

PRINCIPLES OF LEGISLATION

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Class-room live lectures edited, enlarged
and updated**

PRINCIPLES OF LEGISLATION [Bentham]

1. The Principle of Utility.
2. The Ascetic Principle.
3. The Principle of Sympathy & Antipathy.
4. Operation on Legislation.
5. Objection to Utility.
6. Kinds of pleasures & pains.
7. Sanctions.
8. Measures of Pains & Pleasures.
9. Sensibility.
10. Political Good & Evil.
11. Reasoning behind offences.
12. Moral & Legislation.
13. False Reasoning.

Text - Book

Bentham

Theory of Legislation.

QUESTIONS BANK

1. Discuss the Principles of Utility.
2. What are the objections to the Principle of Utility and how does Bentham counter them.
3. (1) Bring out the significance of Arbitrary Principle. Account for Bentham's rejection of this Concept.
(2) Enumerate and briefly explain the causes of Antipathy.
4. (1) What are the different kinds of Pleasures and Pains,
(2) State and explain the various simple pleasures and simple pains catalogued by Bentham.
5. Discuss how Bentham explains the 'Sanction' with his theory of pleasure and pain.
6. Account for the erection of certain acts into offences.
7. Discuss the limits within which Morality & Legislation Operate.
8. 'On the subject of Legislation, false reasoning is seriously objected to, by Bentham' - Explain.
- 9 How does Bentham analyze political good & evil. How are they "" diffused through society.
9. Briefly state the method adopted by Bentham to measure pleasures and pains.

INTRODUCTION

Jeremy Bentham, the celebrated architect of the concept of utilitarianism, in his works 'The Theory of Legislation', and 'Introduction to the Principles of Morals & Legislation' not only enunciated his moral and legal philosophy but also provided a manual of instructions to the conscientious legislator, who in this philosophy, finds gleanings into the Sociology of law.

The subject is full of theories and expositions of the fundamentals, touching the concept of pleasure and pain. But there is much glamour in reading these chapters. All the chapters centre round his concept of pleasure and pain.

In reading these chapters, you experience pain. But, surely the pleasure will be proportionately more in the Exam, when you come out with great success

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CHAPTER 1

UTILITY

Ch. 1 Bentham's Theory of Utility

Bentham's book 'The Theory of Legislation' is a masterpiece in the field of law. Bentham's objective is to educate the legislators and to provide them with a sound philosophy broad-based on the theory of Utilitarianism.

Legislation is a science and an art. It is a science as it contains certain basic principles to do good to the community and it is an art when it provides for the various means to achieve the good.

The objective of the legislator must be to do public good. He may base his reasons on general utility.

Utility is the basis of Bentham's theory. The principles of utility form the basis of his reasoning,

On an analysis of the principles of utility, we find that all our ideas, judgements and determinations spring from certain motives: pleasure and pain.

It is the duty of the moralists and the legislators to make a great study of these two concepts pleasure and pain.

Utility is an abstract term. It expresses some propensity or tendency of a thing to prevent some evil or to do some good. Evil is pain or the cause of pain. Good is pleasure or the cause of pleasure. Hence, anything which conforms to this utility, brings happiness to the individual. The legislator must have the objective to augment the total sum of the happiness of the individuals that form the community.

Utility is the first principle-the first link in the chain. The legislators reasoning for making a particular law, must be based on this principle.

Utility has a commendable logic behind it. In making law, the legislator must calculate or compare the pleasure or the pain that it brings about. Here pleasure & pain are used in the ordinary meaning i.e., what everybody feels when put in a situation it is the experience of the peasant and the prince, the unlearned and the philosopher.

Utility as a principle has its essence in the virtue and the vice. Virtue is good as it brings pleasures, vice is bad as it brings evil. Moral good is good as it brings pleasure to the man, Moral evil is bad as it brings pain to the man.

The legislator who believes in the theory of utility, finds, in the process of law-making, a number of these virtues and evils, that the

proposed law may bring about. His objective must be to bring more virtue, He must also distinguish pretended virtues and evils from the real virtues and evils.

