



Faculty of Law
Victoria University of Wellington

Foundations on Silt: Jeremy Bentham, Liberalism and the Science of International Law

Research Paper
History and Theory of International Law (LAWS 540)

Robert Deuchars

Contents

1. INTRODUCTION.....	3
2. BENTHAM VS BLACKSTONE	5
3. INTERNATIONAL LAW AND THE PRINCIPLE OF UTILITY	8
4. THE CODIFICATION OF INTERNATIONAL LAW.....	15
5. CONCLUSION.....	19

Word count: 7,522 (excluding footnotes).

1. Introduction

When the words *good* or *bad* are uttered the user generally takes their meaning derived from a system of ethics or morals. In this sense *good* and *bad* are particularist in nature and also socio-culturally specific. Let us take a simple example from Antiquity. At school in the West we learn of a figure called Alexander the Great, the Macedonian. By all accounts we are taught that he was a great, and by extension a good man. In modern day Iran Alexander of Macedonia is known as Alexander the Devil. So the question arises: was Alexander *good* or *bad*, or both? Is it possible to state unequivocally that the actions of Alexander were as a matter of fact morally *good* or morally *bad*? I think the answer to this question is fairly straightforward: it depends. Now this answer is not a simple descent into postmodern territory and moral relativism; there are genuine and empirical reasons to believe all three possibilities pertaining to the actions of Alexander. In short it is not possible to extrapolate from the particular to the general and it is not a question of semantics or even of critical hermeneutics. There is no either/or for Alexander of Macedonia. The binary opposition of *good* and *bad* cannot be applied to the particular actions of an individual and furthermore cannot be generalized as a principle, rule or otherwise.

This distinction or argument between what can be deemed *good* and what can be deemed *bad* may at first sight seem irrelevant to the law but it is not. In moral philosophy natural law theory states that law is based on morality, therefore negating the possibility of a bad law. It is at this point that Jeremy Bentham comes to our attention. Bentham believed that law and morality, although connected need not necessarily be so. Under the principle of utility, which I will explore in more detail later in this essay, Bentham believed that individual intent of an action could be disassociated from the intent that ought to be in place. The principle of utility was this test. In other words when determining the right course of action and what laws should be obeyed for all circumstances and systems, the principle of utility was the foundation. And I will argue later on in this essay that although Bentham is identified as a legal positivist and a philosophical realist his negative idealism is based on an error, much in the same way that he thought he had identified the fallacy of natural law. Bentham's foundations may not be on stilts but perhaps, more accurately, they were built on silt. Moreover Bentham's position as a moral philosopher is rather unusual in that although he was indeed interested in the behavior of the individual he was insofar as that behavior might have some bearing on a general system of law.

This essay is therefore concerned with this troubling problem. I will proceed as follows. Firstly, I will give an overview of Bentham's criticism of natural law and of William Blackstone in particular. Secondly, I will look at Bentham's contribution to the internationalization of the law and his use of the "principle of utility"; he coined the neologism "international" as one of many. I will then move on to see how Bentham expected to actualize his foundational principle through his efforts to persuade others of the efficacy of codifying international law as a form of 'science'. I conclude by arguing that Bentham's philosophical realism was, in fact a form of idealism, bordering on the religious; his 'cosmic calculus'.

Bentham lived during the Age of Reason and rationality, measurement and accurate calculation were elevated.¹ However, measurement and in Bentham's case measuring the quantum of happiness would always come at a cost. The Enlightenment myth of certainty through supposed objectivity, which was promised to bring certainty, stability and truth with a capital 'T' i.e. a singularity of truth-claims, was flawed from the outset and although accurate measurement is not to be discounted, it cannot possibly apply to the complexity of human affairs. To accept such a proposition would for example assume humans to be automata, and in this particular context, reduce the judge to a Newtonian machine. This extreme reductionism lies at the heart of the principle of utility, whereby all legal systems would be capable of being subject to one idea, purporting to be realist in nature, but in fact, reliant on a great act of faith in its understanding of being.

Bentham's error is the same as Kant's. Kant believed that universal order would come about by the spread of what we now called liberal-democracy and capitalism. It would be the way forward without recourse to the socio-cultural specificities of different societies. Kant envisaged a one-world state, as did Bentham, whilst paying lip service to the heterogeneity of classes, cultures, and ethnicities and in the final analysis Empire.

Rules provide the basis for self ordering and this in Kant and Bentham's view would be how Europe and by extension the world would solve the problem of order, or as I prefer to call it ordering. Kant and Bentham both believed in what we now call self-ordering complex adaptive systems, popularized by the likes of John Holland and Walter

¹ See for example Simon Schaffer "Accurate Measurement is an English Science", in Edward N Wise (ed.), *The Values of Precision*, (Princeton University Press, New Jersey, 1995), Ch.6.

Kaufmann² and advocates of complexity theory and in some cases chaos theory. This states quite simply that despite the incredible complexity of the natural and human worlds all of existence can be reduced to simple axiomatic rules. Law would be the centre-piece of this analysis of the human condition, and through obedience to the law on an international, actually global scale, the question of adherence to the law would be solved without any need to address the emergent property that lies at the heart of the international system of states; the anarchy problem. Not only is this a categorical error, it is, taken to its logical extreme a dangerous myth. Although Kant and Bentham are mostly regarded as liberals with a commitment to global peace the implications of their philosophy does not necessarily lead to the democratic peace thesis, it also conceivably takes us on the road to totalitarianism, fascism and dystopia. In short, *overcoding* and a return to Aristotle's teleologicalhylomorphism.

