

|LAW AUDIENCE JOURNAL|
|VOLUME 1|ISSUE 2|DECEMBER 2018|ISSN (O): 2581-6705|

|LAW AUDIENCE JOURNAL™|

|VOLUME 1 & ISSUE 2|

|DECEMBER 2018|

|ISSN (O): 2581-6705|

EDITED BY:

LAW AUDIENCE JOURNAL'S

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A JURISPRUDENTIAL EXPLORATION OF STING OPERATIONS

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INTRODUCTION:

This Article draws its essence from the recent news about a couple of cases against Israel based NSO Group registered by a Qatari citizen and a Mexican journalist for spying activities. This NSO group is one of the prominent market players in the spyware technology and has sold spyware to a number of countries. The stance of the company in such lawsuits remains constant that the supply of such spyware technology to government is for the purposes exclusive use against the criminals and cracking any terrorist activity. Such spyware enables the controller to monitor calls, e-mails, text messages and contacts of the target's mobile device.¹ On similar standing comes sting operations. In both of these domains, technology is being used against the rights of the targets, especially the right to privacy.

The theme of this article is to find the rightness or wrongness in the use of spyware and sting operations. Can the use of technology for such purposes be justified? The answer of the same shall be explored jurisprudentially and for simplicity matters, the author shall be using sting operation as the protagonist in this analysis.

Sting operations have seen constitutional and legal safeguard in multiple cases. However, the courts have not dealt with any analysis of *whether conducting sting operations is justified or not, jurisprudentially*. Talking jurisprudentially, the major theory that stands against sting operations is deontology, which in essence says that means should justify ends and the individuals should not perform acts that are *ultra vires* the pre-set norms. Therefore, when the Constitution impliedly says that right to life includes right to privacy, then conducting sting operations would be inconsistent with the Constitution as per the deontological approach, though it may not bring the persons concerned to true justice. Similarly, when the Code of Criminal Procedure establishes a certain procedure for collecting evidence, conducting sting operations would be the violation of those established procedures.

¹ *Hacking a Prince, an Emir and a Journalist to Impress a Client*, THE NEW YORK TIMES (August 31, 2018), <https://www.nytimes.com/2018/08/31/world/middleeast/hacking-united-arab-emirates-nso-group.html>; *UAE used Israeli spyware 'to target Qatari emir, Saudi prince'*, ALJAZEERA (September 1, 2018), <https://www.aljazeera.com/news/2018/08/uae-israeli-spyware-hack-phones-belonging-opponents-180831113905857.html>.

On the other hand, the approach that justifies the sting operations is consequentialism, that in essence says that ends should justify the means and acts should be performed bearing in mind the just or unjust consequences of such acts. Therefore, if an individual conducts a sting operation with an intention to lead certain evidence against the suspect that may ultimately help the society and specifically the court, then such act of the individual would be a just act to do.

Therefore, the debate now leads to the point that what is the just choice, whether people should choose deontology or consequentialism as their approach in life. This article shall try to find an answer to it, especially in light of the sting operations.

I understand that jurisprudence is mere philosophy and it is the law of the land that prevails. Therefore, I would refer to the cases of **R. M. Malkani v. State of Maharashtra**² and **Rajat Prasad v. C.B.I.**³ that provides legal backing to sting operations in India.

In **Rajat Prasad v. CBI**, the Supreme Court, while upholding sting operations conducted in larger public interest held that such journalistic exercises undertaken in the interests of supporting criminal justice delivery system can be deemed accepted for the want to criminal intent. The Court gave much emphasis to the absence of *mens rea* for the non-completion of an offence through the act of sting operation.

In **R. M. Malkhani v. State of Maharashtra**, the question was regarding the admissibility of the tape recording of a telephonic conversation that was alleged to have been illegally obtained in the contravention of Section 25, Indian Telegraph Act, 1885. The Supreme Court allowed admission of such recording as a reliable evidence for the absence of coercion or compulsion in the recording of such statements. Thus, it was held that such an evidence does not violate Article 20(3) of the Constitution of India for the absence of the aspect concerning compulsion.

There would be another interesting issue covered through this article, which is, the difference between consequentialism and utilitarian approach. It is clear that sting operations are justifiable from the utilitarian approach as it ultimately leads to greater happiness in the society. However, if consequentialism were not separated from utilitarianism, there would be

² R. M. Malkani v. State of Maharashtra, A.I.R. 1973 S.C. 157 (India).

