VERSTEHEN: A FUNCTIONAL IMPERATIVE IN MEDICO-LEGAL CASES†

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'Verstehen', a German word usually translated as 'understanding' or 'comprehension', has been developed into a concept of great social significance by Max Weber who together with Emile Durkheim is generally regarded as the founder of the modern sociology as a distinct social science. Durkheim's attempt to found a science of sociology was based on the scientific positivism of his day, where Weber's intellectual training in neo-Kantian school of philosophy led him to distinguish sociology as a social science from natural sciences.[1] The point of distinction is that, while we might wish to establish universal laws in the natural sciences, this was not the task of social sciences since their interest is in the causal explanation and understanding of social actions in their particular historical contexts. But at the same time, Weber argued, that human society was not a matter of chance but of "probabilities" because human beings mostly act rationally and this make the study of social interaction a science, and *'verstehen'*, an indispensable tool, a method par excellence of sociology for studying people's actions[2].

As a method *verstehen* enables us to have access to the meanings people give to their actions. It consists of placing oneself in the position of others to see what meaning they give to their actions, what their purposes are, or what ends they believe are served by their actions. In this process,

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1. At that time, the neo-Kantian school of philosophy was associated with the names of Wilhelm Windelband and Heinrich Ricket in Germany which distinguished between *phenomena* (the external world we perceive) and *noumena* (the perceiving consciousness).

2. See, Max Weber, THE METHODOLOGY OF THE SOCIAL SCIENCES (Glencoe: Free Press, 1949). This concept forms part of a critique of positivist or naturalist sociology which analyses human action from 'the outside' on the analogy of natural science.

the researchers or social scientists direct their attention towards 'interpretative understanding of inwardness and meaning of social action' as distinguished from direct observational understanding called 'evidenz'.[3] From this perspective, the conception of *'verstehen'* is based on the perceived advantage of the social sciences over the natural sciences. In the case of the latter, comprehension is only mediate; that is, we are concerned only with functional relationship and uniformities of the various elements collectively.[4] Whereas in the case of the former, our comprehension is immediate; that is, we are concerned with the subjective intention of the actors individually.[5] Thus, in the study of a natural phenomenon there is no inside story, and we try to understand it only as a dictum-an expression of law and nothing more; whereas, in the study of a social phenomenon there is always an inside story, a meaning in the human affairs which needs to be comprehended, although we cannot comprehend them fully as these are invariably mutable.

However, there is one perennial problem in understanding a social phenomenon - the problem of 'values', which are implicit in every human action. In fact, it is these values which make human behaviour meaningful, and therefore, these cannot be disregarded in the study of human actions. If this is so, then how to make the study of social actions scientific? In this context, Weberian sociology suggests a solution. It advocates 'value-neutral' or 'value free' approach, which simply means that social scientists should study the social actions objectively; that is, without allowing their own value-judgements to come in. Raymond Aron, a French sociologist, makes this thought clear by distinguishing, 'value judgement' from 'value reference'. According to him, 'value judgements' are personal and subjective. These depend upon the individual's own beliefs and values. Whereas, 'value references' enables us to deal with social problems 'objectively'. What, therefore, according to Aron, Weberian sociology emphasises is that in understanding a social action, we should avoid 'value judgement' and not 'value reference'.

It is in this backdrop suggested that *verstehen* is an indispensable tool for a judge who bears the responsibility of understanding a 'human action' from 'within', rather than merely from 'outside', in the course of dispensation of justice. This is particularly true in medico-legal cases that are increasingly coming to the fore in the wake of commercialization of medico-legal services under the law of consumer protection.

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3. The term 'evidenz' refers to the 'direct observational understanding'.
4. Such as how the Earth revolves around the Sun, or rotates about its axis.
5. Such as, why the doctor performed an operation in a particular way.

