

# A DISCOURSE ON JEREMY BENTHAM'S PRINCIPLE OF UTILITARIANISM AND ITS IMPACT ON EXTRAJUDICIAL PUNISHMENT

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## **Abstract**

The issue of extrajudicial punishment has become a worrisome phenomenon not just among seasoned legal experts but also leading scholars of moral philosophy. Extrajudicial punishment, as an identifiable moral albatross, denigrates the sacredness and sanctity of the dignity of the human person, hence making it compelling for global concern. The objective of the paper, therefore, is to give a robust exposition of insightful accounts of Jeremy Bentham's utilitarian principle, his moral theory, as it concerns extrajudicial punishment. It demonstrates that the principle of utility adequately shaped and influenced Bentham's thought in addressing legal, social and political issues of that time. The framework is the consequentialist moral theory, the reason punishment for crime should be for corrective purposes to make the criminal stay away from crime. Finding reveals that the award of punishment for crime was not anchored on the moral principles of rehabilitation, hence, in a bid to reform the legal system, punishment for severe crimes like capital punishment, which was rife during the period under review was vigorously condemned and recommended for abolition. The paper recommends that the intent of punishment should not be predicated on suffering the criminal rather punishment for crime should thrive towards achieving justice for the criminal, the injured and society. It is only when punishment for crime is anchored on the rehabilitative theory of punishment, which is geared towards correcting the criminal in the course of imprisonment, that punishment becomes morally justifiable otherwise punishment becomes a crime against the criminal.

**Key Words:** Consequentialism, Crime, Extrajudicial punishment, Justice, Morality, Punishment

## **Introduction**

This study discusses Bentham and his theory of utilitarianism. Utilitarianism is a consequentialist ethical theory in philosophy. Here, the subheadings under review are: the idea of utilitarianism, the principle of utility, and Bentham's penal utilitarianism. This analysis will give insight into what Bentham truly represents and what defines his philosophy. Although utilitarianism was founded by Jeremy Bentham, literature in philosophy has revealed that he was not the only utilitarian. After this work is done with discussing Bentham, John Stuart Mill, an ardent follower of Bentham will also be extensively discussed. The utilitarians are known for their popular cliché, which says that an action is good if it produces the greatest happiness for the greatest number of people. They maintained that the validity of all human actions is assessable on the basis of utility. This invariably means that all the activities of man are reducible to the level of utility. To them, any action that brings less pain and greater happiness is good, and on the other hand, any act that brings greater pain and less happiness is bad. In addition, the utilitarians insist that the primary goal of law is to provide happiness and protect the society from pain through legislations that will engender collective happiness for the society. The discourse on utilitarianism will help the thesis to distil submissions advanced by

scholars in their various literatures on utilitarianism. It will also make us understand that utilitarianism is an ethical theory in philosophy.

### **The Idea of Utilitarianism**

Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873) were associated with the classical formulation of utilitarian moral theory (Bentham, 1948). Bentham was an English-born student of law and the leader of a radical movement for social and legal reform anchored on utilitarian principles. His primary published work was *Introduction to the Principles of Morals and Legislation* (1789) (Mackinnon, 2007, p.50). The title itself indicates his aim namely, to take the same principles that provide the basis for morals as a guide for the formation and revision of law. Bentham stated that basically there is not one set of principles for personal morality and another for social morality (ibid. p.50).

