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HUMAN RIGHTS MONITOR

To tackle refugee upheaval in Europe

MOHAMMAD GOLAM SARWAR

THE report of the UN High Commissioner for Refugees (UNHCR) discloses that 65.3 million people including refugees, asylum seekers and internally displaced were forced to flee from their home in 2015 which is the largest total UNHCR has ever estimated. It also shows that one in every 113 people on the planet is now either an asylum-seeker, internally displaced or a refugee. This unprecedented number of refuges shuddered the stability of the world particularly Europe where a vast number of refugees are approaching with each passing day. UNHCR estimated that since the beginning of 2016, 83,000 people came to Europe by sea. The EU statistics agency reported that 1.26 million people applied for asylum in the EU in 2015. It also estimates that another three million irregular migrants will reach Europe until 2017. The restless conflicts, violence and civil wars in the Middle East and the political instability in Africa are mostly blamed for this ongoing refugee crisis. While tacking this refugee crisis and relocating the people, EU member states are taking diverse measures instead of concerted measures that raise questions.

Though the road to Europe for refugees is risky, they prefer to reach Europe because the EU pledges for both the right to non-refoulment (Article 19(2), EU Charter of Fundamental Rights), and the right to asylum (Article 18, EU Charter of Fundamental Rights). In addition to the 1951 Refugee Convention and its 1967 Protocol, Common European Asylum System (CEAS) and its implementing tool, the Dublin Regulation mainly comprise the legal framework in Europe that deal with protection of refugees.

European Court of Human rights through its judgments endorses obligations upon states regarding protection of asylum seekers and refugees. CEAS, the main instrument to regulate asylum applications in Europe was developed to respond the inadequacies relating to refugee protection arising out of state-centred territorial reaction against migrants and refugees. It aimed to set out 'common high standards and stronger cooperation to ensure that asylum seekers are treated equally in an open and fair system'.

With a view to implementing the CEAS, the Dublin regulation II aims to identify the responsible EU member state to analyse an asylum application and to stop the misuse of asylum processes.

It is interesting to note that while EU and its Member States expressed commitment to guarantee protection to the asylum seekers through CEAS in one hand, but on the other hand they applied restrictive immigration policies and strategies going beyond their protection commitment.

The EU approach towards refugees that combines asylum with immigration has been considered undesirable on the ground that immigration law is concerned with controlling entry while refugee law deals with international protection. While dealing with migration flows, EU member states only prefer skilled workers from the vast number of displaced people. Britain in this case seems to be in a strict position which refused to take refugees except skilled migrants. Though Britain promised to resettle 20000 people by 2020, after Brexit it becomes doubtful.

Another criticism against EU approaches to refugees is apparent from the notion of safe third countries under Dublin System. Under Dublin II regulation, while determining the state responsible for examination, the asylum application may be diverted towards 'safe third countries' where there would be 'presumably' no risk of persecution or refoulment. This notion of safe third countries is practically used as a procedural device that permits the state authorities to reject asylum application on 'unfounded' and 'inadmissible' grounds even without considering the merits of the application.

While the aim of international bodies including United Nations is to protect refugees somewhere, the objective of safe third countries is to provide protection elsewhere. The unfortunate point is that Europe does not want to become a safer source of place for refugees and accordingly they adopt controlling and escaping policies. However, the magnitude number of refugees somehow (mostly illegally) managed to reach Europe and EU failed to cope up with the crisis due to their outdated system.

In this backdrop, it is recommended that EU approaches towards refugees should be fashioned in a way that creates balance between migration control measures and refugee protection. The controversial notion of safe third countries under Dublin System should be revisited emphasising the rights of refugees and asylum seekers. The EU and its member states should develop an early warning system and emergency response measures to deal with the recurrent refugee influx.

Finally, EU member states should come forward to measure the impact of risk generated by the current upheaval and allocate resources to implement necessary measures and decide what number of refugees they can share based on their capacities.

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HUMAN RIGHTS RIGHTS ADVOCACY

Legal issues in caring for elderly people

DR. NAHID FERDOUSI

EACH year, on October 01, we observe "the International Day for Older Persons" through rallies and meetings and human rights-based promises for the elderly. Elderly is an obvious reality and last stage of human life cycle. In practice, most of the elderly people in our country suffer from some basic problems, such as poor financial support, absence of proper health and medicine facilities, family negligence, deprivation, and socioeconomic insecurity. Moreover, there are no separate facilities for the old people in public transports, at ticket counters, banks and hospitals etc.