These are the facets of the concept of utility and based on this exposition Bentham develops his philosophy of utilitarianism. His works 'the theory of legislation' and 'Introduction to the principles of Morals and Legislation', form a manual of instructions to a legislator. A knowledge of these, makes the legislator appreciate the moral and legal philosophies of Bentham and also to get an insight into the sociology of law.

Ch. 1-2 Objections to Utility

(a) Bentham is rightly called the Partriarch & the chief exponent of the theory of utilitarianism. His principle of utility, based on pleasure & pain-is applied by him, to explain the basis of political obligations; it is the end objective of Govt. and legislation.

Man obeys the law and lives in a politically organised society for it is the best way of securing his interests and happiness. In fact, political life is based on the principles of utility. Hence, Laws, the measures of the Government, political institutions and rights are to be judged and justified according to the principles of utility. The greatest happiness of the greatest number is the basi« of utility.

(b) Objections :

Though this theory is sound and practicable some objections have been raised.

i) Some trifling objections may be raised based on verbal difficulties. These are not substantial, but still require careful attention.

ii) The language used to explain the result of utility is virtue. But this is objected to on the ground that 'Virtue' is generally understood as opposed to utility. According to Bentham this is not correct. Virtue is the sacrifice of a less interest to a greater, from a doubtful to a certain definite interest. Hence, the place of virtue is secured. If a person calculates badly, and arrives at a wrong result, the mistake is not that of arithmetic *but the man*. This is true in respect of virtue.

iii) It is commented that the principle of utility is *only* a revival of epicureanism (Phiosophy of Epicure, Greek philosopher : who tought pleasure was the chief good). This is not true, according to Bentham. The epicurian doctrine had damaged the basis of morals & moral values. It was a dangerous concept, and, has nothing to do with utility.

iv) What is utility is judged by each person and hence, it is objected that it loses its force.

Bentham points out that man is a rational being and hence, must have this faculty otherwise he would be an idiot.

v) The next objection is put on the basis of the religious principle; the will of God; it is universal, sovereign and decides the good and evil. Hence, it is the only rule.

Bentham answers this by saying that the will of God is expressed by man by presuming what it would be. That is why revelations or gospels are different.

Hence, this objection is not correct.

vi) The next objection is that when utility is to be followed in politics, there would be a difference. The aim of good morals is different from the aim of politics. Bentham answers saying that the ultimate aim of both is securing happiness.

vii) The next objection is, that which is useful may not be just and honest. This is not so. The collective idea is important.

viii) Lastly it may promote opportunism in people because under a contract a person can commit a breach for his own advantage. This is also not true Bentham says. It is the utility of contract which is the force to it, not the agreement itself.

Alternative :

There is no alternative to the principle of utility. What is the substitute?

Bentham asks, is it a (1) despotic principle or (2) a capricious principle on the feelings of individuals ? Hence, utilitarianism is the best and the only solution Bentham claims.

CHAPTER 2

PLEASURE AND PAIN

Ch. 2-1 Pleasure & Pain: Two Sovereign Masters. (Chapters 1, 7 & 8)

Bentham in enunciating his concept of utility, speaks to the tendency of a thing to secure some good and to shield from evil. Evil means pain ; Good means pleasure. Hence, pleasure and pain become the starting point-the first link in the chain-to define utility. A comparative estimate or calculus of pains or pleasures should be made in every process of providing orderly reasoning.

Explaining the status of these two : pleasure & pain, he states '*Nature has placed mankind under the governance of two sovereign masters, pleasure & pain*'.

Bentham's theory is clear. We owe all our ideas, and, we refer all our decisions to the two sovereign masters, namely, pleasure & pain. To seek pleasure, and, to avoid pain is the sole aim of mankind. Every moralist and every legislator must study mainly this naked truth of life - an unmistakable reality of life. Every aspect of utility is subject to these two motives of human being i.e., seeking pleasure and shunning pain.

The concept of sanction (legal force) is also based on pleasures and pains covered under the heads: Physical, Moral Political & Religious. These four sanctions have different impacts on individuals.

The measure of pleasure & pain is ably done by Bentham by referring to the *value of pleasure*. He finds four circumstances as to :

- i) its intensity
- ii) its duration
- iii) its certainty &
- iv) its proximity

He further elaborates this with reference to its productiveness, its purity and its extent.

