

## BENTHAM AND THE GREEKS

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1. On 9 February 1823 Jeremy Bentham began to draft his commentary on the first Greek Constitution. He wrote:

“To find the provisional Grecian constitution in so high a degree conformable to the principle of the greatest happiness of the greatest number has been matter of considerable and no less agree[e]able surprise to me.”

In some ways this is a remarkable statement. In this lecture, with a few digressions, I propose to have a look at what Bentham thought of the constitution, an exercise which I intend will tell us something about the Greeks as well as something about Bentham. And there are some points of political philosophy which I will discuss along the way; so the lecture is rather loosely organised, for which I hope you will forgive me. First there is some background.

2. The provisional constitution in question was the Constitution of Epidavros. It was made at the Assembly of Epidavros, which met in the last weeks of 1821. Epidavros is in the Argolid, that north-east corner of the Peloponnese where you will also find the wonders of pre-classical Greece: Tiryns, Argos, and Mycenae rich in gold. But if you go to Epidavros, you will see a jewel of the classical period: the 4<sup>th</sup> century BC theatre, the most perfectly preserved classical Greek theatre to be found in Greece itself. Its magical acoustic is still put to good use, in

summer performances of the great Athenian tragedies and comedies. However the Assembly of 1821 was not held at Epidavros. It was held down the road at the nearby coastal village of Piada. Its naming of Epidavros is a good example of the Greeks' creative approach to truth, which in some ways is richer than the conventional literalism of the English. However this is perhaps an optimistic view, not least given the opinion of Lord Byron, the greatest of the philhellenes, expressed in his journal on 28 September 1823:

“The worst of them [the Greeks] is that... they are such damned liars; there never was such an incapacity for veracity shown since Eve lived in Paradise. One of them found fault the other day with the English language, because it had so few shades of a Negative, whereas a Greek can so modify a ‘No’ to a ‘Yes’, and *vice versa*, by the slippery qualities of his language, that prevarication may be carried to any extent and still leave a loop-hole through which perjury may slip without being perceived.”

It is not entirely clear what Byron meant by the “slippery qualities” of the modern Greek language, and I can think of one instance where it is perhaps less subtle than the English. Greek makes no distinction between ‘very much’ and ‘too much’: the word *parapoli* does for both. I have never been able to work out whether the inference should be that excess is desirable or undesirable; but however that may be, the usage can have perplexing consequences. I have a guidebook translated from the Greek into English, which contains, as every guidebook to Greece should, an account of the spectacular Vikos Gorge in the Pindus mountains, in the north of mainland Greece. The guide expatiates upon the beauty of the place, then in its judgment of the site’s attractions for the visitor, it is described as “much too interesting”.

3. I digress. The Assembly of Epidavros was convened a remarkably short distance in time after the flag was raised and the Greek War of Independence begun against the Ottoman Turks in March 1821. The revolution was started in different places. Four towns in Greece each claim to have been the first, all of them in the Peloponnese; and two, Kalamata and Areopolis, in the Mani. The Mani is the central peninsula of three promontories which jut into the Mediterranean Sea at the southern end of the Greek mainland. Its people, who were given to blood feuds and building towers for houses the better to shoot each other, claimed and claim today that they were never entirely subdued by the Turks.

4. Early in the War the Greeks made considerable advances. After six months or so they had captured the four Peloponnesian fortresses of Monemvasia, Old and New Navarino and Tripolis, and had enjoyed other successes. But the Greeks were mortally inclined to fight amongst themselves. In his magnificent account of the War<sup>1</sup>, published in 2001, David Brewer describes the suspicion and hostility prevalent between three groups: the islanders, the Roumeliots (mainland Greeks north of the Gulf of Corinth) and the Peloponnesian Greeks. But there was another division, no less important, also described by Brewer<sup>2</sup>. This was between three quite different groups. There were first the civilian and ecclesiastical leaders, including 41 bishops. This group was on the whole rich, and had done well out of Ottoman rule. Secondly there were the military captains, including the great Kolokotronis, “the Old Man of the Morea”, whose mounted statue you can see in Athens just off Constitution Square. The group included some who were

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<sup>1</sup> *The Flame of Freedom* (John Murray, 2001). John Murray was of course Byron’s publisher.

