

LEGAL THEORY-I

PROJECT ON:

BENTHAM'S UTILITARIANISM

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CHAPTER-1: INTRODUCTION

Utilitarianism was a philosophical movement which flourished in nineteenth century England and, although it made converts in other countries, always retained a distinctly English Flavor. Some of its roots can be found in the writings of the Scottish eighteenth-century philosopher David Hume (1711-1776), who became the founder of an empirical theory of value grounded on the value experiences of the common man. Hume cannot, however, be regarded as a typical and thorough going exponent of utilitarianism. Bentham's contribution provides a fully elaborated and systematic view of Utilitarian Doctrine.

In utilitarianism, the moral worth of an action is determined only by its resulting outcome, although there is debate over how much consideration should be given to actual consequences, foreseen consequences and intended consequences. In 'A Fragment on Government', Bentham says, "it is the greatest happiness of the greatest number that is the measure of right and wrong" and describes this as a fundamental axiom. In 'An Introduction to the Principles of Morals and Legislation', he talks of "the principle of utility" but later prefers "the greatest happiness principle."

The theory of Utilitarianism takes its name from the Latin word Utilis, meaning 'useful'. It was first developed by Jeremy Bentham, a philosopher and legal theorist of the 18th century. Bentham sought to produce a modern and rational approach to morality which would suit the changing society of the industrial age. This was also the era of the French and American Revolutions, and of the Enlightenment, so orthodox morality was challenged on many fronts.

Utilitarianism may be regarded as a relativist, consequentiality and teleological system of ethics, prescribing no fixed moral rules and judging an action by its consequences or end result.

Bentham's legal Philosophy is called 'individualism'. He was an individualist and said that the function of law is to emancipate the individual from the bondage and restraint upon his freedom. He supported the economic principle of 'Laissez Faire, which meant minimum interference of the State in the economic activities of individuals. According to his utilitarian theory, the right aim of legislation is the carrying out of the principle of utility, or in other words, the proper end of every law is the promotion of the 'greatest happiness of the greatest number'.¹

Bentham devotes much of his work to violent attacks upon the whole natural law conception. But if he is impatient with the vagueness and the inconsistencies of the natural law theories, if utilitarianism represents one of the periodical movements from the abstract to the concrete, from the idealistic to the materialistic, from the a priori to the empirical, this movement at the same time expresses aims particularly characteristic of the nineteenth century.

Bentham argued that one should maximize happiness for the majority ('the greatest good for the greatest number': Francis Hutcheson), a view which is known as the 'Utility Principle'.

¹ Dr. Avtar Singh- Introduction to Jurisprudence, 2nd edition 2006, Wadhwa Nagpur, Pg. No. 13-14

Happiness was thus equated with moral goodness. This idea further identifies Bentham as a 'psychological hedonist', since he regarded humans as being primarily motivated by pleasure and the avoidance of pain. A contented society would be a good society.

To bring reason and evidence to the field of ethics, Bentham then put forward what he regarded as a scientific or empirical process for making moral decisions, known as the 'hedonic calculus'. This consisted of seven key criteria one must consider when making a moral choice:

- Intensity
- Duration
- Certainty
- Propinquity or remoteness (how close at hand pleasure falls)
- Fecundity (how likely pleasure is to be followed by more pleasure)
- Purity
- Extent (how many people it affects)

Utilitarianism is one of the most powerful and persuasive approaches to normative ethics in the history of philosophy. Though not fully articulated until the 19th century, proto-utilitarian positions can be discerned throughout the history of ethical theory.

Though there are many varieties of the view discussed, utilitarianism is generally held to be the view that the morally right action is the action that produces the most good. There are many ways to spell out this general claim. One thing to note is that the theory is a form of consequentiality: the right action is understood entirely in terms of consequences produced. What distinguishes utilitarianism from egoism has to do with the scope of the relevant consequences. On the utilitarian view one ought to maximize the overall good, that is, consider the good of others as well as one's own good.²

This argument, developed almost at the end of Bentham's long career, perhaps serves only to confirm the hazardous nature of the quantifying exercise on which he had embarked at its very outset. As it happens, Bentham himself looked back to those beginnings in a passage that immediately follows the attempt, just examined, to clarify the formulation of 'the greatest happiness principle':