In Bangladesh, there are resource constraints, capacity problems, infrastructural weaknesses, education deficiencies, and poor attitudes and expectations in relation to caring for elderly people. Elderly people mostly suffer from some physical illness and they need comprehensive medical care and services. Provision of health care for elderly people at various sites such as hospitals, nursing homes, old age homes and other places of shelter should be within the umbrella of legislative protection of rights and effective legal redress mechanism should be in place to guard against violations of rights.

The support that government provides for the elderly in our country is not sufficient.

There was no specific legal framework regarding maintenance of elderly parents until 2013. The government has enacted *Pita-Matar Voronposhon Ain* 2013 regarding

protection of parents which is related to the issue of ageing. In this regard, collective responsibility is an urgent and top priority to protect legal rights of elderly people. They have the right to highest attainable standards of physical and mental health care. The Ministry of Health and Family Welfare is responsible for developing health policies and implanting the Health, Nutrition and Population Sector Programme. Except the old age allowance, there are no other schemes in government level. There is no particular department which can investigate the violation of elderly people's right. But a significant challenge is to involve elderly people directly in all matters related to their care both ethically and legally.

It is an ethical and moral responsibility to extend best care towards senior citizens so that they can pass their ending days of life with respect, proper care, and security. In this context, the government should be creative in renewing and revising policies and programmes for the better future of the elderly population. There is need to establish standards for service care providers, including in-home, community-based and residential settings. Every social policy should include a policy of active aging for elderly population. In addition, concerned personnel should assist the senior citizens so that they can enjoy their legal rights properly.

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LAW EXCERPTS

The unruly horse

MANAL MOHAMED

A corollary to the rise in international trade and globalisation of commerce is an increase in cross border trade disputes. The parties to these disputes cannot afford to be tied down by the shackles of differences in geographical locations, legal systems and lengthy complex court procedures. In order to overcome these hurdles, the parties often resort to arbitration as allowed by the 1958 New York Convention.

However, round the world, the "public policy" exception continues to be one of the most popular impediments to enforcement of foreign arbitral awards. Academics still refer to "public policy" as an "unruly horse" resonating *Lord Denning in Enderby Town Football Club Ltd* v *The Football Association Ltd* [1970 E. No. 2145] - [1971] Ch. 591] where he quoted Hobart, CJ in describing "public policy". It has not been possible to arrive at a uniform precise definition for "public policy".

Under Article V(2)(b) of the Convention, recognition and enforcement of an arbitral award may be refused if the recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is being sought. This ground for challenging enforcement of a foreign arbitral award has been incorporated in national arbitration legislations of Convention member countries; Section 46(1)(b)(ii) of the Arbitration Act 2001 of Bangladesh makes similar provisions. The Convention does not define the notion of public policy and its concrete manifestation varies from country to country.

Critics argue that a wide construction of the meaning of public policy would defeat the purpose of the Convention. The International Law Association in its Final Report on Public Policy (2002) recommended the scope of public policy to be narrowed down to "international public policy". The sub-committee of the International Bar Association in 2014/2015 conducted a comparative study on "public policy" covering more than 40 jurisdictions, revealing that in vast majority of the jurisdictions a violation of public policy implies a violation of fundamental or basic principles.

The lack of definition for "public policy" in the Convention and also in the national legislations has left the national courts struggling to define the limits of the public policy exception. In England and Wales, the courts are reluctant to arrive at a specific definition.

Similarly in India, the courts have had a bumpy ride with narrowing the parameters of "public policy" exception [*Renusagar Power Co. Ltd.* v *General Electric Co.* (AIR 1994 SC 860)] only to widen it in a couple of subsequent cases. Thereafter, the Supreme Court of India reined in the unruly horse by affirming the above three restrictive criteria in the more recent case of *Shri Lal Mahal Ltd.* v *Progetto Grano Spa.* (2014) 2 SCC. Finally, the recent amendment in 2015 to the Arbitration and Conciliation Act 1996 of India has attempted to provide definite guidelines which largely mirrors the recent Supreme Court decision.

In the US the courts have refused to entertain the "public policy" exception even when the enforcement of the foreign arbitral award would conflict with the US sanctions [*National Oil Corp.* v *Libyan Sun Oil Co.*, 733 F. Supp. 800, 819-20 (D. Del. 1990).

It is not sufficient to consider only whether there will be a violation of public policy but also assess the severity of such violation. In France, the Court of Appeal of Paris has decided that the violation of public policy must be "flagrant, effective and concrete". The fact that the "public policy" exception should only be allowed in extremely rare cases is reflected in the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): "Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognise an award and enforce it without abandoning the very fundaments on which it is based."

