Rethinking The Moral Question in Bentham's Positive Law

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Abstract

This paper assesses Jeremy Bentham's positive law. It identifies and discusses the three tenets of positivism in Bentham's legal philosophy vis-à-vis the separability, analytic and imperative precepts. While Bentham's separability thesis is mostly interpreted as his denial of moral basis for law, it is argued that Bentham's view is misconstrued by such explanation. The paper articulates that, although Bentham's analytic and imperative principles do not support any naturalist ground for the practicality of law, his separability theory of course, endorses the adoption of social morality. This paper proposes that Bentham's utilitarian principles are sound for contemporary practices of law. Whereas I identify some challenges of Bentham's theory, it is contended that a rejection of one of his precepts does not imply a collapse of his legal theory as most commentators have supposed.

Keywords: law, morality, social fact, utility, three positivist tenets

Introduction

In recent decades, the practice of law has raised a number of issues. Central to these are issues relating to the source(s) of law, its validity as well as objectives. Roughly expressed, Bentham's theory of law is based on some of the tenets of positivism. The paper identifies the separability, analytic and imperative principles as basic to Bentham's conception of law. Bentham's critics supposed that he is arguing that law, properly conceived, is a positive law. This position has led to various criticisms of Bentham's legal philosophy. This paper notes that some confusion arises when some critics of Bentham's legal theory suppose that a critique of one of the tenets of positivism amounts to a collapse of Bentham's positive law theory. Consequently, the paper attempts to contribute to the resolution of this misinterpretation of Bentham's theory as well as its challenges by exploring the three ingredients of positivism in Bentham's account. To come to grips with our objective, this paper has three parts. The first section discusses the nature of positivism. The second part exposes Bentham's arguments for positive law and his treatment of the concern on sources, validity and criteria of a good law. In the third section, the paper assesses the challenges of Bentham's positivist principles. Let us now take them in turn.

Understanding Positivism

To begin with, let us recognize that it does sound improper to contemplate on the nature of positivism in discourse on law, without a brief reference to its alternative, naturalist conceptions of law. Thus, in this section, the naturalist hypothesis shall be briefly identified. By 'naturalist hypothesis' concerning law, we mean a clause suggesting any of the following statements: 'morality cannot be separated from law,' 'the basis of law is rooted in human nature,' 'God is the originator of law,' etc. For instance, the position that human nature is central to law is expressed in views such as: 'every man has conscience that controls his actions,' 'all humans seek self-preservation,' 'humans are rational beings', among others. An example of natural law argument is this: law, properly conceived, cannot but reflect certain human conditions - human nature.

It is to be noted that, in the history of legal theory, natural law has been expressed in both ontological and deontological ways. The natural law theory that advances human nature such as conscience, reason, desires, etc. as fundamental in establishing the sources and measures of [a good] law is ontological. Lloyd Weinreb affirms human nature as vital in establishing the sources of law. Robert P. George (1999:32) corroborates this stance when he notes that one of Weinreb's goals in *Natural Law and Justice* is to "restore the original understanding of natural law as a theory about the nature of being, the human condition in particular." Thus, those who defend ontological bases for law seek criteria that unify all humans so as to establish/extract moral guidelines from them. Accordingly, the declaration of universal moral laws arises from such approach.

However, the difficulty in providing moral foundations for law lies in how naturalists have defended certain extra-legal principles such as 'the existence of God', 'conscience', 'rationality,' 'will', etc., as certain, useful and unambiguous bases for law. Attempts to defend extra-legal basis for laws have been questioned by jurists and philosophers, especially the advocates of legal positivism. Of the many challenges of natural law theories, central are the problems concerning moral foundation for the validity of law. Michael D. Bayles (1992:116) observes this point thus:

> In the history of legal philosophy, natural law has been an influential view of the relation between law and morals. This theory maintains a necessary connection between law and morals. One influential version of natural law rests on two tenets: (i) certain moral principles are discoverable by natural reason unaided by revelation; (ii) to be valid laws must conform to or at least be consistent with these principles. Any law that grossly violates them, or the more fundamental, is invalid.