2. Bentham vs Blackstone

In the Preface to his *A Fragment on Government*, Bentham makes two striking quotes. The first states:³

The age we live in is a busy age; in which knowledge is rapidly advancing towards perfection. In the natural world, in particular, every thing teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored and the all-vivifying and subtle element of the air so recently analyzed and made known to striking evidences, were all others wanting, of this pleasing truth.

This places Bentham squarely into the modernist/rationalist tradition. It encapsulates the spirit of the times, of history accelerating, of progress, of the growing faith in scientific discovery that would lead to an enlightened and cosmopolitical earth. Bentham is optimistic about the future, as were many of his contemporaries. It is a striking quote not due to its optimistic tone but rather due to the profound ignorance that Bentham, who took great pride in his methodical approach to all matters, displays to the reality of the world in this time. The quote is striking precisely because of its teleological nature, of its

² John Holland *Hidden Order: How Adaptation Builds Complexity* (Basic Books, New York, 1995), Walter Kaufmann *The Origins of Order: Self-Organization and Selection in Evolution* (Oxford University Press, New York and Oxford, 1993).

³ Jeremy Bentham *A Fragment on Government Being an Examination of what is delivered, on the Subject of Government in General In the Introduction to Sir William Blackstone's Commentaries: by Jeremy Bentham with a Preface, in which is given a Critique on the Work at Large*, retrieved from <http://www.efm.bris.ac.uk/het/bentham/government/htm>.

lack of skepticism and of its liberal utopianism (Bentham admitted being utopian but was highly critical of his liberal contemporaries). As such, although Bentham acknowledged the utopian nature of his theory he wished to ground its foundations on the merit he saw in the natural sciences and a positivist outlook. I mention it here, as this facet of Bentham's philosophy would characterize almost his entire life's work. The second quote of note comes almost immediately after the first. It states as follows:⁴

...perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all would, when produced, appear capable of bearing the name of discoveries: with so little method and precision have the consequences of this fundamental axiom, *it is the greatest happiness of the greatest number that is the measure of right and wrong*, has yet to be developed.

Bentham calls the principle of utility a "fundamental axiom". It is here that we see the infiltration of the hard sciences into the thinking of the moral philosopher, although as noted above we must be careful to assign Bentham a place of any great import in moral philosophy. A number of questions arise however. Is it possible to demonstrate beyond doubt that the utility principle governs all human action in general and the inclination to obey a rule codified in law? This becomes doubly problematic as the principle is supposed to apply to the individual as an individual but also to a political community as well. Bentham believed that the law was a rule of conduct covered by a sanction for breaking the rule. Why should individuals and groups have an inclination to obey based on a twofold understanding of governance and utility? Should the individual obey because the law is good by definition and why should the individual obey merely on the occasion of a rule accompanied by the threat of a sanction. Does this then make the law *good*? And furthermore, how is one to demonstrate, or as Bentham asserts, prove that the law is conducive to happiness and thus *good* and ergo should be obeyed?

Bentham reasoning to the questions above was always to apply the principle of utility but ultimately his argument becomes circular. He has a particular view of an essentialist and individualistic human nature; humans (all without exception) are driven by a fundamental axiom), where the law is in conformity with this axiom it must be right and the individual and the collective must obey. Scientific observation and demonstrable 'facts' would provide the mechanism for the delivery of this all-encompassing system and would lead as in the natural world to a perfect system of law; universally.

⁴ At <http://www.efm.bris.ac.uk/het/bentham/government/htm>.

It has to be noted here too that although Bentham was fond of using the language and rhetoric of science, of logical propositions and proofs his attachment to empiricism was borderline to say the least. So his problem with Blackstone can probably be summed up without recourse to the ridiculousness of his caricature of Blackstone in the *Commentaries*. I tend to agree with Richard Posner who argues that Bentham should have viewed Blackstone as one of his predecessors, given that they had much in common in that they both believed in “common utility” as a basis for law and both had followed in the footsteps of Hume and Beccaria. They also shared similar views on criminal justice and many of Blackstone’s ideas preceded Bentham. Posner argues that it was not Blackstone’s adherence to common law and the principle of utility (the word was used widely but not axiomatically). Rather Posner thinks that it was Blackstone’s opposition to a fundamental principle which Bentham needed to make his whole system work; the principle of codification.⁵

At the heart of codification is a belief-system, that of objectivist rationalism. Bentham believed that if people could only be made to understand the rules, then as error was removed from perception then universal rules could be written and followed: universally. Descartes and Kant had similar views, namely that the removal of uncertainty, ambiguity and linguistic error would emancipate human being from the yoke of custom and tradition and ultimately to freedom and peace through the use of reason in public space. According to Alfange this situation would have to be constructed in social space. He notes:⁶

The fabric of felicity, Bentham realized, would have to be reared “by the hands of reason and the hands of law”. Reason would be used to acquaint men with the principle of utility and to persuade them that it would ultimately be in their interest to act in accordance with the dictates of that principle. Law would be used to coerce those who remained recalcitrant, by offsetting the personal pleasure that might be obtained from an act contrary to the principle of utility through the imposition of pain in the form of punishment.

