

WHISTLEBLOWER'S PROTECTION AND REFUGEE STATUS POST SNOWDEN'S REVELATIONS

SHIBI KIRAN, M¹.

¹Former Guest Lecturer in Political Science, Maharaja's College, Cochin; Former Guest Lecturer in Political Science in Devasom Board College, Ernakulam. Kerala, INDIA

ABSTRACT

Edward Snowden attracted international attention after leaking millions of documents about electronic surveillance by the United States government has brought the spotlight back on the need to protect whistleblowers as well as the need to rethink the definition of who is a refugee, so that such whistleblowers and others can carry on normal life at least in a different country.

KEYWORD: *Edward Snowden, Surveillance, whistleblower, Refugee Status, Refugee Convention, Human Right, Political Asylum, Espionage.*

Edward Snowden is an American computer professional, former Central Intelligence Agency (CIA) employee who copied and leaked classified information from the United States National Security Agency (NSA) in 2013 without its prior approval. His disclosures have revealed numerous global surveillance programs, many run by the US Government with the cooperation of many telecommunication companies and European governments.

On May 20, 2013, he flew to Hong Kong after leaving his job at an NSA facility in Hawaii and in early June he disclosed thousands of classified NSA documents to journalists Glenn Greenwald, Laura Poitras and Ewen Mac Askill. Snowden became internationally known after stories based on the material appeared in *The Guardian* and *The Washington Post* and later, *Der Spiegel* and *The New York Times* and so on.

Like any other whistleblower Snowden could have kept his identity a secret but *The Guardian* revealed his identity on his request on June 9, 2013.

He justified his actions saying: "I don't want to live in a society that does these sort of things [surveillance on its citizens] ... I do not want to live in a world where everything I do and say is recorded ... My sole motive is to inform the public as to that which is done in their name and that which is done against them." And further: "I didn't want to change society. I wanted to give society a chance to

determine if it should change itself. All I wanted was for the public to be able to have a say in how they are governed."(Hamill, Jasper. 2013)

On June 21, 2013, the U.S. Department of Justice issued the following charges against Snowden: one, violating the Espionage Act of 1917 and second, theft of US Government or foreign government property. On June 23, he flew to Moscow, Russia, where he reportedly remained for over a month. Later that summer, Russian authorities granted him one-year temporary asylum, which was later extended to three years. As of 2015, he was still living in a secret location in Russia while seeking asylum elsewhere.

PROTECTION FOR WHISTLEBLOWERS

Two significant and related things of importance for Snowden which came up as a result of this revelations is: one, the protection needed for whistle blowers and; second, the lack of clarity in the definition of a Refugee by which a whistle-blower can get protection in a different country because of possible persecution in the person's home country. As per existing laws it is up to the individual countries' legal systems to protect the confidentiality of the whistleblowers. It is rather common under these circumstances for governments to deny access to information and to penalize sources and whistleblowers, when it comes to (but certainly not limited to) cases related

to national security and intelligence.

It is in this background that David Kaye, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has submitted a report to the UN Assembly in 2015 highlighting the need to protect sources and whistleblowers around the world.

The report concludes with a number of recommendations and urges the States and international organizations to adopt or improve existing laws and practices and also to develop the necessary political and social environments to provide genuine protection to sources and whistleblowers. Such protections should not only be adopted by governments but also international organizations such as the United Nations. Some of the recommendations given in the report include:

- **Ensure national legal frameworks provide for the right of access to information in accordance with international standards:** National legal frameworks establishing the right to access information held by public bodies should be aligned with international human rights norms. Exceptions to disclosure should be narrowly defined and clearly provided by law and be necessary and proportionate to achieve one or more of the above mentioned legitimate objectives.
- **Adopt or revise and implement national laws protecting the confidentiality of sources:** Laws guaranteeing confidentiality must reach beyond professional journalists, including those who may be performing a vital role in providing wide access to information of public interest such as bloggers, "citizen journalists," members of non-governmental organizations, authors, and academics, all of whom may conduct research and disclose information in the public interest. Protection should be based on function, not a formal title.
- **Adopt or revise and implement national legal frameworks protecting whistleblowers:** State laws should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of domestic or international law, abuse of

authority, waste, fraud, or harm to the environment, public health or public safety.

