On Authority's Primacy over Power: Putting Authority into Perspective

Jean-Pierre Cléro (Université de Rouen)

Nomography as the science of authority

Foucault was often praised because he understood that the exercise of power was not only vertical, as in the case of political sovereignty but also horizontal and that it permeated all spheres of civil society. Supposing this was a discovery he made about power, the same remark could not be applied to authority, for the issue of authority was quite early torn apart between very diverse registers, even when it was studied from the point of view of political philosophy. Thus, when Hobbes explained the political contract as being the transmission of a right to a sovereign in Book I, Chapter XVI of *Leviathan*, he analysed authority in terms that largely extended beyond the political sphere: "Of persons artificial, some have their words and actions *owned* by those whom they represent. And then the person is the *actor*; and he that owneth his words and actions, is the author: in which case the actor acteth by authority." Authority is not a quality but the designation of a being, which does not necessarily have any empirical existence, but which is supposed to have done or said something that binds all those it represents. It is easy to conceive the legal and political interest of such a notion that makes it possible to act in the name of others, but it is clear as well that that notion extends far beyond the legal and political spheres. The fact that authority is collected in one subject, or even a subject of subjects, that is a community, is not its only basis. As Hobbes said, "There are few things, that are incapable of being represented by fiction. Inanimate things, as a church, an hospital, a bridge, may be personated by a rector, master, or overseer". He at once added that "things inanimate, cannot be authors … such things cannot be personated, before there be some state of civil government". Very soon, though, philosophers who had read Hobbes - British ones in particular - strove to show that he was wrong and used the term "authority" about texts in an extra political sense and not only because they were sacred, as well as

about images, paintings,[1] sometimes about objects that were quite trivial,[2] about ideas, representations,[3] sentiments, and even animals. Hasn't such an incredible generalisation of *authority* relegated the concept to the rank of a simple metaphor? Or has such an extension, on the contrary, allowed the legal and political use of the concept to be specified to the point that, as Foucault's analysis of micro-powers forcefully shows, the Moderns were sometimes able to open it onto the classical problem of its opposition to freedom?[4]

I. Contradictions and extension of the notion of *authority*.

At the precise moment of the XVIIth century when the notion of *authority* seemed to tighten to those of *mask* and *delegation* through that of *person* stood the very principle of the extension of that notion. Hobbes established authority as a substitute for the non-existence and unreality of the person and the subject. Acts, words, thoughts and sentiments may be said to exist, but the being they are attributed to does not necessarily exist. The fiction of the *author* takes the place of the lack of reality of the *person*. The philosophers who, after Hobbes, analysed authority in terms that were close to his, always at the same time questioned the reality of the subject, that is of the psychic unity that one cannot but suppose if one wants to

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1 *Of the standard of taste*, in: *Essays and Treatises*, Thoemmes Press, Bristol, 2002, vol. I, pp. 247-248.

2 *Treatise of Human Nature*. In that treatise, Hume talked of a compound object being called one thing in different ways (I, IV, III, Selby-Bigge, Oxford, Clarendon Press, 1978, p. 221).

3 *Treatise of Human Nature*, Selby-Bigge, I, III, IV, p. 83. Hume mentioned "the authority either of the memory or senses".

4 This is the case, for example, of D. Deleule, in his interview with F.P. Adorno, *L'héritage intellectuel de Foucault*, ("Foucault's intellectual heritage") in: *Cités*, PUF, Paris, 2000, nb 2, p.102: "[...] when he radicalizes the issue of power, Foucault seems to go beyond the framework of the classical political thought and resort to a sort of social anthropology, but this is to better come back to the political sphere afterwards and, in his own way, to the traditional issue of relations between authority and freedom, under new conceptual forms". How could one not think of the discourse "On the Origin of Government" written by Hume when listening to or reading those two excerpts by D. Deleule ? (See Hume, *Quatre discours politiques*, Centre de Philosophie politique et juridique, Université de Caen, 1986, p.145).

organise the social, legal and political world. The person does not exist, but one may allow it some reality by way of a play of fictions. Such a tearing apart, which is present in the works of almost all the authors who do not admit the substantiality of the subject, though they may strongly oppose one another in some other way as Hobbes, Hume, Kant, Bentham, and Stuart Mill did, is the source of a multiplicity of contradictions. The question now is whether such contradictions may be solved. There are mainly three of them, and we will study the last one more particularly.

The *first* one of them consists in exposing, under the mode of a fiction that is still to be realized, what is condemned on the level of facts and reality. Though the subject is endowed with no reality, it is still possible to *pretend* it is and to demand that some aggregates of acts, thoughts, words, or sentiments be structured into units in order for the law to be enforceable and the political organisation to be constituted. This raises the problem of the point up to which the tearing apart of things as they are and of things as they are supposed or wished to be may be bearable. Can the impossibility for each individual position to coincide with its empirical being be transformed into a play of rights and duties? Authority is given the strange task of registering such a difference and reducing it at the same time, while the individual or some other being is supposed to become that sort of entity that it was before demonstrated did not and could not have any existence. Is there any sense in asking beings to become what one knows is impossible? The Kantian trick which consists in projecting a concept that at present contains contradictions, as though it were a regulating idea, does not have any other consequence than that of deferring their resolution. But is it possible to solve a difficulty by indefinitely postponing it? Deontology may not solve all the aporias of ontology.

The *second* contradiction still better reveals the structure of authority. Though indeed deontology may sometimes be established as a sort of authority that would solve the contradictions of ontology, this is not done through a continuous movement that would conjure away the difference that exists between *being* and *the obligation to be*, *to be* and *ought to be*, but rather by invoking values that are different from those that led to the conflict in question. That there are persons may not be *true*, but *order* or *social organization*, that is, justice, which is worth truth, demands that there be and

that they be imposed, so that the author of an act or the possessor of some good be known. Resorting to authority always implies the balancing of two types of values, one of which is supposed to solve the difficulties of the other, or overcome the conflict.

