erkämpft werden mußten, ohne deshalb nun im Rückblick eine Anknüpfung an Elemente der Tradition ausschließen zu müssen. So wird die westliche Geschichte zum „*Beispiel* ... für Widerstände, Mißverständnisse, Erfahrungen und Chancen im Ringen um den Schutz der Menschenwürde unter den Bedingungen der Moderne" (131). Einer kulturessentialistischen Vereinnahmung der Menschenrechte für den westlichen Kulturkreis wird damit ebenso widersprochen wie einer Zurückweisung der Menschenrechte im Namen eines traditionellen Ethos auf seiten etwa islamischer Staaten. Der menschenrechtliche Universalismus wäre in beiden Fällen preisgegeben – und mit ihm der normative Anspruch der Menschenrechtsidee an eine jegliche Rechtsordnung. Diese aber kann, wie Bielefeldt im abermaligen Bezug auf Kant darlegt, „Legitimität beanspruchen nur als konsequente Freiheitsordnung, die ihrerseits auf die Würde des Menschen als sittlich autonomes Subjekt verweist" (183). So sind die Menschenrechte zumal gegen theologische Begründungsversuche als säkulares Recht zu behaupten, das nur *als* solches auch die Freiheit der Religion zu gewährleisten vermag (vgl. 184, 186, 188, 194).

Die Erwartung eines „overlapping consensus" in der Menschenrechtsdebatte dürfte freilich nicht nur im Blick auf das Thema „Recht und Religion" verfrüht sein. Daß deshalb gleichwohl nicht einem „Kampf der Kulturen" (Samuel P. Huntington) das Wort zu reden ist, dafür liefert die vorliegende Untersuchung gute, bedenkenswerte Gründe. So ist Bielefeldts *Philosophie der Menschenrechte*, wiewohl in ihrer philosophischen Optik vielleicht etwas einseitig auf Kant fixiert, zweifellos ein Buch, das dem interkulturellen Menschenrechtsdiskurs wichtige Anstöße zu geben verspricht.

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GUILLAUME TUSSEAU, *Jeremy Bentham et le droit constitutionnel. Une approche de l'utilitarisme juridique,* Paris: L'Harmattan 2001, 320 pp.

Guillaume Tusseau's book attracts attention for three reasons. First of all, it is a study of Jeremy Bentham's contested legal utilitarianism. Secondly, it purports to examine, and partly reconstruct a dimension of Bentham's legal theory that is not as well known as others: his constitutional theory. And finally, the third reason is that the book is written in the French jurisprudential tradition being a revised version of a D.E.A. dissertation in legal theory and philosophy of the University Paris X-Nanterre. But why Bentham, why constitutional law and why in France?

Why Bentham? His moral theory, especially his utilitarianism, have been discussed in depth over the past two centuries. Tusseau's point is not to revive controversies about Bentham's moral theory, but merely to "examine what can be a source of learning in Bentham's work on constitutional law".[1] From the beginning the author even concedes that his approach to Bentham's work is founded on an "attitude of critical sympathy".[2]

And *why constitutional law?* Bentham's jurisprudential writings are not as well-known as his essays in moral theory and even when they are, it is more for their insights into civil and criminal law than for constitutional law. Although he wrote more on the former, he also thought and wrote a lot on constitutional issues. Such considerations may be found in the *Fragment on Government* or the *Constitutional Code*, but they are also scattered in other essays. His writings on the declarations of fundamental rights, the separation of powers, electoral rules and political regimes are constitutive of a steady attempt to describe and account for what he himself delineated

1 G. TUSSEAU, *Jeremy Bentham et le droit constitutionnel. Une approche de l'utilitarisme juridique*, Paris: L'Harmattan 2001, 18. Note that all translations from French are mine.