³ Rajat Prasad v. C.B.I., (2014) 6 S.C.C. 495 (India). See R. K. Anand v. Registrar, Delhi High Court, (2009) 8 S.C.C. 106 (India).

no sense in arguing the same thing using another justification. Therefore, the author has segregated utilitarianism from consequentialism.

Before moving on, I would like to clarify that all the arguments to follow pre-supposes the existence of genuine use of spyware or sting operations. It is to be presumed that when spyware is provided for keeping a track on criminals, the Government or any other entity is not using it for any purpose. Consequently, the author does not support any use of spyware or sting operation against private individuals for testing or any other purposes.

STING OPERATIONS: ACTIONS TO REACH OUT FOR JUST

CONSEQUENCES:

I. BACKGROUND:

If one needs to define consequentialism, the definition of Samuel Scheffler may be preferred, as it has pointed out the crux of consequentialism, i.e. *maximising rationality*. He defines consequentialism as:

“The core of this conception of rationality is the idea that if one accepts the desirability of a certain goal being achieved and if one has a choice between two options, one of which is certain to accomplish this goal better than the other, then it is, ceteris paribus, rational to choose the former over the latter.”⁴

Such maximization does not require that the individual should examine the entire possible alternative and the best out of those should be performed. The only thing that has to be satisfied is that the selected alternative should not be worse than what any reasonable person would have chosen instead.⁵

This acts as a suitable jurisprudential support to the idea of conducting sting operations. The goal that one desires to fulfil through sting operations is the extraction of crucial information that the suspect would not otherwise provide and it may act as conclusive information as well. In terms of the alternatives available to such an individual, the only other option than performing a sting operation is to be passive and let the state agencies investigate the matter. Therefore, of times when it is reasonable to expect that the ultimate information can be

⁴ Samuel Scheffler, *Agent Centred Restrictions, Rationality, and the Virtues* 252 (1985).

⁵ Amartya Sen, *Consequential Evaluation and Practical Reason*, 97(9) *Journal of Philosophy* 486 (2000).

extracted only through sting operations, then it would be just to perform a sting operation as it would accomplish the goal in a form better than the other alternatives would.

Another reason for which I would prefer consequentialism as a theory of justice in the present scenario is that if the State follows deontology, it would be unreasonable as well as arbitrary for the state to evaluate the conduct of the individuals in a similar manner when all would have faced varied circumstances and reasons for the conduct. For example, if the State says that one should not transgress into the right to privacy of an individual, then, irrespective of the motives, all acts of breach of privacy would be considered as a violation of law by the deontologist. However, if the breach of privacy happens in a scenario such as a sting operation where there are grave allegations of a crime against the suspect, the consequentialists would argue for having a varied understanding of the right of privacy and enlist an exception for the same. Therefore, the same conduct of 'breach of privacy' would be considered differently in different circumstances and that, I believed, would be a just inspection.

II. THE MAHABHARATA ARGUMENTS:

Apart from the definitional justifications, I would like to support sting operation from the conversation between *Arjuna* and *Krishna* during the Mahabharata war. It presents the consequential and deontological approach in the form of *Arjuna's* and *Krishna's* arguments, respectively. Arjuna was a consequentialist and therefore he was reluctant to fight the war, as it would lead to killings of the people he has affection with and many innocents as well. Therefore, he thrives for a consequence, i.e. *nyaya* or justice that is independent of the *niti* or the laws or process followed to derive such *nyaya*. On the other hand, Krishna strikes on the duty of Arjuna to fight for the just cause, irrespective of his evaluation of the consequences as the duty.

The major reason why Arjuna focussed on the consequential aspect is that he believed that one must take responsibility for the consequences of one's actions and such responsibility cannot be overlooked by the consequence-independent duty.

Following the reasoning of *Arjuna*, I would be supporting sting operations. If sting operations were directed for a *nyaya*, then such operations would be justified. I believe that performing sting operations for the reasons of finding the truth and helping the court in bringing the persons concerned to justice would be a *nyaya* consideration or just consequences. Therefore,

irrespective of the means that the person employs, the actions would be justified by the consequences.

Surprisingly, though deontology would say that as India have settled law for investigation and collection of evidence, one should not illegally⁶ obtain the evidence. However, I would say that apart from the law, society expects that everyone should realise his or her duty towards achieving a just society. A just society would be one where the law is developed to help the smooth functioning of the society and not to rigidify its dealings. Therefore, in furtherance of this duty, if an individual undertakes a sting operation, his actions would be justified even by deontologists.