- **Internal institutional and external oversight mechanisms should provide effective and protective channels for whistleblowers to motivate remedial action:** In the absence of channels that provide protection and effective remediation, or that fail to do so in a timely manner, public disclosures should be permitted. Disclosure of human rights or humanitarian law violations should never be the basis of penalties of any kind.
- **Protections against retaliation should apply in all public institutions, including those connected to national security:** Because prosecutions generally deter whistleblowing, penalties should take into account the intent of the whistleblower to disclose information of public interest and meet international standards of legality, due process, and proportionality.
- **Establish personal liability for those who retaliate against sources and whistleblowers:** Acts of reprisals and other attacks against whistleblowers and the disclosure of confidential sources must be thoroughly investigated and those responsible for these acts held accountable. When these attacks are condoned or perpetrated by authorities in leadership positions they consolidate a culture of silence, secrecy, and fear within institutions and beyond, deterring future disclosures. Leaders at all levels in institutions should promote whistleblowing and be seen to support whistleblowers, and particular attention should be paid to the ways in which authorities in leadership positions encourage retaliation, tacitly or expressly, against whistleblowers.
- **Actively promote respect for the right of access to information:** Law enforcement and justice officials must be trained to ensure the adequate implementation of standards establishing protection of the right to access information and the consequent protections of confidentiality of sources and whistleblowers. Authorities in leadership positions should publicly recognize the contribution of sources and whistleblowers sharing information

of public relevance and condemn attacks against them.

- **All of these principles apply to the United Nations and other international organizations:** The UN and international organizations should adopt effective norms and policies of transparency to enable the public greater access to information. Specific norms protecting whistleblowers should follow similar criteria provided in the recommendations for States: wide scope of application, promotion of disclosure of information in the public interest, and clarity in the mechanisms for reporting and requesting protection. Particular attention must be paid to the effectiveness and independence of existing reporting and justice mechanisms given the lack of access of whistleblowers to any other formal justice system. (From the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression)

Though this report is a step in the right direction, Snowden had his asylum applications rejected by most of the countries and it requires a relook at the concept of the status of a refugee.

WHO IS REFUGEE

The definition as to who is a Refugee is defined in the Text of the 1951 Convention .Relating to the Status of Refugees and the Text of the 1967 Protocol Relating to the Status of Refugees.

According to Article 1 A. (2), any person who owing to well- founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out- side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Now, according to the criteria laid out for determining as to who is a refugee, Snowden can be said to have a well-founded fear of being persecuted for reasons of holding a political opinion. Though he is charged under crimes against the state, one can say that through his actions he has brought to the attention of American public

and to the world citizens the extent of breach of privacy done by the American Government in collaboration with other agencies and states. This position is beautifully explained by Human Rights Watch:

“The law often criminalizes the disclosure of secrets by employees or agents of a government. But international law recognizes that revealing official secrets is sometimes justified in the public interest. In particular it may be necessary to expose and protect against serious human rights violations, including overreaching or unjustifiable surveillance.” (Human Rights Watch 2016)

Therefore one can clearly say that these revelations were purely done for the sake of public interest and thereby qualify him as a candidate for getting refugee status.

Apart from the above mentioned Refugee Convention and Protocol, in the case of Ecuador granting asylum to Julian Assange, the founder of WikiLeaks, the Government of Ecuador quoted a list of 16 conventions and treaties under which his request has been accepted saying that the right to asylum is governed by a large body of international human rights and refugee law treaties. (Official statement by the government of Ecuador, 16 August 2012). The 16 conventions are:

(1) **United Nations Charter** of 1945, Purposes and Principles of the United Nations: the obligation of all members to cooperate in the promotion and protection of human rights;

(2) **Universal Declaration of Human Rights** 1948: right to seek and enjoy asylum in any country, for political reasons (Article 14)