In medico-legal cases, the courts are invariably concerned with the activities of the doctors as professionals. A 'profession' involves the idea of an occupation which requires a systematic body of knowledge through specialised intellectual training, high ethical standards, a 'self-less' non-financial orientation of service to the public interest, and autonomy over work. The occupations which are regarded as professions have four characteristics[6]: first, the nature of the work is skilled and specialized and a substantial part of it is mental rather than manual; second, commitment to moral principles goes beyond the general duty of honesty and a wider duty to community may transcend the duty to a particular client or patient; third, professional association regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; fourth, high status is enjoyed in the community. Thus, the moral commitment to serve the community with wide discretion and professional anatomy is one of the key attributes of the profession, as distinguished from an occupation which is substantially nothing but the production or sale, or arrangement for the production or sale of commodities.[7]

Medical profession in its work orientation is supposed to serve the suffering humanity. It entails exclusive concern with intrinsic rewards and performance of a task which is typically associated with personal services involving confidentiality and high trust.[8] As an organizational form, it includes some central regulatory body to ensure the standards of performance of its individual members, a code of conduct, careful management of knowledge in relation to expertise which constitutes the basis for professional activities, and finally the control of members, selection, and training of new entrants. In India, the medical practitioners are governed by the provisions of Indian Medical Council Act of 1956. The Code of Medical Ethics is made by the Medical Council of India, which regulates the conduct of the members of the medical profession. The Code also provides for disciplinary action by the Medical Council of India or State Medical Councils against a member of professional misconduct. All this shows that the professional activities are qualitatively distinct from the ones in other occupational pursuits, and, thus, are in need of a differential treatment.

However, the increasing commercialization of medical services is causing a shift in the service orientation of some of the members of the

6. See, Rupert M. Jackson and John L. Powell, PROFESSIONAL NEGLIGENCE cited by the Supreme Court in *Indian Medical Association* v. *V.P. Shanta*, AIR 1996 SC 550.
7. Scruttom, L.J. in *Commissioner of Inland Revenue* v. *Maxse*, 1919 IKB 647 at 657.
8. See, OXFORD CONCISE DICTIONARY OF SOCIOLOGY (1994) at 321-22.

medical fraternity from 'commitment ' to 'callousness'.[9] This has led to the spurt of medico-legal cases, accusing the doctors on grounds of deficiency of one kind or the other in medical services. The resolution of the conflict problems between the doctors and the patients by the courts requires a differential approach - an approach which is qualitatively different from the one needed to resolve disputes between the ordinary consumer and the commercial producer. Since the doctors are professionals with an area of wide discretion and autonomy, the courts need to adopt *verstehen* as a methodological tool for examining the validity of their actions. In other words, through, *verstehen* the courts would be able to arrive at the full explanation of a doctor's action.

Alfred Schutz in his PHENOMOLOGY OF THE SOCIAL WORLD (1932), however develops a more elaborate conception by extending Weber's work and exploring the formation of goals from the streams of experience. This leads him to distinguish because motives (which lie in the past experience) from 'in order to' motives '(which point to a future state of affairs that the actor wishes to bring about).[10] In the context of medico-legal cases, this only means, 'because' motives would enable the court to decipher and decide about the doctor's actions contextually; whereas the principle propounded by the court on the basis of which the decision was rendered would serve as 'in order to' motives, that is, a valuable guide for the future.

Besides, there is yet another potential benefit of *verstehen* methodology. While applying the objective laws contextually, the courts are at once enabled to be creative and competent to deal with the increasingly varying situations in a pragmatic manner. Speaking conversely, if *verstehen* is avoided or ignored, we are likely to miss the meaning of the actions, putting thereby the various activities into a broad category, whereas these might be belonging legitimately to different ones.

The potentials of *verstehen* methodology we may now examplify throught the analysis of two very recent Supreme Court decisions that have been flashed across the country by our national press; namely, the *Spring Meadows Hospital* case[11] and the *Apollo Hospital* case[12].

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9. See. Jyotica Pragya Kumar, *Development through Medical Profession in the Wake of Science, Technology and Communication (A Viewpoint in Sociology)*, presented at the XXV ALL-INDIA SOCIOLOGICAL CONFERENCE held under the aegis of the India Sociological Society at Aligarh Muslim University, Aligarh, December 17-19, 1998.
10. See, *supra* n.8 at 256.
11. See, THE TRIBUNE, March 26, 1998, now reported fully as *M/s Spring Meadows Hospital and Another* v. *Harjol Ahluwalia*, AIR 1998 SC 1801.
12. See, THE TRIBUNE, November 17, 1998, now reported fully as *Dr. Tokugha Yepthomi* v. *Apollo Hospital Enterprises Ltd.*, 1998 (6) Scale 230.

