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### Moral aptitude and the moral sanction in Bentham's institutional architecture: Is there any room for non-egoistic motivation?

Among the many achievements of Schofield's *Utility and Democracy*, one of the most important is the convincing settling of the question regarding the time of the democratic turn in Bentham's thought, its origin and its theoretical roots. Scholars disagree as to the moment of Bentham's "conversion" to representative democracy with universal male franchise; but there seems to be little doubt that the events following the French Revolution deeply scared him and delayed such a conversion, thereby halting his work on plans of electoral reform in Britain.<sup>1</sup> Schofield traces the democratic turn back to the emergence in Bentham's thought of the notion of *sinister interest*. The phrase "sinister interest" first appears in 1797 in Bentham's writings on the poor laws,<sup>2</sup> to indicate a personal or class interest the maximization of which does not add to, but rather subtracts from, general happiness. In other words, sinister interest stands in the way of the general interest's stream. Since, for Bentham, every human action is driven by the agent's conception of his/her

<sup>1</sup> See E. Halévy, *The Growth of Philosophic Radicalism*, Faber and Faber, London 1972, pp. 147 et seq.; M.P. Mack, *Jeremy Bentham. An Odyssey of Ideas 1748-1792*, Heinemann, London 1962, pp. 410-441; J.H. Burns, *Bentham and the French Revolution*, «Royal Historical Society Transactions», 16, 1966, pp. 95-114; J. Dinwiddy, *Bentham's Transition to Political Radicalism*, "Journal of the History of Ideas", 36 1975, reprinted in W.L. Twining (ed.), *Bentham: Selected Writings By John Dinwiddy*, Stanford University Press, Stanford 2004; J. Steintrager, *Bentham*, Ithaca, New York 1977, pp. 57-58; M. James, *Bentham's Political Writings 1788-'95*, "The Bentham Newsletter", 4, 1980, pp. 22-24; D.G. Long, *Censorial Jurisprudence and Political Radicalism: A Reconsideration of the Early Bentham*, "The Bentham Newsletter", 12, 1988, pp. 4-23; P. Schofield, *Jeremy Bentham, the French Revolution and Political Radicalism*, "History of European Ideas", 30, 2004, pp. 381-401.

<sup>2</sup> See P. Schofield, *Utility and Democracy. The Political Thought of Jeremy Bentham*, Oxford University Press, Oxford 2006, p. 109.

interest, and no act can be, strictly speaking, disinterested,<sup>3</sup> sinister interest is the product of “a certain propensity universal in human nature. This propensity in the breast of each individual is the propensity to sacrifice all other interests to that which at each moment appears to him to be his own preponderant interest.”<sup>4</sup> As Schofield explains, it is most likely that Bentham’s disappointment at the failure of the Panopticon project was the cause which made him focus on sinister interest. He became convinced that the building of the Panopticon had been blocked by the “sinister influence” of the Grosvenor family, whose residence stood close to the site he had chosen for the prison. The notion of sinister interest was subsequently employed by Bentham in his writings on judicial procedure and the law of evidence, from 1803 on.<sup>5</sup> While in *A Comment on the Commentaries* Bentham still ascribed to mere ignorance and prejudice the lawyers’ hostility to necessary legal reform, the idea that this was rather due to their class interest only began to show from his denouncement of the excessive costs of litigation in *Truth versus Ashhurst*. A full-fledged attack on the lawyers’ interests as the cause of unacceptable shortcomings in the administration of justice was finally contained in Bentham’s *Scotch Reform* writings, partially printed and published in 1807-1808.<sup>6</sup> The occasion for such writings was offered by the discussion of reform proposals for civil justice in Scotland. Bentham saw the procedures in English courts as pursuing not the *ends of justice*, but the *ends of judicature*. This meant that judicial procedure was not subservient to the utilitarian purpose of maximizing enforcement of the legislator’s will, with the minimum of attached delay, vexation and expense for the suitors (and, more generally, for all those involved in the suit). On the contrary, the slowness and inefficiency of judicial procedure allowed the maximization of profit and ease for the members of the “law partnership”, which Bentham also called “Judge & Co.”: judges, lawyers and mala fide suitors. These were the ends of judicature, and for Bentham they were the main cause of the malfunctions of justice administration in England. Since judges had been “left with power to pay themselves by fees,”<sup>7</sup> instead of being paid by salaries, in order to increase their profits they had multiplied “the occasions of extracting fees”, thus

