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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LEGAL AND ETHICAL PERSPECTIVE ON THE USE OF UNDERCOVER OPERATIONS IN FINANCIAL CRIMES INVESTIGATIONS

AUTHORED BY - SHIVANI SHARMA

Introduction

Undercover operations in Financial Crime investigations play a vital role as it helps in obtaining vital information, and the proof required for successful convictions. This is being used by investigating agencies in those financial crimes where it becomes necessary to dig up the roots to find out the real truth. With the right tools and training, undercover agents get in contact with criminal organizations get insider knowledge, and gather direct evidence that might go unreported.

Despite this, it is always surrounded by the legal and ethical questions of its veracity and admissibility in a court of law. Therefore, it becomes very difficult for the courts to deliver justice on time. These questions are being asked by people due to the involvement of complicated laws and disparate cultural values. This casts an obligation upon the authorities to protect fundamental rights like privacy and due process. In this research paper, we are going to highlight these legal and ethical considerations that need to be considered in conducting undercover operations in financial crimes investigations in the Indian scenario. For better understanding, we will analyse a case study to know whether these considerations are being followed by the investigative agencies or rather find their place only in the academic industry.

Undercover Operations-Tool of Financial Crime Investigations

In the field of financial crime investigations, undercover operations are essential tools that serve a crucial role in revealing the intricate web of dishonesty and corruption that leads to illegal financial activity. It has been often seen that these crimes involve a chain of events where each and every action is a crime in itself such as preparation, conspiracy etc. Therefore, it becomes necessary for investigative agencies to extract each layer and dig out the roots of the crime. In such a complex crime undercover operation helps in gathering relevant information that can be used in court, facilitating convictions. But this can only be possible when the appropriate

training is given to the agents as it involves a high risk of being caught which leads to danger of life as well. Therefore, it is always advisable to operate with fake identities and act like an ordinary man by creating personalities that fit into specific criminal networks. Undercover agents obtain access to confidential domains of information, covert transactions, and key players in fraudulent operations by assiduously cultivating trust and loyalty. In this way, these agents get an opportunity to understand the workings of these organisations and keep their eye on each transaction to understand the loopholes in the entire transaction. This is the nature of these crimes they look like a legal transaction but later turn out as illegal affecting the entire economy.

In addition to this, these operations help in securing the national security of India by coming in contact with various organisations such as the Financial Intelligence Unit-India. This agency is incorporated under the Ministry of Finance with an objective to keep an eye on overall illegal financial transactions with national and international effects. With coordinated work from the Ministry of External Affairs, these agencies send their undercover agents to combat such crimes as these crimes may lead to terrorism which has a direct impact on the national security of India.

India Legal Perspective on Undercover operations

Despite having all these advantages, the authorities have to be mindful while conducting these operations due to legal and ethical considerations. As it has a direct impact on the fundamental rights of an individual. As far as India is concerned there is no specific legislation that governs this undercover operation in the financial crime regime. Still, we can take inferences from other legislations and international conventions to which India is a party. But this does not suffice the purpose as these operations raise serious issues which affect the individual's fundamental right enshrined under Article 21 of the constitution.

Article 21 protects individual's life and personal liberty and allows them to live with dignity. But this has been seen that while gathering the information these agencies get so involved which leads to the infringement of the privacy and life of the people who are involved in or investigating these illegal activities. This fact cannot be ignored that our Indian criminal legal system provides equal protection to criminals as well as victims of crimes. But all the fundamental principles lose their implications in undercover operations. Along with this, it is

necessary to address the issue of privacy rights because most of the undercover operations are being conducted by investigative agencies on the basis of mere suspicion. But these agencies get access to all the personal as well as professional information of the people and their family members involved in the illegal transaction without any specific authorization. It leads to the violation of privacy rights under Article 21 as it is not allowed to interfere in the life of any individual with no authorization which leads to commissions of further crimes. As preliminary investigation of these crimes is done on mere suspicion with no specific authorisation and there is no safe mechanism used by these agencies to procure this intricate information. This may further lead to abuse of power by the investigative agencies as there is no proper control upon these agents to gather any information. As a result, these agencies make arbitrary decisions and violate the principle of natural justice.