Bentham thought that the same principle could be applied to the law on a global scale. No amount of incremental change could bring about these conditions to lay the way for perfectibility, hence Bentham’s intolerance towards Blackstone’s more conservative understanding of how the law worked and what it could do in the real world. And like Kant, Bentham also penned his plan for *Perpetual Peace*; a plan submitted to the world

⁵ Richard A Posner “Blackstone and Bentham” (1976) (19) *The Journal of Law and Economics* at 594-596.

⁶ Dean Alfange Jr “Jeremy Bentham and the Codification of Law” (1969) (55) *Cornell Law Review* at 61.

but somehow would only work if Great Britain and France came into some type of cosmic alignment. Of course, it is difficult not to sympathize with the idea of perpetual peace; however the manner in which Kant and Bentham's proposals were presented, which as stated above they both *needed* to complete their philosophy are framed, lay bare the subjectivism and particularism of schemes which, whilst purporting to promote and uphold universal and objectivist principles are merely the manifestation of socio-culturally specific norms and values, but cast on a global scale.

It is perhaps for the reasons outlined above that Bentham was so hostile to Blackstone. Bentham in a manner similar to Kant had a system; his system had a kernel of certainty as opposed to the more piecemeal common law arrangements favoured by the likes of Blackstone. Bentham probably viewed the outlook of Blackstone as a fundamental obstacle to place law on a scientific footing. He called the law of judges "dogs law" and most likely despised the incrementalism that he perceived to be at the heart of the English legal system. With a system like this in place, Bentham's proposals to basically do away with this form of law making would also not likely find a sympathetic hearing.

Having now established some of the reasons how Bentham formed his view of the law as he saw it and his hostility to its inadequacies I will now turn to Bentham's contribution to international law. As we have seen above Bentham believed that he had a solution to the inadequacies of all legal systems, rooted in a particular form of rationalism and he certainly held the conviction that he had found in the principle of utility a basis from which to escape the uncertainty and conflicting opinions of the type of law lauded by Blackstone. So it is to a consideration of the "international" that I now turn.

3. International Law and the Principle of Utility

Jeremy Bentham coined the word "international" in his famous work *Introduction to the Principles of Morals and Legislation*.⁷ Today we take the word for granted as unproblematic, uncontested, and fixed in its ontological status. To be sure, international law appears to exist on its own plane of reality, separate from its antecedents in the 'law of nations' and of domestic jurisprudence.⁸ However, despite the fact that there have been international laws in various forms dating far back into antiquity there are a number of issues with international law as it is understood today which suggest that to understand

⁷ Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation*, (JH Burns and HLA Hart eds., Clarendon Press, London [1789], 1996).

⁸ Gordon E. Sherman "Jus Gentium and International Law" (1918) 12(1) *The American Journal of International Law* at 56.

what international law ‘does’ we have to enquire into its social construction, the many possible historical trajectories that it could have taken, and rather than viewing it as an ‘object’ of study, it is perhaps better to conceive of the internationalisation of law as an on-going and contested global social set of processes and practices.⁹

I will firstly consider the emergence and rise of the ‘international’ as a separate sphere of reality. In an article by Philip Schofield begins with a quote from José del Valle, the Guatemalan politician to Bentham in which he says “Your works give you the glorious title of legislator of the world”.¹⁰ Bentham was famous in his own lifetime and his work and his influence reached some curious places, from Russia, Greece to Latin and South America. So perhaps the title was apt.¹¹ The late eighteenth and early nineteenth century was certainly a transitional period globally; what we now term ‘globalization’ was much in evidence then as it is now. In fact the world was arguably just as globalized then as it is today. Massive population movement, advances in communications, the aftermath of the revolutions of 1776, the emergence of nascent states in Latin America all combined to make the worlds of politics, political economy, law and commerce truly global in nature. Combined with these radical societal changes was the confrontation of the forces of radicalism in all its forms with the forces of conservatism, reactionary or otherwise.¹²

Latin America provides us with a particularly useful insight into power relations in that region and also a useful guide as to how codification historically can be viewed in two quite distinct ways. Firstly, codification can be seen as an agent of social change in its liberal guise i.e. as liberals would have it: a force for good. Secondly, it can be seen as a means to consolidate political power using the law as its primary vehicle. The term legislator of the world has a double connotation. It could mean the benevolent and enlightened dissemination of rules that will solve the problem of uncertainty. On the other hand it is also reminiscent of the model for the ideal society espoused by Plato; not Athens as is commonly taken for granted; but Sparta. The question immediately arises: who is the legislator? Simon Bolívar? As Mirow notes:

⁹ Hidemi Suganami “A Note on the Origin of the Word ‘International’” (1978) 4(3) *British Journal of International Studies* at 226.

¹⁰ Philip Schofield “Jeremy Bentham: Legislator of the World” (1998) 51(1), *Current Legal Problems* at 115.

¹¹ It has to be noted that although Bentham and his brother Samuel spent quite some time and effort in Russia both on the idea of the panopticon and as potential codifiers, their success was limited. See David Lieberman “From Bentham to Benthamism” (1985) 28(1) *The Historical Journal* at 199.

