BENTHAM’S CONSTITUTIONAL THEORY
AND THE GREEK CONSTITUTION OF 1822*

I. Bentham’s ‘Observations’

‘To find the provisional Greek 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 agreeable surprize to me’, wrote Jeremy Bentham on 9th February 1823, the day he began to draft his commentary on the first Greek Constitution1. This virtually unknown work was commissioned during a period when support for the Greek cause in England, which had been growing since 1821, finally coalesced with the establishment of the London Greek Committee (largely by John Bowring), the arrival in London of Andreas Louriottis to initiate negotiations which would culminate in 1824 in the first Greek loan, and the departure of Louriottis and Edward Blaquiere for Greece to begin the involvement of the London Greek Committee (and Lord Byron) in Greek affairs2. As Bowring and Blaquiere were in close contact with Bentham, and Bentham had been active in assisting the Greeks in various ways

* I am most grateful to Dr. S. Conway and Mr. T. Venning of the Bentham Project, University College London for assistance in transcribing the manuscripts used here, and to the Librarian of UCL for permission to quote from the manuscripts.

1. UC (University College) xxi. 221 (9 February 1823).

since the autumn of 1821, his name appeared among the first members and
supporters of the London Greek Committee⁴. He was also well-known by this
time as a jurist of international standing⁵. Thus, it was natural for him to be
asked to comment on the first efforts of the Greeks at drafting a constitution.

Throughout February, Bentham devoted considerable attention to his
writings for Greece. The manuscripts which bear headings connecting them
with Greece were roughly of three sorts: detailed studies of the various articles
of the Greek Constitution; some general principles of constitutional law such
as a justification for placing sovereignty in the people; and more specific
institutional proposals like those which later appeared in the Constitutional
Code⁶. At the end of February, Bentham somewhat hastily put this material
together to form his ‘Observations’ so that Louriottis and Blaquiere could
take it with them when they departed for Greece on 4 March⁷. At the time of
their departure, he instructed Blaquiere as to how he was to proceed in Greece.
He requested that the cost of translation and publication should not be paid
by the Greek government mostly because he wanted to ensure that the Greek
government did not have to take responsibility for the anti-monarchical
sentiments expressed in it. He also wanted the ‘Observations’ published with
Greek and English versions in parallel columns⁷. Blaquiere and Louriottis
duly delivered the ‘Observations’ on 16 May to the Greek legislature where
it was received with great enthusiasm⁸. Bentham received two letters thanking

3. For a list of members of the London Greek Committee, see Woodhouse, op.cit.,
p. 182-4.
4. See J. R. Dinwiddy, 'Bentham and the Early Nineteenth Century', The Bentham
Newsletter, No. 8, (June 1984), 15-33.
5. The manuscript of Bentham’s ‘Observations on the Constitution of Epidaurus of
January 1822’ is at UC cvi. 327-94 (26 February-2 March 1823). Parts of it are in Bentham’s
hand and other portions are in the hands of two of his assistants, John Colls and Richard
Doane. Bentham gave no precise title to the work. The heading on the various sheets of
manuscript is: ‘Greece. J.B.’s Observations on particular articles’. The title Bentham placed
at the beginning of the work is ‘Observations by an Englishman on a passage in Raffanel’s
Histoire des evenemen[t]s de la Grèce, Paris, 1822... p. 429 etc.’ The ‘passage’ in question is
an early version of the Greek Constitution of 1822 which is printed in French on pp. 429-41
of Raffanel’s history. It was this version on which the ‘Observations’ was based. Other
manuscript material written at this time is in UC xxi. 180-309 written between 9 February
and 4 March 1823.
6. See Bentham to Blaquiere, 2 March 1823, UC xii. 103; see also Louriottis to Bentham,
14 February 1823, UC xii. 100.
7. Bentham to Blaquiere, 2 March 1823, UC xii. 103.
8. Blaquiere to Bowring, 16 May 1823, UC xii. 123: ‘To day has been rendered peculiarly
interesting by what occured in the Chamber of Representatives, when I presented the Philo-
him for the ‘Observations’; the first from Alexander Mavrocordatos as Secretary to the Provisional Government, and the second from John Orlandos and John Scandilides who were President and Secretary of the Legislative Senate respectively\(^9\).

Contrary to Bentham’s original plan, the Greek legislature announced that it would arrange for the translation into Greek ‘with as much dispatch as may be ... for the common use and benefit of the nation’\(^{10}\). In spite of these sentiments, it was obvious that neither the personnel nor the equipment existed in Greece to make and print such a translation, and the ‘Observations’ was never published. Nor was the work included in the collection of Bentham’s writings edited by John Bowring in 1838-43. The only known copy, believed to be virtually complete, has been found in the vast Bentham archive at University's works and observations, and made a speech ... Resolutions were immediately passed for translating the works and an appropriate letter will also be written. I have found a man who is likely to devote the remainder of his life to the study and propagation of Mr. B’s principles. This man is a priest!!! very amiable and enlightened. I am taking the necessary steps to set him to work. But there is not a single type in G[reece] much less a press!!!'. On 11 June, Blaquiere wrote to Bowring (UC xii. 126) in a similar vein: 'Pray inform the Philosopher that a most flattering letter has been voted to him by the Legislative Assembly, and that the observations are in a course of translation - In other respects he has a right to be amply satisfied with the devotion universally felt here'. In his book on the Greek revolution, Blaquiere later wrote: 'Mr. Bentham has given up all the energies of his powerful mind to the subject; and though Greece may not be enabled to profit by his sublime and benevolent labours so soon as the friends of humanity could wish, she already appreciates their value, with a degree of gratitude and zeal that does her public men and citizens the very highest honour' (The Greek Revolution, London, 1824, p. 310n).