In this regard statutory reform in India is helping to shape the courts' approach. In such context, it is safe to say that the unruly horse is in the process of being tamed.

THE WRITER IS A BARRISTER-AT-LAW, ADVOCATE OF THE SUPREME COURT OF BANGLADESH.

YOUR ADVOCATE

This week Your Advocate is ***Barrister Omar Khan Joy****, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.*

Query

I have been in the financial sector for a long time. As a banker, am I eligible for Workers Profit Participatory Fund (WPPF)? The points that I ponder as follows:

If Banks are not exempted from the Labor Act 2006 and its subsequent amendments and everyone [except mentioned in the amended regulation] is eligible, then why private and foreign banks have not declared WPPF? What can be the implication on banks if not declared? Since the claim is passed through Law and amended further to clarify, are banks in breach, in view of legal and ethical grounds?

Response

Thank you very much for your query. As far as banking companies are concerned, it is indeed a debatable area with regards to which we, as legal practitioners, are waiting for a judicial clarification just as many of you are.

In my opinion the laws are, however, quite clear. According to Section 232(1) of the Bangladesh Labour Act, 2006 (as amended till 2013 and hereinafter referred to as 'the BLA'), Workers' Participation in the Company's Profits (hereinafter referred to as 'WPPF') shall be formed by every "company or establishment which fulfils any of the following conditions:

-the paid up capital of the establishment is one crore taka or more at the end of the accounting year; or

-the value of the fixed assets at cost on the last day of the accounting year is not less than two crore taka or more." [Quoted from the BLA]

This section is basically the amended version, brought about in the 2013 Amendment to the BLA. Prior to the 2013 Amendment, this section used to stipulate that WPPF shall be formed by "all establishments which are engaged in industrial undertaking which fulfil any of the following conditions…" [Quoted from the BLA; underline added] As you would see, the underlined phrases were omitted in the 2013 Amendment. As a result, under the BLA, as it stands at present, a company need not be an 'industrial undertaking'; it only needs to fulfil either of the two aforesaid conditions to be obligated to form a WPPF.

What seems perplexing at times is that, although the term 'industrial undertaking' was omitted from Section 232 (which deals with the applicability of WPPF) its definition contained in section 233(1)(g) was nonetheless amended. The term 'industrial undertaking' also does not appear elsewhere throughout the BLA. It is humbly submitted that such is an error in the law. What stands it that, irrespective of a company's status of industrial undertaking, WPPF becomes mandatory only if the company fulfils either of the conditions given in section 232(1). Even if a bank would still want to rely on falling within the scope of 'industrial undertaking' to question whether WPPF is obligatory on it, it can be safely said that in the 2013 Amendment the said term was amended to unequivocally include 'banks' into its ambit. As such, banks are clearly industrial undertakings.

Having said the above, insofar as the BLA is concerned, banks must establish and maintain WPPF and whosoever falls within the meaning of 'beneficiary' shall be entitled to the bank's profit in the proportion and manner as encompassed in the BLA. However, this conflicts with section 11 of the Banking Companies Act, 1991 (as amended till 2013 and hereinafter referred to as 'the 1991 Act'). Section 11 of the 1991 Act prohibits banking company from employing or continuing the employment of "any person whose remuneration or part of whose remuneration takes the form of commission or of a share in the profit of the company". This, in essence, may mean that a banking company cannot form WPPF.

This conflict led to a series of discussions and debates amongst the banking companies and its employees and entailed communications from banking companies seeking clarifications from different government offices. Considering the differences in views, opinions and decisions, the banking companies began the practice of not forming WPPF. Amongst many, one of the prime contentions in support of this practice is that, the 1991 Act is a special law while the BLA is a general law. As such, special law shall have prevalence over the general law and, therefore, banking companies need not form WPPF.

However, I am of a different view. Firstly, there is an aspect of law known as implied repeal. The 1991 Act, being an older legislation than the BLA (enacted in 2006) may have impliedly repealed this provision contained in section 11 of the 1991 Act. This is further reaffirmed by the fact that when the 2013 Amendment was brought, the term 'industrial undertaking' was amended to specifically include 'banks'. The most recent law takes precedence over the old ones by virtue of the rule of implied repeal. Furthermore, the fact that it is a widely accepted practice and that questions have been raised to the government offices, does not override the applicability of a piece of legislation by default. To stop or stay the application of a provision of legislation, one has to seek orders from the proper forum: the High Court Division. Until and unless such an order clarifying, limiting or staying the applicability of provisions of the BLA in relation to WPPF is passed, the legislation should continue to apply.

Therefore, my view is that banks are under an obligation to form WPPF as per the BLA.

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