¹² James E. Crimmins “Bentham’s Radicalism Reexamined” (1994) 55(2), *Journal of the History of Ideas* at 259.

...the foreign influences of Napoleon and Bentham shed light on Bolívar's aims in proposing civil law codification in the midst of the political deterioration of Gran Colombia. Bolívar's turn toward the Code Civil was a political move aimed at reasserting power to further his dream of a unified South America equal to the United States of America in strength and prosperity. Even if a new national codification of civil law did not result in Bolívar retaking control of Gran Colombia, he would leave a legacy to Latin America similar to Napoleon's legacy to Europe and Justinian's legacy to Rome, an enduring law that would last far beyond a lost empire.¹³

We can see from the quote above one version of the legislator of the world. It is, I would suggest distinctly illiberal. Bentham seems to have overlooked the potential for his ideas to contribute not to liberalism, benevolence and freedom but to the centralisation of formal political power. The question arises immediately and can also be related to the Panopticon. If there is an all-seeing eye or a supreme legislator who checks the checkers? What is the justification for the singular agent who gets to decide societal rights and wrongs, good and evil. Although one does not have to agree in full with Karl Popper, he makes this argument in Volume 1 of the *Open Society and its Enemies*¹⁴. An argument against the Platonic world-view and for the somewhat disorganised and sometimes chaotic world of liberal society. So Bolívar provides us with a particularly useful example to highlight the different trajectories Bentham's particular genius could go. On the one hand to do away with feudal privilege and customary rights to be replaced with the ideas of liberty embodied in the European Enlightenment and on the other to centralise power in perpetuity; the type of thinking despised by the likes of Popper and Hayek.

It is against this backdrop of radicalism and conservatism that Bentham perceived the inadequacies of existing codes of law as they pertained to the international realm and he proceeded to critique the idea of the 'law of nations' and espouse a distinctly more internationalist world-view of law, premised on a distinction that he proposed was scientific in nature between the 'is' and the 'ought' of law. The emergent term

¹³ M C Mirow "The Power of Codification in Latin America: Simon Bolívar and the Code Napoleon" (2000) (8) *Tulane Journal of International and Comparative Law* at 85-86.

¹⁴ Karl Popper *The Open Society and Its Enemies, Volume 1, The Spell of Plato* (Routledge and Kegan Paul, London, 1945).

‘international law’ first appeared in the *Principles* and Bentham felt the need to qualify the term in a footnote as follows:¹⁵

The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which commonly goes under the name of the *law of nations*: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D’Aguesseau has already made, I find a similar remark: he says, that what is commonly called *droit des gens*, ought rather be termed *droit entre les gens*.

It seems clear that Bentham here is not simply making an analogy or a simple re-naming the law of nations as suggested by Hart¹⁶ but is attempting to carve out a separate realm of law as it applied to sovereign states and here we see the personification of the state as a moral agent. It is the state within a system of states that has agency, not the individual. Thus we also see some of the problems within the liberal tradition in international law and in other disciplines such as international relations. Simply put in liberal thought the primary agent is supposed to be the individual within a society of like-minded rational individuals. In Bentham we see the expression, found in the liberal internationalism of the English School and Hedley Bull and Martin Wight of an International Society¹⁷; but that International Society is not one of individual human beings but one of individual and rational states.¹⁸

This position did not go unchallenged although it has held sway. For example Phillip Marshall Brown writes that:¹⁹

The term “international law,” as suggested by Bentham as the equivalent of *jus inter gentes*, is restrictive in meaning and misleading. The *jus gentium* advocated by

¹⁵ Jeremy Bentham, *An Introduction to The Principles of Morals and Legislation*, in M. W. Janis ‘Bentham and the Fashioning of “International Law”’ (1984) 78(2), *The American Journal of International Law* at 408-409.

¹⁶ at 409.

¹⁷ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (Basingstoke, Macmillan [1977] 1997).

¹⁸ Ole Spiermann “Twentieth Century Internationalism in Law” (2007) 18(5), *European Journal of International Law* at 785.

¹⁹ Phillip Marshall Brown “Jus Inter Gentes” (1941) 35(3), *The American Journal of International Law* at 513.

Grotius was much more comprehensive. It embraced all the customs and principles applicable to the members of the various *gens* who were under the *jus gentium*'.

Brown goes on to state that "This theory that only states are the subjects of international law ignores a very simple and basic fact, namely that whatever the nature of the claim or the means available for enforcing it by an individual, its foundation logically is an original wrong—*damnum*—to a person. All else is fiction'.²⁰ This small passage and critique by Brown strikes at the heart of the rise and fall of the 'international'. I do not think it a coincidence that it was penned in 1941, and although it may appear as a small footnote in the annals of scholarship of international law I find it striking that not only does it address the paradox of sovereignty in international law²¹, it also stresses the dangers of totalitarianism in the face of the optimism of inter-war international legal scholarship. Furthermore, the author concludes with an optimistic assessment of what ought to be the case in the post war period. As he notes:²²

It was most refreshing and encouraging to note during the sessions of the Annual Meeting of the American Society of International Law in Washington, April 24-26, that the general trend of the discussion was to stress the rights of individuals...We must valiantly contend for the fuller recognition of the rights of human beings who are the proper, and the main, concern of all law. We must return to the earlier concept of the law of nations as *Jus inter gentes*.