<sup>3</sup> For Bentham, “*disinterestedness* [...] must be understood to denote [...] not the absence of *all* interest, a state of things which, consistently with voluntary action, is not possible, but only the absence of all interest of the *self-regarding* class. [...] the most *disinterested* of men is not less under the dominion of *interest* than the most *interested*” (*Deontology together with a Table of the Springs of Action and Article on Utilitarianism*, edited by A. Goldworth, Clarendon Press, Oxford 1983, p. 100).

<sup>4</sup> J. Bentham, *First Principles Preparatory to the Constitutional Code*, edited by P. Schofield, Clarendon Press, Oxford 1989, p. 13.

<sup>5</sup> *Ibid.*, pp. 109-111.

<sup>6</sup> See A.J. Draper, “*Corruptions in the Administration of Justice*”: *Bentham’s Critique of Civil Procedure, 1806-1811*, “*Journal of Bentham Studies*”, 7, 2004.

<sup>7</sup> J. Bentham, *Letters on Scotch Reform*, in J. Bowring (ed.), *The Complete Works of Jeremy Bentham*, Tait, London-Edinburgh 1838-1843 (hereafter *Works*), vol. V, p. 5.

causing “factitious complication, obscurity, unintelligibility, uncognoscibility, in the system of procedure.”<sup>8</sup> The interests of the members of the “law partnership” offered an example of sinister interest, since their maximization was neither beneficial, nor even innocuous: by augmenting the wealth and ease of a restricted class of citizens, it damaged the great majority of the people. Suitors conscious of being in the wrong knew that judicial procedures would provide them with means “for staving off, and oftentimes finally eluding, compliance with the just demands on the other side” (in the quality of defendants), or “for forcing compliance with unjust demands” (in the quality of plaintiffs).<sup>9</sup> All that was requisite was money enough to endure the length of the suit and to pay all the fees. As an obvious result, then, “justice [was] thus denied to the poor, to the labouring classes, to the great majority of the people, as being unable to pay the fees.”<sup>10</sup>

As Schofield explains, it was only after the Scotch Reform writings that Bentham came to see that not only the members of the legal, but also those of the political establishment shared a common sinister interest.<sup>11</sup> He realized the existence of a constant and natural opposition of interests between the “subject many” and the “ruling few”, which sprang from the principle of self-preference.<sup>12</sup> Public officials were always at risk of performing the “sinister interest”, that is, to sacrifice the whole community’s interest to their own personal or class interest. Identification of interests, then, between political and judicial functionaries on the one hand, and the whole community on the other hand, was artificial and had to be pursued by putting the rulers under control of the ruled. For Bentham, this could be attained by placing every action of rulers and officials under scrutiny of the public opinion, which gave voice to the interests of the great majority of the people, thence corresponding (at least by and large) to the dictates of utility. The “Public Opinion Tribunal”, as Bentham called it, was to be endowed with full control of the functionaries’ behaviour. This required, of

<sup>8</sup> Ibid. Such a causal nexus must have been something more than a mere Benthamic illation: due to the general dissatisfaction with the administration of justice, from 1816 on a number of parliamentary commissions were appointed to investigate into the duties and emoluments of the higher courts’ officials; in 1851, the Common Law Commission finally recommended that all judicial officials be paid only by fixed salaries. See M.I. Zagday, “Bentham on Civil Procedure”, in G.W. Keeton and G. Schwarzenberger (eds.), *Jeremy Bentham and the Law. A Symposium*, Stevens & Sons, London 1948, pp. 68-78.

