Armed Forces (Special Powers) Act, 1958: An Analysis From The Perspective Of Benthamite Utilitarianism

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“If to save hundred lives one life is put in peril or if a law ensures and protects the greater social interest then such law will be a wholesome and beneficial law although it may infringe the liberty [read life] of some individuals.”

This passage seems to suggest that the Armed Forces (Special Powers) Act of 1958 (hereinafter “AFSPA or the Act”) is based on the notion of “necessity” to justify killings of the people of North-East. This notion was considered in R. v. Dudley and Stephens2, where Lord Coleridge brushed aside such concept completely. He said, “By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him deliberately taking another’s life to save his own.” Is this the entire notion on which AFSPA is based? Is there any standard by which we can determine the goodness or otherwise of this law? If Jeremy Bentham is to be believed, the answer to this question lies in his theory of utilitarianism. Utilitarianism is one of a number of bridges between jurisprudence and philosophy.

The Armed Forces (Special Powers) Act of 1958 (AFSPA) has invited much wrath from different circles of the society. At the same time many believe that the legislation is necessary for curbing terrorism in the North East. But when one tries to find the opinion of the populace on which this Act has been imposed, the answer is almost unanimous — repeal the Act. The Supreme Court of India, in Naga People’s Movement of Human Rights v. Union of India4 has upheld the validity of AFSPA. Earlier in Indrajit Barua v. State of Assam1 the Delhi High Court had also upheld the validity of the legislation. But in both cases the courts have been more concerned by the bare text of the legislation and the question of legislative competence of Parliament while enacting such a law. It is submitted that this law cannot be brushed aside after a bare perusal of the sections. It involves far ranging issues from jurisprudence, which the courts of “law” have ignored.

Justice Jeevan Reddy Committee5 has said that the Act should be scrapped because it is inadequate and is seen as a symbol of oppression in the North-East.6 But it wants some of its thorniest features included in the Unlawful Activities (Prevention) Act, 2004.7 It is astounding that why instead of a thorough introspection of the Act in order to discern the very jurisprudence on which the Act is based, an attempt of escapism is made. Whether upon varnishing, an old mask becomes new?

This paper intends to analyse the notions of Benthamite Utilitarianism and juxtapose it with the provisions of this Act in order to establish an inherent link between the two.

Benthamite Utilitarianism

Perfect happiness belongs to the imaginary regions of philosophy and must be classed with the universal elixir and the philosopher’s stone.

Jeremy Bentham pioneered the theory of positivism. He was disillusioned by the way law was understood in England and more specifically with Blackstone’s treatment of law. He wanted to set a more rational standard for determining the goodness or otherwise of law. He said that nature has placed man under two sovereign masters, pain and pleasure.9 Thus the principle of utility is the principle which approves or disproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question. This is true not only of the actions of the individuals but also of actions of governments.9 The principle will be applied to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered; if the party be the community then the happiness of the community. He defines a community as fictitious body, composed of individuals who are considered as constituting as it was its members. Thus, the interest of the community is the sum of the interests of the several members who compose it. Bentham gives seven factors that have to be considered for measuring utility:

1. Its intensity.
2. Its duration.
3. Its certainty or uncertainty.
4. Its propinquity or remoteness.
5. Its fecundity.
6. Its purity.

Therefore, the starting point is to measure the utility of an individual even if the utility of the community is to be measured. Then one must take into account the pleasure produced in the first instance (by the act under consideration), then the
pain; now see the value of each pleasure produced by it after the first, which constitutes the fecundity of first pleasure, then the value of each pain produced by it after the first, which constitutes the fecundity of the first pain and finally balance out the pains and pleasures, with respect to that individual person and then repeat the exercise with respect to each person whose interest is in concern.9

Utilitarianism seems so natural as if every other criterion is a falsity. People indeed want to take steps that maximise their happiness and minimise their pain, unless they are ascetics. Utilitarianism seems to make each issue turn upon a question of fact â€“ theory seems to offer the attractive prospect of decisions based upon hard evidence and firm criteria.10 A legislator who follows Bentham, should instead of indefinitely postponing urgent problems of law must approach them with a criterion of disputed philosophical validity, especially when he can have materials in form of official records and statistics, and findings of anthropologists, legal historians, etc. which will greatly add to the precision.11 Utilitarianism can claim to treat conflicting interests with absolute equality: everyoneâ€™s interests are taken into account and are given equal weight; the decisions that result simply reflect the neutral results of the calculus of losses and gains in utility.10 Like all the other assumptive models, it is not free from blemishes. It is pointed that utilitarianism fails to take into account the distinctiveness of individuals as it tries to project the rational choice of one man as the social choice.12 It has also been stated that to maximise the happiness in aggregate is not the answer as it is necessary to distribute happiness equitably, thus equalising welfare is more important than maximising it.10 Mathematical precision which utility seeks to inject in the system erstwhile guided by morals has been criticised as it presumes that pleasures and pains are commensurable inter se, which has been criticised for it seeks to use human sentiments as mathematical tools for arriving at the answer.11