And so it was to be, in a manner of speaking, with the establishment of the United Nations and the U.N Declaration of Human Rights. We can see here parallels with the proliferation of international organizations in the nineteenth century, mostly emanating from the liberal tradition, but spreading across the academic disciplines, especially that of geography, the hard sciences and laterally of anthropology. We must also be mindful of the darker side of this modernist movement; of social Darwinism, eugenics, fascism and the bastardisation of the international socialist movement in the form of nationalist-Marxism. In simple terms the idea of the 'international' is one whereby the world becomes the object and man the subject. International law in that sense is but a sub-set of the Enlightenment quest for progress and the perfectibility of man. But of course it is a

²⁰ at 513.

²¹ Necati Polat "Three Contemporaries: The International, Bentham and de Sade" (2000) 18(4), *Social Text*, at 1.

²² Brown at 514.

cosmology that is Janus-faced; speaking the language of individual rights and duties but also it is the language of Occidental modernity and Empire.²³

Bentham's position is to my mind paradoxical. On the one hand he makes an appeal to Nature stating that all human action derived from Nature and action is governed by the twin principles of pleasure and pain. He states this commitment at the outset in his most famous work, *An Introduction to the Principles of Morals and Legislation*. He posits the principle of utility axiomatically. In other words there is an element of fatefulness that governs human action. Bentham's now famous opening passage is stated as follows:²⁴

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.

However, if this is indeed the case then there would be no requirement for the many of Bentham's ideas related to the modification of human behavior, say for example in his idea of the Panopticon. In brief the Panopticon, although originally designed for a factory in Russia, became synonymous with the idea of the perfect prison.²⁵ The Panopticon operated on a tripartite system of power/knowledge whereby individual behavior could be modified through hierarchical observation, normalizing judgment and a combination of the two, the examination. Similarly, if the twin masters of pleasure and pain were actually universal drivers of all human action then Bentham's idea to tattoo individuals (as an act of benevolence) would not actually be required. Bentham's

²³ Gertrude Himmelfarb "Bentham Scholarship and the Bentham "Problem" (1969) 41(2), *The Journal of Modern History* at 189. Eileen P. Sullivan "Liberalism and Imperialism: J. S. Mill's Defense of the British Empire" (1983) 44(4), *Journal of the History of Ideas* at 599.

²⁴ *Principals* at 1.1.

²⁵ See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London, Penguin, 1977).

numerous ideas are more analogous to the idea of the construction of the governable person.²⁶

In similar vein to Miller and O’Leary’s argument regarding the social practice of accounting the law performs a similar function. The law domestic and international does not exist in a social vacuum. It cannot be viewed through the lens of the traditional legal historian or theorist. It has become far too deeply implicated in other practices such as accounting for it to be subject to isolated study as a set of technical or juridical activities. The law is a social practice as well as a profession. Legal organizations do not exist in a social vacuum, either, and the number of people exposed to different forms of law has continued to grow, thus ensuring that legal forms act both on technical practices but also back on the self, albeit in ways we do not fully understand.²⁷

It also seems rather odd to declare human nature as being essentialist but at the same time asserting that it also is malleable and tractable. Bentham acknowledges that the quote above is metaphorical but he proceeds to give the principle of utility law-like qualities. This extreme form of reductionism is doubly troubling due its conflation of the *ought* of human action and the *is* of agency. Bentham states that utility ought to and actually does govern all agency; thus in a way negating agency. This in turn surely raises serious problems with his whole schema over the question of free will and pre-determination. Bentham’s utility principle is to be operationalized through the law. As late as 1911 one could still read passages such as the following in the *American Journal of International Law*:²⁸

Law is the whole of the rules, which regulate the relations of men. At the commencement of civilization and, even at the present day, primitive peoples and nations not in a complete state of civilization have clothed these rules with supernatural attributes; they have been represented as having been imposed upon mankind by a supernatural power; they have been given the effect of magic formulas, which, it is supposed, result in the chastisement and punishment of those who violate their dictates.

²⁶ See Peter Miller and Ted O’Leary “Accounting and the Construction of the Governable Person” (1987) 12(3), *Accounting Organizations and Society*.

²⁷ Robert Deuchars *The International Political Economy of Risk: Rationalism, Calculation and Power*, (Ashgate, Burlington and Aldershot, 2004) at [155].

²⁸ Ernest Nys “The Codification of International Law”, (1911) (5), *The American Journal of International Law* at 871.