9. The 'conjecture' made by C. Triantaphyllopoulos ('Ipomnima tou Bentham peri tou protou ellinikou politeumatos kata anekdotoi apantiseis tou Bouleutikou', Praktika tis Akadimias Athinon, xxxvii (1962), 80-7) and repeated most recently by Pan. J. Zepos ('Jeremy Bentham and the Greek Independence', Proceedings of the British Academy, lxii (1976), 296-7) that the letter of thanks for Bentham’s Observations’ was delayed because the Greek government did not want to make a forthright stand on Bentham’s hostility to monarchy is clearly false. Bentham received two letters of thanks for the 'Observations' which he subsequently published. See Bowring, iv. 580-1 (letters 1 and 2). The so-called delayed letter to which Triantaphyllopoulos refers was in fact a reply to a letter from Bentham which was in turn a reply to a letter from Alexander Mavrocordatos to Bentham introducing the two Greek Deputies, Orlandos and Louriottis, to Bentham (Bowring, iv. 581-3, letters 3 and 4). Triantaphyllopoulos and Zepos (and others) have also been confused by the fact that the Greek government responded twice to presentations by Bentham: on the presentation of the 'Observations' in 1823 and the presentation of the early draft of the Constitutional Code by Leicester Stanhope in April 1824. For the response of the Greek government to the latter, see Bowring, iv. 583 (letter 5).

sity College London and it, together with related manuscripts, will be published for the first time as part of the new edition of the Collected Works11.

In this paper three major themes of the ‘Observations’ will be considered: a) Bentham’s thesis that the acceptance of popular sovereignty should lead to a transformation of the theory and practice of constitutional government; b) his use of the greatest happiness principle to resolve problems arising from the exclusion of the minority Turkish community from citizenship; and c) his novel and important contribution to constitutional theory in the doctrine of ‘latent negatives’. Then the relationship between the ‘Observations’ and Bentham’s better known work on constitutional government, the Constitutional Code, will be explored. Finally, consideration will be given to the allegation that the Constitution of Epidaurus was a mere ‘façade’ created by the Greeks to impress Europeans as to the capacity of the Greeks to operate a Western, centralized government. This allegation raises not only the question of the point of Bentham’s commentary (if it was on a constitution not meant to be operable) but also the general issue of the relationship of constitutional theory to practice.

II. Popular Sovereignty and the Division of Power

Unlike most earlier and even later writers on constitutional law, Bentham believed that once the doctrine of popular sovereignty was accepted as the basis of a constitutional system, the whole of constitutional theory would have to be radically altered. The object of constitutional government, it is commonly said, is to replace the rule of men by the rule of law. And one object of a constitution is to limit the power assigned to various offices so that the temptation to exercise arbitrary or despotic power is minimized. The traditional means by which power is limited is through the division of power among various bodies which then have the capacity to check and thwart others in the state, but not the power to impose their particular wills. The division of power was widely hailed as the main means for avoiding despotism and, for the 18th and early 19th centuries, was exemplified in the English constitution. The doctrine took a variety of forms and, indeed, had been known to political thought since antiquity. Bentham had long been suspicious of the doctrine and was especially critical of the formula of Blackstone in the Commentaries on the Laws of England12. This criticism became more pointed once he had

11. In a volume tentatively entitled: Writings for Greece and Tripoli.
become committed to representative democracy, as the doctrine affected his theory at two crucial points. Firstly, it was directly opposed to his principle of legislative supremacy and the clear subordination of the executive and judicial branches to the legislature (and hence through the legislature to the people). Secondly, so long as the English constitution was held up for emulation, and the American constitution praised insofar as it embodied this principle (although in a different form), Bentham felt that no progress generally in constitutional theory and practice was possible. For under the widespread influence of writers like Montesquieu and DeLolme, liberal politicians throughout the world looked to England or America for models of their constitutions\(^\text{13}\). In his earlier writings Bentham, though critical of Blackstone, remained somewhat sympathetic to Montesquieu and DeLolme\(^\text{14}\). But by the time he was writing for the Greeks, he was a sharp critic of all three writers and in the ‘Observations’ he explicitly dismissed their accounts of the English constitution as ‘the romance’ and warned the Greeks not to take their writings seriously\(^\text{15}\).

In the ‘Observations’ Bentham discussed the theme of the division of power in the context of the Greek constitutional provision for sharing legislative power between the Legislative Senate and the Executive Council\(^\text{16}\). However, he soon developed his theme more generally, and took as his starting point the principle of ‘strict and absolute dependence’ on the people of the state\(^\text{17}\). This principle affected the division of legislative power only indirectly, and its aim was to arrange the institutions of government in such a way that the will of the electors would be least thwarted and that government would be most accountable to it. For Bentham, this was best achieved, not through a direct democracy or a small republic, but through a representative democracy with a single legislative chamber elected by virtual universal suffrage in annual elections using the secret ballot. The executive and judicial branches of govern-

\(^{13}\) C.L. de Secondat, Baron de Montesquieu, *De l'esprit des lois* (1748); Jean Louis De Lolme, *Constitution de l'Angleterre* (1771).

\(^{14}\) *Comment/Fragment (CW)*, pp. 124, 278 and n.

\(^{15}\) UC cvi. 354 (1 March 1823).

\(^{16}\) See Articles 9 and 10 of the Greek Provisional Constitution of Epidaurus (1822). The version used here, the same as that used by Bentham, was printed in C.D. Raffenel, *Histoire des événements de la Grèce*, Paris, 1822, pp. 429-41 (see note 5 above). The more widely circulated Greek/English version (*The Provisional Constitution of Greece*, London, 1823) had not yet been published when Bentham wrote the ‘Observations’.

\(^{17}\) UC cvi. 338 (27 February 1823).
ment were then devised to be as dependent upon the will of the legislature as the legislature was dependent upon the will of the electorate.

Bentham admitted that in certain circumstances the principle of the division of power could have beneficial consequences. Where legislative power in a state was independent of the people, its division could lead to moderate government, because the various bodies in the state possessing legislative power would compete for the favour of the people to advance their own interests. They would also be inclined to compromise among themselves to advance their interests further. The result of this process would tend to favour the people generally, and produce a form of 'weak' government (as in England) which was preferable for the people than more absolutist regimes (as on the Continent). Bentham could see the advantages of this 'weak' form of government sufficiently that he argued against the institution of the principle of absolute dependency in England, as this would produce, unless the laws generally were radically reformed, 'the consummation of despotism and misrule; it would give to the laws ... a strength altogether irresistible'.