â€œIn utilitarian doctrine the egoism of the individual is at once explicitly affirmed and implicitly denied.â€•13 Welfare has to be measured in terms of pleasure that a particular step provides to the society. In short, the goal of all individuals is to give maximum of pleasure to all, even if their own pleasure is sacrificed in the process.11 Finally, it can be stated that although the theory seems to encapsulate the rationale of every human action, it has its infirmities in explaining as to why a hedonistic individual will forsake his interest for the greater good. Human life does not run on a fixed set of values; utility is no calculator of human sentiments.

Benthamâ€™s view of natural rights and its fallout on his criminal law thinking

A Chancery rhyme has often being sung, depicting the power and finality of law:

â€œLaw is the embodiment of everything that is excellent; There is no fault or flaw, And I my Lord embody the law.â€•

This rhyme seems to put forth a very positivistic stance as if one is to accept the transcendence of law. Bentham was a positivist but he would not have accorded to the wordings of this rhyme. He said that, â€œunder a Government of laws, what is the motto of a good citizen? To obey punctually; to censure freelyâ€•14. He was disillusioned by the legal process of England, which had mystified the â€œlawâ€•. He hated the obscurity and ambiguity of laws and wanted them to be precise and free from jargons. He went on to state, â€œWhat grieves me is, to find many men of the best affections to a cause which needs no sophistry, bewildered and bewildering others with the like jargon.â€•14

In this context we need to appreciate his views on natural rights. The theory of natural rights was explained by Thomas Jefferson in the Preamble to the Declaration of Independence of America as follows:

â€œWe hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and Pursuit of Happiness â€“ That to secure these Rights governments are instituted among Men, deriving their just power from the consent of the governedâ€•;

Bentham felt that the theory of natural rights created a fallacious impression that the Government in its workings is restrained. He criticised the American Declaration, for he felt that it is not feasible to put fetters on governmental authority in the form of â€œinalienable rightsâ€•, since the exercise of governmental power will at times infringe those rights. To him nothing could be established without rationale or reason and the theory of inalienable rights was doing just that. Being a positivist he firmly believed that any idea that men possess, rights which are not the creature of positive law but could be used in criticism and opposition to it was a gross conceptual confusion.15 His hatred of such rights can be gauged from the fact that he described these rights as â€œround squareâ€•, â€œa son that never had a fatherâ€•, â€œa species of cold heatâ€•, â€œa sort of dry moistureâ€• and a â€œkind of resplendent darknessâ€•.16

His reverence to the theory of utility and disdain for the theory of inalienable natural rights is glaringly portrayed when he speaks of his views of preventing crime. His expressions are definite. Bentham viewed the law as a weapon the Government wields to punish criminals or anyone else in the name of the greatest good for the greatest number. For the sake of the greatest good, many of his suggestions have a direct bearing on the fundamental rights of the individuals. The purpose of law to him is to deter people from following the path of lawbreakers and if by torture, a Magistrate is able to secure information at less cost than other means, why forbid?17 He criticised the right to silence of an accused and given a free and fair chance to escape before being shot.18 The real intention is to make the contest between the
Finally let us discern how would have Bentham reacted to such an Act had he been alive. He would have felt elated, that very often denied giving sanction for any legal proceeding on the pretext that it is frivolous and inconsequential.

AFSPA and its affinity with Benthamite Utilitarianism

Any social welfare depends directly and solely upon the levels of satisfaction and dissatisfaction of individuals. Thus if men [read majorly] take a certain pleasure in discriminating against one another, in subjecting others to a lesser liberty as a means of enhancing their self respect, then the satisfaction of these desires must be weighed in our deliberations according to their intensity, or whatever, along with other desires. If society decides to deny them fulfilment, or to suppress them, it is because they tend to be socially destructive and a greater welfare can be achieved in other ways.\(^{12}\)

AFSPA has some seen some of the most widespread protests. Be it the nude protest by a dozen Manipuri women in 2004 to condemn the alleged rape and custodial death of Thangjam Manorama by Assam Rifles personnel or Iron Sharmila’s\(^{19}\) fast unto death\(^{14}\) since 2000, it clearly shows that people detest the Act, which curbs their basic human rights.