I think this small quote captures Benthamism and his command theory of law. Also and unsurprisingly it also captures Bentham's key idea of overcoming all of the obstacles of global civilization by "the convenience and utility which would result from the publication of the law of nations in the form of rules; in other words, the benefit which would result from the substitution of international custom by a written international law".²⁹ In other words Anglo-American legal scholars in the main at the turn of the twentieth century and on the eve of the first catastrophic war were blind to imperialism, although to be fair to Bentham his proposal for *Perpetual Peace* necessitates the disengagement from all colonies but not on the ground that colonialism is wrong but that it is not profitable. The more important sentiment conveyed by statements such as these is of course the casting of the European world-view or cosmology to the rest of the world; the world should be cast in the image of the Enlightened European and by definition a law-state and a world-state would 'tame chance'.³⁰

4. *The Codification of International Law*

I will now address Bentham's codification of the law within the framework of the utilitarian principle and finally I will make some suggestions as to the contemporary meaning, significance and legacy of Bentham's 'cosmic calculus'. My primary argument is not to assess Bentham's attempts to codify international law, as it is quite clear that these efforts all failed to a greater or lesser extent. Rather it is, as I have noted earlier in this essay, that Bentham's faith in the efficacy of calculation, liberalism and reason to overcome the problem of order(ing) is at best, misguided and taken to its logical extreme dangerous.³¹

The philosophical underpinnings of Bentham and his followers were based on a calculative view of human nature. Human beings and by extension states were rational calculators who aimed to maximise the quantum of happiness. This happiness was a function of the balance between that which man is governed in his nature by the twin masters of pleasure and pain.³² This may seem overly simplistic to base a system of morals and ethics by twenty first century standards but it was common-place in the eighteenth and nineteenth centuries and Bentham was a product of the socio-cultural and

²⁹ Nys at 872

³⁰ This is Ian Hacking's term, which he used in his now classic text *The Taming of Chance* (Cambridge University Press, Cambridge, 1990).

³¹ Ian Harris "Order and Justice in the 'Anarchical Society'" (1993) 69(4), *International Affairs* at 725.

³² Philip Schofield "Jeremy Bentham, The Principle of Utility, and Legal Positivism" (2003) 56(1), *Current Legal Problems* at 1.

theological specifics of that philosophical departure point. Furthermore I am not suggesting that this world-view does not have contemporary significance. Although Bentham's own efforts to codify international law all failed in his own time and did indeed have a strange mixture of imperatives from his admiration of the *Code Napoleon* to his attempts to secure funding for the codification of US federal states' law the impact of codification of law and now of life cannot be underestimated. As Viner notes:³³

Men normally are interested to some extent in the happiness of others, and in exceptional cases are capable of "universal benevolence," or a dominating concern with the happiness of mankind at large, but generally, if they are left to themselves, there will be a serious discrepancy between the actual behaviour of individuals and the behavior which would conduce to "the greatest happiness of the greatest number".³⁴

Viner is suggesting here that in the final analysis human beings by their very nature need an arbiter to ameliorate for the fact that they are less moral in groups and that function (globally) can be carried out by the law. Viner goes on to state that:³⁵

It is the function of the legislation to coerce or bribe individuals to make their behavior coincide with that required by the greatest-happiness principle, and of education and moral leaders to mould men's desires so that they spontaneously associate the happiness of others with their own happiness'.

There are two points of note here.³⁶ Firstly, we can see that Bentham does not believe that human beings are naturally co-operative; rather they are naturally rational egoists and, secondly, that it will take social intervention on a moral and legal level to shape human behaviour. This is at odds with much liberal thinking and is much more akin to a particular form of social constructionism, perhaps along the lines of Berger and

³³ Jacob Viner "Bentham and J. S. Mill: The Utilitarian Background" (1949) 39(2), *The American Economic Review* at 365.

³⁴ Burne asserts that Bentham reformulated the principle of the "greatest happiness of the greatest number" to the principle of "the greatest happiness". If Burne is correct then the implications for representative democracy and the rule of law are far-reaching. The greatest happiness if reformulated correctly as Burne suggests is surely a better principle for all, as the 'greatest number' could be equated with the majority, thus rendering the minority impossibly unhappy according to the utilitarian principle. P. Burne "Bentham and the Utilitarian Principle" (1949) 58(231), *Mind* at 367-368.

³⁵ Viner at 365.

³⁶ HB Jacobini "Some Observations Concerning Jeremy Bentham's Concepts of International Law" (1948) 42(2), *The American Journal of International Law* at 415.

Luckmann.³⁷ Bentham does view humans as basically passive but more importantly, malleable, though and he did believe that social change could be achieved by what he variously termed a ‘moral arithmetic’ or a ‘felicific calculus’. Moreover he was not alone in these endeavours.³⁸

In order to achieve these ideals Bentham became convinced of the need to codify the law. The importance of this conviction is not whether it is true or even an historical necessity. Rather as Bentham himself believed it was important as furthering the liberalist project on a global scale. This was the importance of codification; to replicate European civilization through legal codes to the rest of the world.³⁹ In this sense Bentham cuts a paradoxical figure. On the one hand a thinker full of emancipatory ideas, including universal suffrage, health and labour reform, penal reform, and animal rights to name a few. On the other hand he wished to create a cosmopolis premised entirely on the imaginary of a liberal, civilized and European society. In other words Bentham’s outlook typified a one-world civilization based on the ethics and morality of Europe. Thus his ideal-type of international law would simply be that of an underdeveloped psychology fused with a hyper-rationalist morality. That said, Bentham and other codifiers were not entirely unsuccessful in their endeavours. According to Schofield Bentham’s commitment to codification was borne out of a complete lack of trust in common law. He notes that:⁴⁰

In one respect it did not matter which set of rules were imposed, so long as some set of rules were imposed and these rules were known and certain. The crux of the problem with the common law was that those subject to it did not, and could not, know what it ordained, and this created uncertainty. Expectations could either be formed or were constantly liable to be disappointed; and the consequence was insecurity.