Authority, which, it is easy to see, extends, through the previous contradictions, to all sorts of domains, still further extends when applied to objects. How indeed could the conditions of unity, identity and substantiality, which are never but ideal, or even verbal, be different for the object when they are applied to the subject? It is necessary now to study the tension (I point as the third contradiction) that exists between *symbol* and *thing* within authority more thoroughly.

II. What does the authority of a thing such as an image, a text, or some even more trivial object, consist in?

It is not physically that a thing exerts some authority. An image may exert some authority on someone who agrees to submit to its law or who is at least ready to do so. Authority is a symbolical force. This does not mean it may not produce some intense effect on our intelligence, affectivity, or sensitivity. It may even move us much more violently than some force that produces its effect without it being possible to escape it. A certain passivity lies in the submission to authority. While one accepts it in a way, it is not possible though not to submit oneself to it. Conversely, reality does not exert any force without leaving some kind of room to manoeuvre. In their own way and on their level of reality, things exert some authority too. One is submitted to them as to a sort of rule. More precisely, authority and reality work together as two rules that are at the same time different and dependent on one another. One can always take risks or give oneself some room to manoeuvre as regards reality, but one does not then master the sanction of being in the right or in the wrong by incurring those risks. Authority is the combination of initiative that the object (the situation) lets me have or that I take and the necessity I meet from the moment I have taken it. Authority is the couple made of the hold I have on the object and the obligations it then confers on me. An object exercises some authority on me when it is separated from me according to rules or laws that ensure its own autonomy. It plays its own part in a whole in which I have had and have a role to play.

Imagine that I want to draw a figure in perspective. I am free to present any side of it, free to decide how I want to highlight it by putting some distance between it and the surface of the painting, free to choose the point of view, the vanishing point, the source of light, but once those are determined, some implacable necessity comes into play. The sides that apparently vanish way from the surface of the painting do so regularly. If I do not follow those rules of presentation, which are not the rules of things themselves, the sides lose all vanishing quality. I am not painting a figure anymore, but doing some inlay work. According to those laws I cannot decide upon, colours must change on the sides of a thing that vanishes away towards the horizon. I could not possibly prevent things from becoming increasingly evanescent on a painting as they recede in the distance. From the simple freedom of some "desire to represent" one has gradually moved to rules that are more and more insistent and compel me to abide by some definite kind of practice without which what I am doing or intended to do would lose all plausible coherence. For the work to be detached from me and live its own and universal life, I have to observe rules which I have not decided upon. This is the condition for it to escape from me and to exert some authority on me. A series of intricate plays to which I have given life by wanting to present some story, as one used to say in the XVIIth century, are triggered one after the other on the side of the image, the multiple planes of which recede and melt into one another, thereby giving intricate freedom and necessity in a play in which each decision has determined implications it does not control, as well as on the other side of the image, since my decision is taken into a system of rules that are increasingly constraining. For the image that is authoritative to live its own life and to stand out as such, some rules are needed to ensure its separation from the will which has decided it.

We have now come to the point where it is possible to analogically implement the idea of nomography.

III. The idea of nomography.

There is a comparable relation between, on the one hand, laws and those who decide them and above all those who write them, who are not necessarily the same people, and, on the other hand, engravings and those

who make them. Those who are submitted to the laws are also related to them in a way that is similar to that which exists between spectators and the engraving they look at.

Indeed, as rules limit the drawer's creation, the writer of laws, which may or may not have been asked for by a democratically elected assembly, meets the limits of existing rules and principles. Just as someone looking at a drawing is at the same time submitted to the will of its creator and to the rules that govern it, whoever considers laws is sensitive to the impact of a will which imposes something on them and to the limitation, by the rules, of its representation or of its writing.

Here is the moment to indicate the place and function Bentham gave to nomography,[5] for it allows a criticism of authority and of its permeating character more interesting than the questioning of micro-powers, which, with some reason, still implies that some punctilious will is minutely working in each of our actions. The most interesting part of Bentham's philosophy is not that in which he conformed to that bureaucratic delirium that exerts its power on bodies to better straighten them up. It lies more in the displaying of a sort of unconscious law, which sometimes makes them express the contrary of or something different from what they intended. It is clear that authority lies in that unconscious, that it is as much in the concealed part of the will of the legislator as in what it seems to explicitly express, that the concealed part is much less chaotic than one would think, and that it is made of symbolical elements which are extremely regulated. To decipher such a symbolic system in order to know what we bury without knowing it, that is without wanting to know, such is the task of nomography, which is today too easily assimilated to linguistics,[6] though it is, much more generally, the taking into account of the unconscious of laws.

Understanding what laws would be good for the people is completely different from beginning to have an idea about them, from wanting them

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5 Today it is sometimes called *legistic*, which refers to the art of writing laws that positively govern societies.

6 The very few works in that field today, such as Frederick Bowers', are essentially linguistic. See in particular his work *Linguistic Aspects of Legislative Expression* (Vancouver: University of British Columbia Press, 1989).

and knowing how to write them. The legislator certainly understands things themselves. He knows the reasons for having laws, can and must explain the necessity of them, as Bentham insisted, but it is a completely different task to give them the appearance that will make them produce the effect he wants.[7] He is as powerless in that matter as whomever he imposes laws upon. The art of the legislator is to the nomographer as the knowledge of the anatomist is to the drawer who knows the appearance of bodies. The nomographer is good at writing. This does not mean however that his art is essentially intuitive and must remain without rules.

Let us try to formulate some hypotheses on a nomography that would be a science of horizontal authority, by which I mean of the least illusory kind of authority, the authority the assertion of which is the most real, for the other one, the vertical one, that of sovereignty, may well be some phantasm perched on stilts. Discipline is still the most obvious aspect of such authority, since it is stated through regulations. There exist some aspects of authority which are not expressed with the same minute clarity. The real Panopticon is not some picturesque outgrowth of the social sphere.