One interesting nature of naturalist accounts of law is that law ought to be based on common or universal principles. While this is common to theories of natural law, these theories are diverse as well as conflicting. In medieval era, for instance, Aquinas' conception of law is based on his belief that God is the originator of law as well as morality. Hence, a separation thesis would amount to dethroning God. In a similar vein, H.L.A. Hart (1983:52) notes:

> Sir William Blackstone, for example, says in his 'Commentaries', that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from the Divine original.

There are other versions of natural law that are deontological. Central to the deontological version is the belief that natural law cannot be deposed, although one can underplay its moral argument. Robert P. George (1999:32) notes that a natural law is deontological "…when it purports to identify principles of moral rectitude independently of inquiries into the nature of (human) beings" or when it completely dispenses with the notion of normative moral order. Rather than providing any metaphysical ground for law, defenders of this version of natural law supports certain a priori bases for law as self-evident.

While it is correct to hold that natural law theories enjoyed high level of acceptance among religious philosophers during the medieval era, however, it has largely been criticized at the dawn of positivism. As William P. Alston (1954:43) puts it: "Positivistic empiricists have argued that from an empirical standpoint, metaphysics is illegitimate - in fact, meaningless…" Originally, Auguste Comte is credited as the father of positivism. His ideas were influenced by writers of the 18th and early 19th centuries, especially the thought of David Hume. Comte's positivism begins a revolution against theological cum metaphysical explorations of reality that he considers to be obscured. Reality, to his mind, can only be grasped at the domain of science or positive level. While Comte describes theological and metaphysical stages as phases in the growth of the human mind, they are however outmoded. Comte (2000:27-28) points out that "…the human mind, by its nature, employs in its progress three methods of philosophizing, the character of which is essentially different, and even radically opposed: viz: the theological method, the metaphysical and the positive." He writes further:

> In the theological state, the human mind, seeking the essential nature of beings, the first and final causes (the origin and purpose) of all effects, in short, Absolute knowledge, supposes all phenomena to be produced

> by the immediate action of supernatural beings. In the metaphysical state, which is only a modification of the first, the mind supposes, instead of supernatural beings, abstract forces, veritable entities (that is, personified abstractions) inherent in all phenomena. What is called the explanation of phenomena is in this stage, a mere reference of each to its proper entity…In the final, the positive state, the mind has given over the vain search after Absolute notions, the origin and destination of the universe, and the coituses of phenomena, and applies itself to the study of their laws, that is, their invariable relations of succession and resemblance. Reasoning and observation, duly combined, are the means of this knowledge (Comte, 2000:28).

Comte's excerpt indicates that observation and reasoning are characteristics of positivism. Robert C. Scharff (1995:87) clearly summarizes the tenets of positivism when he writes:

> 'Relativity' is one of six qualities that, Comte argues, are characteristics of a truly "positive" philosophy - the other five being 'real [in the sense of eschewing any interest in the merely imaginary]', 'useful', 'certain [as opposed to indecisive]', 'precise', and 'organic' [i.e., concerned to organize and unify in order to indicate that positive philosophy - precisely as 'philosophy', and especially in light of its concern for the ultimately socio-political ends of knowledge].

The bottom-line of positivism is that speculation seems no longer significant in providing certain knowledge about the state of affairs. While it seems clear that observation, reasoning, relativity, reality, usefulness, precision, certainty and organism are defended in positive philosophy, it appears erroneous to suppose that all positivists share a monolithic view. This suggests that different brands of positivism such as legal positivism, logical positivism, logical atomism, among others shades defend different tenets of positivism. In this respect, Hart (1983:57) warns that the indiscriminate use of the label 'positivism' to designate the works of all legal positivists, for instance, has led to much more confusion. Now it is plain that there are diverse characteristics of positivism. If one seeks to establish the tenability of a positivist's positions therefore, one ought, first, to establish such a thinker's positive theses. Then we should ask: What are the characteristics of Bentham's positive law theory? Before we attend to this question, in the second section, let us emphasize that among legal positivists, an emphasis is placed on social facts as the ultimate source of law. This, however, does not entail that all positivists accept as well as defend the same account on what social facts are. Again, there is a position that law is a command issued by man. As the foregoing suggests, emphasis is placed on the fact that laws are promulgated by humans. Moreover, there