In this process, legislation is like arithmetic. Income is the 'good' that law brings, pain is the outgo. This is an analytical method. This theory of moral calculation is done in making the law, to provide more good and less pain.

Hence, Bentham is correct when he claims that all persons are subject to this concept of pleasure and pain.

Ch. 2-2 The Ascetic Principle (Chapter 2).

Ascetic means 'one who practices'. It refers to the monks who practice penitence & devotions. They desire to reduce pleasures and to suffer pain.

This Ascetic principle is opposed to the principle of utility. It is followed mainly by philosophers and devotees. The philosophers raise above humanity, and despise vulgar or sexual pleasures. In return, they get reputation and glory in society.

Bentham says that these are 'foolish people' tormented by vain terrors. According to them, they feel that they should punish themselves so that they may not be born again. Their objective is to reduce pleasures to the

minimum and to suffer pain. Each pain brings happiness in the other world.

These persons have a horror of pleasure. Everything that gratifies the senses is criminal, odious and therefore to be abandoned.

They approve everything that diminishes enjoyment. They blame everything that helps to increase enjoyment.

Asceticism has its origin in the concept that attraction of certain pleasure may lead a person astray and force him to commit pernicious acts. The evil here was more than the good. Hence, it was prohibited. But, the basis of all good laws and sound morals is also to forbid such pleasures as would bring bad effects in society. No doubt the ascetics have taken their principle to the extreme. They have made a frontal attack on utility.

Bentham opines that the ascetics have made a mistake. They have attacked pleasure itself, they have condemned it. They have made it the object of a general prohibition.

This principle, has not influenced the governments. On the contrary, every Govt, has the object to acquire more strength & prosperity. Hence, asceticism has appealed to some individuals. Some monastic orders have been patronised by some Govts. Beyond this, this principle has made no impact?.

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CHAPTER 3

SYMPATHY AND ANTIPATHY Ch. 3-1

Principle of Sympathy & Antipathy. (Arbitrary Principle)

The principle of Sympathy and Antipathy is also called the Arbitrary principle. According to this, certain actions are approved or disapproved, without giving any reason for the decision, except the decision itself. An action is good or bad according to the whims and fancies of an individual.

This is not a principle of reasoning ; it is the negation of it. A despot belongs to this group. He speaks sovereignty; he admits no appeal. He does not think that he should justify his decision with reference to the good of the society. I feel that it is so. 'It is my intimate conviction' etc. Bentham quotes a despot telling 'God speaks by my mouth. Come and receive the Oracle of God'. The despot's opinion triumphs, it is supreme. What results from this is anarchy. This is the essence of Arbitrary

principle. Here, the despot is unmindful of the consequences. He furnishes no reasons. Hence, this cannot be made the basis of and system of reasoning. As such, this is to be discarded.

Bentham says the principle of Sympathy neither admits or rejects the theory of utility, but floats between the good and the evil. That which is not under me is against me' is its motto.

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Ch. 3-2 Causes of Antipathy.

Bentham observes that Antipathy has its tremendous influence on morals and legislation. What factors give birth to Antipathy?

i) Repugnance of sense : something which the senses do not agree, to accept. Animals are killed as they are brought of as ugly.

ii) 'Wounded Pride: When a person does not accept but shows disregard there is wounded pride. Contempt grows.

iii) Power Controlled: We find our power is limited and bounded. This is a secret pain.

iv) Confidence in the future weakened or destroyed. Falsehood makes us doubt and we do not rely upon such a person.

v) The desire of unanimity : Unanimity is very pleasing to us. There would be mutual confidence and increase of pleasure.

vi) Envy: , When certain advantages are given to some, others envy. With envy person may become an ascetic. Envy leads to reducing the pleasures.

Ch. 3-3. Influence on Government,

It is the principle of sympathy and antipathy that has exercised the greatest influence an Governments.

i) A Government which has wealth and commerce looks to the society as a workshop. Men are productive machines. It cares not for the torment of the men. It is sufficient if they become rich. The Govt. is in different towards evils.

ii) Govts. which have power and glory as means to do public good, resort to wars, conquests, new acquisitions etc. They do not consider that this glory has great misfortune in the killing of hundreds of persons, and other evils.

iii) Governments which are administered well, which protect the property and persons, where people are happy, this is another type.