III. THE RESPONSIBILITY ARGUMENT:

It is not only the justifications of *Arjuna* that encompasses responsibility aspect in consequentialism. If we understand the concept of holistically, it intrinsically possesses the need to take responsibility for the consequences of one's choice. Such inclusion of responsibility argument against the person making a choice of acts to yield a particular consequence relates to a couple of things:

- The discipline of *evaluation*;
- The discipline of *choice* based on that evaluation.⁷

This connection of choice of consequences and responsibility for the same can be witnessed in the works of *Philip Pettit* as well. He says that “consequentialism is the theory that the way to tell whether a particular choice is a right choice for an agent to have made is to look at the relevant consequences of the decision; to look at the relevant effects of the decision on the world.”⁸

Therefore, if any individual undertakes an action, he would be deemed responsible not only for the actions but also for the evaluations that he would have been made while reaching to a decision of choosing his actions.

One implication of taking responsibility for the consequences is that it differentiates utilitarianism from consequentialism. This is because taking responsibility opens the scope

⁶ Illegally here denotes any process other than the process warranted under the law.

⁷ Amartya Sen, *Consequential Evaluation and Practical Reason*, 97(9) *Journal of Philosophy* 477 (2000).

⁸ Philip Pettit, *Consequentialism* (1993).

for the individual for undertaking actions that are not directed towards utilitarian grounds, however, they lead to a just consequence.

Therefore, if an individual who undertakes a sting operation for malicious reasons should be bound to take responsibility and further face punishments for the same and thereby consequentialism exquisitely segregates justice-oriented sting operations from malice-oriented sting operations.

Another important point of consideration is the position of the person at the time of making the choice and it a part of the evaluation of the choices. A third party, who is completely uninvolved in the circumstances; need not to attach any special values to the choice of the person involved. Therefore, the evaluations have to be done by reasonably understanding the situation of the individual taking the decision as to the choice of his actions. This is again in contrast with the utilitarian principle wherein the evaluation is independent of the person concerned. Thus, while the courts evaluate the choices and the reasons underlining such choices, they need to understand the position of the person making the choices.

IV. A GOOD-RIGHT APPROACH:

In common parlance, many people may confuse between good actions and right actions. However, there is a fine line distinction between the two. The difference also acts as a distinction between utilitarianism and other such theories and consequentialism.

A *good* is something that is valuable and worthy. If we define ‘good’ from various jurisprudential theories, Bentham would say that enhancing utilities or experiencing pleasure is *good*; Aristotle would say that endorsing virtuous traits is *good* and similarly Rawls would argue that have just institutions in the society is *good*.

In this framework, the right actions would be a way or process to attain the good. Therefore, utilitarianism is the theory of the good; however, consequentialism is the theory of right action.

Applying this to the sting operations, the *good* is the justice to the parties concerned in a case. The right actions would be a procedure established by law or any other action that ultimately leads to the achievement of the good. Therefore, as sting operations would be effectively helping in attaining the good, it can be said as the right action to do.

V. A PROMOTING-HONOURING GOOD APPROACH:

The understanding of *good* would now help us in understanding the difference between consequentialism and deontology is a deeper sense. Consequentialism supports any action that *promotes* the good. On the other hand, deontology supports only those actions that *honour* the good.

Let us understand the difference between honouring and promoting *good* using the example of *social justice*. Promoting the good of social justice would mean doing any activity that in essence promotes or endorses social justice conditions. However, opening an NGO and working explicitly in this domain would be termed as honouring the good. Similarly, in the cases of sting operations, if we take *good* as deriving just conclusions at the end of court trials, it can be honoured by following the procedure established by law. However, it can be promoted by conducting sting operations because it would lead to just conclusions to the trial. Ultimately, justice would prevail more effectively following consequentialism than deontology. It also shows that state is treating the individuals with respect because following *promotion of the good* approach allows people to develop their own ways to contribute in the good, whereas *honouring the good* approach mandates the individual to contribute in a particular way.

To put in other words, the major implication of choosing consequentialism over deontology is that it would be possible for the individual to perform certain acts that *prima facie* appears to be contradicting the good. Therefore, if the consequences of the actions ultimately promote the good than not performing the actions, such actions would be just actions.

However, there arises a fundamental question here. What if promoting the good involves the violence of equally important, or even more valued good. Let us take an example. Is it just to torture a terrorist to extract information about his terrorist organization? The deontologist would be against the notion of torturing the terrorist as the means involved in torture blatantly violates the human rights and therefore any consequence derived from it would not be justified. However, then deontologists would be facing an interesting question that whether the rights of the law-breaker are to be secured against the lives of the innocents.