James Mill, the father of John Stuart Mill, was an associate of Bentham and a supporter of his views. John Stuart Mill was the eldest of his nine children. He was educated in the classics and history at home. By the time he was twenty, he had read Bentham and had become a devoted follower of his philosophy (ibid.p.50.). The basic ideas of utilitarian moral theory are summarised in his short work, *Utilitarianism*, in which he sought to dispel misconceptions that morality had nothing to do with usefulness or utility or that it was opposed to pleasure (ibid.p.50). For example, in one of his works *On Liberty* (1859), Mill argued that the only reason for society to interfere in a person's life, to make that person to behave in certain ways is to prevent that person from doing harm to others (ibid.p.50). People might choose wrongly, but Mill believed that allowing bad choices was better than government coercion. Liberty in itself is to express one's own opinion, which he believed, would benefit all (ibid.p.50). However, it is not clear that utility is always served by promoting liberty. Nor is it clear what Mill would say in cases where liberty must be restricted to promote the general good (ibid.p.50). In his work, *On the Subjection of Women* (1869), Mill also emphasised the general good and criticised those social treatments of women that did not allow them to develop their talents and contribute to the good of society. Consistent with these views, he also supported the right of women to vote. Later in life, he married his longtime companion and fellow libertarian, Harriet Taylor. Mill's political consciousness avail him the opportunity to be voted as a Member of the British Parliament from 1865 to 1868 (ibid.p.50). His experience in politics greatly influenced his political thoughts and his liberal background.

Bentham and Mill represent the hybrid utilitarians, pure democrats, progressives, the empiricist and optimistic scholars. And due to their democratic perspectives, they argued that social policy ought to work for the good of all persons, not just the upper class and that when interests of various persons conflicted that the best choice was to allow that interest that promoted the interests of the largest number of people to prevail. The utilitarians were progressives in that they questioned the status quo (Mackinnon, 2007 p.50). They believed that if the contemporary punishment system was not working well, for example, then it ought to be changed. Social programmes should be judged by their usefulness in promoting what was deemed to be good (ibid.p.50). Observation would determine whether a project or practice promoted this good. Thus, utilitarianism is part of the empiricist tradition in philosophy, for we only know what is good by observation or by appeal to experience. Bentham and Mill were also optimists. They believed that human wisdom and science would improve the lot of humanity. Mill wrote in his *Utilitarianism* (1861), "All the grand sources of human suffering are in a great degree, many of them almost entirely, conquerable by human care and effort" (ibid.p.50).

In further demystifying the concept of 'utility', Mill holds the view that the creed, which accepts as the foundation of morals "of the greatest happiness principle" holds that actions are

right in proportion, as they tend to promote happiness. Those actions are wrong, as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain, by unhappiness, pain and the privation of pleasure. To give a clear view of the moral standard set up by the theory, much more requires to be said: it includes in the idea of pain and pleasure, and to what extent this is left an open question (Mill, 1971, p. 18). Mill argues that on all these points utilitarians have fully proved their case; but they might have taken the other and, as it may be called, higher ground with entire consistency. This position agrees with the theory of utility as to the fact that some types of pleasure are better than the other. While calculating both quantity and quality are taken into consideration, but it is a matter of fact that this process of estimation is supposed to be dependent on quantity alone. The same considerations are open to another method as to the doctrine of utility, which is based on a misconception of the basis of the moral standard. It is argued that the theory of utilitarianism makes men to be in sympathy. It ignites the moral feelings of men. It makes them to have consideration of just the quantity without considering the outcome of actions and not taking into cognizance the estimation of the qualities from which these actions evolve.

### **The Principle of Utility**

The most important principle of utilitarianism is called the Principle of Utility or otherwise called the Greatest Happiness Principle (Bentham, 1838). This principle has several formulations in Bentham and Mill's theory of utilitarianism. These two simplified formulations, correlated with each title (ibid). The principle of the greatest happiness states that the morally best "or better alternative is that which produces the greatest good. On the other hand, net utility is defined in terms of happiness or pleasure". (Mackinnon pp.50-51) suggested that we ought to do that which produces the greatest amount of happiness or pleasure for the greatest number of people (Mackinnon, op. cit, pp.50-51).

Bentham espoused that:

Human nature has placed humankind under the control of two sovereign masters, pain and pleasure. It is only for these persons to tell us what we are supposed to do, as well as to determine what we shall do. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In other words, a man may pretend to abjure their empire: but in real sense of it, he will remain a conformist (Bentham, 1948, p.1).

