



Doctrine of Independent Obligations: A Remedy to Economic Migrations Issues

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Introduction:

The concept of migrants in general is a human conduct or practice which originates and relates to ancient times. It has grown to a larger proportions ever since the infamous incorporation of international warfare in international relations, the World Wars I and II. The term migrants however remains to be a composite species majorly due to its different fields of understanding and application. However 'migration' in contemporary times majorly reflects 'work'. Etymologically the term 'migrant' was derived from the Latin term *migrare* which literarily means moving from one place to another/to change one place of living. In the context of labour jurisprudence the birth and introduction of migrant workers at the national and international level has emerged inter alia due to various reasons, namely, the violation of human rights, discriminatory practices, lack of protective mechanism for vulnerable groups especially women and children, in humane consumers, disguised techniques of criminals, collapse of economic integration/independence, increasing division among developed, developing and under developed nations, poverty, the notion of orphaned conflicts, failed nations and climate change.

Economic Migration and its Crisis:

The movement of migrants in search of basic and better jobs itself highlight the effects of globalization and the economic crisis, which is better called as Economic Migration, Remittances and skills gained from international migration are the great resourceful outcomes of modern migration, which will be immensely useful to the economic development, welfare of the individual migrant family, community and eventually to that of the nation. The cruel reality is that by very nature the Migrant Workers are vulnerable. More importantly even though they are aware of the fact that international migration on grounds of trafficking and other human rights abuse will be hazardous, they still undertake the process to earn higher income if not at least to earn decent work when compared to the low or nil opportunities in their state of origin. In most cases of the migrant case studies, the urge for higher income in foreign countries eventually leads to the denial of basic inherent right to life itself.

In the context of the migration process at different stages the financial constraints are involved which clearly indicate that it is Migrant Workers who are the most vulnerable. The 92nd session of the ILO conference in the year 2004, the ILO significantly adopted the resolution on "Towards a Fair deal for migrant workers in the global economy" which focalizes on the need for engaging the Migrant Workers with that of the social protection and social dialogue and all these elements constitute decent work. It also reflects the global crisis

on Migrant Workers. The economic performance is the major reason for the influential factors of international migratory labour force. The modern issues contain both positive as well as the negatives.

The remittance factor constitutes a major benefit for the Migrant Workers. The high cost of migration paid by the Migrant Workers to the recruitment agencies constitutes a negative aspect, which also discourages productive employment at the same time collapses the positive effects of globalization. In fact the positive benefits in order to be derived the MW must have access to the financial services, such as safe and reliable money transferring intermediaries.

In regions like Africa due to the frequent civil wars, the positive effects vanish and poor employment increases wherein the cross border migration is worst hit. Other fatal factors on reduction of economic performance of the Migrant Workers may include natural disasters, decline of markets of the developed nations, and other similar events. Another example would include the sharp economic crisis of United States which in turn not only affected the productive jobs and also triggered the migration crisis in the northern as well as the other hemispheres.

In the case of the remittance at the international, national and regional levels they form tools for importing foreign exchange and boost the national economy, rejuvenate employment schemes, at the house hold they reduce poverty (depends upon the capacity of the house hold's productive investment) and contribute human resource development in countries of Origin. However the reduction of remittance is fatal to the life cycle of the Migrant Workers, their families and finally to the nations itself. The remittance issue is controlled by that of the migration opportunities, employment and that of the levels of earning. The core issues is whether the remittance flow of the migrants can be sustained in the near future, while considering all the relevant affecting factors. The present trend itself indicate a decline in the global scenario.

The major factors that affect the reduction of remittance are the poor employment compelled upon the Migrant Workers due to the reasons of wide discrimination, violence and xenophobic actions against them. In certain cases the violence may be influenced and the migrant due to the right of self-defense may use aggression, which may result in the isolation in the Host State. When the violence escalates it also stimulates the Host State to check and eliminate the case of irregular migrants, which again affects the inherent human rights of the Migrant Workers. In all the above said instances it is not only the Migrant Workers who suffers, but eventually it also leads to the destruction of the families of them in various forms.

The reduction or loss of productive remittance as a negative impact on the Migrant Workers will further change in the case of male and that of the female Migrant Workers, as the latter are less protected in the labour market they suffer heavily. It also leads to the impact of women Migrant Workers under employment. They may also be forced to accept inadequate terms and conditions of employment. The plight of the women employed in informal economy, for example the case of migrant women domestic workers is a case in point.ⁱ

Further, the lack of institutional framework in proper utilization of the remittance proves costly to the downfall of positive effects of economic migration. International labour scholarship and the active community activist provide valuable suggestions to mitigate the above said problems which are as follows: (1) Simplification of migration process; (2) Provide information on Labour markets; (3) Better facilitation of Passport Process; (4) Reduction of unnecessary official fees; (5) Establishment of Village Funds; (6) Use of Migration fess for Village Development; (7) Organize Skill Training, (8) Find Markets for Products and Services; (9) Promotion of opening of Saving Account.ⁱⁱ

The other major consideration in the human rights perspective involved in the subject matter is that of the assistance to be rendered by the diplomatic offices. As international migration requires the support of the Origin State at various levels, and one such important utility is that of the Right to Consul which constitutes a major human right for foreigners travelling abroad for any reason. The said right is available under the Vienna Convention on the Consular Relations, 1963 under Article 36 (1) (c).ⁱⁱⁱ In the background of the specific problems attached with that of the Migrant Workers (in cases of the Host State charging them for crimes related

with migration issues) the role of consular officials has become inevitable, for example, in the case of irregular migrants combined with the lack of social approach or rights based approach by the Host State, the problems are enlarged.