In the *Spring Meadows Hospital* case, the Supreme Court held the hospital liable for reducing the life of a young child to a mere 'vegetative state'. Accordingly, it approved the award of Rs. 12.5 lakhs as compensation on grounds of negligence of the hospital doctor in favour of the child by "taking into account the cost of equipments and recurring expenses that would be necessary" for sustaining the said child in that state,[13] and Rs. 5 lakhs in favour of the parents of the child "for their acute mental agony and life long care and attention which the parents would have to bestow on the minor child".[14] This is how the conflict was resolved by the court. However, the use of *verstehen* would enable us to see the story from within and thereby reveal certain facets of the case which otherwise do not come to light. Their articulation, in our view, is of futuristic import as it provides a meaningful direction to the society at large. In this case, *verstehen* methodology requires us to ask in the very first instance, 'why did the parents of the child go to the law court against the hospital doctor?" This question is pertinent in our cultural context, because in India the doctor is regarded as a repository of extreme trust and confidence by the patients, and their yielding of themselves to his judgement is almost unqualified. But in the instant case, the answer to the pointed question is not far to seek. The sequence of the story suggests that the parents of the child must have felt terribly injured by the reckless conduct of the concerned doctor. Firstly, he himself was supposed to administer the injection, which he quite thoughtlessly, delegated this duty to a nurse who was not quite qualified to do the job. Secondly, he himself was not even present at the time when the injection was given to cover up any anticipated consequences like the sudden stopping of the heart. In fact, the absence of the doctor caused the undue delay in reviving the heart which eventually resulted in reducing the child to a mere 'vegetative state'.

It is indeed true that the court approved the award of compensation in favour of the child on grounds of negligence of the doctor, but the amount of compensation, instead of directly relating to the act of negligence, became tagged to the cost of equipment needed to sustain the child in the 'vegetative state'. Suppose the child would have died instead of being reduced to that pathetic state, obviating the need for any expensive equipment. In that case, what should have been the basis for computing the compensation. Nil? Certainly, 'no'. doing *verstehen* suggests that no amount of damages would ever be enough to compensate the irreversible loss. What is sought to be achieved through the award of damages, therefore, is the objective : to recompense the injured feelings on the one

13. *Supra* n.11, para 13 at 1807.
14. *Id.* at 1808.

hand, and to ensure that such a negligent act does not recur. The amount of compensation may, however, be computed in the same manner as the court did in order to recompense the agony of the parents of the child.

Verstehen is this case also enables us to have a peep into the motives of the Spring Meadows Hospital management that prompted them to adopt the so called "humanitarian approach".[15] When the child was discharged from the All India Institute of Medical Sciences, the Spring Meadows Hospital which itself advised the parents of the child to take the child in the pathetic state to the Institute lost no time to make an offer to take care of the child "even without charging any money for the services rendered" by them.[16] The court did disregard the plea of the so-called humanitarian approach of the hospital authorities because, in their view, "the mental agony suffered by the parents" would remain "so long as they remain alive".[17] *Verstehen* on this score, however, allows us to go deeper and discover the underlying 'counterfeit role'. The Spring Meadows Hospital's 'humanitarian approach' was simply a ploy to preclude the impending legal liability arising out of their negligent action. This sort of seeing from within through *verstehen* would enable the courts to come up with articulate solutions which are more conducive to social order and social stability.