The principle of utility recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law. Systems, which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light (ibid.pp.1-2). The principle of utility as we can see deals with the foundation of the present work, and it will be very proper therefore, at the outset to give an explicit and determinate account of what is meant by it. This is according to the tendency, which it appears to have to augment or diminish the happiness of the party whose interest is in question, or what is the same thing, in other words, to promote or to oppose that happiness.

Utility means when the value of an object can produce the deserving benefit against mischief or sadness. The collective happiness of a people is paramount and not pleasing individuals, which is the standard of morality in utilitarianism. The individuals are the ones, who make up the community. As a result, utilitarianism, therefore, believes in the communal or total benefit of all. The general interest of the community is the totality of the persons, who make up that community. What is now assumed as the interest of the community? It is referred to as the sum of the composition of such community. An action is adjudged comfortable if the principle is

anchored on utility and with the motive that the community at large will benefit at the end. Policy making is for the general good of the people and is assessable by the utility maxim.

Bentham posits that happiness is just pleasure and the absence of pain (Bentham, 1829). The credit or discredit of a pleasure or pain is depended on the intensity and duration and can quantified precisely in line with the moral principle. By the assertion of quantifying utility in principle, he meant actions or decisions of individuals or institutions of government that tend to bring happiness are good while on the other hand, actions or decisions that tend to bring pain are bad. The position underscored here is that decisions and actions of mankind should be capable of producing happiness for the greatest number of people, otherwise it will be assumed as pain, which is anti-thetical to the utilitarian maxim. In view of the foregoing, we can say that his principle of utility is not far from what is stated below:

- i) The collective good of a society is the summation of the happiness of the people in that society.
- ii) The primary goal of morality is to promote the good of society.
- iii) A moral principle is ideal if and only if its conformity to universality would produce greater good for the society.
- iv) Universal conformity to the principle of utility (“Act always so as to maximize total net balance of pleasures and pains”) would maximize the good of society.

In view of the above, it can be convincingly argued that the principle of utility is the ideal moral principle (ibid).

Furthermore, Mill espouses that whenever the principle of utilitarianism is discussed, the notion of utility is central. He identifies utility with pleasure, but the discussion of the verdict of the morally competent judges, from where he writes he said that appeal is not possible. He suggests that the right choice among an array of alternative actions is the one that reflects a kind of informed rational preference (Mill, 1971, p. xiii). How such informed preference can be explained is unclear. If the morally competent judge is defined simply as one whose preferences are utilitarian, then recourse to the notion of a judge is unilluminating and, indeed misleading. If the judge is described in terms of other characteristics, it remains to be seen how and why those characteristics relate to the standard of utility (ibid. p. xiii).

Mill elucidates further that the question of how utility is to be construed is only the beginning. If maximisation of utility is the ultimate criterion, it then becomes essential that an agent seeking to make a utilitarian choice must compare the estimated utilities, which would most likely result from each of the alternatives he considers. Bentham also believed that such comparison is possible, and because of that, he proposed a hedonistic calculus that will draw a comparison between pleasure and pain. This perspective will help to identify such relevant factors as the intensity, duration, certainty, proximity, fecundity, and purity of pleasures compared (ibid. p. viii). Having discussed utility, the next subheading discusses Bentham’s penal utilitarianism. The focus here is on Bentham’s position on what the goal of punishment for crime should be. It elucidates the relevancy of the inquiry of utilitarianism into the award of punishment for crime. Bentham articulated this notion of punishment from the rehabilitative perspective for the award of punishment to be deserving. Thus, punishment becomes a crime or disservice against the criminal when it subjects the criminal to pains and fails to reform him or her.

### **Bentham's Penal Utilitarianism**

The classical school of penology came into limelight between the eighteenth century as a reaction against the arbitrary state of feudal law and order of the Middle Ages (Faqr, 2015, p.3). It was particularly influenced by Rousseau's General Will theory, which states that once a social contract is reached the individual, has no choice in the matter, but must submit to the authority of the civil leader (ibid.p.3). To further expatiate Faqr, the classical school derived the idea of criminal liability of individuals in association of social and collective nature of punishment. Taking a cue from Montesquieu's doctrine of 'anti-savagery of laws', the classical school adopted the 'principle of crime and punishment'. Beccaria, in his own contribution said that the commission of crime is irrational when the penalty is harsh, cruel and certain (ibid.p.4). These opinions gave moral force to the argument that the acts of torture and death penalty should be abolished.