<sup>2</sup> These various divisions are described by Brewer in Ch. 3, pp. 125 – 128.

really bandits – klephths. Their relationship with the prosperous civilian leaders was – how shall I put it? uneasy, and at times adventurous. Thirdly there were what Brewer calls the westernisers: merchants, officials, and professionals of the Greek diaspora. Of these the most prominent was Mavrokordatos, who had belonged to Shelley’s circle in Italy. After the outbreak of war he took ship to Mesolongi, whither in 1824 Lord Byron was to follow, and to die.

5. As Brewer shows, when the Greeks came together in December 1821 at the Assembly of Epidavros their aim was to form a single national government (there had been two separate regional governments earlier established), and the Assembly’s first act was to appoint a committee to draw up a constitution. The work was quickly done. The provisional Constitution of Epidavros was drafted, approved and signed within a fortnight – on 13 January 1822. It was backdated by a few days to 1 January. Greek independence from the Turks was formally proclaimed on 27 January. Brewer points out<sup>3</sup> that among other things the new national government had to

“balance the conflicting claims of the various interest groups. The proceedings of the assembly were therefore not just a drily rational exercise in constitution-making; they were a covert but fierce competition for power”.

6. On 5 July 1822 Mahmud, Pasha of Drama, commonly called Dramali, crossed the River Spercheios in the Sultan’s name with the largest force seen in Greece since 1715, when the Turks had driven out the Venetians. His objective was to cross into the Peloponnese, recapture the citadel of Corinth, relieve the Turks who were blockaded at Nafplion, and recapture also the town of Tripolis in the

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<sup>3</sup> P. 128.

Peloponnesian hinterland. The Greeks abandoned the Acrocorinth, so that was taken. But Kolokotronis was appointed commander of the forces resisting Dramali. He inflicted a crushing defeat on Dramali at the ravine of Dervenakia, on the road between Argos and Corinth. In December 1822 Nafplion was surrendered to the Greeks. Shortly thereafter the Constitution of Epidavros was revised at Astros, 20 miles or so south of Nafplion, at a second national assembly in April 1823.

7. In the same month Edward Blaquiere and Andreas Louriotis, on their way to Greece with Bentham's completed *Observations* on the constitution, stopped at Genoa to enlist the support of Lord Byron. It was this meeting that was to set Byron firmly on the course that led to Mesolongi. At length Blaquiere and Louriotis delivered Bentham's *Observations* to the Greek legislature on 16 May. Now Bentham had not composed the work simply upon his own initiative. The *Observations* were commissioned on behalf of the Greeks: Louriotis, their agent, invited him to draft them. Bentham had in fact had some association with the Greek cause since 1821, when he was visited by Pikkolos, an emissary from Adamantios Korais. Korais is an interesting character. He had been born in Smyrna – Izmir – in 1748, the same year as Bentham. He was instrumental in promoting, if not inventing, a form of the Greek language called *katharevousa*, which was closer to ancient Greek than the spoken demotic. It fulfilled a political purpose as the Greeks' aspiration for independence grew brighter: its proximity to the ancient language was a living reflection of their heritage. You could see

Korais' head on the old red 100 drachma note, before the advent of the Euro; and if you go to the island of Chios, you can see his magnificent library.

8. Nor was this the limit of Bentham's connections with Greece in the early days of the War of Independence. He was one of the first members and supporters of the London Greek Committee. Its formation in March 1823 was not unconnected with internal British politics. Voices in the Greek cause became increasingly insistent in 1821, but were to some extent muted because the foreign policy of the Tory government was one of neutrality in relation to the Greek efforts. Professor Fred Rosen of UCL says:

“Neutrality meant not raising funds and not sending men and equipment to assist the Greeks in the war.”<sup>4</sup>

Professor Rosen was Director of the Bentham project. His book *Bentham, Byron, and Greece* is an important resource for this whole subject. I have greatly relied on it in writing this lecture. He makes it plain, as does Brewer<sup>5</sup>, that the strictness of the policy was very much inspired by the Foreign Secretary, the tragic Lord Castlereagh, who went mad and killed himself. Castlereagh was replaced as Foreign Secretary by Canning in September 1822, and Canning took an altogether more relaxed view of what was and was not required for the sake of neutrality. His approach was, as Brewer puts it<sup>6</sup>, that “private subscriptions could go hand in hand with official neutrality, so that England’s influence in Greece could be strengthened without jeopardising the alliances of the powers”. And so the London Greek Committee was born. In appendices to his book Rosen sets out

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<sup>4</sup> *Bentham, Byron and Greece*, Clarendon Press, 1992, ch. 11 p. 222.