In the year 1769 or thereabouts, at the age of about twenty-one, it occurred to Mr Bentham that the relation respectively borne to them by happiness might with no small practical advantage be taken for a common bond of connection, a common club-room, a common stock for all the several branches of art and science, a common trunk for all the branches (this was the emblem he found in use) of the Encyclopaedical tree.³

² W. Friedmann's *Legal Theory*, 5th edition, Columbia University Press, New York

³ <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=283466>

This, he goes on to say, was the notion he had applied ‘in detail in the work called *Chrestomathia*’. In that context, being concerned with pedagogic and logical issues, Bentham had little to say about the political applications of his theory that are of central interest here. What he does say may, however, merit more attention than it has usually received.

First of all then, ‘GOVERNMENT, alias POLITICS’ is distinguished from ‘PRIVATE ETHICS’ – which is ‘Ethics in the more usual sense of the word’. And politics, thus distinguished, is itself either ‘*Esoscopic*’. viz. INTERNAL GOVERNMENT, INTERNATIONAL GOVERNMENT and POLITICS’. The analysis is then more fully developed.

By internal Politics, may be understood that branch of Ethics which has for its subject the conduct of Government, i.e. of the ruling members of the political community or state in question, as towards the whole number of the members of that same community; by International Politics, that branch of Ethics, which has for its subject the conduct of Government, as above, as towards the members, whether rulers or subjects, of other such communities

Bentham then goes on to a ‘Division of Internal Government’ along lines and using the terminology he was to employ a few years later in the Constitutional Code. This excursus has had the incidental effect of confirming the point that Bentham’s political thinking is not to be seen as (in Lyons’s term) ‘parochial’. More importantly, at this stage of the discussion, the *Chrestomathia* material provides another illustration of what may well seem to be a gap

between the fundamental ethical and psychological principle of Bentham's utilitarianism and the specific theories he claims to derive from that principle.

The gap may indeed be bridged by what might, in relation to Bentham's original 'fundamental axiom', be called the *axiomata media* from which his specific prescriptions are immediately derived.

CHAPTER 2: UTILITARIAN THEORY PROPOUNDED BY BENTHAM

The essence of this philosophy is explained by Bentham in his own words:

“Nature has placed man under the empire of pleasure and pain. We own to them all our ideas; we refer to them all our judgments, and all the determination of our life. He who pretends to withdraw himself from this subjection knows not what he says. His only subject is to seek pleasure and to shun pain. These eternal and irresistible sentiments ought to be the great study of the moralist and the legislator. The principle of utility subjects everything to these two motives.”

Pleasure and pain are Bentham’s “Law of Nature”. He defined Utility as “the property or tendency of a thing to prevent some evil or to procure some good.” Now good is pleasure and evil is pain. The task of law is to serve the good and avoid the evil, that is to serve utility.

For Bentham, Pleasure and Pain replace, such notions as justice and injustice, morality or immorality, virtue or vice. This sensualistic evaluation of life is somewhat modified, however, by Bentham’s analysis of types of pleasure and pain. Sense, riches and power are among the pleasures tabled by Bentham; but among others are friendship, good reputation, benevolence, knowledge and association. Pains, on the whole, are the counterparts of pleasures. The measure of pain may be one caused to him because of his relationship with or interest in the first sufferer.

Bentham was a realist and his activities were many sided. His keen desire for law reform based on the doctrine of utility, his ambition for codification based on complete dislike for judge made law filled his work with a sense of mission. He was a champion of codified law and of English Law reform which in view was in chaos in those days. He advocated that there could be no reform in substantive law without reforming its structure through a process of analysis. Therefore, he distinguished expository jurisprudence (i.e. what the law is) from censorial jurisprudence (i.e. what the law ought to be). Bentham criticized the method of law making, corruption and inefficiency of the administration of justice and restraints on the individual's liberty.

The Benthamite legislator who wishes to insure happiness for the community must strive to attain the four goals of subsistence, abundance, equality and security for the citizens. Bentham said "All functions of law" may be referred to these four heads. Of these four ends of legal regulation, security was to him the principal and paramount one. Security, he pointed out, demands that a man's person, his honor, his property, and his status be protected, and that his expectations, insofar as the law itself had produced them, be maintained. Liberty, although a highly important branch of security in his view, must sometimes yield to a consideration of the general security, since laws cannot be made except at the expense of liberty.

