CHAPTER-II

ORIGIN AND HISTORICAL DEVELOPMENT OF THE RULE OF CHANGE IN CIRCUMSTANCES
1. INTRODUCTION

Before we get into the details of explaining and examining the doctrine, it is important to discuss the origin and historical development of the emerging concept of changed circumstances. Here we would study the evolution of the concept in its historical background because only that would lay the foundation of the theory in its legal and judicial aspects. The evolution of the theory would be traced back particularly during the 19th & 20th century because that is the time when International business and trade deepened its roots. The historical significance of the concept would also be discussed with respect to major business centers like United State of America, United Kingdom and India. The scientific opinion of the legal scholars and advocators would also be described and discussed.

2. ORIGIN

The concept traces its origin back, from the legal concepts prevalent in Greece and Ancient Rome. The principle discussed in this rule is one of the doctrines that can be traced back to the legal concepts/doctrines in Greece and Ancient Rome and all other Nations of the world which were ruling under the 'principle of concluded contracts'.

3. ANCIENT PERIOD

In ancient Greece this concept was followed or popular because according to it the contracting parties could modify or assimilate the changes in the concluded contract. Therefore, to avoid unnecessary exploitation of the theory, in ancient Greece, treaties were signed only for the limited period (i.e. the period so defined in the contract) so that if necessary, those contracts could later be reviewed and modified, an account of occurrence of
unforeseeable events during the term of the contract. Professor "Redslobs" while quoting Polybe gave the following guidelines to the people of spart.

"If circumstances still are the same as were at the time of contract and unity with Eloliens exists in its original shop, your policy should not deviate from the original path, BUT if the circumstances referred above, changes as a whole, it will be justified that the proposals made to you are like a new order which has so far not been finally decided and should be consulted more."1

Therefore Greeks made contracts for limited period only. Sources suggests that strong traces have been found in Roman law. A famous Roman text contained the maxim:-

"There is no obligation to the Impossible."2

Roman Law developed a doctrine of impossibility to deal with impossible performances. In ancient Roman law we find some regulations about unforeseeable events, even at the time of the formation of a contract or treaty and documentary proofs are also available wherein it is suggested that contracts especially economic contracts were cancelled because of the change in circumstances. Therefore studies suggest that in Ancient Roman law, preliminary understanding of clause Rebus existed.

The clause "Rebus Sic Stantibus" suggests that the binding strength of contracts has religious roots. Its history and development to the current stage can be traced since the early times, wherein, it is stated in the Old Testament, which is sacred to Christians as well as Judaism. It asserts:-

"When a man makes a vow to the LORD or takes an oath to obligate himself by a pledge, he must not break his word but must do everything he said."3

In the new testament also, Jesus commands his followers to honor their word:

"Let your 'yes' be 'yes' and your 'no be 'no"4
4. MEDIEVAL PERIOD

In the Medieval period the real origin of the clause 'Rebus' can easily be traced as principles ethic in the writings of the scholastique: St Jamas d’Acquin. He writes:

"The promisor is not faithless towards his promise, if because of changed circumstances, he fails to fulfill his promise"  

Another philosopher of the west ‘Spinoza’ firmly believed that the treaties and contracts exist as long as cause of creating them survives. It gave a religious and moral feel to the doctrine and the sense of the doctrine of ‘Rebus sic stantibus’ was shifted to religious authorities of Christianity, who were the legislator of the principles of law on legal and judicial affairs in that era. Yet another scholar of that era writes:

"It should always be kept in mind that the legal and judicial act or the provisions of the contract were framed without considering a change in the circumstances at the time of formation of contract"

During the medieval time the factor – morality was also attached and the doctrine was interpreted on new terms. The medieval Canon lawyers, however, turned impossibility and fault into basic principle of moral responsibility. The Canonists concluded, after some initial hesitation, that one could not be morally obligated to do impossible. Famous jurist ‘Gratian’ had said-

"When every alternative cause of action is sinful, one must choose the lesser sin."
If Gratian were right, a person might find it impossible not to sin since every possible course of action is sinful. Later canonists rejected his position. By definition, one is morally obligated not to commit a sin. They argued that, one could not be obligated to do the impossible.\(^9\)

Hence, the Canon lawyers concluded that a person who was at fault because he failed to use due care was not only morally guilty\(^{10}\) but also, morally obligated to make the compensation for any harm caused.\(^{11}\) Since the Canon lawyers were concerned with moral responsibility, it is not surprising that they concluded that a person can be morally responsible only when he could have acted otherwise and was at fault for failing to do so.

Nevertheless, their conclusions about moral responsibility got into tension with the Roman limitations on civil liability. Another famous legal scholar of the era:-

‘Sir Albericus Gentilis’ attached International status to this doctrine. Sir Albericus Gentilis described the doctrine as the manifestation of general legal principle that could be executed both in private law and International law.