<sup>5</sup> Op. cit., ch. 14 p. 140.

<sup>6</sup> Ibid.

two lists, the first a list of the early members of the Committee and then a list of the full membership. Bentham is in both lists. The great majority of the politicians who joined were Whigs, Radicals or Independents, and there were a lot of Scots and Irish. Brewer describes the Committee as a protest movement. The first steps it took were represented by the journey to Greece in March 1823, the month of its foundation, made by Blaquiere and Louriotis bearing Bentham's *Observations* with them. The Committee was to be much engaged in raising money for the Greek cause. The first appeal for funds had been made by Dr Lempriere, author of the famous classical dictionary, who appears in the second of Rosen's lists, that of the full membership of the Committee. In 1824 Bentham was called on to mediate in a bitter dispute concerning the first Greek loan. Rosen describes the details<sup>7</sup>, but I am not going to go into that. I am concerned with Bentham and the Constitution of Epidavros. Let me return to it.

9. The Constitution included provisions for civil rights which would certainly not be out of place in the modern era: equality before the law, security of property, no taxation save under existing law, and so forth: see generally Articles 2 – 8. Those values no doubt sat easily enough with Bentham's utilitarian ideal, and are the elements in the Constitution which prompted his opening remark about the greatest happiness principle.
10. However the Constitution contained other provisions which excited Bentham's criticism. By Articles 9 and 10 legislative power was shared between the Legislative Senate and the Executive Council. The Senate was to be elected for a year, would pass laws, and vote on matters of war and peace and an annual

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<sup>7</sup> Op. cit., ch. 6.

budget. The Executive of five members, appointed by the Senate, would in turn appoint departmental ministers. The Senate and Executive could however each veto acts of the other. In reality, therefore, they shared the legislative power. There was also to be an independent judiciary, but part of its function was to draw up new laws.

11. Thus the legislative power in the Constitution was split. You will see at once that this is not the conventional split between legislature, executive and judiciary with which we are familiar in ordinary discussions about the separation of powers. Here the distinct power to legislate is itself divided. I have wondered whether this represented a throwback, however pale and indirect, to the division of power that one finds in the constitutional arrangements of ancient Sparta in the classical period, which included a citizen assembly, a council of elders, powerful officials called ephors, and two kings. A slightly, but perhaps only slightly, less fanciful analogy might be between the Epidavros Constitution and the old notion of a mixed constitution, whose pedigree goes back at least to Cicero and Polybius. There the idea was that the combination of different elements – they might be monarchy, aristocracy and democracy – could as Rosen puts it<sup>8</sup> “combine the virtues of each form of government without any of the vices”. In discussing Bentham’s criticisms of Blackstone, Rosen states<sup>9</sup> that Bentham “easily ridiculed” this conception of the mixed constitution.

12. We should at any rate be clear that the *sharing* of legislative power, provided for by the Constitution of Epidavros, was quite different from the *separation* of

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<sup>8</sup> Op. cit., ch. 3 p. 43.

<sup>9</sup> Ibid.

powers favoured by Locke and Montesquieu. This feature of the Epidavros Constitution was greatly disapproved of by Bentham. He also disapproved of a whole series of detailed provisions which allowed various officials a potential veto on legislation and thus, in effect, conferred on them a share in the legislative power. There are many instances. Thus by Article 24 the President of the Senate was empowered to fix the days on which the Senate should meet and disperse. So he could stop it meeting at all. By Article 30 all legislative acts had to be signed by the President and countersigned by the Principal Secretary. Either could, one supposes, refuse to sign. And so on. Bentham called these implicit vetoes “latent negatives”.

