

1951 REFUGEE CONVENTION: A COMPREHENSIVE CRITIQUE

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Introduction

A refugee is person who is outside his country of origin having a well-founded fear of persecution because of his race, religion, nationality, membership in a social group, or political opinion; and is unable or unwilling to avail himself of the protection of the country, or to return there for fear of persecution.

It was in twentieth century that there was a need felt to have laws to protect the interests of the people who were displaced due to war. The various international conventions provided for such provisions which played a significant role in safeguarding interests of refugees. But these conventions were limited to providing protection from specific instances of persecution. One such example can be deciphered from the convention that dealt with displacement of people due to Bolshevik Revolution in Russia in 1917. The main thrust of the earlier conventions was to facilitate travel and identity documents to the refugees in question. Subsequently various conventions developed which gave a broader meaning to the definition of a refugee. The first one was in the year 1933 which dealt with providing international status to refugees. Presently it is the 1951 convention which mainly deals with providing protection to the refugees. It can in other words be termed as Magna Carta of the refugee convention.¹

¹ Hyndman, Patricia, The 1951 Convention Definition of Refugee: An appraisal with particular preference to the case of Sri Lankan Tamil Applicants, Human Rights Quarterly, Vol.9, No. 1 (Feb, 1987), pp.49-73, The John Hopkins University Press, available at <http://www.jstor.org/stable/761946>, last visited on 26th November, 2011

Application of this convention

This convention deals with both the situations wherein refugee status could be granted or refused. According to this convention and 1967 protocol, the term refugee applies to any person who is considered a refugee under the arrangements of 12th May 1926 and 30th of June 1928 or under the conventions of 28th October 1933 and 10th February 1938, the protocol of 14th September 1939 or the constitution of international refugee organisation.²

This also includes people who due to events occurring before 1st January 1951 and owing to various other factors have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion and also those who are outside the country of their nationality and are unable or, owing to such fear, are unwilling to avail the protection of that country. A peculiar situation that is also covered under this convention is of people who do not have a nationality and being outside the country of their former habitual residence because of such events, are unable or, owing to such fear, are unwilling to return to it.³

Further this convention has been supplemented by other conventions which have further broadened its horizon or it can be said its applicability, such as The Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa, a regional treaty adopted in 1969 that added to the definition found in the 1951 Convention a consideration that included, any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.⁴

In 1984, a colloquium of Latin American government representatives and distinguished jurists adopted the Cartagena Declaration which if persons who flee their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal

² Convention and Protocol relating to the Status of refugees, available at <http://www.unhcr.org/3b66c2a910>.

³ Id

⁴ Jastram, Kate and Marilyn Achiron, Refugee Protection: A guide to international Refugee law, UNHCR.

conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order are to be given protection under this act.⁵

The 1967 Refugee Protocol which was subsequently added is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. The Refugee Convention and Protocol cover three main subjects:

- The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status
- The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refoulement, to a territory where their lives or freedom would be threatened
- States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention

By acceding to the Protocol, the member States have agreed to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet most of States have preferred to accede to both the Convention and the Protocol. Hence it can be said that the, States have reaffirmed that both treaties are central to the international refugee protection system.⁶

It seems that over the years the definition of 'refugee' has been developed to cover all the aspects of refugee status. However, it is also observed that still there are certain issues which are not addressed by these conventions. These issues involve certain practices that are deep rooted in the culture of certain areas and people seek refuge to escape such anomalies. The concern is that these issues are either not covered or do not fulfil the criteria of the present convention with its supplements. The following case studies further substantiate the lacunae in the definition.

⁵ Id

⁶ *Supra* n.2

The case of Asylum and the doctrine of internal flight in the light of HJ (Iran)

One of the controversies that surround the 1951 convention is sexuality as the grounds of an application for refugee status. This contention comes into limelight when the provision regarding persecution is discussed. This case concerns homosexuals who are discriminated due to their very orientation. The state of Iran persecutes these people because they are presumed to be a dishonour to the societal setup and community orientation of that area. It was held that if there exist a material reason for the applicant living discreetly on his return would be fear of persecution which would follow if he were to live openly as a gay man then in that case the place where such a person seeks refuge must be granted the same. If such a person has a well-founded fear of persecution to reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the convention exists to protect i.e. the right to live freely and openly without fear of persecution.