Due to these reasons, the information gathered through these operations lacks' evidentiary values in a court of law. Although Sections 24 and 25 of the Indian Evidence Act clearly state that confessions before a police officer and under police custody are not acceptable Section 26 admits those confessions which is before a third party and likewise. The involvement of electronic evidence in these operations imposes a direct question upon the admissibility as there is a high chance of manipulation in the absence of specific protocol considering the implication of Section 65B of the act. But when it comes to judicial precedents the Supreme Court is very clear and states that the admissibility of evidence procured through undercover operations depends upon the proper implication of due process which is prescribed by law. ¹On the other hand, the Court categorically states that the person against whom the undercover operation is conducted can alleged that some violations are being done against them. In this respect the duty of the courts is to check that no operations-related rights are violated. ²

In my opinion, these are all secondary issues as the primary issues which need to be considered first is related to the admissibility of the undercover operations and the defense given to the prosecution in court of law. I supreme court of India pronounced a judgment which is related to the validity of these operations in which the court specifically states that till now there is a big question of implementing or validating this tool of investigations especially for detecting financial frauds. ³At this point the court take reference from other jurisdictions such as US, UK

¹ State of Maharashtra v/s Bharat Chaganlal Raghan (2001) 9 SCC 1

² R.K Aanand v/s Registrar (2009)8 SCC 106

³ Rajat Prasad v/s CBI (2014) 6 SCC 495

and Canada and concluded that it is true that these countries have accepted the validity of these operations but partially. On the similar lines the court accepted these operations and ready to provide them a title of enforceability.

The court analysed the inherent nature of undercover operations and stated that these operations can be considered a form of inducement where the other party or the investigating authorities create a situation and forced the accused to commit a crime on the promise of complete confidentiality and secrecy. The court stated that if the authorities do not lay a trap, then there can be a possibility that the accused will not commit any crime. At this stage the court put a lot of emphasis about the defense of entrapment. As these operations raise a serious conflict between the right of two individuals. As in these situations the person who is conducting the undercover operations violates the right of another person's right of privacy without having authority to do the same. The issue before the court is that whether these violations should be ignored in the context of public interest and punish the actual offender or the person against whom the operation is being conducted. In this respect the court clearly states that it is unjust to establish that the court acquit any person who goes against the principles of criminal law or violates the fundamental rights of an individual enshrined by the constitution in the pretext of public interest. Although, at this stage as well the court will look into the intention of the person while considering relevant evidences. These evidences should be gathered from the intervening circumstances which were existing during the commission of the crime and not by examining the mental state of the accused. It is important for the court to do such in-depth analysis as courts are considered to be protectors of fundamental rights and if these issues are not being addressed then it can lead to a serious violation of constitutional as well as many human rights. The court stated that the above-mentioned defense is well recognised in United States of America in those situations where the crime is committed by the accused in those situations created by the investigative agencies. In addition to this the court discussed the applicability of this defense at length and compared it with different jurisdictions. The reason behind this is that in the past this defense was being misinterpreted by the courts in many jurisdictions which changed the inherent nature of this defense and leads to many unjust and improper decisions. Historically, this defense was interpreted for the benefit of prosecution which was wrong and further corrected by the courts. Afterwards it was found out that this defense has the capacity to turn the tables and can go completely against the prosecution or the authorities who conducted the undercover operations. As far as US is concerned these operations are widely accepted by the law enforcement agencies and as well as by the court only for specific cases

such as theft property disputes, judicial corruption, or prostitutions and so on but not for financial crimes which has changed in recent times.⁴

At this point the court also referred to the judgment of the Canadian supreme court where the court laid down the criteria to fix the liability of both the persons. According to this judgment it is the duty of the court to look into that whether the instigating authorities provide or create a circumstance for the accused to commit a crime without evaluating the actual mental state of the accused.⁵ As all these factors affect the validity of these operations in court of law. Therefore, it casts a duty upon the court as well as upon the investigating authorities to go with tool of investigation only in those situations where there are no other option to reveal the truth. If the answer is in affirmative then the court must intervene and examine that if any other reasonable person will act in the same manner as of accused or not. Along with it the court also examines the time, nature, and actions of the authorities. If it is found out that the authorities are misusing its power and inducing the person against whom the operation is conducted then it directly affects the admissibility of the operations as well as the evidences collected from this operations in court of law.

In addition to this the court also emphasised upon regime of these undercover operations and the defences of entrapment in United Kingdom and highlights the shift in the applicability of this defense in English court of law. Traditionally, the trend of conducting these operations was totally different where the investigating authorities were more inclined towards these operations. If it is found out that the crime is being conducted by the offender due to the inducement by the authorities then it only affects the quantum of punishment and did not lead to acquittal. The reasoning behind this opinion of the courts was that the operations were being conducted in the interest of society at large especially in the situations of detecting financial crimes.⁶ But this position has been changed in another landmark judgment of house of lords where the court specifically stated that this fact cannot be ignored that the nature of undercover operations forced the offender to commit some crime where the state official hides his/her identity and abet him to do the same. As these operations are being conducted by the authorities which somehow related to the criminal law. The most essential principle of criminal jurisprudence is mens rea and if court is unable to find out any malafide intention then it affects

⁴ Sorrell v/s United States (1932) 287 US 435

⁵ R V/s Mack (1988) 2 SCR 903

⁶ R V/S Sang (1980) AC 482

the entire validity of the operations and can go against the prosecution. Therefore, this defense is for the benefit of defendant and not for the prosecution.⁷

The point here is to be noted that this judgment addresses another important issue where instead of state agencies these operations are conducted by individual. In these types of cases the conflict arises not only with respect to the validity of the operations but also raises a serious question of infringement of fundamental rights. In practical terms this creates a lot of burden upon the judiciary as it is hard to establish the authority of conducting the same. As well as it is difficult to prove that all these evidences collected for the detection of financial crime is reliable or not.