CHAPTER 4

KINDS OF PLEASURES

Ch. 4, **Kinds of Pleasures : Simple pleasures & simple pains,**

(Chapter 6)

The inventory of man's sensations is done with great labour of analysis by Bentham, who puts them into two:

i) Simple pleasures, ii)

Simple pains, i)

Simple pleasures :

a) Pleasure of sense: The pleasure of taste, of smell, of sight, of hearing & of touch. In addition, the blessing of health, and the pleasure of novelty may be included.

b) Pleasure of Riches: This is a kind of pleasure derived from possessing certain things. It will be so lively at the moment of acquisition.

c) Pleasure of Address: On attaining perfection in something, say in composing music, one gets pleasure.

d) Pleasure of friendship: Developing good will and of expecting services from them.

e) Pleasure of good Reputation : This is getting esteem & goodwill of the people.

f) Pleasures of Power: Power which a man has, which makes others follow through hopes or fears.

g) Pleasure of Piety: Favours of God either here or there.

h) Pleasure of Benevolence: This is what we sense, when we contemplate the happiness of those who love us. This is the pleasure of social affection.

i) Pleasure of Malevolence : This is the pleasure experienced by those who do not love us.

j) Pleasure of Knowledge : This is a mental faculty to discover or invent something.

k) Pleasure of Memory: To remember in a proper order what has happened.

l) Pleasure of imagination : Arranging in a proper order the desires.

Principles of Legislation

m) Pleasure of hope: Qesiring for the good in'future.

n) Pleasure of Association.: When an object is connected with some other object, there may come a charm.

o) Pleasure of pain : That which ends or diminishes pain is itself a source of pleasure.

Complex pleasures: A combination of two or more of the above simple pleasures produces complex pleasures.

ii) Simple pains:

a) Pains of Privation (Ennui): This is covered under 3 heads : Pain of desire (hope of obtaining something). Pain of disappointment (hope suddenly fails) Regret (losing something good).

b) Pains of sense: There are nine: Hunger and thirst, taste, smell, touch hearing, sight, excess of cold or heat, diseases, fatigue of mind or body.

c) Pains of maladdress : What one gets in fruitless efforts.

d) Pains of enmity : Hatred experienced in respect of others,

e) Pains of Bad Reputation: What a man feels when exposed to a situation considered" bad.

f) Pains of Piety: Fear of offending God.

g) Pains of Benevolence : When others are suffering, we experience some pain.

h) Pains of Malevolence: When a person whom we hate gets happiness or becomes prosperous, we get this pain.

i) Pains of memory

j) Pains of imagination k)

Pains of fear.

. Basis and use of classification :

This division, Bentham has done after much labour, and its utility is great. The entire system of Morals & legislation can be easily explained away. Similarly, offences^ or 'criminality or evil of certain action/or punishments-may be explained.

According to Bentham, this theory of pains and pleasures is the sole foundation of all knowledge on the subject of legislation.

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CHAPTER - 5

SENSIBILITY

Gh. 5. Primary & Secondary which affect sensibility,
(Chapter 9)

Bentham's extension of the principle of pleasure and pain takes us to his concept of sensibility.

All causes of pleasure do not give the same pleasure to all. Similarly all causes of pain will not produce the same pain to all. The difference is in its sensibility. It is in its degree or in kind.

The circumstances that influence the sensibility are spoken of as primary or secondary. The primary circumstances are those that by themselves would influence sensibility of a person under a given cause, thing or situation. The secondary circumstances would not by themselves influence the sensibility of a person under a given cause, thing or situation. They would, however, jointly with the primary circumstances influence the sensibility of a person. The differences in sensibility depend on certain circumstances which influence the moral or physical conditions of individuals.

In matters of legislation, we cannot proceed with any degree of assurance without considering all circumstances which tend to influence sensibility.

The following are the primary circumstances which influence the sensibility of an individual.

