UNIVERSAL HUMAN RIGHTS: A UTILITARIAN PERSPECTIVE

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ABSTRACT

It is hoped that every nation state in the world should conform to the so-called "universal human rights". The United Nations Organization elucidates the terminology "human rights" as the "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination".[1]

The above framework of human rights, based on which the International Human Rights Law has evolved, is implemented in India, too. It is well-known that India has ratified the Universal Declaration of Human Rights (UDHR). UDHR is "a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly resolution 217 A (III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols (on the complaints procedure and on the death penalty) and the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol, form the so-called International Bill of Human Rights"[2].

In the recent times, political activism has taken rather undesirable turn and "mob" is the ruler. In such rough weather, all the weaker sections of the society are

[1]. United Nations, https://www.un.org/ (last visited Dec 27, 2020).
[2] *Id.*

pushed out of the "inner circle of the powerful", including the religious minorities, socially and economically backward sections of society, women, children, physically and mentally challenged individuals.

It is hypothesized in this research that although the so-called "utilitarian philosophy" appears quite rational when one has to "weigh" the options while making choices related to public policies and legislative or administrative decisions; the interests of the minorities and weaker sections of society will get compromised and thereby weaken democracy in India in instances where the philosophy is misunderstood and misinterpreted.

Keywords: Universal Human Rights, Jeremy Bentham, Utilitarianism, Jean-Jacques Rousseau, John Locke, Indian Judiciary.

I. Introduction

In the early 19th century, the so-called "Analytical School of Jurisprudence" evolved in the times when several extraneous factors and influences arguably defined the scope and tone of laws. The "Positivists" or the "Analytical School" were the theoreticians studying the legal concepts in rather systematic way to understand the structural nature of legal systems[3]. They insisted that the context of their socio-political reality was more appropriate for such analytical thinking, rather than the past or future of the jurisprudence of their times. The "Analytical School of Jurisprudence" upheld the "law" as the "command of the sovereign" and insisted on the "legislation" as the source of law. It is interesting to note, however, that the legislative authorities were often the kings or queens, and the "command of the sovereign" was essentially the wishes of the rulers [4]

The chief exponent of the "Analytical School of Jurisprudence" was Jeremy Bentham - whose philosophy of utilitarianism was the core concept in theory of jurisprudence. This School of Thought demarcated the law systematically and advocated the "reform of law in the light of changing social needs and conditions and not on extraneous considerations". One of the main contributions of this School of Thought was in giving an "accurate and intimate understanding of the fundamental working concepts of all legal reasonings"[5].

Clearly, the promotion of the principle of utilitarianism (of greatest happiness of the greatest number of people) cannot justify the violation of the rights by the State guaranteed to any individual irrespective of his (or her) gender, caste, creed, or religion. In other words, Bentham's Utilitarianism was not developed for articulation of the "Analytical School of Jurisprudence"; but in due course, in 19th century, his philosophy influenced the Positivists. Therefore, it is essential for us to first understand the tenets of utilitarian philosophy.

This research intends to understand how one can arrive at a "rational decision" whereby a politically and administratively defendable choices can be made? This in fact is the heart of Jeremy Bentham's "utilitarian philosophy" – which articulates the justification of those public policies and socio-political actions that are based on "maximum pleasure for maximum people".

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[3]. Edgar Bodenheimer, Analytical Positivism, Legal Realism, and the Future of Legal Method Hein Online, 44. *Virginia Law Review*, 365 (1958)

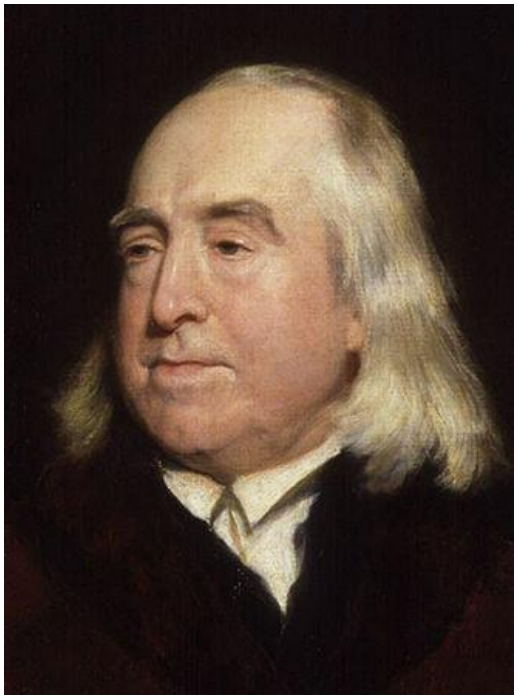
[4]. 5 V.D Mahajan, Jurisprudence and Legal Theory, 439-440 (Eastern Book Company, 2012).

[5]. 5 V.D Mahajan, *id* note 4, at Chapter XXII.

II. What is the Utilitarianism Principle as propounded by Jeremy Bentham?

It is well known that Jeremy Bentham[6] is regarded as the founder of positivism in modern sense of its term. He defined law as "an assemblage of signs, declarative of a volition, conceived or adopted by the sovereign, concerning the conduct to be observed in a certain case by certain person or class of persons who are supposed to be the subject to the sovereign power".