The doctrine of Independent obligations basically traces its roots from the schools of *jus natural* (Natural law). It is not made like manmade legislations; it is discovered and applied in relevant situations. As natural mandates rationalism, ideas of reason, universalism and high principles of morality, there are some obligations which exist in the absence or independent of the concept of consent, state autonomy and operates as a formidable exception to the traditional principle consent makes law. Due to the nature of such obligations they command strict adherence irrespective of the contracting status of the state. The position of doctrine of independent obligations was discussed by the International Court of Justice as early as 1951 in *the Case concerning the Reservations to the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The world court emphatically opined that there are obligations in international law by their very nature have to be complied and the authority of it is not based on the consent of the nations and they fall outside such framework. The direct incorporation of the doctrine was magnificently done by the International Law Commission in the monumental work on the VCLT, 1969. The doctrine finds a place under Article 43 of the Convention.^{iv}

In the International labour jurisprudence, the ILO's work on the Declaration on the Fundamental Principles and Right to Work, 1998 is one such mechanism which commands obedience irrespective of the ratification status of the Member States. In the context of international migration laws under the labour jurisprudence, the impact of *jus cogens* human rights norm has been enormous sans implementation and related issues. The evils of trafficking, smuggling, forced labour, illicit trafficking in flesh trade (prostitution) on women and children have indeed totally destructed the positive elements of migration and has attracted the liability and scrutiny of the international community. Moreover the UDHR considered constituting a foundational instrument in promoting the principles of human values in its preambular part explicitly states "whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".^v

The ICPR also in its preambular part lays emphasis by stating, "Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying, civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights".^{vi}

Thus at present times the basic threshold on the subject matter is focalization of *migrant rights as human rights*. Even if they are irregular (un documented), if the migrant workers are deprived of inherent, inalienable and indispensable right to life, they deserve it, not as a migrant workers assuch but also as a fellow human being, male or female.^{vii} No State can deny such an understanding or commitment as said above it is a universal, natural, moral, social and independent obligation without exceptions. In particular the international community and that of the ILO Member States have to follow the principle of solidarity, in shouldering the obligation. However in reality irregular migrant workers are identified as violators of the various laws of the national legal system and charged under the penal regime which leads to further criminalization and grave abuse of their human rights.

Conclusion:

Economic migration has failed due to the major financial crisis faced by the migrant workers starting from the Origin State itself and severely formalized in the transit and that of the Host State. The issues of international migration in the context of ill effects of globalization has to be re-examined. The present day migration on the globalization angle is tilted more into the negatives, which requires through research to identify the determinant factors. The rights and duties of all the state actors in the migration process have to be re-assessed, as the problems commence at every stage of migration. The overlapping of the laws in the subject as the channelized by way of proper institutionalization of them, with effective law making on the subject matter and appropriate instrumentalisation by way of legally binding instruments. This research article imbued with restoration of dignity of the migrant workers in human rights perspective which is based on the doctrines of independent obligations.

ⁱ For a detailed understanding on the discussions on Migrant Workers and Economic Crisis, generally see, Ibrahim Awad (2009), *The Global Economic Crisis and Migrant Workers: Impact and Response*, second edition, international labour office: Geneva, pp: 1-64

ⁱⁱ For a detailed analyses of problems of economic migration and the Asian case Studies, generally see, Somphone Sisenglath (2009), *Migrant worker remittances and their impact on local economic development*, ILO Asia-Pacific Working Paper Series, ILO.

ⁱⁱⁱ The Vienna convention on Consular Relations, 1963 under Article 36 envisages the following: “(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (c) reads: consular officers shall have the right of visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action”. The original instrument is available under www.ilc.org.

^{iv} It can be called as a foundational but not certainly as one of the universal in character and effect; the reason is not because of its status as a declaration, but due to its western influence and patronage. When explained the principles enshrined under the UDHR have attained customary status of international law, therefore the binding value of the instrument is not to be challenged. However, the UDHR intentionally omits the Principle of Right to Self-determination, popularly referred as the Principle of International Democratic Governance. A clear indicator that the western drafters at the time of its adoption still were actively involved in enjoying the profits out of their evils of colonization, therefore they did not want to lose the ill profits, to their advantage, they excluded the right of the people to determine their own political, social, and economic and cultural form of life. Thus from the Afro-Asian addressed or identified as to universalize human rights.

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^{vi} R.P. Anand (1994), *Salient Documents in International Law*, Vikas Publications: New Delhi

^{vii} The original instrument is available at www.un.org.