is a contention that moral law arises from social interaction. This emphasizes the importance of interpersonal relations in the decidability of what is right or wrong. In addition, the claim that law serves a useful end is also evident in positive theory. More importantly, positivists also claim that law is relative to place. Indeed, there is also the thesis that law is rooted only in legislative and judicial decisions, which seems complete and univocal. There are other tenets, which are not universally agreed on by legal positivists, who subscribed to Comte's positivism. Thus, the distinctive nature of Bentham's positive law needs to be identified.

Inspired by Comte, Bentham introduces certain characteristics of positivism into his conception of law. This is not the place for extensive exploration of Bentham's legal theory. Suffice it to note that Bentham rejects naturalist suppositions concerning law. Whereas he criticizes extra-legal basis for law, he defends a utilitarian basis for law, which rests on three positivist characteristics namely: separability, analytic and imperative tenets. What follows in the next section, is a discussion of Bentham's legal theory.

Bentham's Legal Positivism

In this section, Bentham's positive law is our concern. He argues for the adoption of positive law as the appropriate account of law. While Bentham is generally acknowledged to have spearheaded the scientific exploration of law, there are others who share similar opinion that law requires a scientific footing. For instance, John Austin, H.L.A. Hart, Hans Kelsen, Joseph Raz, among others are defenders of legal positivism. It would amount to an exaggeration of the matter to suppose that all legal positivists are univocal in their submissions. Thus, our concern is to discuss Bentham's legal positivism, rather than the views of all legal positivists.

The point is that Bentham helps to bring law nearer to the level of science - behavioural science. We have to state more exactly the way this is attempted in his works. While science means many things to different people, science or positivism, in Bentham's view, connotes the reliance on observable facts and the search for empirical bases for all actions. This search involves the distinctive identification of a single cause to an effect. Here, Bentham's idea of science refers to method of investigating state of affairs (reality), whereas reality signifies fact. As Comte (2000:28) once observes, "What is now understood when we speak of an explanation of facts is simply the establishment of a connection between single phenomena and some general facts, the number of which continually diminishes with the progress of science." A potent theme of Bentham's positivism is that through

observation, one can derive facts about social happenings and the method of science enables one to discover the causes of certain effects.

During the periods when Bentham wrote, most people, especially philosophers and jurists, were interested in establishing the origin of legal facts. In providing answers to the origin of social facts on which law is rooted, Bentham proposes a utilitarian basis, which, he believes, is consistent with the positivist tendencies. As Philip Schofield (2006:28) states it, "According to Bentham's ontology, there was nothing in human experience which was not ultimately referable to some physical fact…" Here, utility, to Bentham, is a social/physical fact simply because it is experienced. Thus Bentham gives two observable behaviours that he considers could serve as a clear example of social facts. These are feelings of pleasure and pain. They are not only considered as social facts, he contends that pain and pleasure are the only sources of human actions, including legal behaviours. Bentham (2000:19) writes:

> If the principle of utility be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that what- ever principle differs from it in any case must necessarily be a wrong one. To prove any other principle, therefore, to be a wrong one, there needs no more than just to show it to be what it is, a principle of which the dictates are in some point or other different from those of the principle of utility: to state it is to confute it.

As Bentham points out, utility is basic to human actions. Bentham believes that this [i.e., principle of utility - pain and pleasure] can be used to explain all legal behaviours as well. Then, he opines that nature puts humankind under the governance of pain and pleasure, which should guide us on what we ought and not ought to do. In this vein, Bentham avers:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. 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 words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The principle of utility recognizes 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 of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light (Bentham, 2000:14).