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[7] *Nomography*, Bowring, III, p. 242: "The legislator, and not the individual, is indeed the person by whose feet the dust is raised; but when it once raised, and all the time it is raising, his own eyes are not less effectually prevented from enabling him to see his way through it, than the eyes of those upon whose back his commands and prohibitions, burdens and restraints and punishments, and all his snares and entanglements, are rained down. Hence, not only is the individual prevented from knowing and understanding what on this and that occasion the meaning of the legislator is, or was when he wrote, -but in a certain sense the legislator is himself prevented from understanding what he himself is doing while he writes. What may or may not have happened to him is, to know what is own meaning, wish and intention is at the time: but that which is sure to happen to him is, not to know what his own wish and intention would have been, if throughout the whole field of action of which he has taken possession, his conception of his subject had been at the same time correct and complete to the degree in which it ought to have been so, -and might have been, and perhaps would have been, if the obstructions which the accustomed system of disorder raised up before him as he advanced had been removed, and his intellectual faculties had received the comfort of those helps, which, on every other part of the field of mental action, are framed, communicated, received, and employed in such salutary abundance".

It is a well that is "working within the law"[8] for the effective mastering of things and men but only aims at becoming invisible in doing so. Now is the time to analyse how authority is inscribed at the heart of the symbolical system.

IV. Nomography as the science of authority.

Nomography is to laws as ichnography is to images. Mistakes in nomography are as serious, and their consequences even more so, as mistakes in ichnography, for laws are then disassociated from one another and stand against one another, as paintings are dislocated when the rules for their making are disregarded.

Nomography stands at the meeting point between three spheres. *First*, there is the law the legislator wants to establish. It is not because one wants to write a law that that law will be written as one wishes it to be.[9] This point is well known. Rousseau underlined it in *The Social Contract* (Book II, Chapter VII). One may want one's good and we may grant Rousseau that one always wants it, but we also have to grant him that one does not always see it, that one does not always know how to give it the best form. Rousseau assigned that place of the legislator to that man who stood, if not above the other men, at least above the laws, precisely because he gave men their laws. *Then* comes the situation that is to be regulated and organized. No situation is at once legal. It has to be qualified or determined, as well as its objects and its anchoring points, which are always fluctuating, and which are made of our morals, our sciences and our ideals - which lead to contradictory attitudes that have to be held together and made as coherent as possible. The ontology of laws is of course relative in that sense. Such a relativity is reduced only by means of the illusion produced by the inertia of laws that are already established, the consequence of which is that new situations are thought on the basis of older ones, because we don't know how to, cannot and don't want to constantly reform whole parts of the legal

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8 As Bentham so well says.

9 In that sense, the *common law* detects a problem that did not exist only in England up to modern times. Written law may be full of surprises because of the distance it stands at from the desired law.

system. There exist no more rules to enforce those rules than to invent them.

Last stands language, which, because of its double chaining of signifiers that are stable and of signified that are impossible to fasten, is to be found in all the previous contradictions, while adding some of its own. The passing of time creates all sorts of distortions between a signifier and its signified. Unavoidable ambiguities develop because the constituent parts of signs do not share the same history. It is interesting to note on that point how, to take a contemporary example that anyone will be familiar with, the 1994 French laws on bioethics use the notion of *person* in all sorts of meanings, thus constantly playing the one against the other and making room for the most diverse forms of hypocrisy. The different modifications they have undergone have not changed anything much as far as the stability and precision of their expression is concerned. Thus the notion of *person* seems to be valued as a principle and is in fact used to cover all sorts of actions that go against it. It may indeed be that the forces and desires that lead to hypocrisy are more important than the apparent check some Kantian sense of the notion keep them in. Then, why cannot they be expressed in less covert a manner?

One may indeed dream of some legal system which would exactly express what the legislator desires, which would mask nothing of reality, which would clear up all ambiguity, all obscurity, and prevent all drifting apart of signifiers and signified. However, one can only tend towards such a result, from which one is distracted by the simple agitation of grand principles which, though presented as guidelines, only add to the existing confusion. To impose such a legal system, the transcendence of gods that Rousseau mentions in the famous Book II, Chapter VII of *The Social Contract* is needed. But by definition gods are not subject, as men are, to a particular point of view on things. Instead of the Rousseauistic phantasm of a legislator who invents the law, challenging all perspective and all finiteness of point of view, the stress must be laid on language and on the finiteness of whoever must write it and in so doing let the totality the legislator dreams of escape. There is not only one way of writing laws apart from which all the others would be bad ones. Each way presents advantages and drawbacks, and it may not always be possible to establish a hierarchy among them. Not one of them gives the key to nor the plane of all the points of view. As perspective gives the illusion that it is

possible to have a multiplicity of points of view, and not only the one we seem to be strictly attached to, the written law seems to give to whoever reads it or discovers it the illusion of myriad situs (observation posts) from which one could have a regulated totality at one's disposal. But such a totality is some unavoidable phantasm that rises from the writing of laws. In fact, we do not have it. Though that writing gives the impression that there exists some sort of universal sovereignty, it could never realize it, and anyway it only aims at it as some illusion for the reader.

Rousseau is once again obsessed by the vertical play of the forces of command. He does not see the forces that are at play horizontally and which support the writing of laws. For the rules that are concealed in order for the law to escape those who use it and whom it dominates, as Rousseau asked for,[10] are still more complicated than the laws on perspective which regulate the separation between images and their spectators and even their maker. They are always expressed in a particular language which makes some points of view possible while forbidding others, thanks to the syntax and semantics that inform each one of them.[11] The idiosyncrasies of their language are particularly difficult to detect for those who speak it. Here is the reason why it is so difficult to translate laws into another language than the one they were first enunciated in.[12] Authority may easily stand and be

[10] Everybody knows the famous sentence Rousseau wrote in a letter to Marquis de Mirabeau: "Here is, in my old ideas, the great problem in politics, which I compare to that of the squaring of the circle in geometry and to that of longitudes in astronomy, that is, finding a form of government that would put laws above mankind" (*Complete Works*, Anguis, Paris, 1827, T. XXVI, p.181).