Bentham's philosophy was named as the "Utilitarian Individualism". He argued that the purpose of "law" is to free an individual from bondage and from restraints on his freedom. His principle of utilitarianism, therefore, emphasized that the ultimate end and objective of the legislation should be "the greatest happiness of the greatest number of people". Utility, thus, was defined as being "the property or tendency of a thing to prevent some evil or produce some good; the consequences of which are either pleasure or pain"[7].



[6]. Jeremy Bentham (15 February 1748 to 6 June 1832) was an English philosopher, jurist, and social reformer regarded as the founder of modern utilitarianism. Bentham defined the "fundamental axiom" of his philosophy the principle that "it is the greatest happiness of the greatest number that is the measure of right and wrong." He became a leading theorist in Anglo-American philosophy of law, and a political radical whose ideas influenced the development of welfarism. He advocated individual and economic freedoms, the separation of church and state, freedom of expression, equal rights for women, the right to divorce, and (in an unpublished essay) the decriminalizing of homosexual acts. He called for the abolition of slavery, capital punishment and physical punishment, including that of children. He has also become known as an early advocate of animal rights. Though strongly in favor of the extension of individual legal rights, he opposed the idea of natural law and natural rights (both of which are considered "divine" or "God-given" in origin), calling them "nonsense upon stilts.

[7]. 8 VN Paranjape, Studies in Jurisprudence and Legal Theory, 24, 26-27 (Central Law Agency 2016).

Jeremy Bentham, English philosopher,
15 February 1748 to 6 June 1832

This principle holds that the purpose of law is to bring pleasure and avoid pain. A law should be judged on these standards. Bentham's utilitarian philosophy, thus, holds and argues that, by upholding the principle of utilitarianism in a democratic set-up, no individual or group should be subjected to undue weightage of utility, in a way that the minority is not made to suffer at the expense of the benefits and pleasures of the majority.

An example by Prof. Michael Sandel from the University of Harvard could be quoted here. In his lectures on "Justice; The Moral Side of Murder"[8], Prof Sandel explains using the case study of the famous 19th Century case of *Queen vs Dudley and Stephens*[9]. Prof Sandel argues that it would be immoral and outrightly criminal to use the utilitarian theory to justify that it was alright to kill an already ailing person for the collective benefit and survival of the majority.

The question that Bentham's utilitarian philosophy fails to answer is, "How does one adhere to the principle of utilitarianism while suppressing the rights of others"? This issue becomes exceedingly complex, and a difficult problem arises when one tries to balance the competing interests or the good of the individual against the good of the entire community.

It is particularly important for this argument on utilitarian philosophy to understand what the positivists meant by "rights". Positivist philosophers like Bentham, Mill, and Austin regarded the definition given by philosophers like Plato and Aristotle to be the apt definition. "Rights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states"[10].

Adhering to the various definitions of "rights" propounded by philosophers like Aristotle and Plato, which were relied upon by the positivist philosophers in the 19th Century (including Bentham), the principle of the greatest happiness of the greatest number of people could have

[8]. Harvard University, Justice: What's the Right Thing to Do? Episode 01 "The Moral Side of Murder" YouTube, https://youtu.be/kBdfcR-8hEY (last visited Dec 14, 2020).
[9]. *Queen vs Dudley and Stephens*, 14 QBD 273 DC
[10]. Stanford Encyclopaedia of Philosophy, "Rights", https://plato.stanford.edu, (Last Visited Nov 27, 2020).

never been used by the positivists to justify the violation of the right guaranteed to any individual.

In summary, Jeremy Bentham's Utilitarianism is essentially an "ethical philosophy" (a variant of the so-called "Normative Ethics"). According to this theory, moral action is the one which leads to the greatest happiness for the greatest number of people. It is also a form of "Altruism" – wherein pleasure is regarded as the supreme ideal of life. It is important to note that, in Utilitarianism, individualistic pleasures are not focused (only universal pleasure or pleasure for maximum persons is pursued).

In other words, Bentham's Utilitarianism can also be called as the "Consequentialism"[11] because the moral worth of a given action can only be determined by its consequences or outcome. In this philosophy, "the ends justify the means". The Utilitarian Theory is also known to be "teleological" in nature[12] – wherein the actions are considered moral only when they are purpose-driven and create maximum pleasure of maximum number of people. . **Table 1** depicts the strengths and significance of Bentham's Utilitarian Principle[13,14]

Table 1: The strengths and significance of Bentham's Utilitarian Principle.

Sr. No.	Short Title for the Strength	Description of the Strength and the Significance of Bentham's Utilitarianism
A	Natural laws were rejected by Bentham	The predominant theory in the times of Bentham was of "Natural Law" and rights were nearly justified by that theory. Bentham rejected it completely!