It is here that we see why Bentham spent the better part of twenty years on codification. Codification could yield certainty and provide ontological security for the population; the true object of law and governance. The Enlightenment, if nothing else was a quest for certainty and it is not too difficult to see why. The ruins of the thirty year’s war, the waning temporal power of the Catholic church and its monopoly over the *true* and the

³⁷ Peter Berger, and Thomas Luckmann *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, (Anchor Books, New York, 1966).

³⁸ Wesley C Mitchell “Bentham’s Felicific Calculus” (1918) 33(2), *Political Science Quarterly* at 161.

³⁹ Charles Noble Gregory “Bentham and the Codifiers”, 1(900) 13(5), *Harvard Law Review* at 344.

⁴⁰ Schofield “Jeremy Bentham: Legislator of the World” above at 122.

real led many philosophers to seek a number of methods to achieve the Enlightenment dream of certainty of the world ‘outside’ of being. If the world could be codified by international law then uncertainty could be banished. With uncertainty gone, security and ultimately peace would surely prevail. This in short is the modernist ideal, shared by a long line of thinkers including Kant, Bentham, Mill, through to Rawls and Habermas.

Bentham was quite explicit of the intent for his proposal for codification. He states succinctly in Section three:⁴¹

Reasons, indicative of this conduciveness, are reasons derived from the principle known by the name of the principle of utility: more expressively say, the greatest-happiness principle. To exhibit these reasons, is to draw up the account between law and happiness: to apply arithmetical calculations to the elements of happiness. Political arithmetic—a name that has by some been given to political economy—is an application, though but a particular and far short of an all-comprehensive one, of arithmetic and its calculations, to happiness and its elements.

Political Arithmetic was originally the term used by Sir William Petty⁴² and it was the precursor to political economy. Petty along with his colleague John Graunt were perhaps the first people to use information gathered on the population such as the London Bills of Mortality to attempt to measure the state of the nation. Petty was also the surveyor of the newly conquered Ireland and he used his position in Ireland to become very affluent as one of the biggest landowners in the country. Petty and Graunt also used the Bills to measure statistical patterns in the population, or more accurately quantitative methods to ‘discover’ reliable knowledge. Petty pre-dated Adam Smith but the passage by Bentham above has the mark of Petty over it, not Smith.

⁴¹ Jeremy Bentham CODIFICATION PROPOSAL, ADDRESSED BY JEREMY BENTHAM TO ALL NATIONS PROFESSING LIBERAL OPINIONS; OR IDEA OF A PROPOSED ALL-COMPREHENSIVE BODY OF LAW, WITH AN ACCOMPANIMENT OF REASONS, APPLYING ALL ALONG TO THE SEVERAL PROPOSED ARRANGEMENTS, Section 3, retrieved at <http://oll.libertyfund.org/titles/1925>.

⁴² Petty became the first Earl of Shelburne under and is not to be confused with the second Earl, who was in fact a friend of Bentham’s and Petty’s great-grandson. A separate essay would be necessary to trace the genealogy of thought from the political arithmetic of Petty to the utility principle in the law of Bentham.

5. Conclusion

It can be said though that Bentham like so many liberal thinkers was pursuing an implausible dream. As highlighted by the Frankfurt School of Horkheimer and Adorno⁴³, The Enlightenment was always a myth and that myth was always enlightenment. Contrary to the lofty goals of the liberal Enlightenment, the world does not become the object to be crafted in the image of European civilization. It is much more complex than that. The world is as much ‘in here’ as ‘out there’, in other words, the world is what we make of it, not in the sense suggested by Alexander Wendt who whilst positing a post-positivist ontology, remains committed to a positivist epistemology.⁴⁴ Wendt reaches what he considers to be the logical conclusion of the meaning of structure and agency in the international system in a later work. He reaches the same conclusion as Kant and Bentham and posits his answer teleologically just as these two esteemed philosophers do. A one-world state is inevitable.⁴⁵

In other words to a world made manipulable by observation and scientific method. Or as perhaps a more radical philosopher such as Nietzsche might say, the world of the subaltern resists the primary forms of societal control, namely, law, institutions and contracts.⁴⁶ In similar vein Deleuze makes the link between law and capital in what he calls overcoding.⁴⁷ The objective then of this line of thinking is to escape the codes of which the law, domestic and international forms an integral part.

Bentham begins his essay *Objects of International Law* as follows:

If a citizen of the world had to prepare a universal international code, what would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and duty

⁴³ Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment* (Continuum, New York, [1944] 1997).

⁴⁴ Alexander Wendt *Social Theory of International Politics*, (Cambridge University Press, Cambridge, 1999).

⁴⁵ Alexander Wendt, “Why a World State is Inevitable” (2003) 9(4), *European Journal of International Relations*.

⁴⁶ Gilles Deleuze “Nomad Thought”, in David B Allison (ed.) *The New Nietzsche: Contemporary Styles of Interpretation*, (The MIT Press, Cambridge Mass. and London, 1985) at [148].