Although Bentham contends that the principle of utility (pain and pleasure) tells us what we ought to do, he stresses indeed that 'ought' is 'is/should' in the positive sense. Here, Bentham seems to echo David Hume's view that the word 'ought to' should not be interpreted as an ahistorical principle that is evident in natural law theory - wherein morality is based on hypothetical principle. Let us state here that a neglect of the distinction between 'social morality' and 'non-social morality' would do a disservice to Bentham's conception of law. The point then is to mention that Bentham's social morality/positive morality identifies the existence of morality of a social group. In other words, morality as he conceived it only can emerge from a people living in an existing political society. It would be erroneous, Bentham contends, to speak of morality that originates from non-human being--say, God, for example, since this is only fictitious or speculative. Thus, "Bentham insisted on this distinction without characterising morality by reference to God" (Hart, 1983:54), but by principle of utility. Bentham (1789:23) writes: "The principle of utility neither requires nor admits of any other regulator than itself." Having said this, Bentham argues that since natural morality fails the observable roots of social approbation and disapprobation, it cannot serve as the bases for the decidability of the validity of law. Relying on the positivist character of observation, Bentham espouses the separability thesis. What does this thesis entail for Bentham?

The separability thesis is a crucial aspect of Bentham's positive law. This tenet can be explained severally in his works. First, Bentham believes that human law cannot be based on natural law or natural moral theories. This would mean that unscientific principles are bases for scientific ones. Secondly, even when social morality is considered, Bentham believes that law still remain valid even if it is contrary to social morality. Alluding to Bentham's separability thesis, Bayles (1992:123) explains that:

> A law's being immoral does not deprive it of validity, nor does a rule's being moral make it valid law. One could maintain that the relation between law and morals arises only when one attempts to interpret laws. Here the influence of morals on interpretation might indicate a necessary connection. Or, it might be claimed that a system of rules must meet certain moral conditions to be a legal system.

The basis for the separation of social morality and natural kind on the one hand, and separation of law and morals on the other hand is that, through it, men would see the precise issues posed by the existence of morally bad laws as well as to grasp the specific character of the authority of a legal order. The point that Bentham reaches here is that the naturalists confuse descriptive

and prescriptive laws for supposing that natural morality should dictate the validity of law. While natural morality, for instance - the Divine Command Theory - is totally ruled out by Bentham's positive theory, he believes that law must follow certain social moral conditions.

Subsequently, Bentham's utilitarianism is used to explain the moral conditions necessary for the validity of law. But what does utility entail? And, how does Bentham derive moral bases which are useful for law from it? Bentham (2000:14-15) defines utility as:

> … that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.

While Bentham adopts the principle of utility to show that both individual and community experience pleasure and pain, he adopts the principle of utilitarianism to advance moral basis that presses for the gratification of happiness, rather than mischief, for the greatest number. David Lyons (1991:84) points out that, "A utilitarian can never allow the cure to be worse than the disease (measuring both by their 'mischief')." He adds that, "Bentham must be committed to the assumption that whenever a public official applies the standard of community interest directly to his conduct, he should conclude that it is most likely that the community will best be served by his adhering to rules that are grounded in utility." Having thought that this is the case, Bentham proposes that law in actual sense of it derives from principle of utility with the intent of reducing mischief (pain) as well as promoting the happiness for the greatest number. In his discussion of the purpose of law as the reduction of pain as well as his measure of a good law as that which promote happiness of the greatest number, Bentham engages in what is now referred to as analytic jurisprudence.

Bentham takes the task of analysis as fundamental in legal matter. The purpose is to attain precision about legal terms and practice. Bentham believes that by defining law, one easily resolves the challenges that are associated with the corpuses of natural jurists. Thus, Bentham (2001:224) notes that law is:

> …an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who is the case in question are or are supposed to be subject to his power; such volition

> trusting for its accomplishment to the expectation of certain events which it is intended such declaration should, upon occasion, be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.