[11]. Stanford Encyclopaedia of Philosophy, "The History of Utilitarianism", https://plato.stanford.edu/entries/utilitarianism-history/, (last visited Jan 12,2021)
[12]. Britannica, T. Editors of Encyclopaedia. "Teleological ethics", Encyclopaedia Britannica, https://www.britannica.com/topic/teleological-ethics, (last visited May 3, 2021)
[13]. Anurag Chaudhary, Margdarshan for Civil Services YouTube August 05, 2020, https://youtu.be/GeF-lDtcJOE (last visited Dec 3, 2020),
[14]. Anurag Chaudhary, Margdarshan for Civil Services YouTube August 08, 2020 https://youtu.be/gd8cmeqPcOs (last visited Dec 3, 2020)

Sr. No.	Short Title for the Strength	Description of the Strength and the Significance of Bentham's Utilitarianism
B	Maximization of utility was the basic principle	The fundamental tenet of Bentham's Utilitarianism was "maximum good of the maximum people". This emphasis placed his theory on a firm foundation of rational thinking and justice.
C	Bentham redefined the "State" and "Government"	Bentham rejected the views of Plato and Aristotle that the State should take responsibility of moral guardian of the citizens. Also, he rejected the position of Rousseau that the State must ensure absolute freedom to its citizens. Bentham insisted that the State must ensure maximum good of the maximum people and no more. The State, according to Bentham, must steer clear from preaching the morality to the citizens.
D	Fearless criticism of elected representatives	Bentham was rather critical of then Britain's elected representatives. He was not sure if those representatives could protect democracy because they were (by and large) selfish, uneducated, and lazy. He strongly felt that the enhancement of freedom of the press and minimization of the interference of the rich in governance was essential to making democracy work in Britain.
E	Bentham defined three essential characteristics of "Law'	1) Law must protect each citizen. 2) Law must facilitate fulfilment of fundamental needs of every citizen. 3) Law must comfort every citizen, and all should find refuge in law

Sr. No.	Short Title for the Strength	Description of the Strength and the Significance of Bentham's Utilitarianism
F	Bentham was a legal reformist	Bentham insisted that "law" must be clear, logical, simple, and useful.
G	Bentham was a social reformist	Bentham wanted to abolish slavery, sanctions against homosexuals or aimed at protecting the weaker sections in society including animals. In that sense, he would be judged to be one of the ultimate liberals of even 21st Century! He argued that the reformist and welfare-oriented laws and punishments were the only justified ones.

Further, **Table 2** depicts the weaknesses and possible corruption of Bentham's Utilitarian Principle.

Table 2: The weaknesses and possible corruptions of Bentham's Utilitarian Principle[15].

Sr. No.	Short Title for the Weakness	Description of the Weaknesses and Possibilities of Corruption of Bentham's Utilitarianism
1	Materialistic morality was at the heart of Bentham's Utilitarianism	The utilitarian principle of Bentham was essentially based on the so-called "materialistic morality". While emphasising only one of the angles of morality, Bentham seems to have digressed (and even rejected) the other significant aspects of morality including the other non-materialistic aspects of human behaviour. How could one measure everything with one scale of "pain vs pleasure"? In other words, Bentham did not pay attention to or value right vs wrong, true vs untrue or prudent vs imprudent. No wonder his contemporaries and the subsequent philosophers in

[15]. Chaudhary *Id* note 14.

Sr. No.	Short Title for the Weakness	Description of the Weaknesses and Possibilities of Corruption of Bentham's Utilitarianism
		19th Century did not see Bentham's ideology useful while supporting orderliness and morality in the society.
2	Quantity of pleasure was considered as the sole measure of happiness	Bentham's utilitarian philosophy rated happiness based on the so-called "quantity" of pleasure resulting from a decision of the ruler or choice made by a human being. The critics of Bentham, however, viewed this excessive emphasis on the quantity of pleasure rather problematic. Would it be fair if one ignores the calling of one's heart and merely pay attention to the quantity of pleasure?
3	Quantity of pleasure was the sole basis	Bentham's utilitarian philosophy was solely based on the "quantity" of pleasure resulting from a decision of the ruler or choice made by a human being – and not on the "quality" of the pleasure. Many believed that this extreme view was rather paradoxical. Who would believe that the pleasure of a drug addict could be considered equivalent to the pleasure derived by a connoisseur by reading classics? Both derive (arguably) the comparable quantity of pleasure from their respective acts, but the quality of pleasure need not be rated equal. Clearly, the aspect of quality and the source of pleasure must be placed, at least (if not higher), on the equal pedestal that of the quantity of pleasure.
4	Pleasure-causing actions were argued to be the moral actions	According to Bentham, only those actions (or decisions) could be considered "moral" when they caused pleasure. His critics were not appreciative of such one-sided and singular criterion to determine the morality of any given action or decision; because many believed that it is rather difficult to pass simplistic value judgments on morality. In addition, the successors of Bentham

Sr. No.	Short Title for the Weakness	Description of the Weaknesses and Possibilities of Corruption of Bentham's Utilitarianism
		did not see any deterministic clarity associated with Bentham's *pleasure vs pain hypothesis*.
5	Utilitarianism could be misused by majority	The principle of "maximum pleasure for maximum people" could possibly be misused by those social or political forces which would want to organise a large fraction of society through their majoritarian or fascist politics. Although, this fraud of Bentham's principle cannot be ruled out; Jeremy Bentham himself probably could never have approved such corrupt extrapolation of his thought.
6	Pleasure and Pain cannot be considered as the only governing forces of human behaviour	Bentham apparently believed that humans are not capable of making any choice beyond their impressions of pleasure vs pain caused by a given action or decision. His critics were, however, astonished to read into Bentham's commitment to the *pleasure vs pain hypothesis*. Is it not true that humans are influenced by their other passions too?
7	All humans would choose pleasure over pain	Psychologically, Bentham's utilitarianism seems to place all human beings, irrespective of their personal capacities and enlightenment, on the same plain of consciousness. He passionately believes that the fundamental inclination of human mind is to maximise pleasure and minimise pain. Are pleasures and pain identical of all human beings? Clearly, Bentham's critics could not subscribe to Bentham's monolithic idea about human mind. In reality, no two human minds think alike when it comes to pleasure vs pain.
8	Human preference to pleasure may	Bentham emphasized the significance of achieving unending happiness through preferring pleasure over pain. His critics asked