In Indrajit Barua\(^{1}\), the Delhi High Court provided a utilitarian understanding to the fundamental rights under the Constitution. It was stated that any organised society claiming to be civilised and governed by the rule of law, social imperatives for the greater good must take precedence over individual rights.\(^{1}\) Thus it is the State’s\(^{1}\) obligation to see that Article 21 is available to the greatest number.\(^{1}\) The Court traces the history of Assam from remote antiquity\(^{1}\) to the modern age. The Court felt that if this factor were taken into account then it would be noticed that the statute fulfills a social purpose. The Court then tried to draw an analogy between the right of private defence (provided under Sections 96, 97, 99 and 100 of the Indian Penal Code, 1860) available to individuals and even to strangers with the duty of the State to protect life and liberty under Article 21 to subserve the common good, implying that State like an individual can use force to overpower an adversary. The entire objective was to show that the use of force by the State is bona fide and hence it is irrelevant to discern whether the extent of force is commensurable to the harm or not. The reasoning of the Court is truly ingenious, but to say that the principle of proportionality i.e. causing harm in proportion to the threat, can be done away with completely, if the action of the person acting in defence was bona fide, is fallacious in toto. More so in the case of the governmental machinery which is always presumed to be acting in good faith and even more so under the provisions of this Act, which curtails the power of judicial review and immunises every person acting for the purposes of this Act, unless a prior sanction is obtained from the Central Government.\(^{20}\)

We do not have the golden scales\(^{1}\) to measure the extent of force but we certainly have the conscience to know when to stop. With all due respect to the Court, such reasoning invests the power to the State to kill on the slightest of suspicion.

The Supreme Court in Naga People’s Movement of Human Rights\(^{4}\), has finally decided the matter and upheld the constitutionality of the statute. It is submitted that the Apex Court has restricted its understanding to the narrow predicates like checking the legislative competency, testing on the touchstone of fundamental rights, etc. It has failed to take into account the jurisprudence behind the Act. The Court has justified the Act by referring to Article 355 of the Constitution, which empowers the Union to protect every State against external aggression or internal disturbance so that the Government of every State is carried in accordance with the provisions of the Constitution. It has not cared to look into the wider picture\(^{1}\) success of the Act. When AFSPA was imposed in the North-East, there were only four armed opposition groups. At present there number has increased to over two dozens.\(^{21}\) So is it the duty of the Union to fight insurgency, or to make it worse?

The Court has denied the unconstitutionality of Sections 4 and 5 on the ground that they violate Articles 14, 19 and 21.\(^{22}\)

Notwithstanding the Court’s decision, Sections 4, 5 and 6 have been regarded as forming a heinous triplet. Together they constitute the life source of all the violations that have been perpetrated under the Act. Section 4 gives the right of firing first.\(^{1}\) An officer can straightaway fire and cause injury, which may extend to taking life of a person, if he thinks it is necessary for the maintenance of public order. For guidance as to what may be regarded as public order\(^{1}\), two instances are given in the section, (1) the person is acting in contravention of any law or order, which prohibits the assembly of five or more persons, (2) the person is carrying weapons or things capable of being used as weapons\(^{1}\). Other clauses of the section give wide-ranging power to destroy any arms dump likely to be made or attempted to be made, to arrest without warrant who has committed a cognizable offence or against whom a reasonable suspicion exists\(^{1}\), etc. How will one decide what is capable\(^{1}\), likely\(^{1}\) or reasonable\(^{1}\) in such circumstances? Is it not arbitrary? Under Section 5, the person must be made over to the officer in charge of the nearest police station with least possible delay. How will it be ensured that till then no human rights violation will ensue? What is least possible delay? Section 6 gives protection (for all purposes an immunity) from legal proceedings to any person in respect of anything done or purported to be done in exercise of the powers conferred by the Act, unless a prior sanction is obtained from the Central Government. However the Court felt that the same could\(^{1}\) be regarded as immunity, as it gives protection in the form of prior sanction from the Central Government before a civil or criminal proceeding can commence against an officer.\(^{20}\) It is humbly submitted that such an understanding is lexigraphic without considering the way in which the law acts. The Central Government has very often denied giving sanction for any legal proceeding on the pretext that it is frivolous and inconsequential.