The above discussion proves the primary argument that India has no laws and guidelines to regulate these operations and protect these rights. Although international conventions such as the United Nations Conventions against Transitional Organised Crimes recognise undercover operations in financial crime regimes. Article 20 of this convention states that all member states are allowed to induce special investigative techniques including undercover operations to combat financial crimes with the help of bilateral and multilateral agreements. Along with it, special training is being provided to the agent under Article 29 of the conventions. Similarly, the EU Financial Action Task Force lays down specific guidelines to combat money laundering with due recognition to human rights. However, it is important to include all these concerns and enact effective legislation for proper implementation.

Ethical Perspective on Under Cover Operations

One of the concerns that is often raised is that of transparency and reliability. The main element of this operation is secrecy where everything is covered with a shell that needs to be uncovered to reduce financial feuds. Due to the absence of any protocols or specific standards, the questions of transparency always find their way. In this respect, these agencies argue that at the time of deciding a team the agencies communicate all those things which are necessary for the operations including guidelines. However, it has been seen that these authorities often used force to admit those crimes and take arbitrary actions against the protocol in the name of gathering information. This led to another issue of proportionality. Investigative agencies must demonstrate the necessity for covert tactics by weighing the gravity of the crime and the

⁷ R v/s Loosely (2001) UKHL 53

likelihood that crucial evidence can be found using more conventional means. They have to weigh the damage done by the crime, the possibility of using alternative investigative techniques, and the invasion of privacy and liberty that comes with undercover operations.

In the Sahara Fraud case as well, the main allegations of the respondent were that the agencies used unproportionate means to admit as well as gather the evidence. In addition to this, they also alleged that during the investigation investigative agencies used tactics which were resulted in entrapment, a situation in which officers force the people involved to admit all those crimes which they have not been committed before the third party to show its evidentiary value under Section 26 of the Evidence Act. They contended that such activities could exert pressure or manipulation on people which is ethically wrong and leads to direct violations of principles of natural Justice.

In addition to this, a large amount of data is leaked by these investigative agencies as there were specific guidelines for the security of the data. Although Article 21 protects the right to privacy with reasonable restrictions there are no such reasonable restrictions being imposed upon agencies while conducting investigations. The main objective of these agencies is to understand the loopholes in the transactions and in this race, they forget the concept of privacy, dignity, and safety. These concepts are not only legal concepts that are enshrined in Article 21 rather this article is solely based on the ethical and moral principles which are not being followed in this case. At this time there were so many unreported cases of voyeurism, stalking, human trafficking, cybercrime etc committed upon the family members of the parties involved. It happened because there was no mechanism in order to adhere to this issue.

Conclusion and Suggestions

From the above discussion, it is concluded that undercover operations are considered to be the most effective investigative technique to combat financial crime. But it lacks admissibility in a court of law because there is no legal framework that governs these operations in India. It is the need of the hour to enact specific legislation to regulate these operations with due recognition of the ethical and constitutional issues. We cannot ignore this problem by saying that each investigative agency used different tactics while undergoing the undercover operations as each financial crime is different in its nature. As the essence of each financial crime is finding the loopholes in the entire transaction, therefore it is important to enact some

universal guidelines for the admissibility of the evidence in a court of law. Additionally becoming a party to an international convention does not suffice the purpose rather incorporation of these principles will serve dual objectives. On one hand, sss it promotes human rights and safeguards the interest of every individual and on another hand helps in marinating and building effective international relations.

In addition to this, it is important to understand that these operations raises serious issues with respect to individual's personal right heather it is part of fundamental rights or not. Therefore, it is recommended that the lawmakers before enacting any law should be mindful about the past results of conducting these operations. As if the results which are not so acceptable then there is no point of enacting any laws. Till the time, the government is unable to take any preventive steps it is advisable to not allow these operations rather go for other options such as whistle blowing and provides the reasonable protections to whistle blowers in order to combat corporate frauds. The reason behind this is that the laws regarding to the whistle blowing is already being enacted to some extent. Despite the fact that these laws lack in many aspects but it is good to work on existing laws as the enactment of new law can case undue delay which can lead to continuous violations of constitutional and human rights. At the same time can go against the ethical or moral standard of any legal system.

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