13. It is interesting to note – and this is another aside – that latent negatives, or potential latent negatives, can be found in UK constitutional texts of the modern era. I have in mind the conditions of election to the offices of the First Minister and the deputy First Minister provided by s.16 of the Northern Ireland Act 1998, and in particular the 6-week time limit in s.16(1) and (8). The full story is told in the speeches in the House of Lords in *Robinson* [2002] UKHL 32. By a majority of 3 – 2 their Lordships upheld the validity of an election outside the statutory period, so in the end there was no latent negative. But Bentham was a forerunner of modern ideas in other respects also. You will be well familiar with HLA Hart’s use of the concept of the “rule of recognition” as a touchstone for deciding in a developed legal system what will count as valid law. The rule of recognition was a secondary rule, in contrast to the primary rules of obligation. These latter are the rules which actually tell you what to do and what not to do. They establish

obligations and duties. The rule of recognition affords, both for private persons and for officials, authoritative criteria for identifying the primary rules of obligation. I mention this because I think it is interesting that it is powerfully foreshadowed in Bentham's analysis of constitutional government in terms of two kinds of power: operative and constitutive. Constitutive power is

“the power of determining at each point of time in the hands of what individual functionary or... functionaries the correspondent operative power shall at that time be lodged”.<sup>10</sup>

This is effectively the same idea as Hart's “rule of recognition”, or very close to it.

14. Let me return to the mainstream. While he was writing the *Observations* in February – March 1823 Bentham was also engaged in the production of his *Constitutional Code*, which he had started the previous year at the invitation of the Portuguese Cortes. This work is better known than the *Observations*. There was a good deal of cross-over between the two, and Bentham also wrote other manuscripts<sup>11</sup> developing his ideas notably about popular sovereignty and the greatest happiness principle. In what follows I shall not always distinguish the specific source of the proposition in hand. However the relation between the *Observations* and the other manuscripts has some independent importance. On certain issues Bentham seems to have felt less inhibited in expressing controversial opinions, or opinions which might have been difficult for the Greeks to swallow, in the other manuscripts; he wrote with more circumspection about

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<sup>10</sup> Cited by Rosen p. 65, and taken from manuscript material in the keeping of UCL.

<sup>11</sup> See for example *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece*.

them when it came to the *Observations*. An example is his reservations about the constitution's exclusion of non-Greeks – essentially the Muslim and Jewish populations – from the enjoyment of political rights. This was an important issue for Bentham, but he dealt with it very guardedly in the *Observations*<sup>12</sup>.

15. What was Bentham's objection to the split or sharing of legislative power in the Constitution of Epidavros? It was by no means merely the vice of latent negatives, the possibilities of a stalemate which, seemingly, were real enough. Bentham's objection was an over-arching one. He believed that the relevant provisions violated a crucial principle, the principle of popular sovereignty. Legislative power belonged, or should belong, to the people. The will of the electors should be thwarted to the minimum possible extent by the institutions of government. This would be best achieved by a single legislative chamber elected by secret ballot on the basis of a virtual universal suffrage. Moreover the executive and legislative branches of government should, as Rosen puts it<sup>13</sup>, "be as dependent upon the will of the legislature as the legislature was dependent upon the will of the electorate". As for the judiciary, the judges should be appointed by the Justice Minister, but should be liable to be dismissed by the electorate.

16. The Constitution of Epidavros fell far short of this idealised model. But the division of legislative power for which it provided was, of course, a function of the aims of its drafters, which included some settlement of the balance between the competing interest groups. Here is not the place to describe what became of

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<sup>12</sup> See Rosen, ch. 5, p. 85.

<sup>13</sup> Op. cit., ch. 5 p. 81.

that. In relation to another of the drafters' aims, that the new government be effective, it is interesting to notice that John Capodistria, a Greek from Corfu of a distinguished family who was at this time foreign minister to the Tsar and in 1827 was to become the first President of free Greece, had called for a strong central administration. But this was not quite the unicameral democracy which Bentham favoured. Capodistria thought that if the war effort was to be properly co-ordinated, wide powers had to be given to a few, or if possible even to only one man.

17. Now let me return to Bentham's ideal, a pre-eminent single legislative chamber to which all else was effectively subordinate. This was, surely, an extreme majoritarian position. Why did he espouse it? His philosophical justification of it is not to be found in the *Observations*. But it is clear from other writings what it was: the exercise of popular sovereignty coincided more or less with the greatest happiness of the greatest number. The people generally, he believed, would incline to support the greatest happiness principle. Why? Rosen cites<sup>14</sup> this perplexing and indigestible passage from Bentham's paper *Securities against Misrule*:

“The way in which, by expression and effect given to the several individual wills, contribution is made to the universal happiness is this. If the result depended upon himself each individual would give expression and effect to such will as in his judgment would in the highest degree be conducive to his own greatest happiness, whatsoever became of the happiness of others, and consequently on most if not all occasions at the expence of the happiness of all others...