Finally let us discern how would have Bentham reacted to such an Act had he been alive. He would have felt elated, that
there is some jurisdiction somewhere, which has not put the nonsensical concept of natural rights over and above his principle of utility. What is the greatest good in this case? Perhaps it is the rhetoric of patriotism, the insurgency in North-East seems to have been rooted from the idea of secession from the Indian territory, the greater good of the nation demands that the unity and integrity of the nation must be protected at all cost and hence the Act. Truly utilitarian! Putting Benthamâ€™s thinking in perspective of this Act, we recourse back to the previous discussion. Bentham wanted the State to do away with the foxhunternâ€™s reason while trying an accused. Section 4 of the Act, certainly does not give any chance to a person to escape once found to be suspicious; so unlike the foxhunter, the officer need not play the wait and watch policy. The Malimath Committee also seems to have tread the utilitarian path by asking to remove the presumption of â€œproof beyond reasonable doubtâ€™ for the purposes of all criminal legislations23 (the presumption has originated from the notion that â€œit is better that ten guilty men should be acquitted than one innocent man be convictedâ€œ). In any case, this highly regarded rhetoric of the ardent supporters of natural rights finds no place within the framework of the Act, the deviance is all the more glaring because the fate of the people is not decided by the courts of law but by army personnel in the â€œcourse of their dutyâ€œ. The Benthamite notion of considering two sets of innocents: those who might be convicted if such predilections are removed and those, which are likely to become innocent victims of those criminals, which escaped due to the lacunas in the system is firmly in place. Thus the order of the day is indiscriminate firings upon the common people. After all the Government wants to serve the greatest good to the greatest number.

**Conclusion**

In an exclusively utilitarian philosophy there is something very dangerous to the contemporary as well as to older conceptions of civil liberties.15

Prof. Hart while praising the theory for spearheading many reforms has pointed out at its darker side: theory shows its willingness towards the maintenance of general social security. It is ready to abandon, in the process various protections which many would consider to be the fundamental rights of all individuals against the State.15

Utilitarianism cannot be stretched to unimaginable limits and applied in every possible situation because often the result would be unconscionable for the society, which professes, by the doctrine of inalienable, non derogable natural rights. Terrorism has to be fought no doubt but AFSPA is no answer. The Government has tried by meeting force with force; it is time to use the other alternative: repeal the Act.

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- Indrajit Barua v. State of Assam, AIR 1983 Del 513 at p. 525
- (1884) 14 QBD 273
2. QBD 273 at p. 391
- J.G. Riddal, Jurisprudence p. 150
- (1998) 2 SCC 109
1. AIR 1983 Del 513
- A 5-member committee was constituted by the Central Government under the Chairmanship of Justice B.P. Jeevan Reddy to review the Act.
- Special Correspondent, â€œBlack lawâ€œ burial plan with rebirth punch, The Telegraph, 9 October, 2006.
- Id.
9. Bentham at p. 2
9. Bentham at p. 2
9. Bentham at p. 2
9. Bentham at p. 2
9. Bentham at p. 2
9. Bentham at p. 30
9. Bentham at p. 31
10. Simmonds at pp. 20-21
- J. Rawls, A Theory of Justice at p.187. Though Bentham acknowledged that one manâ€™s meat may be another manâ€™s poison. However he felt that individual sensibility cannot serve as the basis for the legislatorâ€™s assessment, see supra n. 16 at p. 283.
10. Simmonds at p. 20
11. Stone at p. 290
11. Stone at p. 291
15. Hart at p. 38
12. Rawls at pp. 30-31
- It was first applied to the North-Eastern States of Assam and Manipur and was amended in 1972 to extend to all the seven States in the North-Eastern region of India.
1. AIR at p. 525
1. AIR at p. 526
- Section 6 of the Act.
- (1998) 2 SCC 109
- The Malimath Committee has stated that "proof beyond reasonable doubt" is not the only standard to determine the guilt of a person. It has argued that a shift is required from such an approach on account of "growing socio-economic problems", "emergence of new and graver crimes", "terrorism, organised crimes", "poor rate of conviction", "practical difficulties in securing the evidence", etc. It has concluded by saying that a middle course between "preponderance of probabilities" and "proof beyond reasonable doubt" has to be taken in order to increase the efficiency of our criminal justice system. See generally, Chapter 5, "Presumption of Innocence and Burden of Proof" of the Report at pp. 65-74.
15. Hart at p. 36
15. Hart at p. 36