1) Natural constitution or temperament of the individual, 2) Health, 3) Strength, 4) Bodily imperfection, 5) The degree of knowledge, 6) Strength of intellectual powers, 7) Firmness of mind, 8) Perseverance, 9) The bent of inclinations, 10) Notions of Honour, 11) Notions of Religion, 12) Sentiments of sympathy and Antipathy, 13) Disorder of mind, etc.

There are certain other circumstances which have got an outward appearance clearly noticeable. They are called Secondary circumstances, namely:- 1) Sex 2) Age 3) Rank 4) Education 5) Habitual occupations 6) Climate 7) Race 8) Government and 9) Religious Profession.

These Secondary circumstances can easily be taken into consideration not only by the legislator but also by the judge who administers justice.

CHAPTER 6

OFFENCES

Ch. 6. Bentham's reasons for creating certain acts as offences. (Chapter XI)

After making an analysis of the evils, Bentham states that there are certain acts which cause more of evil than of good. Legislators have prohibited such acts and have called them as 'Offences'. To get these offences respected, punishments have been prescribed universally. This is well established.

An act should not be declared as a crime basing on prejudices which vary according to time, place, custom and opinions. Trifling acts' may become serious crimes, in the absence of a philosophy, hence, Bentham says 'the Principle of Utility should be made the foundation'. Acts or omissions are to be declared as offences basing the reason on utility. He asserts that all well known offences are reasoned on the basis of Utility, This should be weighed by the legislator by weighing the evil and the good, in all its aspects.

i) Passion of hatred.

If more evil results from a particular act (say theft, robbery etc) than the good, that act should be declared as an offence. The reason is more evil will result if that act is not declared as an offence.

Calculation of the pain or the pleasure, is to, Bentham, as simple as arithmetic. If A assaults B intentionally, B suffers a pain, but A gets the pleasure of assaulting - it appeals to his passion. But, to B-it offends his honour & person.

The pleasure of A in assaulting is temporary, but, soon a fear of hatred by B sets in the mind of A. Fear of every kind surrounds him. Suppose A has cut off a leg of B intentionally, the fear of. hatred of B doing something will be intensive.

ii) Security affected: Ravishment.

This is the effect of the offence. A spirit of revenge may set in with serious consequences.

iii) Motive of Cupidity.

The motive of a man becoming rich by robbing the treasury, of stealing a piece of loaf to save from starvation, the evils that result are of the second order which Bentham has defined. Similarly, a person who commits rape. He may satisfy his appetite but the pain it brings on the woman and on others, is disproportionate. Hence, rape is declared as an offence.

The legislator must measure the good and the evil with a kind of moral arithmetical calculation. He must weigh the evils, their duration and their result. He must measure them properly before erecting the act as an offence. He must also weigh the derivative evils that may result from the act.

Thus, Bentham lays down a solid foundation to erect an act as an offence basing his ordered reasons on his concept of pleasure and pain.

CHAPTER 7 FALSE

REASONINGS

Ch. 7. False Reasonings on the subject of Legislation. (Chapter 13)

Bentham after enunciating his theory of utility, uses that to the process of reasoning with reference to legislation, under 'legislative logic'.

What is 'good reason'⁵ for a law ? It is looking to so much of good and so putting arguments in favour of it. Or, it is looking to so much of evil (pain) and so putting arguments in favour of it.

The other aspect is to offer 'false reasons', Here, what is alleged is not the pleasure or pain. But, it is something other than these !

This reasoning Bentham compares to the 'Sophism' of Aristotle. There is a list of false reasoning.

Bentham enumerates the false reasons on the subject of legislation.

i) Antiquity:

This by itself should not be a reason to follow the law, or not to follow.

ii) Religion:

The Authority of Religion by itself is not a reason to make us follow the law.

iii) Innovation:

Finding a new thing or a new law should not be a reason to follow or not to follow. Progress is essential.

iv) Arbitrary definition :

One reason put forward is that the law is arbitrary. This is a very common political argument. The word law has been defined by Montesquieu & Rousseau but the definitions suffer from lack of definiteness.

v) Metaphors:

One method adopted is to refer to a metaphor or allegory and it later becomes the basis, Blackstone calls law as a castle or a fortress & says it cannot be weakened except by breaking. This is false method of reasoning.