In spite of this caveat, Bentham argued that once the doctrine of popular sovereignty was accepted, there was no justification for the retention of the principle of the division of power. This was not an easy argument to establish, as it meant showing that what had hitherto been widely regarded as a 'good' principle was no longer so. The argument which he used was, nevertheless, a plausible one. Consider the United States, he began, where, in spite of the employment of a form of divided power, nevertheless, most officials were directly or indirectly removable by the people and hence accountable to them. To improve this government, he continued, suppose a king were appointed with a veto on all legislation and the power to appoint and dismiss all members of the executive branch of government. He argued that no benefit could arise from such an appointment nor from the appointment of an hereditary house of lords which would be necessary to support the monarchy. For Bentham, the main consequence of instituting divided power in a situation such as this (besides the fact that the people in general would have their votes devalued) was that government expenditure (now no longer controllable by the people) would increase dramatically, as it had in England under George III, and the burden of this expenditure would fall on the people.

18. UC cvi. 344 (1 March 1823).
19. UC cvi. 345 (1 March 1823).
20. UC cvi. 343 (28 February 1823).
Bentham's argument rested on a deeper foundation, which he did not explore in the 'Observations' but which can be found in the manuscripts which were written at this time. This was simply that the exercise of popular sovereignty coincided more or less with the greatest happiness of the greatest number. Bentham argued on the basis of interests that the people generally were more inclined (or found it in their interests) to support the greatest happiness of the greatest number. No other class of persons, he believed, would have that interest. But why should each individual see the greatest happiness of the greatest number as in his interest? In a characteristic passage, he wrote:

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 expense 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 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 interest²².

Bentham did not argue that the universal interest was the sum of the interests of the individuals who made up the society. The universal interest was more or less fixed and definite and could be defined initially by such values as security, subsistence, abundance, and equality, all of which could be justified as being conducive to the greatest happiness. Individual interests were more variable, and were often such that set individuals in opposition to each other in society, but they could be of a sort to join with the universal interest. For Bentham, the key point was that the individual's interest would be advanced and his happiness enhanced when his interests coincided with the general

²². UC xxi. 247 (20 February 1823).
interest. And when they did not, he would be thwarted by the other members of the community (his allies and coadjutors). He also argued that through a representative system this process of alignment and advancement of interests would be strengthened and enhanced.

Bentham did not argue that the will of the people always coincided with the greatest happiness principle. But he did argue that due to the various checks on self-interested actions which were opposed to the general interest that were built into the system the tendency for the will of the people to coincide with the greatest happiness principle was strong. The division of power, however, disrupted this tendency and placed in power interests which could not easily be made to act in conformity with the greatest happiness principle. Indeed, the division of power was the main opponent to the otherwise efficacious doctrine of popular sovereignty. In saying in the 'Observations' that the employment of the division of power deprived the people of their votes and their share of supreme constitutive power, Bentham also meant that the people (though perhaps gaining a dose of moderate government) were nonetheless being deprived of their happiness, that is to say, of the opportunity for their interests to be advanced in line with the greatest happiness.

III. The Greatest Happiness Principle and the Treatment of Minorities

Bentham's remark (cited above) that the conformity of the Greek Constitution of 1822 to the greatest happiness principle was an agreeable surprise to him was based not on any explicit statement of the principle in the constitution, but on the implications of several key provisions. These provisions contained numerous progressive 'enlightenment' principles such as equality before the law, a wide suffrage, careers open to merit, and progressive taxation based on legislation which Bentham generally favoured and considered justifiable by the greatest happiness principle. Although he was troubled generally by some constitutional provisions (e.g. division of power, judicial organisa-


Art. 3. Les Grecs sont égaux devant la loi, sans distinction de rang ni de dignité.
Art. 6. Tous les Grecs peuvent être appelés à tous emplois. Le mérite seul détermine la préférence.
Art. 8. Les contributions aux charges de l'état sont réparties dans la proportion de la fortune de chacun. Aucun impôt ne peut être exigé qu'en vertu d'une loi.
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It was in the exclusions from suffrage and political power that he saw the main threats to government based on the greatest happiness principle. This applied to the exclusion of women from politics, men under the age of thirty from becoming members of the Legislative Senate, and most importantly the exclusion of all non-Greeks from suffrage and office. As for women, there does not seem to be any specific reference to female suffrage in the constitution, but Bentham was under no illusion that the Greeks had adopted this progressive idea, and, as elsewhere in his writings, though he favoured female suffrage and saw no difficulty with its institution, if it was combined with the use of the secret ballot, he thought it pointless to push a suggestion that would not be at that time taken seriously.

Bentham also anticipated his later critique of James Mill’s exclusion from suffrage of everyone under the age of forty in criticizing the provision to exclude those under thirty from legislative office. But his main concern was with the limitation of political rights to Greeks only, which meant the exclusion of the Moslem and Jewish populations from suffrage and office. In the actual ‘Observations’ sent to Greece, Bentham dealt with this difficult problem in a most circumspect fashion. He did not mention the subject until the final pages of his text and then restricted himself to making suggestions as to how to minimize the opposition between the two groups. In the manuscripts, however, he addressed himself to the situation more directly, as in the following passage:

The constitutive power—i.e., the power of choosing those by whom all operative power in all its degrees commencing with the supreme shall be exercised. The exclusion put on this occasion upon so large a part perhaps the largest part of the existing population is at present it should seem an unavoidable arrangement but it is a highly deplorable one. It entails upon the country the existing division, reversing only the position of the condivident races. It places the Turks under the Greeks as the Helots were in under the Spartans, in Ireland the Catholics under the Protestants, in the Anglo-American

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25. See Articles 1, 2, 6, 13. See also UC xxi. 238ff (19 February 1823).
28. UC cvi. 392-394, which is a copy of cvi. 381-3 (2 March 1823).
United States the Blacks under the Whites. In no country can any such situation [?] have place but in point of morality and felicity both races are, in howsoever different shapes, sufferers by it: the oppressors as well as the oppressed.

To lessen the opposition of interests—to bring them to coincidence as speedily as is consistent with security should therefore be an object of constant care and endeavour\(^29\).