(3) **Declaration of the Rights and Duties of Man**, 1948: right to seek and enjoy asylum for political reasons (Article 27)

(4) **Geneva Convention** of August 12, 1949, relative to the Protection of Civilian Persons in Time of War: in no case be transferred to the protected person to a country where they fear persecution for his political views (Article 45)

(5) **Convention on the Status of Refugees** 1951 and Protocol of New York, 1967: prohibits returning or expelling refugees to countries where their lives and freedom would be threatened (Art. 33.1)

(6) **Convention on Diplomatic Asylum, 1954:** The State has the right to grant asylum and classify the nature of the offense or the motives of persecution (Article 4)

(7) **Convention on Territorial Asylum** of 1954: the State is entitled to admit to its territory such persons as it considers necessary (Article 1), when they are persecuted for their beliefs, political opinions or affiliation, or acts that may be considered political offenses (Article 2), the State granting asylum may not return or expel a refugee who is persecuted for political reasons or offenses (Article 3) and confirmation of the extradition is not appropriate when dealing with people who, according to the requested State, be prosecuted for political crimes, or common crimes committed for political purposes, or when extradition is requested obeying political motives (Article 4)

(8) **European Convention on Extradition** of 1957, prohibits extradition if the requested Party considers that the offense charged is a political (Article 3.1)

(9) **2312 Declaration on Territorial Asylum** of 1967 provides for the granting of asylum to persons who have that right under Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism (Article 1.1). It prohibits the refusal of admission, expulsion and return to any State where he may be subject to persecution (Article 3.1)

(10) **Vienna Convention on the Law of Treaties** of 1969, provides that the rules and principles of general international law imperatives do not support a contrary agreement, the treaty is void upon its conclusion conflicts with one of these rules (Article 53), and if a new peremptory norm of this nature, any existing treaty which conflicts with that provision is void and is terminated (Article 64). As regards the application of these Articles, the Convention allows States to claim compliance with the International Court of Justice, without requiring the agreement of the respondent State, accepting the court's jurisdiction (Article 66.b). Human rights are norms of *jus cogens*.

(11) **American Convention on Human Rights, 1969:** right to seek and enjoy asylum for

political reasons (Article 22.7)

(12) **European Convention for the Suppression of Terrorism** of 1977, the requested State is entitled to refuse extradition when there is a danger that the person is prosecuted or punished for their political opinions (Article 5)

(13) **Inter-American Convention on Extradition** of 1981, the extradition is not applicable when the person has been tried or convicted, or is to be tried in a court of special or ad hoc in the requesting State (Article 4.3), when, under the classification of the requested State, whether political crimes or related crimes or crimes with a political aim pursued, and when, the circumstances of the case, can be inferred that persecution for reasons of race, religion or nationality; that the situation of the person sought may be prejudiced for any of these reasons (Article 4.5). Article 6 provides, in reference to the right of asylum, that "nothing in this Convention shall be construed as limiting the right of asylum, when the appropriate".

(14) **African Charter on Human and Peoples** of 1981, pursued individual's right to seek and obtain asylum in other countries (Article 12.3)

(15) **Cartagena Declaration** of 1984, recognizes the right to shelter, unless rejected at the border and not be returned.

(16) **Charter of Fundamental Rights of the European Union** 2000: establishes the right of diplomatic and consular protection. Every citizen of the Union shall, in the territory of a third country not represented by the Member State of nationality, the protection of diplomatic and consular authorities of any Member State, under the same conditions as nationals of that State (Article 46).

What is interesting is that Julian Paul Assange is a computer professional like Snowden and is the editor-in-chief of the organization WikiLeaks. Through the WikiLeaks website Assange has leaked several documents and diplomatic cables for which he is wanted in many countries. At present he has sought refuge in the Ecuadorian Embassy in London and is his residence now. He cannot leave the premises without getting arrested, though a United Nations panel found, by a majority, that he

has been "arbitrarily detained" and that his detention should be brought to an end.

