

## German Constitutional Case<sup>1</sup> : A Philosophical Outlook

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### Abstract

From Trolley problem to September 11 attack on World Trade Centre, it makes us aware of the tough decisions which a State is required to take during unprecedented circumstances. There cannot be a simple answer to these questions which requires philosophical justification. Can a Government shoot down a civilian plane which has been hijacked and is likely to be used as a weapon? What would be the true justification, if the plane is shot down? This article highlights the competing philosophy which might be useful for ascertaining right answers. Also, to understand when it comes to decision making by the State, whether its motive or ultimate outcome which guides State action.

### Understanding the Issue:

In September 2001, civilian planes were hijacked and used by terrorist as a weapon to cause large scale destruction to life and property. In the aftermath of 9/11 attack on Twin Tower which resulted in human casualties of around 3,000 people. It forced the Nation States to carve out a policy to deal with the contingencies similar to that of 9/11 attack wherein a Civilian Airplane could be used as a weapon of mass destruction. In 2003, a similar incident<sup>1</sup> made German Legislature to ponder more seriously on the issue of Renegade Planes which led to the enactment of New Regulations under Aviation Security Act, 2005. The Act authorized the '**shooting down of plane**' '**if**' it was to be used as a weapon to cause large scale destruction of Human Life and Property. As the issue involved the shooting down of a renegade civilian plane, it sparked the debate of rights of the people onboard such renegade aircraft. After comprehensive deliberation on the question, Federal Constitution Court of Germany struck down the relevant provision<sup>2</sup> on the ground that, 'it violates Human Dignity and State has no authority to weigh one life over other'. This decision was cherished as a human rights victory but it requires close consideration as to duty of State and decision making process. This paper seeks to inquire – **Firstly**: Is it justifiable to shoot down a Civilian Plane with innocent Passengers onboard, who have become objects at the hand of terrorist, to prevent large scale destruction of Human life and Property, which is inevitable consequence, if the plane reaches the target destination. **Secondly**: Is State biased towards Public Interest when it comes into conflict with Individual Rights? The inquiry of this paper is limited to rights

<sup>1</sup> In 2003 an armed man hijacked a small glider plane and circled the sky above high rising banking hubs and threatened to crash it if his demand of making call to USA was not complied. It was clear that the intention was not to use plane as a weapon but only as an instrument to meet his demand as was apparent when he landed the plane and submitted himself to arrest without resisting,

<sup>2</sup> Section 14.3, Aviation Security Act, the direct use of armed force against the aircraft is permissible only if the occurrence of an especially grave accident cannot be prevented even by such measures,

analysis only, leaving out the Constitutionality, Legislative Competence and Criminal implications of such provision. The approach which has been adopted to answer the question is philosophical one.

With regards to the First Question, it is prudent to analyze it with the Kantian Philosophy Adopted by the German Federal Constitutional Court. Immanuel Kant believed that “*Man is Free Moral Agent and has absolute freedom of Action*”. He was against Utilitarian Idea and stated that the moral worth of an action lies in the motive by which action is done and not the consequences which follow it. He believed that, Man is an Autonomous Agent & Rational Being and must do the Right thing irrespective of the consequences. He stated that Morality does not lie in using humans as an object to achieve Collective Good but it lies in the concept that, humans are an end in itself. Basing Morality on interests and preferences destroys its dignity. It does not teach us how to distinguish right from wrong, but only to become better at calculations<sup>3</sup>. In simple words Kant considered, Man as an Autonomous Being who is free to choose what is best for himself and categorical imperative requires Man to treat all other humans with respect and as “end in themselves and not means to an end”. The actions of a man will be judged on Categorical Imperative irrespective of consequences which may follow. Relating back, Kant’s Philosophy to German Constitution Case, where Court struck down the provision of controversial law as it violated human dignity. The primary flaw in this argument is the status of the people inside the hijacked airplane who are by all means ‘objects’ at the hands of terrorist i.e. people are means to achieve evil consequences and they no more retain their ‘autonomous status’ which is an anvil upon which Kant’s philosophy rests. In such a scenario where the humans are mere ‘objects’, dignity argument fails and status of a man as a rational being is lost with it too. And since there is no autonomy, there is no moral responsibility and ‘No Rights’ can be ascribed to the people onboard the Airplane as they are mere ‘objects’ at the hands of terrorist. Hence, application of the Kant’s philosophy is not appropriate in the present case as the rights which court want to preserve do not exist when the man has no autonomous status. Implementation of Kant’s philosophy in the present case is uncalled for, as autonomy is lost and in such a scenario man is no more a rational being. State on the other hand is not a moral creation but a legal creation. State is there to make decisions and to prevent large scale destruction of Human Life and Property. State cannot be shackled through moral argument but has to choose between the competing evils. In the Trolley problem also, doing a positive act of pushing a fat man on the railway track to stop the train from running over the workers was a hard choice, but it is here when State comes into picture to decide among the competing evil goods and make a tough decision. The very creation of State is expression of Utilitarian philosophy where people formed the State in order to protect and promote mutual common interests over individual liberty. Germany’s Constitutional Court’s decision is thwarting State from making any decision and instead make it a worthless bystander. Such an inaction not only commutes a wrong message to the perpetrators of such heinous crime but also attracts the terrorists to Hijack Plane and crash it to cause a mass destruction of life and property. It makes civilian planes more vulnerable to hijacking and most sorted after target as they are immune from counter attack by military forces. The Philosophy adopted by the court is inappropriate as neither the motive of allowing plane to crash land

<sup>3</sup>Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785),

can be universalized nor it can keep up with the principle of human dignity as it prohibits the State from taking any action and making both people onboard and outside the plane 'objects' in the hand of terrorists i.e. instruments of evil intentions of the terrorists. The State cannot be a mute spectator and must take an action irrespective of consequences which may be morally incorrect. As the formation of State was to reconcile the conflicting interest in the Society and not to remain a silent spectator but to take morally tough decision which individuals are incapable of... Creation of state *ipso facto* requires State to take decision on behalf of Individuals upon careful consideration of larger public interest.