It was also asserted that the principle that no change of behaviour, however modest, to avoid persecution can be demanded of asylum seekers, because the very act of making a modification demonstrates the well-founded fear of persecution from which the Refugee Convention protects him.⁷

In order to decide the granting of asylum on basis of sexual orientation International refugee law needs to be considered. UNHCR has also made recommendations and guidelines which set benchmarks to which national legislation, regulations and practice that should be followed in member states. In 2007, a group of 29 human rights experts launched The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. These principles are an attempt to apply existing international human rights law in areas of sexual orientation and gender identity. Although these principles have no legal validation, but these have been supported by several countries. The 23rd principle deals with the right to asylum, which says that:

⁷Buxton, Richard, Asylum and doctrine of internal flight in light of HJ(Iran), C.L.J, 70(1), 41-49, available at <http://login.westlawindia.com>, last visited on 27th November

“Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, because of sexual orientation or gender identity.

States shall:

- a) Review, amend and enact legislation to ensure that a well-founded fear of persecution because of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;
- b) Ensure that no policy or practice discriminates against asylum seekers, on the basis of sexual orientation or gender identity;
- c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, based on that person’s sexual orientation or gender identity.”⁸

The UNHCR provides an analysis of the right to claim asylum on the grounds of sexual orientation according to the 1951 Refugee Convention and its 1967 Protocol, following prevailing international legal interpretation and custom in its Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.⁹ The Guidance Note also serves as guidelines for countries in forming and implementing legislation and regulations. Another practical overview of the current jurisdiction with regards to the rights of asylum on grounds of sexual orientation is the

⁸ Yogyakarta Principles, <http://www.unhcr.org/refworld/docid/48244e602.html> and Michael O’Laherty and John Fisher, “ Sexual Orientation, Gender Identity and International Human Rights Law:Contextualising the Yogyakarta Principles” , in *Human Rights Law Review* , 2008 , 8(2) , pp. 207-248, available at <http://hrhr.oxfordjournals.org/cgi/contents/abstract/8/2/207>, last visited on 1st December.

⁹ UNHCR, UNHCR Guidelines Note on Refugee Claims Relating to Sexua Orientation and Gender Identity,available at [http:// www.unhcr.org/refworld/docid/48abd5660.html](http://www.unhcr.org/refworld/docid/48abd5660.html),last visited on 27th November

International Commission of Jurists Practitioners Guide on Sexual Orientation, Gender Identity and International Human Rights Law chapter VIII.

Both the UNHCR Guidance Note and the ICJ Practitioners Guide focus mainly on two issues which are, persecution or threat of persecution for sexual offences and whether this threat comes under the arena of persecution. This problem surfaced in UK in 1990's. The immigration tribunals in UK were reluctant to criticize another country's criminal laws or penalties imposed for their breach in context of application by homosexuals. However this phenomenon changed in the year 1979 wherein UNCHR guidelines suggested a method for determining the persecutory intent of another country's criminal laws.

The 1951 Refugee Convention states that a refugee is someone who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". Most often, persons seeking asylum on grounds of sexual orientation have been associated with "particular social group". UNHCR has developed guidelines on what constitutes membership of a particular social group which state that,

"A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

In order to decide what constitutes a particular social group, UNHCR looks at both characteristics which are often "innate, unchangeable, or which is otherwise fundamental to identity", as well as "perceived" nature as a group by society. UNHCR considers homosexuals to be an example of such a group. Homosexuality is at once seen as an innate characteristic as well as a characteristic so fundamental to human dignity that the person should not be compelled to forsake it.

According to UNCHR guidelines somebody who flees persecution because they are known as homosexuals in their country of origin may still be perceived to belong to such a group despite a later change of sexual practice. UNHCR also holds that persons seeking asylum on grounds of sexual orientation might also fulfil the criteria of the 1951 Refugee Convention because of political

opinion and religion. In the former case, it is possible to argue that an individual's opinion on sexuality constitutes a political opinion that in some cases will differ from the official policy of the country. Likewise, religion might be relevant in the case where the attitudes of religious authorities are particularly hostile towards sexual minorities or sexual minorities in other ways do not conform to strongly-held religious beliefs in society.

The second important issue in this regard is whether people who seek asylum on basis of their sexual orientation have a reasonable apprehension of persecution or threat of persecution.

Sexual minorities will often face discrimination and harassment from either private individuals or government representatives, and this will often be central in the asylum claim of individuals. In its 1992 Protection Handbook, UNHCR states that:

“Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.”

Hence the decision to grant asylum varies from case to case and according to variant circumstances too. There is also a policy that is adopted by UNHCR that if a person is persuaded to forsake or conceal one's sexual orientation because it is forbidden by the state, it would also be discussed under persecution.

The instances of persecution can also be made out of social, cultural or other types of community pressure, for example when pressuring an individual to marry a person of the opposite sex despite the former's wish. There have been claims made by sexual minorities often reveal exposure to physical and sexual violence, including periods of detention, medical abuse, threat of execution and honour killings. Types of violence and pressure might vary depending on the gender, as

lesbians have in many cases been subjected to so-called correctional rapes, often by relatives and acquaintances, and often on the request of their close family.