[11] Bentham noticed it in Chapter VII, Paragraph 5 of *Nomography*.

[12] This is a point Stuart Mill noted on the subject of the British colonization of India and which, very early, he saw was a source of violence. "The first English conquerors of Bengal, for example, carried with them the phrase *landed proprietor* into a country where the rights of individuals over the soil were extremely different in degree, and even in nature, from those recognised in England. Applying the term with all its English associations in such a state of things; to one who had a limited right they gave an absolute right, from another because he had not an absolute right they took away all right, drove all classes of people to ruin and despair, filled the country with banditti, created a feeling that nothing was secure, and produced with the best intentions, a disorganization of society which had not been produced in that country by the most ruthless of its barbarian invaders." (*A System of Logic*

concealed within the idiosyncrasies of languages which impose themselves upon those who speak them without their knowing it.

The deep difference between Bentham's nomograph and Rousseau's legislator lies precisely in the utilitarian's relinquishing the religious discourse on the legislator's art which Rousseau resorted to in a conditional mode and without apparently believing in it himself. The question is obviously not for men to have gods make laws. Laws are at once a relation of domination between men. The function of legislator gets its meaning from that relation of command between superior and inferior.[13] Rousseau was right in the sense that whoever makes the law is himself subject to no law. This does not mean that he does not belong to mankind anymore and stands above it, but it implies a sort of vertigo, of relation to the void which has to be filled without it being completely possible. The transcendental point of view is only represented by the laws as their imaginary consequence. The formulation of the law is always partial and its universality can never be but feigned. The nomograph, far from starting from religious chimeras, works in the space that separates the phantasms of universality and the particular finite reality which characterizes legal writing, as any kind of writing. He comes to terms with that unavoidable partiality. What gives the impression that only a god could write laws is the space of the values the laws deal with, which is a space that may be called "Zenonian"; that is, lacking any common denominator quite ascribable to them. Between one value and another, there is not always some link, some meeting point, or some relation. Is not the play of laws to make believe there is one? Thus one sees that our analogy with perspective was not much more than approximate, for, because of some of its qualities, the Zenonian space is

Ratiocinative and Inductive, University of Toronto Press, Routledge & Kegan Paul, 1974, II, p. 692-3). One will find it surprising that the emphasis was not put on the question of language in criticisms of colonialism with as much insistence as one would have expected. In any case, any confederacy of States has to face the problem in all its harshness.

13 *Pannomial Fragments*, Bowring, III, 223: "A command is a discourse, expressive of the wish of a certain person, who, supposing his power independent of that of any other person, and to a certain extent sufficiently ample in respect of the subject-matters - to wit, persons, things moveable and immoveable, and acts of persons, and times - is a legislator".

the exact opposite of the perspective space. The latter is irenic, continuous, without rift, generously offering myriad points of view. The former is atomic, allows some void and crossings, and is unable to record where they happened. The space of the law is probably not "Zenonian", but it has to do with that of values, which is.

V. Authority of persons. Authority of things.

It is time to come back to what our detour by objects enabled us to gain on the notion of *authority*. We have suggested that the rules of perspective should be looked for in things -texts, institutions, constitutions, etc. Authority is indeed the art of imposing rules by putting oneself between them and men, or the art of using those rules to slightly modify them, to make mankind reach another stage or to change political and social configurations. It can have that role, however, only by presenting itself, at least partially, as authority of the thing. The mask of the thing is what best allows the symbolic sphere to hide and ensure the movement of reversal which seems to be necessary to whoever considers it. However, if, under the figure of the thing and benefiting from its stability, authority manages to impose itself upon us, it is certainly because, in a way, any symbol is a thing. More deeply, it is also because the thing can be constituted as such - whether it be felt, perceived, or recollected, whether it be directed at our understanding or at our will - only through the symbolical dimension of the expression and because that expression is itself hidden, as a whole line of audacious thinkers have shown after Hobbes and Locke.[14] If the constitution of things, which hides the really hierarchical relations that exist between the actors in human affairs, is mainly symbolical, it is because a symbol can be opposed to itself, turned against itself, can produce the screens and separations the authority needs, while hiding it does so.

It was no accident that in the XVIIth century the analysis of *authority* became decisively centred on the notion of *author* with Hobbes. It was for

[14] As Berkeley, Hume, Bentham and Stuart Mill. It is no hazard that it was the same philosopher who taught the deeply symbolical character of perception and reflected on authority in *Passive Obedience* . See Berkeley, *An Essay Towards a New Theory of Vision*, Paragraphs 46, 47, 49, 50, 51.

formal reasons and for reasons belonging to language that the attention focused on what seems to be a particular "content". Authority is the power of the symbolic under disguise which offers itself through the still deceived figure of the author. Undoubtedly, to Bentham, the notion of *author* appeared as a critical gain when compared to such a notion as *causality*,[15] but the criticism of authority must include the examination of the strategy of "the war of words" in the political field on the one hand, and on the other hand, of nomography in the legal field. On that point, as on the other, the story is only beginning.

Some thirty years ago, M. Troper declared, "The different authorities are subject more to what one may call constraints, that is impossibilities of actions, which are correlative to their insertion into a complex system, than to obligations".[16] We must think now that those "physical impossibilities" which authorities sometimes seem to come up against are more symbolical than they may seem, and that true authority rather lies in those symbolical constraints. It is true that values or their authorities are ignorant of one another, as Pascal showed in *Provincial Letters* by making only the values of force and truth play, thereby leaving some space which, because of its anonymity, seems to be that of things. It is necessary though that, under the authority of things, one should learn how to detect the authority of men, or, more precisely, the mask of authority that men, in an endless struggle, impose on one another. The problem then becomes that of the working of the Zenonian space of the intertwining of values or of their authority.