Sr. No.	Short Title for the Weakness	Description of the Weaknesses and Possibilities of Corruption of Bentham's Utilitarianism
	lead to immoral society	if Bentham had forgotten that the "desire for happiness" is one of the unsatiable desires. Bentham seem to have ignored the fact that the emphasis on pleasure would lead the individual and collective mind to uncontrollable selfishness and lawlessness.
9	Liberty and equality have no place in Government and State as envisioned by Bentham	The utilitarian philosophy seems to be mute on the interrelationship between the State and the Government. The critics argue that Bentham went overboard and ignored the spiritual and philosophical capabilities of human beings. He was rather simplistic in his approach in defining right vs wrong and made no efforts to shape the face of the State and the Government.

III. Historically Significant Variants of the Utilitarian Philosophy

The utilitarian philosophy apparently played a crucial role in shaping the legislations in the western world during the past 2-3 decades. However, the critical question to be deliberated in this research paper is related to the possible incorporation of the elements of utilitarian philosophy in the process of crafting the Constitution of India.

Minority rights cannot be protected unless one incorporates the principle of "discriminatory justice". That was the precise thing done by our Constitution and thereby the rights of weaker, poor, and deprived (humans and all other living creatures) were enshrined through adopting the doctrine of "discriminatory justice"[16].

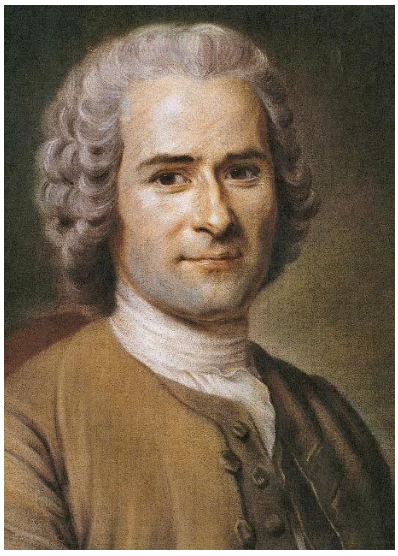
In one sense, the "Universal Declaration of Human Rights" underscores that freedom and entitlement are the two sides of the same coin. This principle is operationalized by the legal

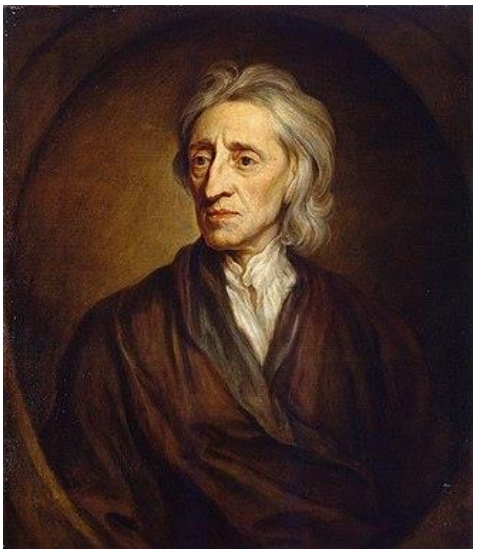
[16]. Dr. G. R. Jagadeesh, Protective Discrimination: Maintaining the Balance under the Constitution, KLE Law Journal, 13, 14, 15.

systems in various Nation States in the World by adopting some variant of the so-called "discriminatory justice" in their constitutions or jurisprudence.

In case of the Indian Constitution, too, the fundamental principles incorporated in the Universal Declaration of Human Rights, *viz.*: "unequivocally linked destitution and exclusion with discrimination and unequal access to resources and opportunities. The framers also understood that social and cultural stigmatization precluded full participation in public life, including the ability to influence policies and obtain justice. In other words, they made it clear that all civil, political, economic, social, and cultural rights were not only universal, but were also indivisible and inter-related"[17].

The importance of balancing this utilitarian principle from human rights point of view stems from the problem of scarcity of resources. This scarcity leads to calculated allocation of the resources in a utilitarian manner to maximise the greatest good, leading to benefits of human rights being accrued towards the achievement of the greatest good. As a result, the rights of the individual or the marginalised or minority class is often suppressed, denied, or violated. Amartya Sen argues that "in its simplest form, utilitarianism in the Indian context holds that what people want and how much they want it is given by how much they are willing to pay for it on the existing market"[18].





[17]. United Nations, https://www.un.org/en/chronicle/article/are-human-rights-universal (last visited Dec 5, 2020).
[18]. Amartya Sen, *Utilitarianism and Welfarism*, 76(9) THE JOURNAL OF PHILOSOPHY, 463 (1979), https://www.jstor.org/stable/2025934 (last visited Dec 7, 2020).

Jean-Jacques Rousseau,	John Locke, FRS
French, 28 June 1712 to 2 July 1778	English, 29 August 1632 to 28 October 1704

Alan Gewirth has argued that there must be at least one absolute right: "all innocent persons have an absolute right not to be made the intended victims of a homicidal projects[19]. It is further said that an individual can lose his or her right to the State if these rights are viewed as being alienable.