Next to security, the legislator must try to foster equality, Bentham demanded. He said, “ought not to be favoured except in the cases in which it does not interfere with security; in which it does not thwart the expectations which the law itself has produced, in which it does not derange the order already established.” The equality which Bentham had in mind was not an equality of condition, but merely an equality of opportunity. It was an equality that allows every individual to seek his own happiness, strive after wealth, and live his own life.

Bentham never questioned the desirability of economic individualism and private property. A state, he said, can become rich, in no otherwise than by maintaining an inviolable respect for the rights of property. Society should encourage private initiative and private enterprise. The laws of the state, he argued, can do nothing to provide directly for the subsistence of the citizens; all they can do is to create motives, that is, punishments and rewards, by whose force men may be led to provide subsistence for themselves. Nor should the laws direct individuals to seek abundance; all they are capable of doing is to create conditions that will stimulate and reward man’s efforts towards making new acquisitions.

Bentham was one of the most active and successful of social reformers through the instrument of legislation that is through measures by which the state regulates the condition of life of all. Bentham devoted his life to the removal of the numerous inequalities which hampered the rising English democracy, survivals from the age of feudalism and landed gentry.

Bentham proclaims the principle of disinterestedness for the reform of public administration. This leads him to propose not only general parsimony in public administration, but deliberate depression of public salaries and emoluments in order to exclude the motive of self interest in the public service. Yet Bentham clearly assigns to the state the task of preventing the accumulation of wealth in the opulent few at the expense of the many.

Bentham thus prevented himself, by his individualist economic philosophy, from realizing the full dynamic of his own thought on legal and social reform. He attempted to stabilize the respective spheres of private interests and public administration at a level which was soon made illusory by the development of modern industrial society. Given the identical postulate of a society of free men living in a condition of equality of opportunity, Bentham shared with many Marxists the illusion of an automatic and necessary development of society towards a certain goal. He marked out but failed to solve the problem how far the state would go to ensure, by deliberate and planned action, the attainment of equality of opportunity without the destruction of fundamental freedoms.

Stripped of all technicalities and accidentals, Bentham's significance in the history of legal thought can be summed up in the following points:

- 1) He links philosophical premises with practical legal propositions.
- 2) He places individualism upon a materialistic basis.

- 3) He relates and subordinates the rights of the self-contained individual to the happiness of the greatest number of individuals, all with equal claims, living in a community.
- 4) He directs the aims of law to practical social purposes instead of abstract propositions.
- 5) He lays the basis for a new relativist tendency in jurisprudence which later will be called sociological jurisprudence and relates law to definite social purposes and a balance of interest.
- 6) He sees a paramount object of law in the guarantee of security, a function developed, to the neglect of others, by analytical positivism.
- 7) He stresses the need and develops the technique of conscious law-making by codification as against judicial law making or evolution by custom.

CHAPTER 3: OTHER JURISTS' CONCEPT OF UTILITARIANISM

❖ JOHN STUART MILL

John Stuart Mill agreed with Bentham's view regarding utilitarianism. He advocated that doctrine of utility in terms of pain and pleasure was altruistic rather than egoistic since the ideal was "the happiness of all concerned". Thus, for Bentham, pleasure and pain were the ultimate standards on which a law was to be judged.

The link is, somewhat surprisingly, the sentiment of justice and utility. The link is, somewhat surprisingly, the sentiment of justice. It means in essence the individual feeling of right which would in itself lead the individual to resent and desire retaliation for anything disagreeable to him, tempered and "moralized" by the social feeling.

This is how Mill links justice with general utility, and it is evident that the approach of this disciple of Bentham's differs very much from that of his master. The emphasis shifts from the individual to the general interest, or pleasure, which underlies Mill's conception of the law. But the conflict between self interest and general good is eliminated by playing off the intellectual against the animal instincts in human nature.

❖ RUDOLPH VON JHERING

Jhering's Utilitarianism is, in many ways, a distinct advance from English Utilitarianism, and his legal philosophy as developed mainly in his principal work, *DER ZWECK IM RECHT*, is altogether one of the most important events in the history of legal thought.

Jhering's system develops aspects of Austinian positivism and combines them with principles of utilitarianism established by Bentham and developed by Mill. It also makes an important contribution to the clarification of the specific character of law as being a form of volition.