VI. On the notion of *law* changing according to whether it is thought of as what the *sovereign power* produces, or whether, as we recommend, it is considered from the angle of *authority*.

We would like to finish by more generally answering the question which prompted that research on nomography and the necessity of asking legal and political questions in terms of *authority* rather than *power*. Why should one start with the issue of authority? The simplest way is to study how law is defined and to consider what advantage there is to start from the

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15 See below, note 29.

16 *Pouvoirs*, nb 4, 1978, p. 62.

authority of law rather than from the power that is supposed to establish it. Through such an amplification we will see that nomography is a piece of a much larger whole.

Hobbes, who has been so helpful to us in determining what has force of law, is of no use to us anymore in the political reflection we intend to have now. When defining law and what its authority consisted in, what really had force of law, Hobbes tightly linked the authority of the law to the power of sovereignty. Closer to Bentham's conception, the enlarged conception of authority now allows us to loosen the links between law and sovereignty, or, more precisely, to show that the links between sovereignty and law are much less simple than what contractarianists imagine, or want us to believe, in their ideology of the promotion of the state, of a state that focalizes and concentrates all aspects, not only of politics, but also of society. Whatever the reasons which led to such promotion of the state, and which were probably due to the fear of civil war,[17] it is a fact that such a promotion prevented Hobbes from drawing all the political consequences from his remarkable analysis of authority. The law is not only and exclusively the matter of sovereignty, though the latter is obviously and essentially linked to the definition of it. Undoubtedly, Bentham's contribution was to see very early how far Hobbes' analysis could be used to present a new meaning of the law.

Though his analyses were not as rigorous and systematic as Bentham's, Hume had already adopted the enlargement of the notion of *authority* on the one hand, and criticized of contractualism on the other. Concerning *authority*, Hume had already seen that all that could appear as a relatively stable structure and could impose itself on the subject(s) as having in its own consistency to order their behaviour was susceptible of having some authority. *Authority* has no homogeneous nature. It implies a great heterogeneity of ingredients, even if such heterogeneity is forgotten in the effect that is produced and even if the subject submits to it without much considering what it is made of. The Humean result that all authority is

[17] The worst of evils is civil war, Pascal said (*Thoughts*, Br. 313), as if the essential of politics consisted in an apagogical deduction from that maxim. In any case, he deduced from it that the choice of governors by merit must be avoided at all costs.

intertwined, interwoven - be it that of the object of a perception, of a sentiment, of a discourse or a fragment of discourse, or of an institution - which was up to now in keeping with the analysis made in *Leviathan*, is less in line with it as it extends to the political sphere, and shows that one does not have to believe in the impression of unity created by the political authority or the law. On that point, Bentham followed Hume's extension, as well as, with even more reason if it be possible, on the second one. It is impossible to represent the link that unites a people to sovereignty, or a member of a people to another, as a contract, in other words, as some balance that may simply be struck between freedom, equality, interest and utility. The historian of England had noticed, or at least believed he had, the effects of such a simplistic conception of politics among the English Revolutionaries of the middle of the XVIIth century. Bentham saw the effect of such abstractions among French Revolutionaries, who wanted their simple procrustean ideas to shape the whole civil society. He saw a direct link between the different versions of the human rights, a legal system written as a metaphysical treatise, and the guillotine's severing of heads.

Deliberately breaking with Hobbes', Rousseau's or the French Revolutionaries' theories on sovereignist contractualism, Bentham started to analyse the law without prejudices, that is without presupposing any knowledge of it that would have obstructed its study from the beginning. Most authors, British ones (Hume excepted, for he had at once denounced the pernicious character of contractualism) as well as continental ones, as Rousseau, though they differed on other points, analysed law as the direct expression of sovereignty, the latter being or not being identified to the people. What they said was not wrong, but their discourses contained the knowledge of what they were looking for from the beginning, and only feigned science, which was quite a drawback. From then on, their alleged knowledge became some sort of ideological funnel.

Hobbes' definition of the civil law in *Leviathan* (Chapter XXVI, 2^{d} part)[18] is well known. It "is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient

[18] It is clear that Bentham read that chapter of *Leviathan* before he wrote his own chapter *Of Laws* on the definition of laws.

sign of the will, to make use of, for the distinction of right, and wrong".[19] In Hobbes' eyes, it was clear that *legislatorem in omni civitate eum esse, sive homo sive coetus sit, qui summam habet potestatem*.[20] The whole chapter was written to show that there is no other source to the authority of the law than sovereignty. For example, if one thought that the force of law is linked to its length of time, one would be quite mistaken. In reality, it is linked to the silence of the supreme power of the time, who has let that law be and can repeal it at any time by means of another law. No value, not even that of truth,[21] can be established above civil law to dominate it or judge it.

Rousseau, who did not follow Hobbes' thought on all points, however considered law to be the vivid expression and movement of sovereignty, but he thought that it was the general will which was sovereign and imposed itself to all the citizens because it concerned them all. Law is the act by which the people rules the whole people, in such a way that *la matière sur laquelle on statue est générale comme la volonté qui statue*. Legislative power is the supreme power, but though the people, who are subject to the laws, must make them, they do not always see the good they desire, and their judgment is not always enlightened. That is why they need some guide who is the legislator. There appeared the discrepancy, though Rousseau tried to minimize it as much as possible, which Bentham particularly theorized.