vi) Fiction :

A fiction is not a good reason. A fiction is notoriously false and hence no reasons should be given. 'The King can do no wrong' is a fiction & misleading. 'The judges, are mirrors in which the image of the King is reflected'. This is a fiction & is ridiculous and puerile, Bentham says.

vii) Fancy :

What is reason? It is said reason decides **and eternal reason orders.**

The right of the father over a son comes from the facts that he is the Chief and the son is the seed of the father (Writings of Gocceiji). This is based not on reason but fancy says Bentham. The principle of utility is not seen here. The son even if he is forty years of age should take permission of his father to marry! Bentham hits hard on the fancy & commends the concept of utility instead.

viii) Antipathy or Sympathy :

These are not to be reasons. This is the arbitrary principle. This is common in penal law-antipathies towards criminals, their actions, the punishments etc. Antipathy against Government, its institution, work etc. leads to a rebellion.

Implicit obedience is the basis of arbitrary principle. Hence, this is not good.

ix) Begging the question :

This should not be the reason. Begging the question (petitio principle) is a sophism. It conceals itself artfully. This means assuming a question; it consists of the very proposition which is in dispute as proved.

Locke & Rousseau explained the social contract theory of the State. This is begging the question. They have assumed the contract itself!

Bentham says utility should have been the reason for making a State.

x) An Imaginary Law : Natural Law.

Natural Law & natural rights are two fictions often used in the books of legislation.

In Natural law, nature is represented as a being and attributes are given to her in law. This process is imaginary and hence endless arguments are made on this. If the laws of nature had directed all persons for their

common good, there was no necessity of any other law at all. They would be useless and unnecessary.

Why use a torch to show the Sun?

Comments:

In all these reasonings, Bentham has shown how false reasons are projected by individuals either in favour or against of particular law. But, he pleads that all these are not good reasons. He submits, any reason acceptable must be based on the concept of utility-that of pleasure and pain.

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CHAPTER - 8

MORALS AND LEGISLATION

Ch. 8. Morals & Legislation. (Chapter XII)

According to Bentham "Legislation has the same centre, but it has not the same circumference."

Morality is an art. It directs the acting of men to produce the greatest possible sum of good.

The objective of the Legislature must be the same.

Though these two differ in their extent, still the end is the same. All actions, public or private come within Morality and individuals are guided by it throughout their lives. However, legislation cannot do this.

The reasons are :

i) Legislation can have no direct influence over individuals, except by punishment.

ii) There is the possibility of punishing the innocent, in the anxiety of punishing the culprits.

Hence, Bentham vertically divides the area of legislation and suggests the legislators not to interfere with the personal interests of an individual. The reason is the person himself is the best judge and he will correct himself when he finds he is in the wrong, e.g. Temperance.

The legislator must look to those areas when a person's actions create evil on others & to legislate there. Then punishment will be effective.

CHAPTER 9 SANCTION

Ch. 9. **Sanction.** (Chapter VII)

Bentham's theory of pleasure or pains explains away the sanction of law.

He says, The pleasure or pain which is attached to a law, is the sanction. The laws of one State, have no force in another State as they have no sanction there.

Pleasures and pains are of four classes.

1) Physical 2) Moral 3) Political 4) Religious.

1) Physical or Natural sanctions: These are in the ordinary course of nature. There is human intervention. A man's house is on fire by accident. There is the pain of natural sanction.

2) Moral sanctions : These are with reference the actions of our fellow men, friends etc. in society. Sanction of honour.

3) Political sanction: The pleasure and pain which result from the actions of the Magistrate in punishing according to law. This is the legal sanction.

4) Religious: The pleasure or pain which results from threats of religions. These are religious sanctions.

e.g: Legal sanction. A persons house is pulled down by orders of a Magistrate.

All these four sanctions have their own impacts. The natural sanction is the one which acts always.

The popular & the religious sanctions are highly variable and change in accordance with utility.

The legal sanction acts on all men with equal force: it is clear and specific. But it requires proof. Hence the **crafty** can escape.

Hence, Bentham suggests to use all the three sanctions: Moral, political & religious. They are like magnets-their power • is doubled by putting the corresponding poles together.