<sup>9</sup> Ibid., pp. 5-6.

<sup>10</sup> Ibid., p. 5.

<sup>11</sup> See P. Schofield, *Utility and Democracy*, as above, pp. 120-121 and 132-135.

<sup>12</sup> Such a principle claims that the action of self-regarding interest is generally stronger and more constant than that of social, other-regarding motives, such as benevolence. For Bentham, the prevalence of egoistic affections is even required for the preservation of the individuals and of the human species. See for instance J. Bentham, *First Principles Preparatory to the Constitutional Code*, edited by P. Schofield, Clarendon Press, Oxford 1989, pp. 27 and 58; Id., *An Introductory View of the Rationale of Evidence*, in *Works*, VI, p. 11; Id., *Principles of Judicial Procedure*, in *Works*, II, p. 120. See also R. Harrison, *Bentham*, Routledge & Kegan Paul, London 1983, pp. 140-147.

course, full publicity of the officials' actions, together with freedom of speech and of the press. Together with publicity, also individual responsibility was requisite, since "a board [...] is a screen"<sup>13</sup> and ascribing official acts to abstract, collective entities allowed their members to feel secure from the people's judgment.

From the public opinion's judgment issued what Bentham called the "moral sanction" at least since *A Comment on the Commentaries*. This was a "source of pain and pleasure" issuing from "such chance persons in the community, as the party in question may happen in the course of his life to have concerns with, according to each man's spontaneous disposition, and not according to any settled or concerted rule."<sup>14</sup> It is an informal social sanction, expressing the approbation or disapprobation of the public at large and the casual, non-organized punishments and rewards attached to the people's judgment. As Bentham explains, the moral sanction is especially effective on "men of rank and opulence and education", much more than "common people", who "are not to derive such large advantages from a reputation, nor to suffer such large inconveniences from the loss of it."<sup>15</sup>

In politics, by the way, Bentham eventually convinced himself that only representative democracy would allow to employ the full power of the moral sanction, in order to avoid the bringing about of the "sinister sacrifice". Under every other form of government, rulers and officials would eventually succeed in limiting the free circulation of information and the publicity given to their acts, so to exercise their power free from responsibility.<sup>16</sup> As stated in the title of *Utility and Democracy's* eleventh chapter, the antidote to the sinister interest of rulers and functionaries was what Bentham called "official aptitude". Aptitude on the part of officials was the sum of those qualities required of them for exercising their functions in the best possible manner, that is, that which most contributed to maximizing the community's interest. Bentham divided official aptitude into moral, intellectual and active aptitude; the first two were properties of the mind (respectively, of the will and of the understanding), while the last was a property of the body. With regard to the contrasting of the sinister interest, the branch of aptitude directly concerned was moral aptitude, which Bentham had earlier named also "probity". This was a "negative quality [...] constituted by the absence, in so far as possible, of a certain propensity universal in human nature": the propensity to pursue the sinister sacrifice of the general interest to that of the individual, due to the self-preference principle.<sup>17</sup>

<sup>13</sup> *Works*, V, p. 17.

<sup>14</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation*, edited by J.H. Burns and H.L.A. Hart, II ed. with a new Introduction by F. Rosen, Oxford University Press, Oxford 1996, hereafter *IPML*, p. 35.

<sup>15</sup> J. Bentham, *A Comment on the Commentaries and A Fragment on Government*, as above, pp. 322-323.

<sup>16</sup> See P. Schofield, *Utility and Democracy*, as above, p. 271.

<sup>17</sup> *First Principles Preparatory to the Constitutional Code*, as above, p. 13.