It can be safely stated here, that clause ‘Rebus sic stantibus’ had its inception on religious and moral platform, and then was given judicial description by Christianity and later on entered the public justice i.e. On one hand it entered into civil law and on other into International law (droit des gens).\(^{12}\) Another legal scholar ‘Bynkershock’ strongly condemned the clause Rebus as he considered it dangerous for conventional law on grounds that it annihilates effects of ‘Pacta sunt servanda’ According to him if circumstances, which are the main cause for the conclusion of
contract, changes then such a change in circumstances does not permit unilateral cancellation of the treaty, rather the parties should come to an agreement to review the contract. The treaty/contract/agreement can be cancelled unilaterally only when it is mentioned so in the contract itself.13

Whereas, ‘Richard Zouch’ shares different opinion altogether. According to him Doctrine of Rebus is nothing but ‘Right of conservation’ of the contracting countries because when as per the treaty, the very existence of the country confronts with a danger due to changed circumstances, the said country has a right to officially announce the cancellation of contract otherwise the contract may be revised with the consent of both the parties.14

“Grotius”, the father of International law, describes that the Doctrine of Rebus is similar to the principles of Civil law but adds that to invoke this clause, circumstances should have a fundamental change in them. The clause would apply only when the circumstances and conditions of the contract are completely changed.

But ‘Vattel’ gave the doctrine of clause tacit. It was based on the norms of public justice and is executable both in internal & foreign law. According to this new doctrine he states:-

“Every agreement can be cancelled when the circumstances, which were significant at the time of conclusion of the contract, are changed and do not exist anymore. There is no doubt that, all agreements are formed under the clause tacit because, parties to the contract officially accept the purport of contract keeping in view of the prevailing circumstances, which were of basic importance for
them and could be regarded as the fundamental condition for the existence of the contract.”

Furthermore he says:

“Even the law ruling over some of the affairs will not be applicable except that, those affairs remain according to their initial circumstances.”

In 13th century, scholars like Thomas Aquinas used Aristotle’s theory of human responsibility to explain the various conclusions drawn above. According to ‘Thomas Aquinas’ views choice was an act of will, and one could only choose what was possible. He promoted the idea that a promise to do impossible is not binding.

Later in 16th century, the same approach was followed by a school known to historians as the “late scholastics.” They made an attempt to synthesize Roman law with the moral philosophy touched by Aristotle and Acquinas. The late scholastics borrowed the conclusion that one cannot be obligated to keep an impossible promise.

In the 17th and 18th century, the same view was adopted by members of Northern Natural school of law. ‘Samuel Pufendorf’ claimed that seller was never liable for failing to do the impossible but if he were at fault in making the promise only, the buyer could recover all or any loss suffered in course.

The deeper we got into Roman laws, the more dimensions we got to know. The two concepts launched here are – Impossibility and Fault. Impossibility applies when the performance is impossible from the beginning. Rule relating to the fault comes in when the performance becomes impossible
subsequently. Hence it becomes noteworthy to point out here why
Natural lawyers were always at angles with Roman law. The reason
being, that natural lawyers had a theory when the person was at
fault in the moral sense, and the Roman law imposed a liability
even in absence of fault. It has come to the notice now that this was
the biggest weakness of natural law tradition and because of this
loophole it never succeeded in finding a place for strict liability.20

5. MODERN ERA

In the late 18th century, 'Thomasius' in Germany and 'Le
Brun' in France attacked the traditional view that there were
degrees of fault and that the degree for which a person is liable
depends upon the contract in question21 'Bigot Preameneu'
rejected that old view as useless and overly subtle.22

Thus, in 19th Century, jurists inherited a body of law in
disarray.

'Kluber', a prominent lawyer of this era believed that the
clause Rebus can be applied only when the change in circumstance
causes disorder in the basic principles of performance of contract.

'Hefter' also pointed out:

"When the change of circumstances of the time of contract
weakens the basic conditions of treaty, an exception could be
considered with regard to the doctrine of Pacta Sunt Servanda.23

The approach of French commentators was confusing.
French legal experts of this age like 'Toullier' and 'Duranton' each
espoused a clear theory but neither was accepted. 'Toullier'
claimed that the code had, in fact established only one standard of
liability in contract as well as tort i.e. liability for 'Culpa
Levissima’. Duranton stated that the code had preserved the traditional theory of degrees of fault depending upon the type of contract. But, the later jurists rejected both views.

Demolombe and Laurent also claimed that no one is liable for impossible. They endorsed the Roman rule that performance will only be excused when it is impossible & impossible objectively for anyone i.e. not only impossible for one party but for everyone.

Scorning such pragmatic confusions in 19th Century, Germans also formulated coherent definitions of impossibility and fault. They tried to state the ultimate conceptions on which the law rested. They concluded that it was logically contradictory to say that a person is obligated to make an impossible performance. The obligation to do something presupposes the possibility of doing it.

Finally, they concluded that logically, Fault could only mean failure to use the care that a person could reasonably be expected to use. As Puchta said, liability for any higher degree of care is a liability for chance. As Windschied said: “it is not only the liability imposed because one was negligent but liability imposed despite the fact he was not.” Hence, the solution of the jurists passed into German Civil code. In the late 19th Century the importance was shifted to frustration of purpose from Impossibility of performance. In the year 1874, for the first time, the sense of the change of circumstances and frustration of purpose was approved in the judicial precedent of England. The inception of this evolution was from the case of Union Marine Insurance Co. Ltd. Vs Jackson.
The claim of frustration of contract because of the change in circumstances was laid down in other different cases and was readily accepted by some of the courts.

