact with Bentham himself, but was extremely familiar with his books¹⁹ and with those of the philosophical, economical, historical and political inspirers of utilitarianism²⁰. It is important to remark it was Bello, not Mora, who introduced Bentham's doctrines in Chile in the juridical field, in a very efficient way: in the teaching of civil and penal law.

3. *A textbook based on texts by Bentham was prepared by Bello for his course of law.* The seven years from 1823 to 1830 were in Chile full of political arguments and of all kinds of institutional endeavours. It is necessary to remember that, in the field of superior studies, since 1819 the University had ceased to perform the function of teaching, which was transferred to the "Instituto Nacional" and to other private colleges. In 1828, José Joaquín de Mora opened the "Liceo de Chile", under the patronage of the liberal government of the time. It was a civil and military school, both secondary and superior including law studies, which were inspired by jusnaturalism. The opposition in 1829 founded the "Colegio de Santiago", with a group of French teachers, to enter into competition with the "Liceo". Andrés Bello was appointed director of

¹⁷ In 1862 Bello gave the manuscript as a present to Diego Barros Arana, in whose collection it is kept (Biblioteca Nacional of Santiago, Biblioteca Americana Diego Barros Arana, piso 2º, estante 25, vol. 17, forty one sheets). As was Bentham's practice, the subjects are written, rewritten and corrected several times. I think, as I say in the text, that the project was written to be offered to Miranda and entrusted by Miranda to Bello, because of the sequence of the dates of the events: (1) at the end of June 1810 the establishment of the Suprema Junta of Caracas was known in London; (2) Bentham wrote the manuscript during August and September (the dates he put in almost every sheet went from August 2 to September 16, 1810); (3) Miranda left England on October 10, 1810.

¹⁸ Miguel Luis AMUNÁTEGUI: *Vida de don Andrés Bello*, Santiago, 1882, 144-145. We don't know which manuscripts were those entrusted to Bello: the exams made up to now in the Bentham's archives, in search of samples of Bello's writing, have been unsuccessful.

¹⁹ Bello owned the second edition, Paris, 1820, of the *Traité*s, as well as Salas' Spanish translation, and six other works by Bentham (*Catálogo manuscrito de la biblioteca de don Andrés Bello*, Biblioteca Central de la Universidad de Chile. Colección de Manuscritos. I. Papeles de don Andrés Bello, N° 129).

²⁰ Among the books he owned we find the works of Locke, Helvetius, David Hume, Adam Smith (*Catálogo*, cit.).

the "Colegio" in January 1830. The most important theoretical subject he established in the curriculum of legal studies was the course of "Universal Legislation", for which he prepared a textbook, a manuscript of about hundred and fifty pages, which was dictated to the pupils. Its contents was considered strictly theoretical, in the sense it had nothing to do with the existing Chilean law, but was intended to create a serious juridical mentality. The course was divided into three parts, following literally one of Bentham's classifications: civil law, penal law and constitutional law. The first two parts of the textbook consisted of extracts from the *Traité de législation civile et pénale* by Bentham, selected by Bello, and the third by extracts of the writings by Benjamin Constant.

José Victorino Lastarria, who held later the mentioned chair and whose opinions regarding Bello are often not friendly, when writing about the sections of civil and penal law of the course says: "Fortunately for our education, Mr. Bello was a utilitarian; and although the points of view of this school are not considered suitable today . . . when he started teaching the science of legislation in our country, he could have done nothing better than follow the Theories of Bentham, whose school was then the one that had the most practical principles to guide the first steps in the science. This is the great merit of Bentham and his disciples"²¹.

When, in 1830, the political situation in Chile reached a permanent organization, both rival colleges, that had been entrusted to the two most capable men to be found in the country, disappeared. Mora pursued his activities in Perú. A new curriculum for the studies of law, inspired by Bello, was brought into practice at the "Instituto Nacional". The "principles of universal legislation" were considered the most important course in the second year. The appointed professor was Jacobo Vial; he and his successors, Ventura Marín (1836-1837) and Felipe Herrera (1838)²² used Bello's textbook in its integrity. José Victorino Lastarria did the same thing during the first years of this lessons, which lasted from 1839 to 1851. Later the third parte, referring to constitutional law, ceased to be employed because he published, in 1846, his own book on this subject. At the same time he insisted that the civil law should be taught together with natural law. As to penal law, following strictly Bentham, he gave it a wider importance. In 1847 he pu-

²¹ *Recuerdos del maestro*, in *Suscripción de la Academia de Bellas Letras a la estatua de don Andrés Bello*, Santiago, 1874, 79.