But, in so far as the effect of it is by others seen or thought to be detrimental to their own happiness, the will of each individual finds an opponent and bar in the will of every other and in the will of all together a bar absolutely insuperable. On the other hand in so far as the effect of

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<sup>14</sup> Op. cit., ch. 5 pp. 82 – 83.

each one's will is by every other individual seen or thought to be conducive to his own greatest happiness the will of each one finds a support and coadjutor in the will of every other: in a word each separate interest finds a bar and that an insuperable one in every other separate and sinister interest: but each man's share in the universal interest finds an ally and coadjutor in every other man's share in the universal interest.”

It seems clear that Bentham did not urge that popular sovereignty always delivered the greatest happiness goods, but that it had a strong tendency to do so, and (presumably) had a greater chance of doing so than did any other constitutional arrangement.

18. Now I shall say something about this ideal of Bentham's before getting back to the Greeks; you must allow me the theoretical reflections which follow. There are, plainly, at least two levels on which Bentham's espousal of popular sovereignty might be called into question. First, we may wonder why we should begin to accept that the body politic, made up of all the citizens, should as if by an invisible hand possess a benign self-correcting faculty, such that although each individual would first of all vote for his own interests, on reflection, given the equal power of every other elector, he will end up voting for the common good – if that is what is meant in the passage I have quoted; I fear I do not myself understand it, and I am not filled with confidence by the fact that Rosen describes it as “characteristic”<sup>15</sup>. Perhaps Bentham's view possesses some affinity with Professor John Rawls' theory about members of society being placed behind a notional veil of ignorance where, not knowing significant facts about themselves, they would agree on principles that would protect everyone<sup>16</sup>. If so it is highly

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<sup>15</sup> Op. cit., p. 82.

<sup>16</sup> See *A Theory of Justice*, 1971.

ironic, since Rawls was opposed root and branch to the greatest happiness principle: his philosophy was a highly sophisticated variant of the social contract.

19. The second level on which Bentham's espousal of popular sovereignty might be called into question is perhaps a deeper one: it is that we may have large reservations about the greatest happiness principle itself. This lecture is not the occasion to go at length into this second question, to confront and criticise the philosophical leviathan that is utilitarianism; though I shall make one or two points about it. The first question is more manageable: why should all the citizens end up voting for the common good, for no better reason than that otherwise everyone will vote for his own interests?
20. Here, I have an uneasy feeling I must have missed something. I cannot see how this idea can rationally be advanced. If we were considering a *direct* democracy without modern party discipline, in which as in ancient Athens and some modern Swiss cantons the citizens were themselves the legislature, I can accept that the voters might compromise to get a result that was more or less generally acceptable. And the result might, given a very fair wind, perhaps be said, sometimes at least, to represent the greatest happiness of the greatest number. But Bentham was not considering such a direct democracy. He made no recommendation for a direct democracy, even if that had been remotely practicable. He favoured – positively favoured as I understand it – a *representative* democracy. But in that case the voters have no strong incentive to compromise with each other. They may, or some of them may, vote *tactically*,

but only in order one way or another to maximise the political chances of the political interest they support.

21. If Bentham believed that the greatest happiness principle would be advanced by its translation into good policies blessed by the choices of the electorate, I am afraid I think that was an unworldly point of view. But I think Bentham lived, at least to some extent, in a much gentler world than the real one. You have to warm to a man who, as Lord Bingham reminded us in his Presidential Address for 2000, gave a name to his walking-stick, and christened his cat the Revd Dr John Langborn; there is much more to him than the dreary righteousness of utilitarianism.
22. I think there is however another basis on which the universal suffrage may support the greatest happiness principle, though it is much less direct than the idea that the electorate would simply vote for good policies. It consists simply in the electorate's power to expel the government at the general election. Now, it is perfectly possible to envisage a barbarous electorate; but if the electorate is more or less civilised, it is likely to throw out a government which it perceives to be corrupt, or extreme, or incompetent. Indeed one need not postulate a civilised electorate: even a barbarous one might object to such things, since any of its members may feel threatened by them. So the discipline of elections is something of an antidote against those vices, at least if the election process is incorrupt and the suffrage is near universal. Even so, at the next election, a contending party may be swept to power by policies that are ruinous or unwise. Democracy –

elections – are a brake not an accelerator: they inhibit bad policy; they do not necessarily promote good policy.