As Schofield explains, Bentham eventually came to regard representative democracy as the only form of government which would allow maximization of moral aptitude on the political functionaries' part. With the appropriate institutional arrangements, responsibility to the people at large would be maximized, so that the Public Opinion Tribunal would be empowered to judge and punish those who pursued an interest opposite to that of the community. The moral sanction, then, would offer a security for maximizing moral aptitude. Moreover, in Schofield's interpretation the officials' moral aptitude seems to be seen by Bentham not as the prevailing of an internal impulse to probity over self-regarding affections, but rather as springing from the awareness that the pursuing of sinister interest is, simply, impossible. The effect of institutional securities would be such that improbity would be disadvantageous on purely self-regarding grounds; "the individual was presumed to act on grounds of self-preference, and so arrangements were devised which allowed him to pursue his own self-interest in no other way than through his share in the universal interest."<sup>18</sup> By calculating which conduct would best promote his/her self-interest, every functionary would realize that the best course of action would be one which contributed to the general interest, thereby maximizing also his/her share in it. No social motives like sympathy and benevolence on the functionaries' part were relied on by Bentham, but only self-regarding ones.<sup>19</sup>

Bentham displays the same concern for the applying of the moral sanction to the judges' conduct as to political representatives and administrative functionaries. Although the moral sanction is less predictable and reliable than the legal or political sanction (that is, the source of pains and pleasures issuing from the decisions of judges, in accordance with the legislator's will),<sup>20</sup> nonetheless the former is much more effective than the latter when it comes to applying a check to the judges' power: "in other cases the power of the moral sanction is comparatively needless and besides that it is comparatively weak. Here it is supremely necessary and the force of it herculean. [...] [The] Judge is a man of honour: he has a rich fund of reputation to preserve and to improve."<sup>21</sup> Of such a passage, anyway, Gerald Postema seems to give an interpretation which sharply contrasts with Schofield's view of Bentham's reliance on mere self-regarding calculation. For Postema, "the informal sanction works well here, because the judge's sense of professional integrity is at stake, and that, says Bentham, is a much more powerful incentive to moral aptitude than threats of punishment, which are bound to lack credibility."<sup>22</sup> Here Postema seems to hold that

<sup>18</sup> Ibid., p. 296.

<sup>19</sup> See *ibid.*, p. 297.

<sup>20</sup> See *IPML*, p. 35.

<sup>21</sup> U.C. LVII, 9, in G. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford 1986, p. 368.

<sup>22</sup> Ibid.

the moral sanction acts deeply on those subject to it, in a way that transcends sheer fear of punishment at the hands of the people in general. On this interpretation, the judges would suffer from, or rejoice at, other people's bad or good opinion of them, without calculating the possibility of purely self-regarding pain and pleasure.

With regard to the passage in question, Postema's interpretation seems mistaken. The "fund of reputation" which Bentham is referring to in this passage from the 1770s is most likely the same as the "good-will fund", a notion that he introduces in *Deontology*:

By every act of virtuous beneficence which a man exercises, he contributes to a sort of fund – a sort of Saving Bank – a sort of fund of general Good-will, out of which services of all sorts may be looked for as about to flow on occasion out of other hands into his. If not positive services, at any rate negative services, services consisting in the forbearance to vex him by annoyances with which he might otherwise have been vexed.<sup>23</sup>

Here, then, honour and reputation are not linked to any internal sense of integrity and respectability on the part of the judges: just like other officials, they simply calculate that their self-regarding interest will be best served by acquiring a reputation of probity, which will increase the probability of self-regarding pleasures and decrease the probability of self-regarding pains.

Moreover, Postema holds that

the moral aptitude, [...] in its positive form must be identified with the virtue or sentiment of benevolence [...] it is the disposition *to be moved* to do what one judges to be in the universal interest. It is not enough consistently to *act* in such a way as to maximize community welfare (regardless of the motive); for one's moral aptitude is well developed only if one acts *on the motive* of benevolence. Thus, the moral aptitude is directly linked to the motive (Bentham calls it a "sanction") of *sympathy*.<sup>24</sup>

Postema seems to take an "internalized" view of moral aptitude which does not ascribe it to the sheer effect of external sanctions, "for if one acts out of fear of sanctions one does not act out of sympathy or benevolence, and so moral aptitude seems to be unnecessary, as long as constitutional structures and the enforcement of them are effective".<sup>25</sup> But this interpretation seems at odds with Bentham's claim that moral aptitude is no more than a kind of "practical innoxiousness" originating from the functionary's impotence to pursue his/her sinister interest.<sup>26</sup> Since "no propensity,

<sup>23</sup> *Deontology*, as above, p. 184.