We may take now the *Apollo Hospital* case for analysis on the basis of *verstehen*. This is the case of a doctor whose proposed marriage to a young lady was called off on the ground because his blood report testifying HIV (+) was revealed to her by the Apollo Hospital - the hospital conducting the test at the time of his blood donation. The doctor sued the hospital for damages on ground of violation of the Code of Medical Ethics; namely, the disclosure of his HIV (+) status to the lady betrothed to him. After pursuing the Hippocratic oath,[18] which constitutes the basis of the International Code of Medical Ethics,[19] and the Code of Professional Conduct made by the Medical Council of India,[20] along with the guidelines formulated by the General Medical Council of Great Britain on HIV infection and AIDS,[21] the Supreme Court held that the rule of confidentiality is not absolute, because it permits disclosure in the circumstances under which "public interest would override the duty of confidentiality, particularly, where there is an

15. *Id.*, para 14 at 1808.
16. *Ibid.*
17. *Ibid.*
18. See, *supra* n.12, para 7 at 234.
19. *Id.*, para 9 at 234-35.
20. *Id.*, para 10 at 235.
21. *Id.*, para 16 at 236.

immediate or future health risk to others".[22] Likewise, the court rejected the doctor's plea of right to privacy on the ground that it is also "not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals, or protection of right and freedom of others"[23]. Since the lady to whom the doctor was likely to be married was saved by the timely disclosure of his HIV (+) status, the same would thus not be considered violative of either the "rule of confidentiality" or "right of privacy".[24] This is how the doctor's appeal to the Supreme Court was dismissed on the merits.[25]

Verstehen in this case, however, brings to the fore a couple of issues which we consider crucial for driving home the requisite social message. The ruling of the Supreme Court in terms of popular perception simply means that "right to marry is not absolute".[26] This is something whose impact is confined to individuals as individuals, and not individuals as members of collectivity, namely the society at large. But we are given to understand that the role of the Supreme Court is not just confined and limited to resolve the conflict between the two contesting parties before it. It goes much beyond that. Its decisions are said to be "the law" - the real operative law, directing the destiny of the whole nation.[27] But the decision in the instant case does not seem to go that far. It does not critically bring into focus the doings of the appellant who himself is not just an ordinary lay person, ignorant of the potential hazards of AIDS. He knew that he was suffering from HIV (+). He knew of this furious fuming fact much before the proposed marriage to the young lady.[28] And, as a fully qualified surgeon of Grade-I, it must also surely be within his competent knowledge that although he himself was not manifesting the disease symptoms as such at the time,[29] yet he was the potential person to transmit the infection to others, and especially to his would be marriage partner.[30] The legal

22. *Id.*, para 17 at 236.
23. *Id.*, para 27 at 238.
24. *Id.*, para 28 at 238.
25 *Id.*, para 45 at 240.
26. See. THE TRIBUNE, November 17, 1998.
27. Article 141 of the CONSTITUTION OF INDIA commands that the law declared by the Supreme Court of India shall be binding on all the courts within the territory of India.
28. The sequence of events suggests that the doctor came to know about his HIV (+) status on June 1, 1995, when he donated blood, whereas he proposed marriage in the month of August, 1995, see *supra* n.12, paras 3 and 4 at 233.
29. The incubation period of AIDS is said to be as long as ten years.
30. See the case history of the young couple, reported in THE TRIBUNE, January 11, 1999 at 5, under the heading *Quaks 'Spreading' AIDS*, revealing that the husband who died in PGI on October 6, 1998, got infected by his wife, who in turn (having no history of adultry), possibly got the same through blood transfusion and died at PGI about a year ago.

consequences of such an act, however, have been rightly brought by the learned judge in the light of the express provisions of the Indian Penal Code.[31] It is categorically provided that if a person, negligently or unlawfully does an act which he knew was likely to spread the infection of a disease, dangerous to life, to another person, then he would be guilty of an offence, punishable with imprisonment for a stipulated period, or with fine, or with both.[32] Since the appellant doctor was suffering from the dreadful disease of AIDS, his proposed marriage, if fructified, would make him guilty of the offence.[33] It appears that the steps which the doctor had taken towards the culmination of marriage namely the betrothal, with the full knowledge that he was the carrier of AIDS, were not sufficient to hold him guilty under the law. Isn't it strange? What is the point in crying over the spilt milk?