23. A constitution whose single overriding principle is the will of the majority expressed by a representative unicameral legislature suffers no restraint in the promulgation of bad policy save the restraint of the ballot box, and that I think is insufficient. A second chamber, at least if constituted on a different basis, may make up some of the deficiency; but Bentham was a unicameralist. The rule of law will make up a good deal of the deficiency; but as I have said Bentham thought the judges should be dismissible by the electorate. Fundamental constitutional rights may make up a good deal more; but as everyone knows Bentham regarded natural rights as nonsense, and if they were said to be unalterable – “imprescriptible” is Bentham’s word – they were “nonsense on stilts”. I have no brief for natural rights in any metaphysical sense, but I certainly think there is a vital place for constitutional rights whose source is by no means merely the will of the majority.

24. A democratic system of government is sometimes sought to be justified by an appeal to the notion of self-determination. I have for a long time entertained more than a nagging doubt about that. In a State of many millions of citizens, with a system of representative democracy, the quinquennial trip to the polling station seems a rather paltry fulfilment of something so grand as self-determination. Perhaps we are on stronger ground if we simply recognise that democracy is necessary for the avoidance of greater ills. That is of course an unoriginal view,

and you will be familiar with Churchill's observation to the House of Commons on 11 November 1947:

"[I]t has been said that democracy is the worst form of government except all those other forms that have been tried from time to time."

So the strongest reason, it seems to me, why a democratic system of government is vital and indispensable is not directly about policy; it is because such a system is an antidote to tyranny. It is a means, not an end in itself. The end which it serves is the achievement of man's potential as a free and rational being. The avoidance of tyranny is integral to such a goal.

25. I do not, then, subscribe to the view that popular sovereignty *ipso facto* delivers the greatest happiness of the greatest number. But in the context of my present subject Bentham might be said to have the last word. He would no doubt be pleased to know that Article 1(2) of the present Constitution of Greece provides in terms that "Popular sovereignty is the foundation on which the form of government rests". I am no scholar of the history of its drafting, though I know it drew on earlier constitutions, and the Greeks have had quite a few. I wonder whether it is just possible that the choice of language is a throwback to the enthusiasm with which the revolutionary leaders greeted Bentham's *Observations* in 1823.

26. What of the greatest happiness principle itself? The objections are well known. They are summarised with great elegance in Roger Scruton's book, *Modern Philosophy*<sup>17</sup>. I will mention only one. Applying the greatest happiness principle, why should the happiness of a minority not be brutally sacrificed, if doing so will

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<sup>17</sup> Sinclair-Stevenson, 1994. See ch. 20, pp. 281 – 283.

enhance the happiness of the greatest number? This postulate is an old objection to utilitarianism (John Rawls thought it very persuasive), but I think it is very topical. Why should we not impose the strictest pains on terrorist suspects, if that will enhance our day-to-day security? In a context like this, might not Bentham's precious utilitarianism justify the most illiberal policies? If you translate the debate about the State's proper reaction to the terrorist threat into philosophical terms, it can be seen as a debate between utilitarianism and justice – justice as due process. It asks: how far may justice be sacrificed to secure a safe outcome? The debate has not so far been enlivened by the colours its protagonists have worn: national security on the one hand, and civil liberties on the other. Every reasonable person is of course in favour of both. The opposition between utilitarianism and justice is a richer formulation. The philosophers, if they are worth their salt, should be contributing to this debate. If they have, I apologise; for I have not seen their contributions.

27. Utilitarianism is beset by many difficulties. I do not know whether its supporters, or scholars of Bentham generally, would quarrel with the comment of the natural law philosopher John Finnis<sup>18</sup> that “Jeremy Bentham oscillated and equivocated for sixty years about whether his utilitarianism was to maximise his own happiness or the happiness of ‘everybody’”. If it was true, he must have been about three-quarters of the way through the process when he came to write the *Observations*.