⁴⁷ Gilles Deleuz and Félix Guattari *A Thousand Plateaus: Capitalism and Schizophrenia*, (University of Minnesota Press, Minneapolis and London, 1987) at [200-201].

In this seemingly small and worthy statement Bentham lays bare not only his cosmopolitical orientation but also his utopian idealism. Bentham took pride in his method of law, and from Hume the idea that objects that were observed had to conform to the properties they possessed.⁴⁸ Now it would be ideal if the ontological status of the world was flat. That is what Bentham means by the ‘equal utility of all nations’. Furthermore it would be ideal if the world was actually comprised of nations; the problem of ordering. But it is not. The world is now comprised of nation-states and although space precludes me here there is a complete history of the hyphen between nation and state. The ordering principle for the world until 1989 was not the nation or the state; it was Empire. Some writers such as Hardt and Negri maintain that it still is.⁴⁹ This little quote also shows that Bentham shared at least in part the deontological ethics of Kant; that is the meaning of ‘inclination and duty’.

All of this is not to suggest or diminish the significance of Jeremy Bentham’s legacy in International Law. What I have aimed to do instead is simply demonstrate that his ‘cosmic calculus’ failed before it began. This assertion does not mean, of course that my argument is claiming in some way that Bentham and the utilitarian principle are ‘wrong’.

The influence of Bentham is quite clear. Utility is a term that is now used generally in many areas beyond the law, especially marginal liberal economics but also perhaps surprisingly to some in Marxist economic theory. Bentham, if he were around today would probably be labelled a social constructionist, a label he might not understand, but he shares with his eminent predecessor Sir William Petty a number of key attributes. Firstly a belief that the future can be *made*, secondly that expression of argument should be simple for all to understand and in Petty’s case to only express himself in *Number*, *Weight* or *Measure*. This sentiment can perhaps be traced to Kant and Hume in terms of international law but also to Petty in political arithmetic. As I have previously argued elsewhere, “he [Petty] declared that numbers were a mode of representation superior to either the written or oral word...and like others of his time, was in the habit of declaring a lack of interest or ‘passion’ for the works he pursued. This practice continues today and fall under the heading of scientific objectivity”.⁵⁰

⁴⁸ Edwin W Patterson “Bentham on the Nature and Method of Law” (1945) 33(4), *California Law Review* at 612.

⁴⁹ Michael Hardt and Antonio Negri, *Empire*, (Harvard University Press, Cambridge Mass., 2000).

⁵⁰ *IPE of Risk*, 2004 above at [47].

So in Bentham's attempts to enumerate the quantum of happiness under the superordinate principle of utility we can see echoes of Sir William Petty, the founder of political arithmetic or what we now call statistics. Bentham in the field of international law attempted consciously or otherwise to emulate the achievements of Petty and Graunt. Although unsuccessful in his own time, DiFilippo argues that:

Despite his conservatism and firmly bourgeois position, Bentham's codification proposals were regularly shunned in England and in the United States as too radical. After his death, the rising industrial bourgeoisie began to draw upon some of his more palatable ideas. Later, Rudolf von Ihering, and then Roscoe Pound reworked Bentham's subjectivist interest theory into more sophisticated forms.⁵¹

It may well be possible that objectivist law could deliver the Enlightenment quest for certainty and serve to solve the problem of ordering. If that were to be the case though it follows logically that the questions of the cosmos, of being and of God would also be solved. Despite the unlikelihood of this state of affairs it does not negate it. In the social sciences and in the theory of law, the debate seems to have moved on as to whether international law is really law. I think its ontological status, though not completely assured, due to the interests of state and capital is not heading into the abyss.

International legal theorists and historians cannot deny the fact that the institutionalisation of many forms of international law, say for example in the World Trade Organization, although decades in the making and the fact that despite repeated failures, firstly through the OECD and now the WTO there will still be more attempts to revive the Multilateral Agreement on Investment (MAI). Again, although imperfect, the fact that a European Court of Human Rights exists and an International Court of Justice as well as the United Nations itself, despite all of its imperfections were it not be in existence we would probably invent it again.

Jeremy Bentham for his part was a visionary. One does not have to agree with his visions of quantification and enumeration but by the same token one cannot ignore their place in a modernist world. In the famous words of Lord Kelvin we find the spirit of occidental modernity summed up in Benthamite form:

In physical science the first essential step in the direction of learning any subject is to find principles of numerical reckoning and practicable methods for measuring some

⁵¹ Terry DiFilippo "Jeremy Bentham's Codification Proposals and some Remarks on Their Place in History", (1972-1973) 22, *Buffalo Law Review* at 251.

quality connected with it. I often say that when you can measure what you are speaking about, and express it in numbers, you know something about it; but when you cannot measure it, when you cannot express it in numbers, your knowledge is of a meagre and unsatisfactory kind; it may be the beginning of knowledge, but you have scarcely in your thoughts advanced to the state of *Science*, whatever the matter may be.⁵²

Now, international law may not be a science like physics. However, we now know that physics is not the science it was once held up to be. Science, art, law and politics are enmeshed in mobile relations, and in a manner similar to the way language evolves; I would expect these mobile relations to continue to evolve as well.

⁵² Lord Kelvin, "Electrical Units of Measurement" 1883 retrieved at <http://zapatopi.net/kelvin/quotes/>.