Counter philosophy which should and ought to have been applied is 'Utilitarianism'. The essence of utilitarianism is that it is considered with the ultimate outcome of the action. Action which results in maximum happiness of maximum number of people is permitted and the contrary which decreases the happiness is disallowed. Jeremy Bentham was the father of the Utilitarianism and according to him Government must take those actions which maximize the pleasure or happiness of the society as a whole. For Bentham 'Consequence' was of utmost importance and not the manner or motive in which it was arrived upon. A very practical approach which still holds its ground is, at the end of the day it is numbers which matters. The State is not bound to respect rights which decreases the pleasure of the community as a whole or which makes the major portion of population unhappy. On Utilitarian ground, it is justified to kill a few persons, if that would increase overall happiness of the community as a whole in long run. For Bentham, numbers were of utmost importance and he firmly believed that, if greater number of life is at stake, the action taken can override the rights and dignity of a man. For Utilitarianism, morality is all about cost and benefit. Bentham's Utilitarianism was severely criticized for the lack of respect towards human dignity and rights. In our opinion critique of Bentham's philosophy is unnecessary, as his whole theory is justification for State's action which undermines certain liberties over larger community interest. Nevertheless, this shortcoming was restructured by his successor John Stuart Mill who introduced quality aspect in the Utilitarian argument. Central argument of J.S. Mills was "*people must be allowed to do whatever they want, provided they do not harm others*"<sup>4</sup>. As per Mills "*Individual is small scale sovereign*". But some pleasures outweigh others i.e. the pleasures which results in long term happiness are more desirable than pleasures which cause happiness for a limited time-period. For Mills '*Actions are right in proportion as they tend to promote happiness; wrong if they tend to produce reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure*'. He also affirms the "*theory of life on which theory of morality is grounded – namely, that pleasure and freedom from pain are the only thing desirable either for pleasure inherent in themselves or as means to the promotion of pleasure and prevention of pain*"<sup>5</sup>. In the German Constitution case, court ought to have had applied Utilitarian Doctrine as the people in hijacked plane are comparatively less in numbers than the people who may lose their life, if the hijacked plane hit the unfortunate target. The State by employing the reasoning of Utilitarian doctrine could shoot down the hijacked plane to save life of people who may be on the target of hijacked plane.

<sup>4</sup>J.H. Mills, *On Liberty*(1859), Stefan Collini, ed. (Cambridge University Press, 1989),

<sup>5</sup> John Stuart Mill, *Utilitarianism*(1861), George Sher, ed. (Hackett Publishing, 1979), Chap-2,

Argument of human dignity and rights will offer no hindrance under Utilitarian doctrine as happiness of majority population or community at large is more preferable than the happiness of people onboard the hijacked planes which are comparatively lesser in number. Also, the argument that the State cannot prefer life of one over another is unfruitful in the Utilitarian view as happiness of larger number will prevail over the happiness of smaller number of people. Utilitarianism is basic economics for which the ultimate consideration is maximum happiness in maximum numbers.

Addressing the Second question, it can be correctly stated that Public interest would be given preference in such cases over individual interest as numbers do matter. Also in the long run it will send a clear message to terrorists that their evil intentions will not be fulfilled by using the civilian plane as a weapon to cause mass destruction to life and property. Here one must also incorporate the qualitative aspect of JS Mills, wherein the shooting down of plane will necessarily involve unhappiness of some people, but the long term effect of such action will be deterrence in future. The terrorists will desist from using civilian planes as a weapon and will not use airplanes as a medium to achieve their evil inhumane intentions. The State has no doubt a duty to preserve life of its citizens but such is not an absolute and unqualified right, as to sacrifice one's life is sometimes considered to be the highest duty<sup>6</sup>. Once the State has evolved to take a tough decision it can employ the Doctrine of Necessity to shoot down the hijacked plane. Doctrine of Necessity is based on three elements i.e. (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil inflicted must not be disproportionate to evil avoided<sup>7</sup>. In effect the Doctrine of Necessity will be appropriately applicable in hijacked plane Case. In an all, it is appropriate to state that, the outcome of the case has made the Government impotent to make vital decisions even in case of utmost necessity. There is no doubt that the declaration of an airplane as renegade is subjective to a particular situation, its universal prohibition is detrimental to future events which requires the State to take action, what this decision basically convey is 'no action'.

It is apt to conclude by twining the abovementioned threads for a holistic outcome. Firstly, it would be appropriate to state that the hijacked plane must be shot down to promote the collective happiness of society in the long run by employing utilitarian argument or to at least have a line of action in the docket to deal with such a situation. Secondly, when Individual Rights are in conflict with the community's interest, the latter must prevail. In present case as it is all about the number economics and it is unreasonable to let thousand people die in order to save few who are designated to die on hijacked plane, the State must always take proportionate action which is absolutely necessary and in circumstances such as hijacked plane it goes without saying that the shooting down of a plane can never be the first choice but sometimes it is the 'only choice'<sup>8</sup>.

<sup>6</sup>Michael Bohlander, *Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes - Taking Human Life and the Defence of Necessity*, 70 *J. Crim. L.* 147, 162 (2006),

<sup>7</sup>*Conjoined Twins Case [2000] HRLR 721 at 815-16,*

<sup>8</sup>*In extremis - hijacked airplanes, "collateral damage" and the limits of criminal law,*

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