28. I will not travel further into these philosophical questions. Let me return to the Greeks and the Constitution of Epidavros. We have seen Bentham's initial

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<sup>18</sup> *Natural Law and Natural Rights*, Clarendon Press 1980, ch. V, p. 116.

approval of the Constitution, and I have discussed some of his criticisms of its substance. Another question is: how far was it actually seen as a practical instrument of government? Some historians have opined that the Constitution was really only a façade, created essentially to publicise the Greek cause and clothe it with a degree of respectability in the eyes of west European powers. Monty Woodhouse, in his biography of John Capodistria, who was as I have said to become the first President of Greece in 1827, says<sup>19</sup>:

“It was a sound instinct which prompted the Greeks to publicise their struggle by adopting a constitution, even if it existed only on paper.”

Louriotis' approach to Bentham to draft the *Observations* is perhaps consistent with this. It is right also that the Constitution's revision at Astros in March 1823 took place in conditions little short of civil war, and it had to be revised yet more fundamentally at the Third National Assembly at Troezen in 1827. All these things might suggest there was little aspiration of practical government in what was done at Epidavros, or rather down the road at Piada, in January 1822. However Rosen takes a somewhat different view of the Constitution's practical place:

“To dismiss the Greek constitution of 1822 as merely a piece of worthless paper would require evidence that those who wrote it did not in fact want constitutional government, and there is no evidence to support this view. Indeed, there is considerable evidence that the Westernised Greeks not only thought constitutional government to be good for Greece but also that it would advance their own interests in the state.”<sup>20</sup>

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<sup>19</sup> *Capodistria, the Founder of Greek Independence*, OUP 1973, ch. 12 p. 276.

<sup>20</sup> Op. cit. pp. 98 – 99.

29. In this context Rosen refers<sup>21</sup> to the view of an early philhellene called Thomas Gordon, who wrote a *History of the Greek Revolution*, to the effect that the Greeks generally were “unfit” for constitutional democracy. I am sure Gordon was not alone. But his view was certainly not shared by Bentham, who “believed that it was always in the interest of the people to have representative democracy and that it was the ruling classes rather than the ruled who threatened constitutional democracy”<sup>22</sup>. One may have no difficulty with that so far as it goes, but Bentham’s approach to the business of constitution-making in Greece was highly idealistic. Rosen quotes<sup>23</sup> the opening paragraph of an essay headed “JB to Greek Legislators”, on which the *Observations* was partly based. I think it was something of a blockbuster:

“You enter upon your career under the most auspicious circumstances. Nothing to match them is to be found in history. Nothing to match them is to be found in present times. Obstacles which in other nations set up a bar to good government, and that bar an insuperable one, have no place in your case. You are not cursed with Kings. You are not cursed with Nobles. Your minds are not under the tyranny of Priests. Your minds are not under the tyranny of Lawyers.”

30. Now, I think it is the greatest irony that Bentham should have seen Greece as a clean slate, *tabula rasa*, whereas in truth you could hardly imagine a country more burdened by its own history. It surfaced not only in the oppositions and tensions between the islanders, the mainlanders, and the Peloponnesian Greeks, or those between the civilian and ecclesiastical leaders, the military captains, and the westernisers, (though it is worth noting that the effort to maintain a balance between these interests led in large measure, as I have said, to the very features of

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<sup>21</sup> Op. cit. p.98, fn. 52.

<sup>22</sup> Ibid.

<sup>23</sup> Op. cit. p.99.

the constitution which Bentham thought objectionable). No; the storm of history blew much stronger than that. I have referred to Lord Byron as the greatest of the philhellenes. That is not because of his verse, though I know no richer evocation of Greece and the Greeks; nor yet because of his death at Mesolongi, though after it the Greek cause could not possibly be ignored. It is because he knew the Greeks were not all sons of Pericles; he saw them, unlike so many of his contemporaries, for what they were. Contrast Bentham's blithe optimism with this passage from Byron's journal of 28 September 1823, written at Cephalonia:

"Whoever goes into Greece at present should do it as Mrs Fry went into Newgate – not in the expectation of meeting with any especial indication of existing probity, but in the hope that time and better treatment will reclaim the present burglarious and larcenous tendencies which have followed this General Gaol delivery.

When the limbs of the Greeks are a little less stiff from the shackles of four centuries, they will not march so much 'as if they had gyves on their legs'. At present the Chains are broken indeed; but the links are still clanking, and the Saturnalia is still too recent to have converted the Slave into a sober Citizen."