Statistically it is observed that around 80 countries criminalize homosexuality, with punishments varying from a fine to possible death sentence. UNHCR has stated that a law can be persecutory per se in, inter alia, cases where they reflect cultural and social norms which are not in conformity with international human rights standard. This includes the criminalization of homosexuality. However, a law need not amount to being persecutory unless applied to, particular groups only (like homosexuals) or if it is arbitrarily or unlawfully executed.

The main question that arises is to determine the real character of the law that is prevalent. In cases where severe punishments are imposed, the persecutory character of the law is especially evident. While in other cases it may not be that evident. It is observed that the act of homosexuality is not very easy to prove. For example, In Iran, where homosexual activity is punishable by death, the testimony of four men who have seen the act (i.e. the penetration) themselves is necessary to find the accused guilty. It is also possible that in some cases some persons may publicly be found guilty of other subsidiary crimes instead of homosexuality to deflect potential criticism from Western countries.

Although the laws may be dormant but it is possible that homosexuals are meted with discrimination or various forms of assault etc. They may not be able to complain about the same as it may lead to their own persecution. There have been cases reported where the authorities in power such as the police and the judges themselves were involved in atrocities to the people in distress. Hence such people ask for asylum facilities to avoid any such persecution.

Thus, after analysing the UNHCR guidelines and the situations that predominantly exist in many countries which are oppressive and extremist especially when dealt in cases of homosexuals, it is observed that: (1) a person need not have faced persecution in the past to avail the advantage of the provisions and safeguards so provided by the guidelines, (2) all that is required is that the person has a well-founded fear of persecution if the person is returned to the native state. Most importantly UNHCR has stated that a person must not in any circumstances conceal his/her sexual

orientation to avoid persecution. Rather the individuality of a person irrespective of their sexual orientation should be respected.

The case of FGM (Female Genital Mutilation)¹⁰

These are gender specific crimes committed especially against women and girls. These women and girls are required to have an international protection because in most of the states wherein this phenomenon is practised, the authorities of these states are either unable to provide protection or are reluctant to do so.

The applicability of the 1951 convention and 1967 protocol can be discussed as where, the convention deals with the phenomenon that there should be a well-founded fear of prosecution due to reasons of race, religion, nationality, membership of, social group or political opinion. It can be observed that, it has now been widely recognised by states that the fear of girl or woman of being subjected to FGM may be for belonging to a, particular community or social group.

UNHCR defines, a particular social group as a group of persons who share a common characteristic other than their risk of being persecuted or who are perceived as a group by society. This characteristic would often be one which is innate, unchangeable or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

It is observed that gender and age of claimants of refuge from FGM are both innate and cannot be changed at a given moment in time. Also, their plea to not undergo any physical alteration can be considered so integral to their human dignity that it becomes fundamental to exercise their human rights. Under the convention size of the group does not hold any relevance and thus broader definition to include young girls or women or narrow definition of girls belonging to, a particular ethnic group can be imputed. There have also been instances wherein the women or girls who have opposed FGM face prosecution behest the local clergy or political leaders have been prosecuted for the same. The claim for refuge can be asked for by the parents of the child in case they feel the

¹⁰ Guidance Note on Refugee Claims relating to Female Genital Mutilation, 2009, available at <http://www.unhcr.org/refworld/pdfid/4a0c28492.pdf>

apprehension of FGM. The refugee status would be given to the child and the parents *mutatis mutandis*, can be granted derivative status.

This kind of protection has been provided by many states and can be observed in various cases such as *Farah v. Canada*¹¹ wherein the Immigration and Refugee Board of Canada described FGM as a “torturous custom” and recognized it as a form of persecution. The United States Board of Immigration Appeals held in case of re *Fauziya Kasinga*¹² that the level of harm in FGM constituted persecution. Further in another leading case of *Fornah (FC) (Appellant) v. SSHD (Respondent)*¹³ the House of Lords stated that “it is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention”. The House of Lords also found that “it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment”. Similar approaches have been adopted elsewhere in Europe, including in Austria, Germany and Belgium

Conclusion

After giving due consideration to the UNHCR guidelines and the case studies discussed above it is observed that the 1951 refugee convention and 1967 protocol are not insufficient according to the contemporary circumstances, but the provisions of the convention can be implemented or utilised in such a way to cover all the lacuna's or it can be said all the circumstances that are in question now.

For instance, to cover the aspect of persecution it is not imperative that actual danger to life and limb is there. The thing that is required is that there is a sufficient because that comes under the phenomenon of imminent danger.

¹¹ 10th May 1994, available at <http://www.unhcr.org/refworld/docid>

¹² 13th June 1996

¹³ UK House of Lords (UK HL 46) 18th October 2006, available at <http://www.unhcr.org.refworld/>

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