Now, if the consequentialists face this situation, such torture would be justified as the justness of the consequence outweighs the unjustness of the means. Therefore, what needs to be focused in these situations is that whether the act is intrinsically good in light of the

circumstances or not. Stated otherwise, if the value that the achieved consequence derives is more than the value of the violated right, then in those cases, it would be just to violate rights of the individuals for promoting the greater good.

VI. IMPERFECT OBLIGATION APPROACH:

Imperfect obligations, as explained by Immanuel Kant, are those obligations that do not have a formal sanction backing them. For example, if person A witnesses B assaulting C, A may not have a legal obligation to save C; however, he does have an imperfect obligation to intervene. This duty, though not formally-oriented, is an implication in the theory of consequentialism.

I believe that individuals do have an imperfect obligation to take part in the justice administration system being the part of the society and this obligation can be utilized by any effective measure such as sting operation.

VII. THE INTRINSIC VALUE APPROACH:

The reason for which I personally prefer consequentialism over deontology is the search for the reason behind any activity. Deontology does not require any analysis of the reason and the individuals have to follow the norms for the sake of them being the norms. However, if a consequentialist performs an activity, he analyses the intrinsic value of such an activity and chooses his actions based on this evaluation.

The reason for which I would support consequentialism in this scenario can be explained with an example. Let us say that the State states that trial shall be conducted by an established due process of law. Therefore, deontologists would not justify sting operations because it does not fall under the due process of law. However, a consequentialist would not blindly rule on the norms. He would first analyse the reasoning underlined the statement of the State. Then he would find that whether conducting sting operations violates the purpose and essence of the statement of the State or not.

As the object and purposes of the State's statement is to prevent all sorts of prejudices that may act against the suspect and because conducting sting operations would not act as a prejudice against the suspect but only reveal the *gospel truth*, therefore, in essence, performing sting operations does not violates the statement of the State intrinsically.

VIII. ADDITIONAL ARGUMENTS:

One of the arguments against deontology is that when the enlisted ethics and laws define the means for an individual, he is barred from taking certain action that he desires to take. Peter Railton has put this in the best manner,

*This would be ethically the best thing to do; however, for ethical reasons, I must not do it.*⁹

On the other hand, consequentialism tends to avoid the alienation of such actions. This even shows another significant aspect on the part of the state, i.e. it depicts that it is treating its citizens with respect and allowing its citizens to choose their actions if such actions lead to just consequences.

Another way of understanding the importance of consequentialism is in light of the development of the deontological means. The laws, means or even societal norms are so made because they based on a reasonable presumption of achieving a just consequence. Therefore, when State rules that homicide is wrong, it is saying so because the consequences of homicide are unjust. Therefore, deontology has no roots without consequentialism.

This would be an interesting point to think upon. If the laws are made by taking into account the consequences of the actions, then why sting operations are not statutorily backed? The reason that I think of is that the legislature cannot generally empower the citizens through a Statute to violate a constitutional right of other persons. If sting operations were to be allowed by specific words of the law, it would become a rule rather than an exception. Sting operations have to be treated as an exception because ultimately it is leading to violation of a fundamental right of an individual and if a rule allows such consequences, then would be a bad rule as it would deem the fundamental right ineffective.

CONCLUSION:

In light of all the above-presented arguments, I would say that consequentialism beats deontology in every aspect and derives justice in an effective manner. The implications of doing the opposite would make the society a slave of the laws. Any innovation to derive a just conclusion would be a violation of law, and therefore, it would lead to:

- Disrespecting human conscience;

⁹ Peter Railton, *Alienation, Consequentialism and the Demands of Morality*, XIII(2) Philosophy and Public Affairs (1984).

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- Presence of norms for securing the suspects and criminals outweighing norms for serving the society as a whole.

Consequently, sting operations can be justified in law as they can be justified by consequentialism. Therefore, I would argue that any law that does not provide space for consequential exceptions is an unjust law. If the laws do not have value for the consequential exception, the state would be ignoring the fundamental fact that every situation is different and one cannot apply one answer to each question he may face in life. Simply put, the State cannot follow one shoe fit all approach. However, laws need to be there because:

- It relieves the individuals from applying their analytics in a general and simple situation with only one right thing to do;
- Many times individuals are not sure as to what action to do, and here the laws provide guidance to them.

One thing that I would say as a caution is that none of the justifications for consequentialism should be considered in isolation. We require that form of consequentialism that encompasses all these justifications, to quote it in a better way; we require a broad consequentialism that may even have a pinch of deontological jurisprudence.