In defining law, Bentham explores the analytic nature of science or positivism in legal matter. As the foregoing excerpt indicates, law is made by the sovereign of a political society. Bentham has dismissed or repelled the idea that there is a non-human sovereign. One recognizes that humans are social beings and are traceable. If, for instance, it is asked: Who issued certain laws? Bentham's view supposes that we can identify such a sovereign as distinct from his subject. Engaging in further juristic analysis, he writes: "…I mean by a sovereign any person or assemblage of persons to whose will a whole political community are (no matter of what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person" (Bentham, 2001:227). It appears clear now that the word sovereign cannot refer to any being other than man. This clarification rules out the contention that God is the law-giver, which is defended by naturalists like Aquinas and Blackstone. Accordingly, if law does not originate from God, then natural morality cannot be the basis for testing the validity of law. The validity of law, in Bentham's account, emerges when the sovereign issued a law (or his will) either by conception or adoption, as well as when law promotes the happiness of the greatest number of people over pain. In this respect, Bentham (2001:227-228) reiterates:

> A will or mandate may be said to belong to a sovereign in the way of conception when it was he himself who issued it and who first issued it, in the words or other signs in which it stands expressed: it may be said to belong to him by adoption when the person from whom it immediately emanates is not the sovereign himself (meaning the sovereign for the time being) but some other person insomuch that all the concern which he to whom it belongs by adoption has in the matter is the being known to entertain a will that in case such or such another person should have expressed or should come to have expressed a will concerning the act or sort of act in question, such will should be observed and looked upon as his.

Again, Schofield identifies the second criterion thus:

> A law was justified to the extent that it promoted happiness (or increased pleasure) or prevented misery or mischief (or provided security against pain). The principle of utility was the standard by which 'the several institutions or combinations of institutions that compose the matter of this science' should be governed, and given the universally

> of the principle, any 'arrangement' which was appropriate 'for the jurisprudence of any one country' would likewise be appropriate 'with little variation for that of any other (Schofield, 2006:52).

Bentham's analytic method exposes his scientific outlook. He seems to believe that if one takes the fact that law arises from a human-sovereign seriously; there will be variations in the law practiced or issued by different people or community. Let us note here that Bentham promotes a relative structure for law. This, however, should not be interpreted as suggesting that there would be many bases for law insofar as there are many nations. He thinks that since pain and pleasure are the sources of law and all human actions, the purpose of law would be to limit mischief. And to achieve this, Bentham proposes his imperative theory of law. This is the third tenet of Bentham's positive theory that we shall expose.

Bentham advances an imperative theory of law to establish the usefulness of law in a human society where people engaged in interpersonal relations. Law, to his mind, aims at arresting mischief. To arrest mischief, Bentham contends that the declaration or rules of the sovereign are commands and prohibitions. As Lyons (1991:83) explains, "For he believes that the law must provide motivation for compliance, and he is convinced that this must be done by threatening punishment for disobedience." Bentham sees law as valuable for social reform; hence, the will of the sovereign ought to involve motivation, influence and force. Apparently, sanction is a potent means of validating the authoritativeness of a law. The goal of sanction, itself, cannot be achieved unless the people are aware about what the law says. For enforcement of law to be useful for the purpose of social reform, therefore, Bentham defends the codification of law. Thus, law must be explicitly codified. If this be the case, Bentham again, seems to attack the supposed natural law theories, which scholars like Aquinas claim to be unwritten, although known by all men. One of the significant things about Bentham's positive law, in this regard, is that it shows that any conflicting view concerning what is right or wrong can clearly be decided by reference to the codified law. Writing on the import of codification vis-à-vis the notions of punishment and reward, Bentham (2001:234-235) contends that:

> This punishment then, or this reward, whichever it be, in order to produce its effect must in some manner or other be announced: notice of it must in some way or other be given, in order to produce an expectation of it, on the part of the people whose conduct it is meant to influence. This notice may either be given by the legislator himself in the text of the law itself, or it may be left to be given, in the way of customary law by the judge, the legislator commanding you for

> example to do an act; the judge in his own way and according to his own measure punishing you in case of your not doing it, or, what is much less frequent, rewarding you in case of your doing it.