In 20th Century, ‘Williston’ supported the original common law principal - “Impossibility was no Excuse” and that 19th Century cases made inroads in the principle.31 ‘Max Rheinstern’ also agreed to it. He thought that impossibility first became a defense in 1863 in the leading case of *Taylor v Caldwell*32 where, the judge ‘Blackburn’ excused the owners of a music hall, which had burned down, from providing it for a performance.33

According to Williston and Rheinstern, he took this rule from the civil law.34 Later on Powell, W.W. Story, Leake, Pollock and Willistone all said that performance was excused by events that made it absolutely and objectively impossible, but not by those that merely made it impossible for the promisor.35

This view passed on to the United States First Restatement of Contracts and is preserved, despite a change of vocabulary; the same is preserved in the Second Restatement of contracts also.

“George Bernard Shaw” is reputed to have said that England and America all two countries separated by a common language.”

Position in different Countries

United States of America

The Doctrine of Commercial Impracticability in American law was passed for the first time in the year 1973 in the Uniform
Commercial Code (U.C.C.). According to it if in a case the performance of contract gets more expensive due to unexpected change in circumstances or events it would render it commercially impracticable. The unreasonable hardship, more expensive, unexpected loss etc leads to commercial impracticability. Therefore in such cases, the doctrine can be invoked. The approval of the term Commercially Impracticable was first laid down in section 454 of the law of contract in year 1930 and then it was passed in year 1943 in U.C.C. (Uniform Commercial Code) and then the latest reform took place in year 1950.36

United Kingdom

Frustration is used to cover cases of impossibility of performance as well as cases where performance becomes senseless.

America flirts with the vaguely defined doctrine of Impracticability but England claims its firm stand on this traditional rule—

“A contract will only be frustrated if the substance of it has become impossible or illegal or the commercial purpose of it has been completely destroyed.”

France

It refuses relief for hardships as to contracts in private sector but gives relief under the doctrine of Improvisation in administrative tribunal for supervening hardships in performance of government contracts.
Hence, we can say that the Traditional Doctrine in both systems, English as well as American legal system have supported the doctrine of ‘Pacta sunt servanda’.

"Agreements must be respected though the heaven falls."

In many legal systems the traditional doctrine continues to receive solid support, and, relief for hardship is limited to these two doctrines. Either performance is made impossible by ‘Force Majeure’ and the contract disappears or the performance becomes impossible and the contract has to be performed at whatever cost. In others, hardship provides an additional ground for the discharge of a contract or for its adaptation to changed circumstances.

The traditional rule that hardship short of impossibility is no excuse for non-performance of a contract and the modern rule of providing relief on grounds of hardship are not the only solution employed by legal systems.

Hence the rule of unexpected circumstances is nothing but Unforseeability in Civil law. It is also popularly known as Doctrine of “Rebus Sic Stantibus.” In French we call it “Theories de l’ Imprevision.”

Some countries have rejected it, others have adopted it through the court’s constructed provisions in their codes, yet others have expressly adopted it in their coded legislation.

6. REVIEW

The conclusion derived from the above discussion is that this concept or the rule can be traced since the Ancient time. In this discussion its origin and historical evolution has been traced from the Ancient Era through the Medieval Times and to the Modern
Times. It suggests that the effect of altered circumstances on the performance of contract had been under consideration since long. The whole process of its evolution was going on in the minds & opinions of scholars and experts since ages. Much attention was paid to it in the last century and hence today we see its successful inception in some major legal systems of the world. The impact has been so breathtaking that the reflection is seen in judicial systems of many countries.

It would be noteworthy to conclude the journey of its evolution at this point. Sources have suggested strong traces since ancient times. They are very strongly imbibed in the Roman law. Roman law developed the Doctrine of Impossibility to deal with Impossible Performances. Canon law also developed the law of changed circumstances to deal with unexpected events that made a performance of greater or lesser value to each party.

In the medieval and early modern period, jurists developed philosophical and moral explanation of these doctrines. With time the explanations were simplified, modified and interpreted in various ways. Today, to many modern jurists both doctrines defy rational explanation.

Nevertheless if we look at the historical development of the doctrine closely, we would find that there is much to be learned both positively and negatively.

Negative part is that the jurists were never able to decipher a good explanation of the Roman text governing Impossibility. According to their explanation no one could be bound to do the impossible – which simply didn’t square with the texts. Positive part is that they did develop a good interpretation of the effect of
unexpected circumstances. If the concept is understood properly and rationally, it explains why relief is sometimes given when performance becomes impossible, which is a weak link in strengthening International contracts in today’s business oriented world.

By the way of its interpretations by various jurist and scholars and legal experts the concept or the rule finds its place in many legal systems of the world in one form or the other.
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