Wondering on what transformed a text into law, on what made force of law, Bentham deliberately turned away from those fictions, which, in this case, were all fallacies. Without fearing to discover the mixed character of what gave law its authority - his reading of Hume encouraged him to do so - he explored the false unity of the notion and examined its structure, as Hume studied that of a sentiment or of the structure of a mental mode of operation, be it an individual or collective one, in *Treatise*. As early as in *An Introduction to the Principles of Morals and Legislation*, which was written and printed at the beginning of the years 1780, but only published in 1789,

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[19] Or, in Chapter XIV in *De Cive*: *Lex est mandatum ejus personae, sive hominis sive curiae, cujus praeceptum continet obedientiae rationem* (*Opera Philosophica Omnia*, (Bristol, England and Sterling, USA: Thoemmes Press, 1999), p. 313).

[20] *Opera Philosophica Omnia*, *Leviathan*, p. 197.

[21] *Doctrinae quidem verae esse possunt; sed authoritas, non veritas, facit legem* (*Leviathan*, in *Opera Philosophica Omnia*, III, p. 202).

he insisted on the fragmented structure of the law, which notion he closed his work on.[22] *Of Laws* only confirmed such a fragmentation and it extended it even more, as four points of analysis were added to the already existing four.[23] First of all, however, we need to make a few remarks on the

[22] Chapter XVII, Paragraph 23 of *An Introduction to the Principles of Morals and Legislation*, Bentham wrote, "The circumstances that have given rise to the principal branches of the jurisprudence we are wont to hear of, seems to be as follows: 1. The *extent* of the laws in question in point of dominion. 2. The *political quality* of the persons whose conduct they undertake to regulate. 3. The *time* of their being in force. 4. The manner in which they are *expressed* [here can be seen that nomography is ready in situation], 5. The concern which they have with the article of punishment".

[23] *Of laws*, Chapter I, Paragraph 2: "According to this definition, a law may be considered in eight different respects.

(1) In respect to its *source*: that is in respect to the person or persons of whose will it is the expression.
(2) In respect to the quality of its *subjects*: by which I mean the persons and things to which it may apply.
(3) In respect to its *objects*: by which I mean the *acts*, as characterized by the *circumstances*, to which it may apply.
(4) In respect to its *extent*, the generality or the amplitude of its application: that is in respect to the determinateness of the persons whose conduct it may seek to regulate
(5) In respect to its *aspects*: that is in respect to the various manners in which the will thereof it is the expression may apply itself to the acts and circumstances which are its objects..
(6) In respect to its *force*: that is in respect to the motive it relies on for enabling it to produce the effect it aims at, and the laws or other means which it relies on for bringing those motives into play: such laws may be styled its *corroborative appendages*.
(7) In respect to its *expression*; that is in respect to the nature of the *signs* by which the will thereof it is the expression may be made known. [This is what we called, as Bentham did in another writing, *nomography*.]
(8) In respect to its *remedial appendages*, where it has any: by which I mean certain other laws which may occasionally come to be subjoined to the principal law in question; and of which the design is to obviate the mischief that stands connected with any individual act of the number of those which are made offences by it, in a more perfect manner than can be done by the sole efficacy of the subsidiary appendages to which it stands, indebted for its force ». (*Of Laws in General*, ed. by H. L. A. Hart (University of London, The Athlone Press, 1970), p. 1-2)

definition which is at the beginning of the study of what Bentham, in a very Humean way, called *relations*.

Here is the definition: "A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power ; such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those conduct is in question." (*Of Laws*, Chapter I, Paragraph 1).

Bentham at once emphasized several aspects of the law. *First* he laid the emphasis on the linguistic or verbal aspect of the law. The law is a text, and that text expresses a will. Whose will does it express? Bentham was careful not to say, contrary to his contractualist predecessors, that it is the will of the sovereign, that it is concentrated in one person, in one or several assemblies, or even in the whole people. The will the reading of the law makes us perceive is only conceived or adopted by the *sovereign* in a state. Far from being immediate, the identification of the sovereign with the law, which seems to be directly issued from it or to be its most vivid activity, is in reality linked to indirect acts of assimilation or appropriation. For the law to appear as being issued by the sovereign, the latter must operate a certain number of acts of assimilation or incorporation, which he may conceal behind a fiction.[24] It is not law at once. It has to become law. This means that, successful as such assimilation may be, or complete as it may appear to be, there will always be some discrepancy between the law, or the will it apparently stages, and the sovereign who presents it as his expression. It is essential that Bentham should place that void at the heart of the mechanism

[24] For example, one may read in *Pannomial Fragments* (Bowring, III, 223) that "To be what it is, a command, general or individual, must be the command of some person. Who in this case is the person? Answer: Not any legislator; for if it were, the law would be a statute law. A person being necessary, and no real one to be found, hence comes the necessity of a fictitious one. The fictitious one, the fictitious person, is called the *common law* -or, more generally, that he may be confounded with the real person in whose image he is made, *the law*".

of the sovereign's apparent production of the law and of the latter's protection by means of the judicial and executive powers. Bentham's detailed analysis consists in all sorts of variations on that void and shows that, on the one hand, the law is not the matter of the sovereign only, and that, on the other hand, what comes from the sovereign does not always have force of law. The question of knowing who writes the law, who wants it, who can impose it and who captures that will to confer it its "force" does not at once show a simple and well-organized group of orientations.

Then, the question of knowing whom (be it only one or several persons) the law is intended for is not better determined either. More exactly, it is problematic, and one must not hurry to reply that the answer is that the law, issued from the people or from some authority speaking in the name of the people, is directed at the people. Only some analysis will reveal whom, what system of persons, what part of the community, what part of the individual the law may address,[25] without any answer being automatic. When Bentham declares that the text of law concerns "the conduct to be observed in a certain case by a certain person or class of persons, who is in the case in question are or are supposed to be subject to his power", he does it in a heuristic manner. The very "casuist" nature of the legal system which is here expressed and which links Bentham's research to Hume's on ethical questions is quite noticeable. In addition, the law does not directly point to what persons it concerns and on what points of articulation. It is at once obvious that it always and unavoidably leaves some play in such an appreciation, which may be discussed during a trial, but which above all allows social partners some latitude.