This passage has been quoted at length because it contains several ideas of considerable interest. On the one hand, Bentham conceded that the Turkish population was or would be an oppressed class forming a substantial minority, perhaps even a majority in the society. He considered the arrangement 'highly deplorable' and pointed out that the Greeks would suffer from this arrangement as much as the Turks. On the other hand, Bentham was willing to see the exclusion as an 'unavoidable arrangement', and was also, in conceptual terms, willing to accept the definition of the new state in terms of its being wholly Greek—that is to say, he was concerned with 'the greatest happiness of the greatest number of the political community in question'. The happiness of the excluded Turks became under this formulation 'a secondary object'\(^30\). Bentham might have argued that the exclusion of the Turks from political suffrage and office was itself so gross a violation of the greatest happiness principle that the constitution could hardly be said to embody this principle. That he did not argue this was not due (as perhaps was the case for female suffrage) to a fear that the rest of his advice would not be accepted if he advanced this position. Bentham's acceptance of the situation was not prudential but conceptual. The object of any political society was firstly to provide for the security (the key ingredient in happiness) of its members. The revolution was fought to rid the Greeks of Turkish rule and to secure for the Greeks an independent state. Bentham could see that the security of this new state might initially have depended on the exclusion of the Turks. If they were not excluded, they might soon be in a position to oppress the Greeks again. While Bentham could accept this argument, he could also argue that the future security of the Greek state lay with the accommodation of the Turks in the state. In the text of the 'Observations' Bentham attempted to move dialectically from the dictates of 'self-regarding prudence', i.e. the security of the Greeks, to a position of benevolence—called 'effective benevolence'—which was compatible with it\(^31\).

\(^{29}\) UC xxi. 192 (12 February 1823).
\(^{30}\) UC xxi. 264 (18 February 1823).
\(^{31}\) See UC cvi. 392 which is a copy of cvi. 381 (2 March 1823). See also Deontology (CW), esp. pp. 249-81 where this distinction is employed.
If the main principle of 'self-regarding prudence' was to avoid the possibility of hostility by the Turkish community, the principle dictated by 'effective benevolence' was 'to treat them with as much kindness as the indispensable regard for your own safety will permit'\(^{32}\). With regard to voting and representation, Bentham argued that the Turks could be given the vote without posing a threat to the Greeks. He took the view that so long as the Greeks were in the clear majority in the legislature, they could afford to grant the non-Greeks suffrage. If at any point the non-Greeks tended to out-number the Greeks in too many election districts, the voting age for non-Greeks might be increased beyond that for Greeks\(^{33}\). In spite of this severe limitation on citizenship, Bentham believed that the introduction of non-Greeks to citizenship would eventually make them good citizens and would diminish the threat to the security of the Greeks. 'They would be raised to a situation high in dignity as well as security', wrote Bentham, 'in comparison of the highest which any of them can occupy even in a Mahometan country at present' and 'to no Christian [i.e. Greek]', he continued, 'could in that case any Mahometan be an object of contempt'\(^{34}\). It might have been argued that in raising the aspirations of members of an oppressed class by granting them citizenship and then frustrating those aspirations by denying them effective citizenship the result might be to threaten the ruling class more than if the oppressed class were left in a downtrodden state. Bentham might well have accepted this argument, but he would then have replied that once integrated into the constitutional system, the non-Greeks would find a number of advantages in remaining in this system, however unjust and frustrating, rather than risking civil war. There would have been a number of issues on which some Greeks and some non-Greeks might agree and together form a majority in the electorate to see put into effect by a wholly Greek legislature. And the willingness of the non-Greeks to engage in constitutional politics rather than attempt rebellion or revolution would so enhance the security of the Greeks that further concessions might be forthcoming.

A second example which Bentham employed in the 'Observations' of how 'effective benevolence' might be compatible with 'self-regarding prudence' concerned the possession of weapons by the two groups. Bentham assumed that in due course Greek males would be trained in the European style of warfare (organised in companies and battalions) and in the use of the musquet

\(^{32}\) UC cvi. 392 (381).
\(^{33}\) UC cvi. 393 (382).
\(^{34}\) Ibid.
and bayonet. Non-Greeks would presumably not be allowed to participate in this training nor to possess firearms the length of musquets. Nevertheless, Bentham argued that non-Greeks should be allowed to carry swords and pistols so that they would be able to defend themselves from attack. This could be achieved, he believed, without arming them in a way which would threaten the security of the Greeks. That is to say, they would have no training in the use of the musquet, and, in addition, would not be allowed to carry concealable weapons such as daggers and very small pistols.

Although Bentham confined his arguments in the ‘Observations’ to the ways the non-Greek population could be treated with benevolence without threatening the security of the Greeks, he was at the time thinking of some consequences of this benevolence which would extend beyond the Greek constitution. In the letter to Blaquiere, which accompanied the delivery of the ‘Observations’ to him to be taken to Greece, he suggested privately:

... supposing them [Moslems] treated with the gentleness there recommended [i.e. in the ‘Observations’] they might ere long be made willing instruments for the liberation of the subjects of the Barbary Powers from the existing Despotisms. The people are everywhere prepared for it, as I have been satisfied by circumstances that have come to my knowledge, but of which no intimation could be given in the paper intended for publication, lest by that means the fulfilment of the prophecy should be prevented by the divulgence of it. Natural and supposed irreconcilable enemies would thus be converted into grateful and steady allies.

Bentham had in the previous year worked with Hasunna D’Ghies, the young ambassador from Tripoli, in devising ways to transform and even to overthrow the established ‘Mohamedan despotism’ and replace it with a more liberal regime, and it is to the knowledge gained in this adventure to which he probably referred in the letter. This additional dimension to the constitutional problem revealed Bentham’s wider concern with bringing happiness and good government to the whole of the Ottoman Empire and beyond. The

35. UC cvi. 393-4 (382).
36. Ibid.
37. Bentham to Blaquiere, 2 March 1823, UC xii. 103.
Greek struggle for independence was the first step but not in the sense of providing an example of a successful revolution. The key to the spread of liberal government to the rest of the Middle East lay with the way in which the Moslems resident in Greece were treated and the extent to which they were well treated depended, for Bentham, on the extent to which they could be admitted to citizenship and civic responsibility. It was for this prize that Bentham thought other Moslem peoples would be enticed to overthrow their despotic governments.