Also, it is conceivable that individuals may either give up or lose their rights. They shall give up their rights either voluntarily or by a deliberate gesture. On the other hand, they shall lose their rights when these rights are alternatively viewed as being a part of the social contract between the individual and the State for the collective well-being of the entire society. To elucidate upon this point, an apt example of election in a democratic society can be used. Accordingly, in a democracy, the citizens of the country, who form the "majority", vote, and elect their rulers, who are entrusted with the powers to govern and serve the wishes of those who elect them power.

Thus, there is a relation in the form of a contract between those who are elected and those who elect them[20]. Any State, viewing the principles of human rights as being alienable from the individual who possess these rights can call upon such an individual to sacrifice his (or her) rights for the well-being of the entire society. This stems from the idea that citizens owe a duty towards the State to defend it just as the State promotes the welfare and protects the rights of the individual. This proposition has found value in Rousseau's view on "social contract"[21].

John Locke[22] favours another view and holds that human rights of all individuals are embedded in the very nature of the Constitution forming a contract with the State. According to Locke,

[19]. Alan Gewirth, *Are There Any Absolute Rights?* 31(122) THE PHILOSOPHICAL QUARTERLY 1-16, (1981), www.jstor.org/stable/2218674. (last visited 9 Jan. 2021).
[20] J.J. Rousseau, The Social Contract, Maurice Cranston (Trans.), 77 Book II, Chapters 4 & 5 (Penguin Books, 1968).
[21]. Jean-Jacques Rousseau (French, 28 June 1712 to 2 July 1778) was a Genevan philosopher, writer, and composer. His political philosophy influenced the progress of the Enlightenment throughout Europe, as well as aspects of the French Revolution and the development of modern political, economic, and educational thought. His Discourse on Inequality and The Social Contract are cornerstones in modern political and social thought. Rousseau's sentimental novel Julie, or the New Heloise (1761) was important to the development of pre-romanticism and romanticism in fiction. His Emile, or On Education (1762) is an educational treatise on the place of the individual in society.
[22]. John Locke FRS (29 August 1632 to 28 October 1704) was an English philosopher and physician, widely regarded as one of the most influential of Enlightenment thinkers and commonly known as the "Father of

the purpose of social contract is to protect and preserve the individual as well as his property. If the State acts in an arbitrary manner destroying individual's life and property, the individual has the liberty to rebel against it[23]. Human rights are to be viewed as being part of a social contract between the individual and State as they are indispensable for a stable society.

Philosophers like John Locke, Jean Rousseau argue that the utilitarian philosophy is an important facet and is part and parcel of a democratic set up in cases where there is a contract between the citizens and the State, which in the modern times, is the government. They further hold that the fundamental human rights are embedded in the Constitution of every nation and it is the foremost duty, and a binding responsibility to adhere to the social contract, to ensure that the right of each and every individual is upheld and protected. These philosophers furthered the utilitarian movement in protecting the rights of all the concerned individual of a given State and advocated the use of Bentham's utilitarian philosophy as being an integral aspect of the social contract.

IV. Human Rights in the Context of the Utilitarian Philosophy

The Black's Law Dictionary defines Human Rights[24] as the "freedoms, immunities and benefits that, according to modern values, all human beings should be able to claim as a matter of right in the society in which they live". Human rights are rights that are transcendental in nature and do not adhere to territorial borders[25]. They are rights beyond borders and applicable to all humans irrespective of their origin.

Human Rights, in a "fair and just democratic society", are paramount for ensuring the rights of the last person or community in a given society. Conversely, any democratic political system should never reduce to the blind implementation of the basic concepts of Utilitarianism including the idea of greatest good for the greatest number. In yet another extension of the principles essential for the so-called fair and just democratic society, management of resources

Liberalism. Considered one of the first of the British empiricists, following the tradition of Sir Francis Bacon, Locke is equally important to social contract theory. His work greatly affected the development of epistemology and political philosophy. His writings influenced Voltaire and Jean-Jacques Rousseau, and many Scottish Enlightenment thinkers, as well as the American Revolutionaries. His contributions to classical republicanism and liberal theory are reflected in the United States Declaration of Independence

[23]. Martin Seliger, Locke's Theory of Revolutionary Action, The Western Political Quarterly, Vol. 16, No. 3, 548, 564.

[24]. 10 Black's Law Dictionary 683, (West, 2019).

[25] 3, Donald R Rothwell et al., Human rights, in International Law: Cases and Materials with Australian Perspectives, 453–515, Cambridge University Press, 2011

in a humane and lawful manner shall be deemed crucial. That can be assured by adhering to the principles of human rights and welfare of each and every individual.

Clearly, the framework of the utilitarian philosophy cannot be considered to be suitable in cases where the State tries to steer away from the well-established notions of utilitarian philosophy propounded by Bentham, by misunderstanding and misconstruing the very essence of the philosophy, and by not including the last person of the community or the group within the benefits.

The concept of pleasure over pain can best be achieved when the State endeavours to function in a democratic set-up by planning and formulating such policies and effectively implementing them for maximum benefit of the society, which should include all, without discrimination and irrespective of their religion, language, culture, caste, etc. Bentham in his utilitarian philosophy never intended to include minority from any aspects of religion, language, or the like.