If law is to reduce mischief so as to maximize happiness for the greater number of people, Bentham argues that sanction ought not to be efficacious, needless, unprofitable and baseless. As the foregoing conditions suggest, punishment to be issued to an offender ought not to be inflicted when it cannot prevent a mischievous act (not efficacious), when the cost is greater than what is prevented (unprofitable), when the mischief can be addressed without it (needless), and when there are no bases for it (groundless), etc. Apparently, the grounds for punishment must be useful to the majority. In other words, the sanction which Bentham proposes is such that outweighs the mischief. Thus, the greater the offence, Bentham argues, so also greater should the punishment be. The Divine Command theory which proposes the same punishment for all sinners seems unappealing to Bentham's positivist mind-set. Against this backdrop, Bentham does not base "…law on divine commandments, reason, or human rights" (http://www.iep.utm.edu/legalpos/).

One crucial point is that Bentham, like Comte, believes that positivism would ensure social reform by purging metaphysical mind-set [in law], thereby replacing them with observation of social facts. Bentham believes that the promotion of majority happiness through the application of imperative law would necessitate harmony. Similarly, and very importantly, Comte (1975:381) contends that:

> Love, then, is our principle; order our basis; and progress our end. Such…is the essential character of the system of life that positivism offers for the definite acceptance of society, a system that regulates the whole course of our private and public existence by bringing feeling, reason, and activity into permanent harmony.

So far, we have deliberated on Bentham's positive law, wherein we have identified the characteristics of his legal positivism. Let us now turn our attention to the challenges in Bentham's theory.

A Critical Appraisal of Bentham's Positive Law

This section aims at clarifying certain issues in Bentham's legal philosophy. Generally, we shall attend to three crucial issues here. First, the extent to which critics' contention that Bentham's separability thesis entails a denial of morality in legal practice would be considered. The second issue as to whether Bentham's imperative and analytic bases for law are controversial

would be appraised. Third, the tenability of Bentham's utilitarian bases as the sources of all actions needs further reflection. Central to all these is our attempt to establish whether the challenges to one of the three tenets of Bentham's positivism (separability, analytic and imperative theses) leads to the collapse of his legal philosophy.

We should begin by asking: What are the implications of a separability thesis which suggests that law should be distanced from morality? This question, we believe, is somewhat different from Bentham's formulation or contention of his separability thesis. Let us explore the implications of the question before identifying Bentham's adoption of the separability characteristic of legal positivism. The question proposes that in a deliberation of what the law should be or in making legal decision in court, no moral issue should be attended to, especially when formulating law or when assessing the arguments of lawyers. This kind of separability thesis has grievous implications for law or social reform. In any case (a) it would hinder social progress since rules are believed to be alien to community's standard of judgment and (b) what constitutes the right conducts would only emerge from new events. In the case of the first implication, there will be no need for social or non-social morality at all. And concerning how legal right emerges, past socio-historical events would likely be ignored since they cannot be grounds for law. It would be a mistake then to suppose that the aforesaid separability thesis can be sustained given that the idea of 'legal right' arises from the belief that collective interest is primary. This 'right' then dictates their moral precept. It appears that the views of natural law theorists concerning the separability thesis rest, primarily, on this obnoxious interpretation of the separability thesis.

Let us now ask: is the above interpretation of separability thesis correct in reference to Bentham's call for the separability of morals and law in legal jurisprudence and practice? Many issues can be debated here. Let us reduce them to at least three arguments. The first issue is the debate on social morality and natural morality. The second contention is on whether normative statements can be produced through scientific enquiry. The third matter is whether morality can be fettered from speculative thinking. The first thing that we seem vital here is to note that Bentham's separability position does not isolate morality from law, rather it does something else. What Bentham achieves through it would be shown after one gets the premises upon which his position is based. Let us succinctly formulate a-joint argument as follows:

Suppose that one desires to show what morality is: one seems to ask: why is certain action good or bad? Let us imagine that someone (A) holds that an action, say, for example, rape is bad. Then, if one asks: how does one know

that rape is bad? If another person (B), say, a natural law jurist, says because God forbids it. It is likely that 'A' will raise further question such as: why does God forbid it? In this case, 'B' may likely reiterate that, it is because the act is not good. Still 'A' probably would not be satisfied with the response simply because 'B' has not established why such moral prescription is uttered. To defend 'B's' reply, another natural law jurist (C), may suppose that such act as rape is bad because it is not rational and even another defender (D), of natural law, may suppose that everyone who has conscience would know that rape is bad. Deepening this argument, an advocate of legal positivism (let us say that person is X), seems likely to be unsatisfied with the responses that B, C, and D (who are all natural law jurists) have advanced. Interestingly, he feels that one can confront the question that 'A' had raised without any recourse to metaphysical defense. To X's mind, the reference to God, conscience, etc., does not address the issue concerning rape and thus natural law explanation fails to provide convincing moral argument for law. Here lies Bentham's basis for the separability of laws and morals. Put differently, Bentham seeks for the separation of natural morality from law. He replaces it with social morality. Social morality here is more appealing. The recognition of social morality is not only in accordance with social practices in every political society, it gives importance to cultural development here and there.

Given that the foregoing argument is in favour of Bentham's separability thesis, does that amount to the claim that this tenet is fool-proof? To our mind, it would be reasonable to connect the first part of the separability characteristic of Bentham's legal positivism with the three other issues central to it. Now one needs to ask: is it possible to develop a social morality on scientific framework? Those who believe that moral statements cannot be derived from scientific principle often question the utilitarian ground of Bentham's legal positivism. Their argument is premised on the ground that scientific explanation of morals would prevent the ideals which are basic to morals, but that are unobservable. The strength of this argument can be taken to be the fact that morals are guidelines to control actions rather than to restrict them. If someone is morally upright, the argument contends, then his/her action cannot bring about harm in the first place, which law is to prohibit. While this argument seems partly strong, some scholars like H.L.A. Hart have defended Bentham's utilitarian standard. For instance, Hart (1983:51) posits that:

> One by one in Bentham's works you can identify the elements of the *Rechtsstaat* and all the principles for the defense of which terminology of natural law has in our day been received. Here are liberty of speech, and of press, the right of association, the need that laws should be

> published and made widely known before they are enforced, the need to control administrative agencies, the insistence that there should be no criminal liability without fault, and the importance of the principle of *legality, nulla poena sine lege.*

The principle of utilitarianism, being the moral basis for law, seeks to achieve the same goal that natural law jurists propose through the use of terms such as 'general will', 'majority interest,' 'common good', etc. Thus, it would be a mistake to think that Bentham's defense of the happiness of the majority based on the principle of utility dismisses the moral appeal in his legal positivism. We agree with Hart that Bentham clearly articulates as well as defends social grounds for the inclusion of community's morals in legal practice. Hart argues then that Bentham "…never denied that, as a matter of historical fact, the development of legal systems had been powerfully influenced by moral opinion" and "…neither Bentham nor his followers denied that by explicit legal provisions moral principles might at different points be brought into a legal system and form part of its rules, or that courts might be legally bound to decide in accordance with what they thought just or best" (Hart, 1983:54). While it is clear that Bentham's system upholds some extra-legal values of natural law theory, the fact that it dethrones God from law, and all historical events in general, raises crucial objection. We would not discuss the implication of Bentham's positive law; rather, let us consider his contention that utility is the source of all human actions.

Is utility a sufficient ground for all social actions? Bentham appears to contend that happiness and pain are mutually exclusive, and that they are opposites. This position is indeed not true. Can one rightly say that if 'Y' is not feeling pain, then it follows that 'Y' is happy? Suppose that Mr. 'Y' and Mrs 'Y' (who are couple) filed a case of divorce in a positive law court, where all the conditions that Bentham has listed hold. Let us assume that both of them are no longer willing to maintain the marriage because they are no longer enjoying sexual, sensual or any pleasure whatsoever that binds them together. If the jurist is to decide the case, as Bentham has argued, he/she would consider the greatest happiness of the family, extended family and even the children of those involved. In any case, supposed all these people, excluding the couple, seek that the jurist should not dissolve the marriage; then conflicting principles exist in Bentham's theory. What are these conflicting issues? First, if the jurist seeks for the happiness of the majority, then the liberty of the couple would be thwarted. Second, if the jurist ruled in the interest of the couple that does not mean that they would be happy. The point is that someone may not feel pain, yet he is unhappy. To translate

pain as the opposite of happiness as Bentham's theory has attempted raises serious question regarding his analytic jurisprudence.