On the revelation of HIV (+) status, the appellant doctor is reported to have been severely criticized and ostracized by several people including the members of his own family and the persons belonging to his community.[34] Consequently, he had to leave his job at Kohima where he was working in the Nagaland State Health Service as Assistant Surgeon Grade-I, and started working and residing in Madras.[35] However, on this count we find no comments or analysis in the judgment of the Supreme Court, although as a matter of first principal it is axiomatic to say, 'he who comes to the court to seek justice must come with clean hands'.

Be that as it may, *verstehen* prompts us to ask: why was the doctor criticized and ostracized by the members of his own family and community? Why was the reaction so strong as made him leave his service as well as home and hearth? In the normal course of life, sociological insights tell us, 'sickness' and 'healing' are well-developed social activities involving publicly organized, say health insurance scheme and large scale hospitals for housing the sick. This is so because illness represents a form of deviance from the normal duties - a deviance which draws sympathy rather than any negative sanction. Infact, within the value system we invariably make the sick person to retire temporarily from his normal duties (sick leave with full pay), and even entrust him to the care of a specialist so that he regains his health. After all, the maintenance of health is considered an

31. See sections 269 and 270 of the INDIAN PENAL CODE.
32. *Supra* n.12, para 40 at 239.
33. *Id.*, para 41 at 240.
34. *Id.*, para 4 at 233.
35. *Ibid.*

overriding practical necessity in all societies.[36] In this respect, particularly in relation to AIDS patients, the judgment of the Supreme Court admirably adds to our understanding.[37]:

> ...the patients suffering from the dreadful disease 'AIDS' deserve full sympathy. They are entitled to all respects as human beings. Their society cannot, and should not be avoided, which otherwise, would have bad psychological impact upon them. They have to have their avocation. Government jobs or service cannot be denied to them....

But then, in the instant case, it is worth pondering, why did the doctor's own kith and kins acted on the contrary? Instead of sympathising, why did they ostracize him? In the absence of full facts before us, we are left only to surmise and reconstruct the requisite sequence contextually.

The strong adverse reaction of the members of the doctor's own family and community must have been due to his own 'moral failures' some time some where. His picking up of the infective deadly disease must have been, to use the perspective words of the learned judge, "the product of indiscipline of sexual impulse" instead of by catching it, say, while performing an operation as a surgeon.[38] In the latter case, the doctor could not be held personally responsible for his pathetic condition. If that was the causal source of the deadly disease, the societal reaction would have been quite different. The society might have made doctor's recovery from the deadly disease the centre of their prime concern. If it was ' incurable' the society still might have 'prayed to God' to save the doctor to serve his own subjects, if for nothing else. On the other hand, if the doctor was found to be a victim of his own misdoings, his conduct needed to be censured by the Supreme Court in a manner a judge of the court in St. Charles (USA) did most recently,[39] so that it could serve as a warning device. The Supreme Court's condemnation of illicit, immoral and inexcusable acts would have

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36. See, 'Talcott Persons' penetrating analysis on the sick role as a part of a case study of modern medical practice to illustrate the principal elements of the social system in his classic work, *Social System* (1950).
37. *Supra* n.12 para 44 at 240.
38. *Ibid.*
39. See, THE TRIBUNE, January 10, 1999 at 1, under the heading *Injected with HIV*. The judge Ellsworth Cundiff was dealing with a man who injected his son with AIDS virus to avoid paying child support. He convicted him of injecting AIDS-tainted blood into the boy, who was then just 11 months old during a hospital visit in 1992. The child, now seven, was diagnosed with AIDS in 1996. While handing down the maximum sentence (on December 1998), for the first degree assault, the judge said he wished that the sentence could have been tougher.

served as Emile Durkheim puts it, a sort of punishment 'to heal the wounds done to the collective sentiments' by the degrading doctor.

Use of *verstehen* by the courts is, thus, a must methodology. It is indispensable in medico-legal cases, because in that we deal with professionals who enjoy a far greater degree of autonomy and discretion in serving the society. Their doings (and misdoings) cannot be comprehended fully without having the 'inside view' of their activities, and for this the discipline of sociology commends the cultivation of *verstehen* methodology as a part of continuing legal education. Else, the courts would continue to be caught in the vicious cycle of what we term 'teleology' in sociology.