Last, and this third group of remarks perfects the modulations on the discrepancy, shortcomings and void that are characteristic of the law, comes the issue of the utilitarian foundation of the law, which is precisely expressed through hope, to be understood in the sense of mathematical probabilities that are current since Pascal and Bernoulli and in the sense of desire. Hope is produced by the probability of some event and the advantage attached to its happening. It is at once obvious that the existence of the law is always accompanied by the possibility that it might not be applied,

[25] Nomography particularly deals with that separation (Chapter VI, Paragraph 3).

despite the benefit it may offer a given community. As to desire, it cannot take any other form than that of want. The efficiency of the law cannot but be linked to the desire that it be efficient. Writing a law always implies some taking of risks. It can never be certain that it will be really efficient and it has often to be changed. Bentham does not take offence of it overmuch, unlike Rousseau, who, making the law sacred, and even sanctifying it, consequently recommends that it should be stable. From that point of view Bentham takes away the law's sacred aura, and does not conform to the perverse dialectic according to which one's submission to the law makes one freer.

The following paragraph is an explanation of the relations which constitute the three previous points. Without dwelling on each relation, we will take a closer look at the notion of the *extension* of the law, which is the object of the fourth remark, and which makes it possible to modulate the quite differentiated circles or the organization of the people that are concerned by the text of a law. When Bentham studies the "*aspects*" of the law, he gives them a content which is related to the modes of the exertion of the will. This triggers the observation that the different applications of the law are less quantitative than modal, or rather that they are translated in quantity though they are deeply modal. This Plato was well aware of, who, in *Laws*, saw that for the lawman to understand the working of the unavoidable legal voids, he must be deeply initiated to the discrepancies that exist between numbers, be they whole, fractional, irrational, transcendental, etc. His reflection on the *force* of law is interesting for our purpose because it does not exclusively put forward the relation between the citizen and the sovereign, though, of course, it does not exclude it. It refers to the *motives*, in all their variety which is not at once detailed but becomes so through a very thorough analysis. Force is not only a relation of the law to the conscious or unconscious motives that are behind it, but also a relation between the law and other laws, which have different motives. The law has some force only in a system and not only because some sovereign has wanted it. Not only does the law derive strength from its relation to other laws, but it must contain the knowledge that it does, and not ignore that by entering the system of laws, it may change the relation of a certain number of people to those former laws. It must include possible corrections to its

action so that its introduction does not wrong those who have not transgressed the laws in force. It is quite clear that Bentham's conception of the legal system was dynamic. The law cannot be derived from some principles as would be the case in a relatively static system of logical or mathematical propositions. Motivations change all the time and the laws must answer to a whole group of motivations which are not always conscious, and even less organized. Last, the place of the *nomography* is perfectly indicated in *Of Laws* (as it already was in *An Introduction to the Principles of Morals and Legislation*, though that word did not exist yet) when, concerning the seventh relation, Bentham mentions the expression of the law. Here again, the written form of the law reveals other forms of void. For, though one may know what one wants when writing the text of a law, one has to choose the manner in which to write it, which is not without consequence on the object, the subject and the people who are to be tried. It is necessary that some angle be chosen, some hierarchy of values be decided upon, to which must be added the fact that then appear other values which were not expected. The law, through the great variety of its statuses, of its actions, of its effects, is thus linked to an extensive play of voids. Laws are extraordinarily heterogeneous, and do not correspond to the image that some rather strictly rational conception would confer on them, that is that of a well-unified system which would be derived from some clearly identifiable sovereignty.

There results a certain number of consequences differing in scopes, by which I mean going from the most to the least important, as well as of heterogeneous importance.

First of all, it is not because an order is not directly given by the sovereign power that it is without legal value. As examples, Bentham lists the order an office gives on the battlefield, a master gives to his servant, a parent gives to a child, a husband to his wife - these do not come, of course, from sovereignty, nor from the organs which specifically represent it. Nevertheless, they are, and must be, very efficient. They will be said to be so because they are supposed to be given in the name of that sovereignty, though the expression "in the name of" conceals the whole difficulty. What appears still more clearly is that the legal system is based on a pyramid of capacities such that the superior level gives less the content of actions than

the authorization to actors, each one in their role and sphere, to make the decisions they deem good, at least from the point of view of the utility principle. For the transgression of that principle at once gives rise to a principle of protest which may go as far as affecting sovereignty itself. That is why Bentham clearly indicates that all the orders which are issued or seem to be issued from the sovereign do not *ipso facto* have the value of laws: "The term *law* would according to the definition applicable to any order whatsoever coming directly from the sovereign. But it is not in all cases that the issuing of any such order is looked upon as an act of legislature": Bentham takes the examples of the *lettres de cachet*, which could lead to someone's imprisonment, and of the obligation to give someone money by king's order. This does not go against one of Rousseau's assertions in *The Social Contract*, for the sovereign makes a decision which concerns only one individual.[26] A chamber of representatives could make that decision which would have force of law. In those last cases, it is the arbitrary, and not the fact that it is against one particular man, which results in the power's decisions not having *force of law*.

One will notice that Bentham's flexibility of experience is great when he is looking for the circumstances in which men, depending on the situation, depending on the state they live in, speak of *law* or prefer to give it some other name. His way of proceeding on the subject of heterogeneity and on the different degrees of authority of the norms is Humean, though Hume himself would never have tried to progress in that specific and precise sphere of the authority of laws.