It is true that Bentham did not invoke a doctrine of universal natural rights or insist that the greatest happiness principle required the equal treatment of all persons in the state in suffrage and political rights. He would most probably have found such doctrines either pointless (given the nature of the revolutionary struggle) or dangerous. But he never suggested that where non-Greeks were deprived of political rights that they should in any way serve the interests of the Greeks or be exploited by them. His main aims were to minimise oppression and insecurity for both Greeks and non-Greeks, and he thought that this could best be done through a constitutional system which increasingly integrated the non-Greek community in a way which did not threaten the Greek community. It was clear, however, that unless the Greeks accepted these changes, they, as well as the non-Greeks, would be threatened, as they would have to maintain their superior position increasingly through force.

IV. Latent Negatives

One discussion in the 'Observations' deserves special notice. In his examination of the division of power Bentham extended his analysis from the open vetoes on legislation (and by implication on the will of the people) possessed in this case by the Executive Council to an analysis of what he called 'latent negatives', that is to say, potential vetoes possessed by various officials by virtue of deficiencies in the way the constitution was itself drafted. The possessor of the veto was, in effect, given a share of legislative power. He might be, as we shall see, a high official, a body of officials, or even a humble clerk.

Bentham contended that a number of articles in the Greek constitution revealed the presence of a 'latent negative'. For example, in Article 24, the President of the Legislative Senate was given the power to fix the days on which the session of the assembly was to commence and to terminate. He thus had the power to determine that the Senate would never meet, or, if meeting,
would cease to do so. Even though this President of the Senate was elected to his position by the Senate itself, he nevertheless would hold office for the duration of the session, and there was no provision for his removal. This official also had the power (in Article 25) of calling an extraordinary session and thus was free to keep the Senate in existence so long as it suited him or to terminate it at will.

The President of the Legislative Senate was given other opportunities to exercise a latent veto. By Article 30, all legislative acts were to be signed by the President and countersigned by the Principal Secretary. If the President refused to sign, the act could not become law. Similarly, in Article 31, he was empowered to transmit resolutions from the Senate to the Executive Council, but Bentham noted that if he did not approve of a resolution, he could refuse to send it on. Finally, in Article 36, where each member of the Senate was given the right to propose legislation, the President was empowered to send it to a committee for examination. As Bentham noted, he could simply omit to do so. Bentham also pointed to similar latent negatives possessed by the Principal Secretary of the Legislative Senate. In Article 31, he was given the power to countersign resolutions of the Senate, and in Article 46 he was to receive resolutions from the President for transmission to the Executive Council. In both of these cases refusal or inaction might lead to the end of these resolutions.

Bentham then turned to the 'latent negatives' possessed by members of the Executive Council and the eight subordinate ministers. For example, even where the Executive Council had concurred in legislation and a particular law had been passed, it might later turn out that a majority in the Council did not agree with the law. This group of three could by Article 54, which empowered the Council to have laws executed by ministers, simply omit to send the law to the particular minister, and the particular law would become inoperative. Furthermore, if the minister who was to execute the law, did not approve of it, he could ensure that it was not implemented. Finally, both the President of the Executive Council and the Principal Secretary possessed a 'latent negative' by virtue of Article 57 where they were empowered to sign, countersign, and seal all acts and decrees. Bentham especially wondered who was to keep the Seal of the State. The constitution did not specify who this might be, but he too might very well possess a 'latent negative'.

In the Constitutional Code Bentham took considerable pains to avoid the possibility that various officials might exercise vetoes on legislative power. Conspicuously absent from the Code were the officials whom he identified as possessing 'latent negatives' in the Greek constitution (e.g. President and
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Principal Secretary of the Legislative Senate). Bentham devised means by which legislative, executive and judicial business would not languish. All officials could be removed by petition and vote. The use of 'deputes' ensured that government business did not come to a halt due to absence from office. The principle of 'single-seatedness' enhanced accountability in office so that those potentially exercising vetoes or otherwise thwarting the popular will could readily be identified and removed from office. But even in a narrow, technical sense, Bentham ensured that one official could not quietly prevent another from carrying out his duties. To take one example, Bentham provided in the Code that the appointment of a civil servant was to be made by the appropriate minister and confirmed by the prime minister. A perfect opportunity for quietly preventing an appointment of which he did not approve would appear to rest with the prime minister by his simply not confirming the appointment. This might be an opportunity perhaps for persuading the minister to appoint someone favoured by himself and perhaps hostile to legislation of which he disapproved. To avoid this 'latent negative' on the execution of legislation, Bentham provided that once the 'location instrument' making the appointment arrived at the prime minister's office, he must either appoint someone else or suspend the appointment made by the minister. If he did nothing, after a fixed period of time the appointment was automatically confirmed. Bentham was not opposed to the prime minister being involved in making the appointment, or, indeed, making the appointment himself. After all, the prime minister was free to dismiss the minister if he so wished. Nevertheless, what he wanted to avoid (and he did so successfully) was giving the opportunity to the prime minister of thwarting or undermining the legislative/executive process simply by inaction. In the Code he was forced to act publicly and by doing so, he was also forced to take responsibility for his actions and thereby be accountable to those who appointed him. Other bodies and offices throughout the Code were carefully defined so that the exercise of 'latent negatives' would be impossible. It might appear that Bentham was dealing here with a fairly minor, technical matter, but once it is recalled that this discussion arose from the earlier consideration of the division of power and was closely related to Bentham's general theory of democratic accountability, it may be seen as an important theme in his theory of democratic government.