As it can be perceived from the views of Beccaria, and Montesquieu's analysis, it is obvious that Bentham adopted the principle of gradation of punishment as a reformative measure, in the sense that the penalty for a crime must exceed the possible advantages gained from the criminal activity (Faqr, 2015, p.4). In Bentham's thinking, the punishment should reflect both deterrent and reformative purposes. Hence, he advocated the introduction of both the procedural and substantive law reformations to criminal justice system, which recognises state power in punishing and rewarding crime, as a necessary step for the elimination of brutal practices of justice and promotion of morality and happiness of the society (ibid.p.4).

Bentham's social reform principles centred on the concept of happiness, which promotes happiness for the greatest number of people (ibid.p.50). Social programmes should be seen against the usefulness of promoting what is deemed to be public good.

It is important to note that Bentham insisted that any assessment of the extent of harm inflicted should be based on the motive, situations and intention under which an act was carried out. Beccaria, in his own analyses, appears to have been daunted by variety of circumstances that his argument advanced. Moreover, in his effort to remove vagueness in such assessment, he rebuffed the possibility of ever being able to determine the intention of a criminal. In the case of Bentham, such assessment was possible to make, and that intention, motive and disposition of an offender formed a central theme of his own utilitarian evaluation of harm done by an offence and danger threatened by the offender in future (Tony, 2002, p.9).

It is obvious that the forms of punishment approved by Bentham certainly rebrand the course of his life. In his earlier writings, a variety of corporal punishments were recommended; in his middle years the panopticon penitentiary was his prime interest; and finally, in the 1820s, evidence is available to suggest that he felt an increasing attachment to nonafflictive, though still complex punishments, especially those of banishment and fining (ibid. p.15). In Bentham's thinking, a satisfactory mode of punishment had to pass the litmus test as seen in his eleven defined ingredients of punishment which are: variability, equability, commensurability, characteristics, exemplarity, frugality, subserviency to reformation, efficacy with respect to disablement, subserviency to compensation, popularity and remissibility. Thus, for the allocation of punishment to be effective and purposeful, it must be awarded or tailored along the eleven properties proposed by Bentham. Effectively, such punishment should be able to produce a commensurable quantity of pain in response to the varying quantities of mischief caused by offences. This continuing stress on quantification always remained a constant rule governing Bentham's assessment of an appropriate type of punishment. Closely related to this key element of variability were the second and third properties of equability and commensurability. The former identified an equalisation of pain necessary when the same

punishment was applied to different individuals, so ensuring that offenders received the same pain if they committed the same offence (ibid.p.15).

It was the latter property of commensurability on which great importance was placed, for this allowed punishment to be based on proportionality. These elements combined to encourage Bentham to abandon in the late 1770s his support for simply corporal inflictions of pain, and to join the enthusiastic contemporary pursuit of an increased use of penal incarceration (ibid. p.15). In terms of theory, the obvious advantage that imprisonment, and particularly panopticon imprisonment, offered was the greatly improved provision for the property of 'exemplarity'. Deterrence was a primary aim, and if prisoners could be seen to be suffering, then the purpose of the punishment could be better fulfilled (ibid.p.15).

In the earlier discussion of panopticon model of imprisonment, Bentham identifies the model as the main purpose of all kinds of punishment. The 1790s saw panopticon imprisonment becoming the dominant and acceptable mode of punishment by Bentham. The model offered adequate punishment for most societies, if not all, at least for serious crimes. The model tends to award both simple and complex punishment as situation demands. Furthermore, the model uses the means of reward to increase its properties of reformation. Bentham proposed the panopticon as an opium operating primarily on the psychological motivations of those incarcerated. It is imperative to see here that corporal pain still formed an intrinsic part of the punishment. In this case, it is not punishment of 'the mind' as it has sometimes been portrayed, but equally it was an effective punishment of the body, and it could be so in a variety of ways. Throughout the period of Bentham's intense focus on penitentiary imprisonment the main legal punishment for serious offences continued to be capital punishment (ibid.p.15).