For Bentham, the benefits of the utilitarian philosophy should percolate to all in the society, and he favoured the majoritarian view by including all under the blanket of the term "majority". The principles guided by protection of human rights should be adhered to and used as a "beacon in the dark" to guide the State in systematically organizing their priorities. While prioritizing the activities of the State, the human rights principles should be borne in mind and it must be ensured that the application of utilitarian philosophy widely made should not lead to enjoyment of the majority at the expense of the minority interest.

Bentham and John Stuart Mill, both argue that the approach of utilitarianism emerges from the concept of "interest". Every individual share interest with the other and for the purpose of legislation, the interests that individuals' shares should be reduced to the most important and essential ones, one being security[26].

The history of human civilization has taught us that nature from its very roots enables the mighty to prevail over the weak. However, it is argued that nature for its own self-preservation requires that laws be made to protect the weak from the unjust might of the powerful.

Thus, Bentham attacked the doctrine of natural rights and argued that this principle shall achieve nothing and would settle to distorted society. Bentham was against the theories and

[26]. Frederick Rosen, *Majorities and Minorities*, 32, American Society for Political and Legal Philosophy 24, 37-38, 39, 41 (1990).

doctrines of natural law since, according to Bentham, the observance of such natural law doctrines would lead to the concentration of power and wealth with the king, who shall then act like a despot, leading to degradation of the society and violation of the rights of individuals acting under the mercy of the king[27].

It must be borne in mind that Bentham's utilitarian philosophy was further developed in 20th Century by the thesis underscoring the needs of the welfare of society by the American philosopher John B. Rawls[28]. This significant variant of utilitarianism was proposed by him in his book 'A Theory of Justice'. His theory of justice places individual rights and human dignity at the heart of his philosophy. Rawls first principle is that civil and political rights must be paramount and economic considerations of the State should not override these rights and thus cannot be justified on any grounds.

John Bordley Rawls
(American; 21 February 1921 to 24 November 2002)

[27] *Supra note 7.*

[28]. John Bordley Rawls (21 February 1921 to 24 November 2002) was an American moral and political philosopher in the liberal tradition. Rawls received, both, the Schock Prize for Logic and Philosophy and the National Humanities Medal in 1999, the latter presented by President Bill Clinton, in recognition of how Rawls' work "helped a whole generation of learned Americans revive their faith in democracy itself." Rawls has often been described as one of the most influential political philosophers of the 20th century. He has the unusual distinction among contemporary political philosophers of being frequently cited by the courts of law in the United States and Canada and referred to by practising politicians in the United States and the United Kingdom. Rawls's theory of "justice as fairness" recommends equal basic rights, equality of opportunity and promoting the interests of the least advantaged members of society. Rawls's argument for these principles of social justice uses a thought experiment called the "original position," in which people select what kind of society they would choose to live under if they did not know which social position they would personally occupy.

The second principle, as postulated by John B. Rawls is known as the "difference principle". Under this principle, Rawls states that social and economic inequalities can only be justified as being fair when they lead to the betterment and advantage to the least benefitted group in a given society. In other words, Rawls means to say that social and economic inequalities should be so arranged to ensure maximum benefits to the community as a whole.

V. Will Utilitarian Principles Affect the Rights of the Minority?

It can be proposed that an approach towards thinking in the direction of the development of society as agreeing with human capabilities and liberty should be adopted. This approach is thus crucial while addressing the societal problems and may possibly answer questions that may develop subsequently. Ronald Dworkin has given a particularly important facet to the concept of rights. According to Dworkin, "rights are political trump that override the basic considerations of general welfare and social and economic policies" [29] [30] He further says that "when the government and the legislature undertakes the tasks of formulating any policy for the governance, or for developing economic, legal and social institutions, the fact that the particular policy or law or decision shall advance the overall equality or general welfare or social utility better than the other alternative, cannot permit the government to interfere with individual rights"[31].

freedom and liberty to enjoy the rights granted to an individual cannot be revoked simply because it has lost its utilitarian value, and it cannot be replaced by another right giving more utility. This concept is profoundly associated with the concept of "equality". The government is duty bound to treat all persons as equal and there shall be equal distribution of the goods and resources between all persons equally. In other words, the principle of equality envisages the world where everyone is equal before the government and the majoritarian angle to welfare shall not be considered polite and justifiable.

Clearly, it would be desirable that the government adheres to "equality" rather than the so-called majoritarian politics. While insisting on equality among all citizens of the nation, the

[29]. Yowell, Paul (2007) "Critical Examination of Dworkin's Theory of Rights", *American Journal of Jurisprudence*: Vol. 52, Iss. 1, Article 5.
[30] See also, Norman E. Bowie, Taking Rights Seriously by Ronald Dworkin., 26 Cath. U. L. Rev. 908 (Pp. 563.,).
[31]. *Id at* 30

government shall make sure that individual human rights are not violated at the expense of catering to the so-called majoritarian social and political interest.

The right to equality pave a way into the Indian legal scenario by way of what we now call as the Public Interest Litigation or PIL. The Supreme Court of India was particularly very welcoming of the concept of PIL as a method of reinstating human rights and fundamental right of the aggrieved individual. Since these rights are to be recognised over period, the Supreme Court relies upon the Centre and the State governments respectively for providing everyone the basic rights as described in the Constitution. Thus, by virtue of Article 14 of the Constitution, the Supreme Court sees all individuals as being equal before the law and provide everyone the equal protection of law.