I doubt whether Jeremy Bentham understood the clanking chains. Why should he? Professor Martin Loughlin says of him<sup>24</sup>:

"Bentham was less concerned about exploring the past in order to explain the present than in examining the problems of the present in order to devise reforms for the future."

Bentham is anyway to be blessed for his support of the Greeks. But Byron gives the authentic description of the people for whom the Constitution of Epidavros was written.

31. The different views of the Epidavros Constitution – to commend the Greek cause, or to form a practical basis of government – conceal, perhaps, a truth greater than

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<sup>24</sup> *Public Law and Political Theory*, Clarendon Press 1992, ch. 1, p. 19.

the arguments on either side of that debate. It is that the interpretation and application of any constitution depend upon principles that are logically and morally prior to the constitution itself. Constitutions are necessarily cast in general terms. The more general any provision of statute, the more scope for differing interpretations according to the values of the interpreters. Written constitutions share a uniform pretence: the pretence is that they possess the last word. But they cannot ever possess it, for a constitution cannot interpret itself. I entertain a private hope that we shall not in Britain be given over to a codified constitution. I think it would involve arguments of substance being demoted to arguments of interpretation. But that is another story, for another time.

32. Now, the interpreters of a constitution are not only the judges, although they are the overt interpreters. They include other officials of the State, leaders of institutions outside government as well as in, and in a real sense the people themselves. A constitution may test the limits of their tolerance: their tolerance of each other, and of the powers set over them. What a constitution means in practice will always be affected by the tenour of its citizens, and by the good will or otherwise of the rulers. A written constitution, however measured, will not on its own settle the spirit of a restless people. The history of Greece after the era I have been describing shows as much. If we look down the years after 1823, beyond 1827 when Greek independence was ensured by the destruction of the Turkish and Egyptian fleet by the allied force of British, French and Russian ships under Admiral Sir Edward Codrington at the Battle of Navarino, beyond 1831 and the sectarian murder of President John Capodistria outside the church of St.

Spyridon at Nafplion, we can see that throughout their modern history the Greeks have had one written constitution or another. A lot of the time they had monarchy, of which Bentham would have disapproved. In two periods they had dictatorships: from 1936 until 1941 under General Metaxas, and, much worse, from 1967 until 1974 under the junta of the colonels. Now by the Constitution of 1975 they have a unicameral legislature elected by a near universal suffrage. Bentham would have approved of that. Still, and through the years, they have been a restless people.

33. For the Greeks in 1822, who of course had much tougher meat to chew than constitutional theory, there is another overlay that comes from these reflections. A constitution, even if its effectiveness is impractical, may be symbolic of a national aspiration without being excoriated as a façade or a pretence. I think that was probably the place of the Constitution of Epidavros. The antithesis between an advertisement of the struggle, and an instrument of government, is surely too crude a dichotomy by which to judge, given the kaleidoscope of interests involved. And, of course, different players will have seen the constitution differently: some as an opportunity for themselves; some as a genuine political advance; some, I suppose, as a futile exercise.
34. But I think the Constitution of Epidavros can be seen overall as symbolic of a national aspiration. If so, Bentham's part in the Greek cause was real if not quite what he intended. His sober advice in the *Observations* about the Constitution's substance was, I fear, much less important than the fact that he gave it. By 1823

he was of course a famous elder statesman of the Enlightenment. His support of the Greeks must have been grist to the mill of their aspirations.

35. Should they have been grateful? It was often said, apparently, in these times that the Greeks were ungrateful for foreigners' hands across the sea. I will give the last word to Lord Byron, in the *Notes to Childe Harold's Pilgrimage*:

“They are ungrateful, notoriously, abominably ungrateful’ – this is the general cry. Now, in the name of Nemesis! For what are they to be grateful? Where is the human being that ever conferred a benefit on Greek or Greeks? They are to be grateful to the Turks for their fetters, and to the Franks for their broken promises and lying counsels. They are to be grateful to the artist who engraves their ruins, and to the antiquary who carries them away; to the traveller whose janissary flogs them, and to the scribbler whose journal abuses them. This is the amount of their obligation to foreigners.”

Mind you, Lord Byron carved his name on the sacred marble of the 5<sup>th</sup> century temple to Poseidon at Cape Sounion; but hypocrisy, I think, is rather over-rated as a vice.