Analysing Bentham's concept of penal utilitarianism or punishment, one must place it within his fundamentals of punishment. It is very salient to note what other commentators have said about utilitarianism. For these commentators, for any possible utilitarianism to serve its designed purpose, it must take a clue from two combinations namely: "a doctrine of the end state to be realised, that is, a condition or state of affairs deemed to have intrinsic value", and "a theory of the consequences of possible actions open to the agent (person, legislature, society), whose value is purely instrumental because choice among these alternative actions is determined by how efficiently each leads (or would lead) to the end-state" (Hugo,1983,p.1037). Bentham submitted that punishment must be morally plausible and justifiable in terms of its conduciveness to achieve its appropriate end. That is, it can be variously stated, but Bentham's account of this end depending on whether he has a proximate or the ultimate end in mind. "The immediate principal goal of punishment," he writes, is to "control action, ' i.e., the conduct of those who are liable to a punishment if they violate the law as well as the conduct of those who are undergoing punishment after having been sentenced for a violation (ibid.p.1038). He also says that "the chief end of punishment" ought to be "general prevention", an end that will be achieved if and only if adequate "control" is attained (ibid.p.1038). Both ends are penultimate. The ultimate end of penal laws is one shared with all legislation, and Bentham describes it as follows: "The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community. Precisely how this end state is to be measured and in what it really consists of are notorious problems, and we will return to this point later. Suffice it to say, here, that Bentham believed alternative social policies could be evaluated by reference to their efficiency in reaching various ends, but the only end state that ultimately mattered is that of the greatest happiness" (ibid.p.1038).

Bentham goes further to stress that punishment is subservient to reformatory in proportion to its quantity, hence, he believes that: "the greater the punishment a man has experienced, the stronger the tendency it has to create in him an aversion towards the offence, which was the

cause of it" (Raphael, *et al* 2001). He reiterates that the punishment for the offences, which consist in an obstinate refusal to obey the law, which is nurtured by his resentment against those who have an interest in forcing him to compliance seems to be confinement to spare diet, he further suggests penal labour for other offences like theft, embezzlement and every specie of defraudment (*ibid*.p.3).

Bentham's central counterargument to retribution is this: Perpetual imprisonment, with suitable aggravations of labour and solitary confinement, can be made to have a more terrifying impact on prospective criminals than it currently does and more than does the threat of death. After all, the criminally inclined classes are by temperament "brutal," "independent," and "wandering," all traits that render them "hostile to steady confinement and laborious industry (*ibid*). He makes it clear that this is not a quick and relatively painless death, is what awaits them, and they will shrink from it the more. The law abiding members of the middle class, who have long ago learned to chain themselves to factories, desks, and careers, overrate the finality of death and underrate the dreadful prospect of a lifetime confined behind bars. If, in short, prospective criminals were as rational as legislators ought to be, they would see that the prospect of life imprisonment ought to have a greater deterrent effect on their behaviour than the death penalty (Hugo, 1983, pp.1044-1045).

The death penalty was seriously attacked by penal reformers in the late eighteenth century, though it was not until 1830 that Bentham published the reasons for his own opposition to capital punishment. He drew up a pamphlet on the death penalty, specifically for the people of France, and throughout this text, he displays all the fundamental penal principles he had first established in 1776-8. In concise terms, Bentham denounced capital punishment for possessing the detrimental qualities of inefficiency, irremissibility, positive maleficence (i.e. tending to produce crimes), and for the enhancement of evils produced by ill-applied pardons (Tony, 2002, p.16). These were described as features of inaptitude, by which the punishment undermined the purpose for which it was intended, this being ultimately to produce future pleasure by inflicting legal pain. In Bentham's view, the pains resulting from capital punishment and more particularly from the widespread threat of capital punishment were judged to be considerable and excessive (*ibid*.p.10).