V. The 'Observations' and the Constitutional Code

When Bentham wrote the ‘Observations’ in February-March 1823, he was actually engaged in drafting the *Constitutional Code*, begun the previous year on the invitation of the Portuguese Cortes and continued in 1823, partly encouraged by events in Greece. A number of proposals and suggestions made in the ‘Observations’ were either taken from this early Code or subsequently appeared in it. Portions of the considerable material on judicial organisation and procedure which appeared in the ‘Observations’, might well have been a brief summary taken directly from an early version of the Code, as a considerable portion of it was written in general terms and made no direct reference to Greece. Just as in the Code, Bentham saw the judiciary as best headed by a single official, the Justice Minister. The Greek constitution, however, though possessing a Minister of Justice subordinate to the Executive Council (Article 20), vested judicial power in a body of eleven officials who were chosen by ‘the Government’ and who then chose from among themselves a President (Article 86). One of the deficiencies of the Constitution was that it failed to spell out either the duties of this body or the means by which its members were chosen by the Senate and Executive Council together. Presumably, it was some sort of supreme tribunal, but no precise duties were given to it. Bentham characteristically criticized the provision for this body and proposed not only its abolition (with considerable savings in money and the avoidance of potential corruption) but also the elevation of the Justice Minister from relative obscurity, as a subordinate member of the executive, to head the judicial authority of the state.

In other suggestions for the organisation of the judiciary Bentham followed closely ideas developed in the Code. He proposed that the state was organised into single-seated (i.e. one judge in each) districts, with the judges appointed by the Justice Minister. Nearly all cases were to be heard in this one type of court. He also proposed here, as in the Code, that power be given to the elector­ate (a provision vigorously criticized later by John Stuart Mill) to dismiss (though not to appoint) judges. He used here the system of substitutes who were unpaid (unless paid by the judges) deputies acting in place of the sitting judge in order to avoid delay in hearing cases. Other provisions, such as two

42. See UC cvi. 363-78 (27-8 February 1823).
44. UC cvi. 368 (28 February 1823). At this point Bentham did not use the term 'depute'
classes of jurors, the exclusion of lawyers from positions as judges, uninterrupted sittings of the judiciary, and judicial hearings open to all who wished to attend, also reappeared in the Code\textsuperscript{45}.

Bentham's suggestions for the two other branches of government, though close to the Code, displayed at least one significant variation largely due to the fact that he modelled the proposals for the executive more closely on the American system than he did in the final version of the Code. The Greek Executive Council, to which he devoted considerable attention in the 'Observations', seemed to violate most of his principles of constitutional organisation. It was composed of five members who were chosen from outside the legislature and who served for one year. The precise method of selection was not determined but was left to further legislation. The Executive Council was a powerful body which performed a wide range of executive functions, and, in addition, possessed a share of legislative power equal to that of the Legislative Senate\textsuperscript{46}. Among its executive powers was included that of the appointment of all government employees. In legislative matters, it could veto any act passed by the Legislative Senate and make its own proposals for legislation.

In contrast to this arrangement, Bentham favoured a single legislature with the executive clearly subordinate to it. He saw in the Executive Council a body which could easily overwhelm and subordinate the rest of the government, and especially the Legislative Senate. Besides restricting its legislative powers and turning it into a true executive, subordinate to the legislature and giving execution and effect to legislation, Bentham proposed a basic simplification of the personnel and duties. In addition to the five members of the Executive Council, the constitution provided (Article 20) for the appointment of eight ministers to deal with such matters as foreign affairs, war, justice, finance, etc. Bentham recommended the abolition of these eight subordinate ministries and the elevation of one of the five members of the Executive Council to a position similar to that of the President of the United States with sole control of the entire executive branch of government. The remaining four members of the Executive Council would be subordinate to him and head four ministries similar to those of state, war, navy and finance in the United States. 'If the business of the Greek nation', he remarked, 'is but carried on with a degree of

which he later adopted from the law of Scotland. See \textit{Constitutional Code}, Vol. I, Ch. V, § 2, Art. 3n, \textit{(CW)}, p. 31n.

\textsuperscript{45} UC cvi. 384 (a copy of UC cvi. 369, 28 February 1823); 384-5 (a copy of 370, 28 February 1823); 388-9 (a copy of 376, 27 February 1823); 389 (a copy of 376, 27 February 1823). Cf. Rosen, \textit{Jeremy Bentham and Representative Democracy}, op. cit., pp. 149-63.

\textsuperscript{46} See Constitution of Epidaurus, Articles 18-22, 52-84.
aptitude and success not very much below that with which it is carried on in that Confederated Commonwealth, the Greeks will be a happy people.47. At any rate, eight positions would have been abolished and the structure of the executive simplified. Bentham did not favour, however, the mere imitation of American practice, as he did not approve of the system of indirectly electing the President and the President's veto on legislation. He proposed instead that the Greek constitution was followed with the annual election of the executive (now limited by Bentham to a single person) by the legislature, so long as the executive no longer was able to veto legislation.

One interesting difference between Bentham's proposals here and the Constitutional Code was that he had not yet developed the more elaborate scheme of thirteen ministers (plus the justice minister) which he later developed for that work and was content here to recommend the four which he believed constituted the American system.48. In contrast, however, he recommended the continuation of the Greek proposal for annual elections of the executive by the legislature, while later in the Code he adopted the four-year term employed in the United States for the election of his prime minister.49.

Bentham also considered appointments to various offices within the executive which in the Greek constitution was left wholly to the Executive Council itself. He proposed that the patronage of each government official should be limited so that the President under the newly proposed arrangement would appoint (and be responsible for) only the four ministers directly under him. They, in turn, would appoint the main officials in their respective ministries. Thus, the power of appointment would be diffused throughout the executive, without any one person or body of persons possessing too great a power of patronage. Furthermore, Bentham proposed clear chains of command and lines of responsibility within each ministry.

Bentham did not devote too much attention to monarchy in the 'Observations' partly because the Greek constitution was republican in form and partly because he did not want to stir up opposition to his other proposals among the numerous Westernized Greeks who, however partial towards republican government in principle, saw the acceptance of a European monarch on a Greek throne as a way of securing independence from Ottoman rule. Although he included a discussion of monarchy late in the 'Observations' he seemed to

47. UC cvi. 332 (27 February 1823).
49. Ibid., p. xxiv; Ch. VIII, § 5, Art. 1, p. 156.
disguise the discussion somewhat by placing it under the heading: 'Unapt arrangements inserted in the Spanish Constitution but not in the Greek'. Nevertheless, the reader finds under this innocuous heading a typical late-Bentham discussion of the inaptitude and corruption surrounding the institution of monarchy in which his dislike of the institution was made abundantly clear.