The Supreme Court Bench headed by Justice Bhagwati in the case of *Francis Coralie Mullin vs Union Territory of Delhi*[32], observed that: "The right to life includes the right to live with human dignity and all that goes with it, the magnitude and components of this right depending upon the extent of economic development of the country, but it must, in the view of the matter, include bare necessities of life and also carry out such activities as to constitute bare minimum expression of human self".

The idea of utilitarianism, often mistaken and misread goes against the very concept of democracy when it fails to adhere to the fundamental principles as propounded by the early utilitarian philosophers. The above judgment holds that everyone should be treated equally and be given the bare minimum expression of human self. By enacting legislation that is seen as a "crowd-pleaser" and having a majoritarian approach shall not be in the best interest of the minority.

In the opinion of the author, every State should bear in mind the principles given under the Civil and Political Rights, found in Articles 1 to 21 of the Universal Declaration of Human Rights prescribes equality before the law, prescribes effective remedy by competent national tribunals for acts violating rights granted by constitutions and by law[33].

While interpreting the principle of utilitarianism, one must remember that incomplete and uneducated approach shall always lead to failure and disruption of the system of rights. All

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[32]. *Mullin v. Union Territory of Delhi*, 1981, 1 SCC 608.

[33] United Nations, https://www.un.org/en/universal-declaration-human-rights/, Articles 1 to 21, (last visited Jan 3, 2021).

care and caution is needed to be taken to prevent the utilitarian benefits to coincide with the very foundation of human rights. There is nowhere written that the happiness of one person should be over that of the others, nor should there be any conduct followed which shall lead to unhappiness for all.

VI. Instances when Indian Judiciary has upheld the principles of Universal Human Rights by applying the "Utilitarian Principles"

The Indian system of governance is what we popularly call the "representative democracy", which provides for a bifurcation of "ruling few" and "subject many"[34]. In this form of democracy, the "ruling few" are always answerable to the "subject many", and if they can be removed from power if they are not able to provide satisfactory answers when asked.

More often than not, we get to see that the universalism of human right principles is violated by those who have the duty to protect them. Such avoidance to universalism principles leads to lack of implementation of the rights. Universalism of human rights is often overlooked while legislating on policies that are short-sighted. Utilitarian philosophy is strongly associated with practical ethics and practical politics and should be remembered by those in power, in its essence, while drafting of any policies.

The Indian judiciary has time and again stepped up to protect the Universalism of the Human Rights granted to all individuals, irrespective of any discrimination whenever a law, custom, tradition, or practise goes against the very heart and root of the problem. A few examples of times when the judiciary worked towards safeguarding the human rights are:

1. Sabarimala Temple Case:

The Ayappa temple in Sabarimala, located in Pathanamthitta district in Kerala prohibits the entry of menstruating women between the age 10 to 50 years inside the temple premises. This prohibition was issued under the aegis of Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 which stated that "women who are not by custom and usage allowed to enter a place of public worship shall not be entitled to enter or offer worship in any place of public worship"[35]. This case was first argued in the High Court of

[34] Rosen *supra* note 28.

[35]. Sangeetha Abraham and Vijeta Verma, The Right to Worship vis-a-vis Gender Parity in India: The Sabarimala Issue, Summer Issue 2020, ILI Law Revie, 198, 199-

Kerala, which favoured the ban on the entry of women in the temple citing that this is an age-old practise, taking form of a custom and the Court cannot interfere into matters of faith of the community at large.

The tables then turned when the Supreme Court, while hearing the appeal in the case of *Indian Young Lawyers Association v The State of Kerala* (Sabarimala),[36] ruled in favour of the entry of women in the temple. Justice R. Nariman specifically chose to test the exclusion of women in the temple against one of the primary limbs of India's equality clauses, Article 15(1), which provides that the "State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

This anti-exclusion test, as envisaged by Justice Chandrachud held "whether a religious practice causes the exclusion of individuals in a manner which impairs their dignity or hampers their access to basic goods"[37]. The Supreme Court thus reiterated the fact that predominance shall be given to the basic human rights and the fundamental rights that are enshrined in the Indian Constitution over any majority view based on opinion in the light of an age-old tradition, custom, or practise.

Justice Chandrachud opined that the Court should always look after to determine what religious practices require Constitutional protection and the legitimate power of the State to intervene in religious matter[38]. It was further noted that when the State has no legitimate right to intervene, and when the practise is not essential for the religion, the basic rights have to be granted to all, irrespective of the fact whether or not the right curtails the powers of the religious denomination.

The Court went a step further in noting that religion and its associated practices should play a pivotal role in ensuring basic rights to all and access to the basic goods and necessities.

While judging this case, the Supreme Court laid high reliance on the case of *Sardar Syedna Tahir Saifuddin v State of Bombay*[39], a 1962 judgment of the Supreme Court wherein the Court had held that religious practices are to be followed as a way of promoting and enhancing the

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[36]. *Young Lawyers Association v The State of Kerala*, 1 2018 SCC SC 1690.

[37]. Suhrith Parthasarathy, *An Equal Right to Freedom of Religion: A Reading of the Supreme Court's Judgment in Sabarimala*, 3(2), University of Oxford Human Rights Hub Journa, 124, 125, (2020)

[38]. *Id*

39. Sardar Syedna Tahir Saifuddin v. State of Bombay, 1962 SCR Supl (2) 496.

rights of the community members, and not to suppress or lower their rights under the garb of religious freedom and superiority.