<sup>24</sup> G. Postema, *Bentham and the Common Law Tradition*, as above, p. 361.

<sup>25</sup> *Ibid.*, p. 362.

<sup>26</sup> See *First Principles Preparatory to the Constitutional Code*, as above, p. 15.

no desire [...] can have place in any considerable force without some admixture of correspondent hope”,<sup>27</sup> under appropriate institutional arrangements the officials would also lose their tendency to pursue their sinister interest; but that would be all with regard to internal dispositions, and no social motives like sympathy would be requisite. This makes more plausible Schofield’s view that Bentham placed no reliance on the social motives to secure good behaviour on the officials’ part. Schofield also quotes a passage in which Bentham denies the relevance of the sympathetic sanction as an “inducement” to moral aptitude in public functionaries, since its influence on their conduct cannot always be ascertained and its strength cannot be measured anyway.<sup>28</sup>

However, there may still be room for an interpretation of Bentham’s thought that allows for non-egoistic motives to play a role in the officials’ desired conduct, contrary to Schofield’s view. For Schofield, Bentham’s institutional architecture relied only on the pure self-regarding interest of the functionaries. Appropriate institutional arrangements would secure that their self-regarding interest could be pursued only as a part of the universal interest. It is true that Bentham saw the prevalence of egoistic motives in the officials as a strategic assumption, as acknowledged also by Postema:<sup>29</sup> the constant prevalence of egoism must be assumed as a political maxim, because, even if it is not true as a theoretical assumption, it must be acted upon in devising a utilitarian institutional architecture. Bentham probably inherited this view from Hume, who had claimed that “it is [...] a just *political* maxim, *that every man must be supposed a knave*: Though at the same time, it appears somewhat strange, that a maxim should be true in *politics*, which is false in *fact*”.<sup>30</sup> But once every inducement to the sinister sacrifice has been removed, and the functionaries can maximize their self-regarding interest only through the increase given to the whole community’s interest, it is doubtful whether their pursuance of purely egoistic ends is the only incentive left to their action. Postema has a point in attributing to Bentham the view that the setting at naught of sinister interest would leave

a motivational void to be filled with proper, other-regarding motives. [...] Bentham’s constitutional strategy [...] was to neutralize, immobilize, and eventually destroy sinister, private interests and limited sympathies, and at the

<sup>27</sup> Ibid., p. 13.

<sup>28</sup> See J. Bentham, *Securities Against Misrule and other Constitutional Writings for Tripoli and Greece*, edited by P. Schofield, pp. 272-273, and P. Schofield, *Utility and Democracy*, as above, p. 297.

<sup>29</sup> See G. Postema, *Bentham and the Common Law Tradition*, as above, pp. 385-393.

<sup>30</sup> D. Hume, *Of the independency of Parliament*, in Id., *Political Essays*, edited by K. Haakonssen, Cambridge University Press, Cambridge 1994, p. 24; see also G. Postema, *Bentham and the Common Law Tradition*, as above, pp. 385-386.

same time to cultivate and liberate the widest sympathy and concern for the common good.<sup>31</sup>

In the *Constitutional Code*, after having stated the prevalence of self-regarding over other-regarding motives, Bentham explains that

to give increase to the influence of sympathy at the expense of that of self-regard, and of sympathy for the greater number at the expense of sympathy for the lesser number – is the constant and arduous task, as of every moralist, so of every legislator who deserves to be so. But, in regard to sympathy, the less the proportion of it is, the natural and actual existence of which he assumes as and for the basis of his arrangement, the greater will be the success of whatever endeavours he uses to give increase to it.<sup>32</sup>