Bentham, indeed, makes juristic analysis one of his utmost goals in his legal positivism. This goal leads him to the third position he arrives at on the nature of law -imperative tenet. Today, the concerns of many critics are on the issues as to whether a universal definition of law is possible as well as whether Bentham's imperative conception of law is satisfactory. It is clear that Bentham takes law to be a command, which a sovereign promulgates. Here, he takes sanction as that force that allows the law to be obeyed. The strengths of Bentham's imperative theory is that: (i) he believes that people should be clear on what the law says, (ii) sanction motivates people to adhere to the sovereign's command vis-à-vis punishment and reward, and (iii) he rightly supposes that natural law is impotent in enforcing people's behaviour. We believe that the demarcation of law from morals seems relevant here because it helps to place Bentham's imperative theory in order. Given that law is generally coercive as Bentham puts it, how to authorise a natural law that is proposed in different religions becomes a difficult problem. It can be seen then that only a positive law can be legally authorised because (a) it arises from the culture of a given people, thereby taking into cognisance the people's cultural diversities, ethnic groups, social needs and interests. As we have it today, it would be a mistake to suppose that a religious law of a given people should form the basis of law in a multi-cultural society, for instance. In any case, only a hard-headed jurist or people would contend that Judeo-Christian law or Islamic law is to be adopted all over the world. Without doubt, there are, of course, different ways different people think about law and morality, thus Bentham's idea provides room for just condition in the decidability of all. We grant then that since natural morality and law are non-enforceable, hence Bentham is correct to suppose that they are not necessary in political society. This, however, is not to be interpreted as entailing a removal of moral values from law.

The imperative theory has several challenges. One of the challenges is identified by Hart, who supposes that a robber may command someone to obey his will, but that is not law, properly conceived. We can defend Bentham's view here. The shortcoming of this argument levelled against Bentham is that the robber does not have authority to command those he forced to obey him/her. Bentham, in fact, identifies clearly that sovereign's will or command must be issued either through conception or adoption, hence this criticism fails. Again, a critic may argue that Bentham believes that the sovereign's command is total, uncontroversial and absolute. If Bentham had advanced this position, then his imperative theory would have been severely

critiqued like Hobbes' theory of the leviathan. Rather, Bentham argues that the sovereign's command can be refused if it threatens the happiness of the majority. Hart (1983:55) corroborates our stance when he posits that, "Bentham indeed recognized, as Austin did not, that even the supreme legislative power might be subjected to legal restraints by a constitution…"

Conclusion

From the foregoing analysis, it is clear that the critical problems of Bentham's imperative theory lie in his criteria for punishment. He believes that punishment is not to be inflicted when its infliction is unprofitable, needless, groundless and not efficacious. Out of these criteria, his unprofitability and not efficacious guides are problematic. First, how do we measure the profitability of mischief done by a terrorist group like Islamic State or Boko Haram - with regards to Bentham's utilitarian theory raises doubt on suitability of his positive law in curbing international crime. Second, Bentham, through his not efficacious view, seems to be arguing that if the killing of suicide bombers cannot be corrected through death sanction, for example, simply because killing suicide bombers has not deterred them in the past, then, first, it is needless, and second, it is not efficacious. While one may argue that although it does not deter the apprehended culprits, however, it could have deterred hundreds who would have engaged in suicide acts if death penalty has not been adopted. Bentham's insistence on these criteria for adoption of sanction then is weak. In the final analysis, while this paper disagrees with certain positions of Bentham's theory, his view on social morality is defended. This, however, does not imply that a collapse of his positive law theory has been achieved. Instead, a new twist has been given to his positive law, wherein its challenges are identified as well as its strengths.

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