On the consequential goal of punishment centred on achieving reforms, Bentham argues that this 'reform' can be achieved both by punishment and reward. If incarcerated, for example, individuals will be habituated to new routines and activities designed to prepare them for 'survival' in an industrial environment. They will be rewarded when their behaviour is deemed non-offensive by the governing authorities. Throughout his later discussions of imprisonment, Bentham offers a means for restraining, perhaps even changing the motivational perspectives of offenders, such that their behaviour may be brought into accord with societal and legal norms. He has been criticised, and clearly many of his practical suggestions are entirely inappropriate for the contemporary penal environment. His underlying theory, however, may not be so easily discarded, and much of what he says, especially in terms of 'disposition' and 'intention' of offenders, and distribution of pain in society, deserves further consideration (Tony, 2002, p.10).

From the foregoing, it can be argued that Jeremy Bentham is not an advocate of death sentence. It is understood that severe offences, which deter rehabilitation, have a certain way of incapacitating a man from doing evil either to himself or others to be punished by death. It is on record that Bentham was a leading philosopher for the condemnation of death sentence but could not bring about the condemnation of punishment by death before his demise. Remarkably, it is on record that Bentham made significant contributions for the abolition of death sentence. This is because he suggested that instead of the state resorting to the death

penalty, which he wholly condemned on a moral ground, a better alternative to this is that these criminals, who have committed murder, should be perpetually kept in prison for a long period to undergo reforms. This brought about his advocacy of life imprisonment as replacement of the death penalty. A salient point in his advocacy for prison rehabilitation is suggestive of the parole board. The parole board is saddled with the periodic appraisal of prisoners imprisoned on life jail on the grounds of a conviction on the assessment of their satisfactory behaviour and conduct by the prison authority. The prisoners certified to have been remorseful by virtue of the moral traits exhibited in their character will be freed on the grounds of this moral conviction by the parole board. This was institutionalised by Bentham in his quest for a reformed society with a view to giving hope to the convicted murderers to be availed the chance to live as against being horrendously executed via retributive justice. This position further reiterates the utilitarian penchant for creating happiness or pleasure for the greatest number. The moral evil linked to the death penalty is huge. It may be argued that for the condemnation of punishment by death has hugely impacted on modern day penal institutions, as the death penalty penal policy is being repealed by many nations across the globe. Many nations have refused to sign the death warrant as contained in enabling extant laws, because of the sanctity and sacredness attached to human life and the element of inhumanity in such obnoxious laws of the state. By not mincing words, it is the act of brutality, inhumanity and other forms of violation of the right to the dignity of persons and the right to life that rehabilitation, as an ethical principle in penal philosophy is set out to address comprehensively as it interrogates extrajudicial punishment. Rehabilitation, as a form of punishment in classical utilitarianism, is saddled with dispensing punishment equitably (proportionally) to the criminal to deter him from crime through adequate reformation and in return restore social order by engendering a safer and crime-free society.

### **Conclusion**

The thrust of this work is in the utilitarian dictum of the greatest good, and it argues very strongly that the State, society or individuals are advised to pursue actions that will bring much pleasure and less pain to the generality of the people. This is, undoubtedly, the position underscored by Bentham in his utilitarianism. While narrowing the discourse to the subject matter in which the work is predicated, the thesis posits that extrajudicial punishments are evil, brutal, distressing, traumatic, sad, immoral and unlawful. Extrajudicial punishment denigrates the humanity of the presumed criminal and reduces his humanity to the lowest ebb. It is an act that is morally condemnable, violates the rule of law and the inalienable rights of the citizens namely, the right to dignity of persons and the right to life. Therefore, the infraction, extrajudicial punishment, having been argued to have a negative moral effect, arguably portends the evil, immoral and illegal practices associated with it. It should be discountenanced and unthought of by humanity, the criminal justice system and its agents.

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