The sympathetic sanction – which Bentham added in 1814 to the physical, the political or legal, the moral or popular, and the religious sanction –<sup>33</sup> is a source of pleasures and pains springing from self-identification with fellow humans or other sentient beings. Although sympathy cannot be trusted for the contrasting of sinister interest, since it is unpredictable and, moreover, the self-preference principle makes it subordinate to egoistic affections, nonetheless there may be plenty of room left for it in Bentham’s institutional architecture, provided that sinister self-regarding motives are contrasted by other self-regarding motives, like fear of punishment at the hands of the moral or the legal sanction. It may even be doubted that the people’s representatives would be able to perform the most active part of their duties, without a genuine feeling of benevolence and sympathy towards the interest of their fellow citizens and of the community as a whole. On the part of a political representative, “appropriate probity [i.e. moral aptitude] consists in his pursuing that line of conduct, which, in his own sincere opinion, [...] is most conducive to the general good of the whole community for which he serves”.<sup>34</sup> Arguably, it is difficult to imagine anyone doing so with the purely self-regarding, egoistic purpose of trying to maximize his/her personal interest as a part of the community’s interest. Something more seems to be required, maybe a form of self-identification with other people’s pains and pleasures – that is, sympathy or benevolence.

Moreover, the popular or moral sanction seems to influence action not merely as a promise of future tangible rewards, or as a threat of future tangible punishments.

<sup>31</sup> G. Postema, *Bentham and the Common Law Tradition*, as above, p. 391.

<sup>32</sup> J. Bentham, *Constitutional Code*, in *Works*, IX, p. 192.

<sup>33</sup> See A. Goldworth, “Editorial Introduction”, in *Deontology*, as above, p. XXI; see also M.P. Mack, *Jeremy Bentham: An Odyssey of Ideas 1748-1792*, Heinmann, London 1962, p. 242. Bentham, by the way, had recognized the importance of sympathetic motivation at least since chapter V of *IPML*, where he speaks of the pleasures and pains of benevolence or sympathy.

<sup>34</sup> J. Bentham, *Catechism of Parliamentary Reform*, in *Works*, III, p. 539.

There is an “internal” aspect of the motivation provided by this sanction, which relates to what Bentham called the “semi-social” motive of the love of reputation.<sup>35</sup> As Schofield himself recognizes, for Bentham respect and disrespect are a source of services and disservices, but also of pleasure and pain in themselves:<sup>36</sup> this involves that they can motivate also apart from the expectation of concrete rewards and punishments at the hands of the popular or moral sanction. Pride and vanity are motives springing from the moral sanction<sup>37</sup> and they are both forms of the desire for esteem.<sup>38</sup> Although they are self-regarding affections and, as such, they must be distinguished from those purely social motives springing from sympathy,<sup>39</sup> nonetheless they display a semi-social nature in that they involve self-identification with others. Pride and vanity make us rejoice or grow sad at the thought of what other people think of us, even apart from any expectation of those external events – that is, other pleasures and pains – that their opinion will bring about.

It would be very strange if Bentham did not take into account the role that social and semi-social motives play in the functionaries’ actions, once the self-regarding motives have been tamed and the moral aptitude has been secured. An extensive survey of Bentham’s views regarding this matter has not been attempted yet and would make a very interesting subject for inquiry.

<sup>35</sup> See J. Bentham, *Of the Limits of the Penal Branch of Legislation*, edited by P. Schofield, Clarendon Press, Oxford 2010.

<sup>36</sup> See P. Schofield, *Utility and Democracy*, as above, p. 294.

<sup>37</sup> See *A Table of the Springs of Action*, as above, p. 83.

<sup>38</sup> See *Deontology*, as above, p. 234.

<sup>39</sup> *Ibid.*, p. 237.