The purpose of the law is for Jhering the protection of interests, and in the definition of "interests" he follows Bentham by describing it as the pursuit of pleasure and avoidance of pain. But individual interest is made part of a social purpose by connecting one's own purpose with other people's interest.

The end or purpose of legal regulation was indicated by Jhering in his often quoted definition of law: "Law is the sum of conditions of social life in the widest sense of the term, as secured by the power of the state through the means of external compulsion." This definition contains a formal and substantive element.

The formal element in Jhering's definition is found in the concept of compulsion. The state exercises compulsion and force for the purpose of ensuring compliance with the norms of the law. A legal rule without compulsion, Jhering declared, was "a fire which does not burn, a light that does not shine."

CHAPTER 4: CONTRIBUTION OF BENTHAM UNDER UTILITARIAN THEORY

Bentham's contribution to legal theory is epoch making. His period is known as the "Benthamite era" in the legal history of England. He introduced legal positivism and treated legal theory as a science of investigation which should be approached through scientific method of experimenting and reasoning. John D. Finch has observed: "the transition from the peculiar brand of natural law doctrine in the work of Blackstone to the rigorous positivism of Bentham represents one of the major developments in the history of modern legal theory.

An advantage of Bentham's Act Utilitarianism is that it considers the consequences and happiness which result from actions; this seems a sensible approach to ethics which would find much support today. The theory is also flexible and easy to apply; it does not prescribe many hard rules and provides a simple method for decision making. The theory also enables tough decision making through its relativism (*i.e.* it would allow us to sacrifice individuals if it is of great benefit to society).

CHAPTER 5: CRITICISM TO BENTHAM'S THEORY OF UTILITARIANISM

According to Friedmann, there are two shortcomings in Bentham's theory; one is Bentham's abstract and doctrinaire rationalism which prevents him from seeing man in all his complexity, in his blend of materialism and idealism, of nobility and baseness, of egoism and altruism. This leads Bentham to an overestimate of the powers of the legislator and an underestimate of the need for individual discretion and flexibility in the application of law. The Second weakness emerges from Bentham's failure to develop clearly his own conception of the balance between individual and community interests.

Bentham advocated that the law should be made exclusively by legislation which was supposed to remove inroads upon individual's freedom and provide him opportunities for development of the self. But, in later times, it was found that the legislation was used to restrict individual's freedom in economic matters.

The problem with Bentham's theory however is that it is truly relativistic, so any conceivable action could be allowed (killing for the sake of pleasure, or ideology). It also enables the suffering of the innocent under a majority, despite obvious injustice. It further allows cruel or sadistic pleasure, since Bentham regarded all pleasure as commensurate (equal), a point noted by the philosopher Bernard Williams.

CHAPTER 6: CONCLUSION

As an abstract ethical doctrine, Utilitarianism has established itself as one of the small number of live options that must be taken into account and either refuted or accepted by any philosopher taking a position in normative ethics. In contemporary discussion it has been divorced from adventitious involvements with the analysis of ethical language and with the psychological theory with which it was presented by Bentham. Utilitarianism now appears in various modified and complicated formulations. Bentham's ideal of a hedonic calculus is usually considered a practical if not a theoretical impossibility. Present-day philosophers have noticed further problems in the Utilitarian procedures. One of them, for example, is with the process of identifying the consequences of an act—a process that raises conceptual as well as practical problems as to what are to be counted as consequences, even without precisely quantifying the value of those consequences. The question may arise whether the outcome of an election is a consequence of each and every vote cast for the winning candidate if he receives more than the number necessary for election; and in estimating the value of the consequences, one may ask whether the entire value or only a part of the value of the outcome of the election is to be assigned to each vote. There is also difficulty in the procedure of comparing alternative acts. If one act requires a longer period of time for its performance than another, one may ask whether they can be considered alternatives. Even what is to count as an act is not a matter of philosophical consensus.

These problems, however, are common to almost all normative ethical theories since most of them recognize the consequences including the hedonic of an act as being relevant ethical considerations. The central insight of Utilitarianism, that one ought to promote happiness and

prevent unhappiness whenever possible, seems undeniable. The critical question, however, is whether the whole of normative ethics can be analyzed in terms of this simple formula.

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