²² DOMINGO AMUNÁTEGUI SOLAR: *El Instituto Nacional bajo los rectorados de don Manuel Montt, don Francisco Puente i don Antonio Varas*, Santiago, 1891, 49-50.

blished the *Theory of penal law. An extract of the works by Bentham adapted to the requirements of the students of the Instituto Nacional*²³. Unfortunately I cannot give an opinion about the alterations Lastarria introduced to Bentham's extracts of the manuscript textbook edited by Bello, because I could not find a copy of this last one up to now, but it is probable that the variations, if there were any, were not very important because Lastarria did not put his name in either of the two editions of the book. This was employed for the theoretical teaching of penal law in Chile at least until 1875. This is the year when the new *Penal Code* is enforced, and the authorities ordered it to be used as the textbook of the course²⁴. A proof of the long time the extracts lasted is the fact that a new edition, without any variations, appeared in 1864²⁵. The book is divided in eight chapters, which titles are: I: Classification of the offences; II: About the mischiefs of first and second degree produced by the offences; III: Means of justification; IV: About direct preventive measures and repressive measures; V: About amendments in general; VI: About punishments; VII: Considerations about several types of punishments; and VIII: Indirect preventive measures.

I will now give some short examples of the contents of the book. Bentham, supported by the principle of utility, defines crime by its effects; he says: "crime is any act prohibited by a positive law, but according to the theory of legislation, any act that ought to be prohibited because of its evil results, could be called crime as well"; immediately he divides and subdivides the offences considering who is the victim of the mischief and its magnitude. He analyses the circumstances that bring to a lessening of punishment and those that bring to its suppression. Public punishment tends "to prevent the same offences being repeated, either because disposition is corrected by fear of punishment, or because the delinquent is disabled of his means of causing mischief". Following the

²³ *Teoría del derecho penal. Extracto de las obras de Bentham adaptado a la enseñanza de los alumnos del Instituto Nacional*, Santiago, Imp. Chilena, 1847, 51 + one p. Lastarria explicitly declares he publishes this text: "Comenzamos entonces a arreglar para nuestros cursos dos textos separados, el uno de derecho constitucional y el otro de la teoría del derecho penal... cuya primera parte apareció ya impresa en 1846. Al año siguiente publicamos también la *Teoría del derecho penal*, que es un extracto de las obras de Bentham" (*Recuerdos literarios*, Santiago, 1878, 242).

²⁴ By decree of 22 December 1874 the chair of "Penal Law" was suppressed and, in its place, that of "Penal Code" was created, which textbook would be the legal body that would be put in force on January 1st of the following year.

²⁵ Santiago, Imp. Nacional, 1864, 47 + one p.

principle of utility no punishment must be imposed when it is groundless, inefficacious, superfluous or too costly. One of the subjects more extensively discussed are measures of penal prevention called by Bentham "indirect preventive measures"; it includes all kinds of possibilities which are explained in seventeen paragraphs.

The sources of the Chilean text are volumes IV and V of the Spanish translation by Salas of the *Traitéés*, published in 1823. It is very short, less than fifty pages, which means that it is only intended to be a guide: the professor must add his own commentaries and examples. It must not be inferred that during the curriculum of law studies, only theoretical penal law was taught: until 1850 Chilean penal law was explained in the course of Spanish law and in the Forensic Practice Academy. An independent chair of penal law was created in 1853 in the last year of the career: here the theory was taught according to Bentham, followed by the law in force. Since then and till 1874 eminent jurists held the chair: Santiago Prado, José Bernardo Lira and Diego Armstrong. During Armstrong's period, the year 1868 is very interesting because two theses on penal law were submitted to the Faculty²⁶. Both asked that the studies be modernized, and criticized Bentham's extracts textbook, finding it insufficient and inadequate: it is the moment when the studies of law tend almost exclusively to professionalism. The first professor who used the *Penal Code* of 1875 as a textbook was invested the same year: he was Alejandro Reyes, a member of the Faculty of Law, who had been the president of the Commission for the codification of penal law. It is worth mentioning that during the first meetings of the Commission, Reyes proposed to use the Spanish Code of 1822 as a model: this was accepted²⁷. It is well known that Bentham's ideas and personal suggestions had a large influence in that Spanish Code.

²⁶ Both are published in *Anales de la Universidad de Chile*, XXX, Santiago, 1868.

²⁷ *Actas de las sesiones de la comisión redactora del código penal chileno*, Santiago, 1873, 3-4.