**VI. Constitutional Theory and Practice**

From the vantage point of contemporary politics and political theory, it takes a considerable imaginative leap to grasp the importance given to constitutions in the 1820s. Nowadays not only are constitutions written largely by civil servants but also, among theorists, they have been devalued in importance when compared with economic forces and such political factors as nationalism and tribalism. Thus, there is a temptation to dismiss any constitution as a facade behind which the real forces of politics and economics operate. From this perspective Bentham's efforts to draft and distribute constitutions throughout the world may seem ridiculous and the fact that leaders of new states seeking to establish constitutional government beat a path to Queen's Square Place, absurd.

There was a revival of interest in constitutional theory and practice in the 1820s, as many new states were created out of the breakup of former colonial empires. New constitutions were adopted, revised or implemented throughout Central and South America, Greece, and in Spain and Portugal. Although this new interest in constitutions was heavily indebted to the last great period in the development of constitutional practice—the 1780s and 1790s when the American and French constitutions were written—Bentham, for one, felt that further steps might be taken which not only incorporated these new ideas and criticized those which were not appropriate but also took full recognition of the most important development since this period. If in the 1780s the seed of constitutional democracy was planted, by the 1820s constitutional democracy might be seen as a fully grown alternative to a variety of European constitutions. Bentham was one of the few constitutional theorists to have seen the significance of this development. In his critique of the division of power he advanced, not the principle of *vox populi, vox dei*, but the doctrine that a constitutional democracy, based on popular sovereignty, could provide settled, moderate government, without practices like the division of power which, for whatever laudable reason they evolved, seemed now only to thwart

50. UC cvi. 390-2 (a copy of UC cvi. 379, 26 February 1823).
the will of the people. It was this doctrine which Bentham later developed in full in his *Constitutional Code*.

During the 1820s Europe was full of revolutionary leaders attempting to raise loans, armies and public enthusiasm for their various causes or attempting to survive in defeat and disgrace on limited resources while planning for the future. Many of these leaders passed through or lived for a period in London, and despite his reticence about seeing people, a number came to know Bentham. What did these adventurers hope to obtain from Bentham and why did they regard the establishment of a constitution as a crucial part of their various revolutionary activities? One answer to these questions is fairly obvious. The adoption of a constitution was a signal to the world of the willingness of these leaders to establish a government able to function within the European political tradition. This signal, however tentative, was essential, if European states were to be persuaded to support loans to the new governments and recognition of their diplomats. Nevertheless, a constitution also served other purposes. It established the nature of the regime (e.g. whether republican or monarchical), and the values it intended to uphold. In establishing various offices and institutions it represented the first step towards settled government.

It has been held that the Constitution of Epidaurus of 1822 was not really a constitution at all and was no more than a facade designed to lead European powers to believe that Greece could be ruled by a centralized constitutional government. William St. Clair has put the matter most strongly: in Greece, the constitution ‘never existed ... except on paper’; and in Europe it encouraged the false belief ‘that the Greek Revolution was being conducted on progressive liberal principles’. It is true that at the time the Greek constitution was written conditions in Greece were anarchic and actual government, insofar as it existed, was based on the localized rule of the *kapetanei* and forms of local or regional government which survived the breakup of Ottoman rule. Nevertheless, considerable efforts had been made to take the first steps towards national constitutional government. An assembly in Greece had adopted the constitution, and it was even revised by another assembly at Astros in 1823. Although this body was more of an assembly of interested parties than a constitutional government, there is little doubt that the constitution, if not operable, represented the ideals and aspirations of the Westernized Greeks who drafted it. Furthermore, they could see that it was in their interest to have

53. For a brief account of these revisions, see Dakin, *The Greek Struggle for Independence 1821-1833*, op. cit., pp. 103-6.
established, even if that goal might have to await independence from Ottoman rule and victory by the Westernized Greeks over other Greeks who opposed a unified national government. 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 Westernized Greeks not only thought constitutional government to be good for Greece but also that it would advance their own interests in the state.

If we can clear Bentham of the possible criticism that he wrote a commentary on a constitution that never existed, it might still be argued that he saw

54. Consider the following passage from Thomas Gordon's *History of the Greek Revolution*, 2 vols., Edinburgh and London, 1832, i, p. 325: 'Such is a slight sketch of this constitution, excellent in theory, but totally unfit for the people to whom it was addressed; hardly did it see the light, when some of its best provisions were openly trampled upon, and others forgotten; indeed the organic law of Epidaurus soon became a dead letter, used only in the following years as a watchword for faction. It may appear surprising, that its authors should have given institutions so thoroughly democratical to a nation, which, after groaning for centuries under despotism, was fast verging towards the worst kind of oligarchy, and that such a charter should have been accepted by the aristocrats, who made up a large portion of the assembly. No one in fact thought this mode of government practicable in Greece; but the ambition of so many individuals, (each afraid of seeing a rival invested with solid and permanent power), rendered it necessary to generalize, and ostensibly to refer everything at short intervals to the mass of the people. Each man looked upon the constitution as a stepping stone to the highest offices, and its framers were not the least aspiring. Having no natural hold on the country from long residence or family connexions, their business was to oppose legal barriers to the great captains and primates; thinking themselves sure of success in a career where victory depended upon political finesse'. Gordon was an early Philhellene, a member of the London Greek Committee, and a first-hand observer of many events during the early period of the Greek revolution. His strong condemnation of the Westernized Greeks and his general view of the Constitution seem to be based on two assumptions which Bentham would not accept: firstly, that the Greek people generally were 'unfit' for constitutional democracy; and, secondly, that the Westernized Greeks were somehow wrong to use constitutional government to advance their own interests. As for the first of these, Bentham 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. See Rosen, *Jeremy Bentham and Representative Democracy*, op. cit., pp. 185ff. With regard to the second assumption, Bentham would not subscribe to a view which separated duty from interest. If the Westernized Greeks could establish constitutional democracy and subsequently gained from such an establishment (though without undermining the constitution) in Bentham's view, valuable motives would be established for supporting the constitution. See R. Harrison, *Bentham*, London, 1983, p. 130. Bentham could obviously see far more grounds for optimism than Gordon.
in the Greek constitution and in Greek society a greater potential for good
government than was realistically present. It was not that he found good
government present in Greece, but rather he found in Greece a 'clean slate',
an absence of obstacles to good government. Here was a society not corrupted
by the traditional political institutions of Europe and which might more easily
adopt the institutions he proposed than a country like Great Britain. In the
opening paragraph of an essay headed 'JB to Greek Legislators' on which the
'Observations' was partly based Bentham called attention in the strongest
terms to the unique position of Greece:

> 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 mind[s] are not under the tyranny [of] Priests. Your minds are not under the tyranny of Lawyers.  