Finally, the Court, by a majority, ensured in this case that the concept of universalism of human rights, corresponding in the Indian Constitution as the fundamental rights, shall not be infringed and suppressed by the majoritarian ideology of the community.

2. Decriminalization of Section 377:

Section 377 of the Indian Penal Code, 1862 was struck down by the Supreme Court in the year 2018 as being unconstitutional and violative of rights guaranteed to individuals by the Constitution. Section 377 deals with "unnatural offences" and makes it punishable with imprisonment for life, or imprisonment extending up to 10 years, and fine.

Section 377 is a part of the British colonial rule, which according to Bentham, were incapable of making laws and governing the citizens. This law had long outlived its validity and the Supreme Court, relying upon the important facets of Bentham's philosophy, though not expressly mentioned, ruled against the constitutionality of this Section.

Section 377 was based upon the idea that anything other than normative heterosexual sexual relations, was against the order of the nature, and therefore, criminal[40]. In the year 2001, an NGO by the name of Naz Foundation approached the Delhi High Court[41] to rule upon the merits of unconstitutionality of Section 377 and to strike it down as being violative of the Constitution and the basic rights that are granted to all individuals, without any discrimination to their orientation. The Delhi High Court ruled in favour of the NGO by declaring Section 377 to be violative of the Constitution.

In 2013, the Supreme Court, in the case of *Suresh Kumar Koushal vs Naz Foundation*[42] (Civil Appeal No. 10972 OF 2013) overruled the decision of the Delhi High Court in the Naz Foundation case and upheld the validity of Section 377. This case was highly ridiculed and criticised for the judges held that, "a miniscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders" and that the High Court had erroneously relied upon international precedents in its anxiety to protect the so-called rights of LGBT persons".

40. Scroll, https://scroll.in/article/893406/section-377-verdict-what-you-need-to-know-about-scs-decision-to-decriminalise-homosexuality, (last visited Dec 28, 2020).

41. Naz Foundation v. Govt. of NCT Delhi, WP(C) No.7455/2001

42. Suresh Kumar Koushal v. Naz Foundation, 2014 3 SCC 220.

While several curative petitions were pending with the Supreme Court with regards to the Koushal case, five members of the LGBT community, under the patronage of Bharatanatyam dancer Navtej Sing Johar,[43] (Crl. No. 76 of 2016) filed a writ petition in the Supreme Court to decriminalize Section 377.

The Court held that criminalizing consensual sexual relationship between two adults goes against the very fundamentals of the Constitution. The Court held that the criminalization of sexual acts violates the right to equality under the Constitution. The Court looked into the matter deeply and with a utilitarian perspective. In fact, the then Chief Justice of India, Justice Dipak Mishra opined that it shall be immoral and wrong to exclude the LGBT community in the majority of the country. The Court further said that LGBT community is entitled to equal citizenship and protection under law, without discrimination.

The Court condemned the views of the earlier Bench in Koushal's case and held that it must be borne in mind that no individual should be subject to unjust treatment at the cost of the majoritarian view. Every individual has the liberty as is granted by the Constitution and it is the foremost duty of the legislature to ensure that they abide by the tenets of the Constitution, rather than abiding by the majority public opinion.

VII. Conclusions

Jeremy Bentham's utilitarian philosophy can be called as a beacon in the dark for the modern-day political system. Bentham was an English philosopher, jurist, and social reformer regarded as the founder of modern utilitarianism. His theory of utilitarianism envisaged the calculus of utility and passionately held that the human behavior is ruled by the sentiments of pleasure or pain.

The theory of utilitarianism is particularly important while arguing for universalism of human rights. The utilitarian theory of Bentham rejected the earlier natural law theories, that put great emphasis on the anarchic and dictatorial rule of the king and subsequently by the State. Bentham further proposed rational and logical thinking by modelling his theory.

Bentham had argued that the foremost responsibility of the State is to protect the fundamental rights guaranteed to all. The universalism of rights guaranteed to all individuals by the State

[43]. *Navtej Singh Johar v. UOI*, 2018 10 SCC 1.

cannot be measured and, at all times, assessed, using the utilitarian philosophies. The State has to cater for the exclusive well-being of certain class or category of individuals, and it is not possible to pass such value judgments against the State at all times.

Professor John B. Rawls was one such scholar who gave importance to the utilitarian philosophy of Bentham and revived his thoughts in the 20th Century. Rawls was a great advocate of the universalism of human rights and believed that human rights were beyond boundaries and should be available to every individual, unmindful of his or her "majority" or "minority" orientation. Rawls's theory of "justice as fairness" recommends equal basic rights, equality of opportunity and promoting the interests of the least advantaged members of society.

As is demonstrated in this research, the Indian Supreme Court has given primacy to the theory of utilitarianism to determine that the opinion of the majority need not always be correct. The benefit of a custom, practise, or the legislation must be percolated to reach the grassroot, which should be the prime beneficiary, in order to ensure that the universalism of human and fundamental rights is maintained.

Thus, it can be seen that Jeremy Bentham's principles of utilitarianism, if not misunderstood and misconstrued by modern-day political system, could be made the basis of governmental policies for upholding the principle of universalism of human rights of all individuals, and for protecting these rights by observing the correct system of law.