2 TUSSEAU, note 1, 18

as constitutional issues. Despite the importance of these considerations in Bentham's thought, only a few have been addressed in recent literature, either in France or elsewhere. Moreover, a closer look has been given to those that are mainly related to political reform and not the more legal ones. According to Tusseau then, "a more complete and coherent presentation emphasizing the depth and explanatory value of Bentham's constitutional theory is still a 'missing page' for a full understanding of Bentham's work.[3]"

Such a comprehensive approach to Bentham's constitutional ideas is not only unprecedented, but also distinctive on account of the major reconstructive work it required. Some of Bentham's writings on the issue have indeed only been released recently and have never actually been published as a coherent whole. In his efforts to reconstruct Bentham's constitutionalism, Tusseau spotlights ideas that are so original both for Bentham's time and for today's legal theory that they greatly enhance the book's intrinsic value. As the author explains, "the aim of the present study is not to seek the true interpretation of Bentham's thought, but focus on his ideas in order to shed a new light on their qualities and flaws and re-think the legal phenomenon today."[4] Of course, as the author warns, such a project is meant to be incomplete given the breadth and complexity of Bentham's legal theory.[5]

Finally, *why write a book on Bentham's constitutional theory in France?* French theorists have not always been interested in Bentham's theory and, when they have, it was more in his moral theory. His legal theory then is still relatively unknown in France. A book was published on the question in 1970.[6] Thirty years later, the time has come to re-examine the validity of Bentham's thought for today's legal theory, both in France and elsewhere. This is precisely the task Tusseau has set for himself in this book whose scope is therefore truly international.

One of the book's essential characteristics is its *dualistic structure* –in the purest French tradition. It starts with a preliminary chapter on the foundations of utilitarian jurisprudence; in this chapter the author briefly summarizes the main tenets of Bentham's principle of utility, his theory of fictions, his rejection of the social contract tradition and, finally, his critique of natural law. This preliminary chapter is followed by the book's two main parts: the first addresses Bentham's expository jurisprudence and the second his censorial jurisprudence. The first part entails two chapters: one on legal rules in general and another on the constitution itself. This second chapter encompasses considerations on the concept of constitutional law and on the constitutional limits to sovereignty. The second part of the book, also in two chapters, addresses Bentham's censorial jurisprudence: first, his considerations on legal reform and, second, his ideas on constitutional politics. The first chapter has a first section on law's social functions and a second one on Bentham's critique of English law. The second chapter on constitutional politics is divided into two sections: one on democracy and the other on Bentham's utilitarian republicanism.

So many *interesting issues* in Bentham's constitutional thought are raised in this book that it is not possible to do justice to them all in such a short review. I have therefore chosen to concentrate on two interrelated issues: first of all, the fact that the constitution is a normative concept that has both a descriptive and an evaluative component and, secondly, the constitution's socially constructed nature.

Bentham's concept of constitutionalism entails *both a descriptive and an evaluative dimension*.[7] In its descriptive component, it

3 TUSSEAU, note 1, 20. This need is confirmed by the fact that a book on Bentham's constitutional thought was published in English at more or less the same time as Tusseau's: O. BEN-DOR, *Constitutional Limits and the Public Sphere. A Critical Study of Bentham's Constitutionalism*, Oxford: Hart 2000.

4 TUSSEAU, note 1, 24

5 TUSSEAU, note 1, 277

6 M. EL SHAKANKIRI, *La philosophie juridique de Jeremy Bentham*, Paris: LGDJ 1970

7 I borrow this opposition between the descriptive and normative components of normative concepts from B. WILLIAMS, *Ethics and the Limits of Philosophy*, London: Fontana Press 1985, 129, 141. For an application to legal concepts, see J. WALDRON, Vagueness in Law and Language, Some Philosophical Issues, (1994) 82 *California Law Review* 509f., 528

amounts to an integral part of Bentham's expository account of the legal system and its unified system of rules. Bentham even sometimes calls it the third branch of law after civil and criminal law.[8] The concept of constitutionalism is also, however, a normative concept. As such, it has an evaluative component and its true meaning can only be deduced from the evaluation of its function and justification and particularly its ability to create the greatest happiness of the greater number. Indeed, according to Bentham, a conception of law, and hence of constitutional law, can only be regarded as truly authoritative if it is the legislator's – if it is anyone else's, it will be taken as nothing other than a *potential* conception, thus revealing the normative nature of the concept.[9]