If a Continental finds Bentham's attitude quite surprising, it may be that he is more prone than a British islander to think of the legal system as deriving from an immense axiomatic pyramid, whereas the *common law*, which is jurisprudential, does not aim at giving an impression of unity and does not make one want to unify the English law from the point of view of the authority of its laws. Thus one cannot criticize Blackstone exactly in the same way as the French or continental supporters of the contract or the

[26] *The Social Contract* , Book II, Chapter VI: "When I say that the object of laws is always general, I am saying that the law considers the subjects *en corps* and the actions as being abstract, never as individuals nor as particular actions."

human rights. Bentham's attitude, however, is not free from the risk of deepening the ambiguity of the notion of law. The utilitarian attitude appears not to be able to choose between the delicate and penetrating casuistry which examines the frontier of cases and the normativity that results from it, on the one hand, and a more normative point of view which would take the risk of pointing to what one must call a *law*.

VII. Final remarks about the ambiguity of the notion of *law*, particularly when the law is pretended *law of nature*.

Apparently, Bentham met the same difficulty about the idea of *law* as Hobbes about *authority*. Hobbes generalised *authority* to the point that one could wonder whether, in his writings, it was reduced to a simple metaphor, though, in reality, it was conceptual. Bentham, after taking the example of domestic orders, wonders, not without worrying about it, whether he is not giving too large a sense to the term of *law*. "It would seem a strange catachresis to speak of the issuing of any such order as an act of legislation, or as an exercise of legislative power. Not but that in cases like these the word *law* is frequently enough employed, but it is in the way of figure." Bentham kept such an objection, since he refused the possibility to use the word *law*, as he considered was unwisely done is physics, as if it were possible to legislate on and in material phenomena, which is properly meaningless.[27] The *Rationale of Judicial Evidence* is quite clear on that point in an important note of Book V (Chapter XVI, Paragraph 4): "The expression *law of nature* is figurative, metaphorical; it is a metaphor taken from the use given to the same word *law* in the case of the *political law*: it is

[27] In *Chrestomathia*, he clearly declares that the only admissible and not purely fictitious meaning of the word *law* is the following one, which is close to that found in *Of Laws*, though he lays the emphasis on some different aspects: "A law is a discourse - conceived mostly in general, and always in determinate, words - expressive of the will of some person or persons, to whom, on the occasion, and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience. This is the only plain and proper sense of the word: in this sense the object of which it is designative is a real entity. In every other sense, it is figurative and improper; the object of which it is designative is a mere fictitious entity; and every discourse, in which the reality of it is assumed delusory" (Bowring, VIII, 94).

to that source, consequently, that we must resort to an explanation of it. When a political law, the expression of an act of human will, is issued, that law emanating from recognized authority, and backed with the usual sanctions, a correspondent degree of conformity in human actions, in the conduct of such individuals as are subject to the law, is the customary and manifest consequence: and (human actions being events) a political law is thus a case of conformity among events. In regard to events of a physical nature, the grand and constant object of curiosity and inquiry, is that which respects the cause: and, on a subject so interesting, when men cannot come at facts, rather than have nothing, they are eager to catch, and content themselves with, words. Between that group of facts, a certain conformity is observed: what is the cause of that conformity? None at all: the conformity is itself nothing: it is nothing but a word expressive of the state our minds are put into by the contemplation of those facts. There are the facts: they do exist: but the conformity, as taken for a fact distinct from the facts themselves, has no existence. The conformity being (like every other fact, real or supposed) susceptible of denomination of an effect, this proves the existence of a cause: what name, then, shall be given to that cause? What name? What word? For when men have got words, they have got that with which (on this, as on so many other occasions) they are content to pay themselves. What cause? *A law of nature*. Here are the events: these events are conformable to one another: here we have conformity among events. But, for that sort of thing which is a cause of conformity among events, we have known a name: it is a law. The sorts of events, the conformity among which this term has been hitherto employed to designate, are human actions. The sort of events of which we are now looking out for the cause, are not human actions, but natural events. Law in this sense must, therefore, have something to distinguish it from law in the other sense. In that sense it is termed *law* simply, without an adjunct: to distinguish this from that, let us give the word *law* an adjunct, and say *law of nature*. If it were fully understood, that a law of nature signifies not an occult cause of conformity among facts, but merely the conformity itself, the phrase might be employed in this sense without danger of confusion". At the very most could one speak of the laws of the physicist who decides to tidy up things and expects to find some order in conformity with his will. However, just as Hobbes or

Hume did not back up in front of such an objection, Bentham was not frightened by the objection he raised himself, and found even more reason to carry out a Humean investigation of the limits and ordinary ways of calling them.

The reader of this quotation was undoubtedly sensitive to the reversal of what was expected, and which, assuredly, was the most conventional. What could prevent one from considering the physical law as the real entity and the political law as the fictitious one? That reversal is the mirror image of another one, which is quite surprising and which is in *Ontology*. The cause is the fictitious entity of the author[28] who is the real entity. The theory of fictions is a priceless tool to deal with opposite problems in that it stands at the very point of reversal[29] which is its special characteristic.

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[28] *La causalité est une entité fictive de l'autorité* (*De l'ontologie*, ed. P. Schofield, C. Laval, J. P. Cléro, Le Seuil, Paris, 1997, p. 40). *Chrestomathia* presented the same positions: "Cause, when the word is used in its proper signification, is perhaps in every instance the name of a fictitious entity; if you want, the name of the correspondent real entity, substitute the word *author*, to the word *cause*" (*Chrestomathia*, ed. M. J. Smith et W. H. Burston, Clarendon Press, Oxford, p. 280).

[29] It must have become so quite recently, as in the XVIIth century, and we find it in Descartes' writings for example, physicists understood the word of law in that sense, having borrowed it from the moral and ethic sphere. At the moment when the physical meaning tended to be the real one, Bentham wanted to recall that reversal. The future, strangely enough, proved him right, as the epistemologists of the XXth century (as Heisenberg or I. Hacking) questioned the fact that physics was the law of nature, and would rather present it as the legislative activity of the physicist.