To this Bentham added shortly afterwards that Greece was fortunate in not possessing colonies: 'In this respect you have the advantage over Spain, Portugal, England, France and the Netherlands: in particular over Spain and Portugal.'

There is some evidence that Bentham was aware of difficulties in establishing good government in new States, or at least was aware that conditions in new states were different from those in established ones. At one point in his writings for Greece, he contrasted Greece with the new states of Latin America and pointed out that in Greece no settled habits of rule and obedience yet existed. But he came very close to asserting that Greece was in some sort of privileged position and exempt from the ills of other European states. One reason for Bentham's belief may have been the fact that he had little experience of a state like Greece which was genuinely new. Bentham realised that the United States (which in other respects served as a model for Greece) was not

55. UC xxi. 290 (21 February 1823). The entire manuscript is at xxi. 290-309 (21-4 February 1823).
56. UC xxi. 294 (21 February 1823).
57. See UC xxi. 224-5 (10 February 1823) where Bentham discussed the way in which uncertainties and dangers in new states led to a dependence of the individual on the whole and a tendency for the individual to make heroic sacrifices for the good of the whole. See also *Constitutional Code*, Vol. I, Ch. VI, § 25, Arts. 42-3 (CW), pp. 83-4, where he explored the problem of a lack of experience and ability among leaders of new states.
58. UC xxi. 211 (28 February 1823).
wholly appropriate as it was already fully established prior to independence\textsuperscript{59}. The new states of Latin America also enjoyed settled European government prior to independence. Whatever Bentham thought of Ottoman rule, he did not think that the Greeks at the time were experiencing settled government and believed that they would not until constitutional government was fully secured.

If Bentham believed that Greece was in an advantageous position with regard to the establishment of constitutional democracy, as compared with European states, by virtue of the clean slate he found there, he did not go so far as to attribute virtues to the Greeks \textit{because} they had no settled government. His assumptions that all political leaders were self-aggrandizing and corrupt would prevent him from imputing to the Greeks virtues based on political innocence. Nevertheless, he was surely mistaken if he thought that it would be easier to establish constitutional democracy in Greece than in Europe, and, indeed, he would eventually come to see this for himself as he became further involved in Greek affairs\textsuperscript{60}.

In spite of the subtlety of the theory and the novelty of some of the ideas, the Greeks for whom the ‘Observations’ were written were hardly prepared to engage in constitutional politics as opposed to the politics of the chiefs, that is to say, of money, weapons, families, and force. That Bentham took their first halting steps towards constitutional politics seriously was a source of considerable gratification to the Westernized Greeks, and this gratification was amply displayed in the official letters which passed between the new government and Queen’s Square Place\textsuperscript{61}. What Bentham proposed, however, was not simply a constitution suitable for Greece, but, in a sense, something more difficult for a new state to adopt. He proposed a constitutional democracy which would have made even greater demands on the Greeks to abandon traditional practices than the constitution they had themselves adopted. As one of a very few among the numerous philosophers, politicians, and ‘liberators’ of the day who wrote, devised, and implemented the constitutions of new states, Bentham had realised that a successful constitutional democracy could not depend on concentrated, independent executive power, and, indeed, he saw in this feature of many states (including Greece) a potential source of despotism. Strong leadership, especially military leadership, was a precondition for national independence, and it would be natural to translate this need which


\textsuperscript{60} See Bentham to Bolivar 13 August 1825 in \textit{The Iberian Correspondence of Jeremy Bentham} ed. P. Schwartz, 2 vols., London and Madrid, 1979, ii, p. 907.

\textsuperscript{61} See Bowring, iv. 580-92.
was essential for political survival itself into constitutional politics as a reliance on strong, independent executive power which would equal if not dominate the legislature. Bentham opposed this move however suitable it superficially appeared even to those involved in establishing the new state. In the 'Observations', as we have seen, he argued against the division of power in general terms and the institution of the Executive Council in particular.

His general approach to constitutional democracy led him to emphasise the importance of elevating legislative power as the most important factor in government. Unless the legislature was supreme, the main task of government, to secure and advance the interests of the governed, could not be achieved. A strong, independent executive serving the interests of the people was as unlikely a prospect for Bentham as an enlightened monarch serving the interests of the people. Both were, almost by definition, in the grip of sinister interests by virtue of their lack of accountability to the people they supposedly served.

It might be argued that constitutional practice since Bentham's day has tended to disprove this thesis. The most successful constitutional democracies have been those where executive power has been most developed and in all constitutional democracies legislatures have played a much diminished role in the governmental process. Indeed, this development has led most commentators to see the emphasis on legislatures actually making laws to be executed by a passive executive as evidence of the irrelevance of much early theorizing about democracy. Bentham's theory could accommodate a diminished active role by the legislature in the governmental process. It would oppose, however, independent executive power as destructive of democracy, and there is no reason to believe that Bentham's ideas on this theme are either irrelevant or outmoded.

62. In the civil strife which developed in Greece in 1823 and 1824, the various factions claimed control of the Legislative Senate and Executive Council which were then established for a period in separate locations. Although the constitution cannot be blamed for the civil war, its design was such as to enable each of the contending forces to capture control of one of the major institutions and to proclaim itself the legitimate government. What was in many respects a struggle between different regions, groups, and personalities thus became a constitutional struggle as well. Although it is arguable that the political struggle became a constitutional struggle because of the special relationship between the Westernized Greeks and the constitution, it is also arguable that the design of the constitution itself encouraged the subsequent division.