Tusseau refers to this duality of the concept of constitutionalism by highlighting how well it fits into Bentham's dual system of expository and censorial jurisprudence and his unified account of jurisprudence as a whole.[10] For the purpose of exposition, the author separates those elements,[11] but it is important to remember that they belong together in an effort to offer a complete account of law and the constitution. It is in fact something Ronald Dworkin emphasizes when he says that Bentham was the last legal positivist to offer a complete theory of law entailing both a descriptive and a normative dimension. This specificity in Bentham's account has also led some authors, like Gerald Postema, to write that Bentham was among the first of a new and more elaborate kind of legal positivists: normative positivists.[12] Normative positivism founds legal positivism on a normative justification, be it utility or social coordination. Tusseau himself notes that "Bentham's constitutional writings are deeply normative, thus including the teleological aspect in the definition of what a constitution is."[13] He observes, for instance, that in Bentham's account "constitutional law is the branch of law which determines, in the political community, the subjects of the powers and duties attached to the exercize of superior normative functions and which sanctions this exercize on others in order to ensure the greatest happiness of the greatest number."[14] It is this normative aim inherent in Bentham's conception of constitutionalism that is then reproduced in all the layers of the legal order, thus enabling the constitution to play a unifying role.[15]

The second interesting point addressed in Tusseau's book is the *socially constructed rather than imperativist nature of the constitution*.[16] With this conception Bentham steers clear of the consequences of absolute imperativism that are often attached to legal positivism. Indeed, the people's own will is reflected in the constitution thanks to democratic procedures. But by avoiding the imperativist Charybdis, Bentham has not yet defeated the Scylla of natural law. He manages to do this by defining constitution-making as a social construction process that is both nourished by the need for social coordination as well as nourishing that need, rather than being bound by pre-constitutional duties to coordinate. In this sense, Bentham's constitutionalism can be compared to Hume's dialectical form of conventionalism.

The originality of Bentham's concept of constitutionalism is revealed in Tusseau's account of how the constitution sets limits to the sovereign *qua* law. This was one of the difficulties faced by the legal theorists of his time such as John Austin. According to them, a constitution understood as law, i.e. the sovereign's commands, could not bind the sovereign himself. For Bentham, then, if the constitution was the result of pure imperativism, it would be hard to see how the people could bind itself; the law would be nothing else than what the representatives of the people imperatively said it is. If, however, the constitution is also justified to them, and to what Bentham calls the 'Public Opinion Tribunal', as something that promotes their interest in stability and coordination, it is easier to see how the people can bind itself to follow the constitution *qua* principle of order of social reality.[17] It is only in this way that citizens can both "obey constantly and resist freely", to quote Bentham. In this sense, Bentham's constitutionalism is truly innovative; it has more in common with the Habermasian inter-subjective justification of law's normativity than with the command theory of law *en vogue* at his time.

8 TUSSEAU, note 1, 137
9 J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in: BURNS/HART (eds), London: University of London, The Althone Press 1970, p. 294
10 TUSSEAU, note 1, 172, 279
11 TUSSEAU, note 1, 25, 79
12 See G. POSTEMA, *Bentham and the Common Law Tradition*, Oxford: Clarendon 1986, Ch. 9; J. WALDRON, Normative (ethical) legal positivism, in: J. COLEMAN (ed.), *Hart's Postscript*, Oxford: OUP 2001, 410ff.
13 TUSSEAU, note 1, 143
14 TUSSEAU, note 1, 143. Note, however, that the author decides on page 144 to expel the normative elements from that definition, although not very consistently since he refers to the 'purpose' of constitutional law on pages 147 and 172. He justifies this choice by reference to Bentham's legal positivism, but this argument ignores that Bentham's positivism is normatively justified,.
15 TUSSEAU, note 1, 147
16 TUSSEAU, note 1, 278

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17 TUSSEAU, note 1, 158, 191