WHY SNOWDEN'S ASYLEM REQUEST WERE REJECTED BY MOST COUNTRIES

The request for granting refugee status by countries can be made under the Refugee Convention and Protocol which has been signed by over 100 countries (States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol). Despite this his asylum requests made on his behalf from 19 June and 16 July 2013, 28 to 27 different countries (including twice to Russia) were unsuccessful but as of 6 July 2013 Venezuela, Nicaragua and Bolivia all confirmed they would offer asylum to Edward Snowden. (<https://edwardsnowden.com/asylum-requests/>)

The reasons for these rejections are: One, Article 31 of the Convention relating to the Status of Refugees, 1951 states that: 1. "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

It means that the person applying for asylum should present himself before the authorities in the applying country. This was the reason cited by most of countries while rejecting Snowden's application. This is a serious limitation for the applicant especially when that person is in a different country and is unable to present himself physically before the authorities in the applying country.

Two, the second reason is that though the United Nations is supposed to be the apex body to mediate between states internationally, the United States with its power and influence is able to persuade other countries to toe its line. As a result many of the countries have covertly rejected Snowden's application from fear of dissatisfying the United States Government.

CONCLUSION

The limitations of protection given to whistleblowers by the laws of individual countries needs to be corrected and the report of David Kaye, the United

Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the U.N. is a step in the right direction which could lead to an international convention or law is praiseworthy. This could be a benchmark to access the limitations of state laws and improve upon it. With regard to the refugee criterion it is clear that definition which limits itself to someone holding a political opinion has a World War 2 mind set when the world was divided into two opposing camps of capitalism and socialism. This needs to be enlarged given the changes in society, culture and technology. In Snowden's case criminal charges by an individual state can amount to persecution. But if the criminal laws do not meet international norms as stated in various international treaties and if the prosecution/persecution is discriminatory then the individual can be considered to be a refugee. Hence the criteria in the definition of a refugee need to be enlarged and specified to reflect current circumstances.

REFERENCES

- Bray, I. (2013). Asylum or refugee status : Who is eligible? NOLO Law for All. Retrieved from <http://www.nolo.com/legal-encyclopedia/asylum-or-refugee-status-who-32298.html>
- D. Banisar, Whistleblowing: International Standard and Developments, (2009) <http://www.prsindia.org/billtrack/the-public-interest-disclosure-and-protection-of-persons-making-the-disclosures-bill-2010-1252/>, <https://forefugees.com/tag/whistleblower/>
- David Banisar (2009), Whistle blowing: International Standards and Developments " in Sandoval, I. (editor), Corruption and Transparency: Debating the Frontiers between State, Market and Society, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011 (hereinafter Banisar) and Transparency International, Alternative to Silence: Whistleblower Protection in 10 European Countries
- Goodwin Gill, G.S. (2008). Convention relating to the Status of Refugees Geneva, 28 July 1951; Protocol relating to the Status of Refugees New York, 31 January 1967. United Nations Audiovisual Library of International Law. Retrieved from <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>
- Hamill, Jasper (2013), 'Ex-CIA techie Edward Snowden: I

am the NSA PRISM deepthroat,' *The Register*, 10 June, Available online at: http://www.theregister.co.uk/2013/06/10/prism_source_named_as_techie_edward_snowden/Last accessed 6 April 2016.

Human Rights Watch (2013), 'Countries Should Consider Snowden's Asylum Claim Fairly' 3 July, Available online at: <https://www.hrw.org/news/2013/07/03/countries-should-consider-snowdens-asylum-claim-fairly> Last accessed 15 April 2016

Human Rights Watch. (2013, July 3). Countries Should Consider Snowden's Asylum Claim Fairly. Retrieved from <<http://www.hrw.org/news/2013/07/03/countries-should-consider-snowden-s-asylum-claim-fairly>

India doesn't have a law to protect Whistleblowers, *Times of India*, Mar 29,2010

Official statement by the government of Ecuador on the asylum approval for Julian Assange (translated),16 August 2012, Available online at: <http://www.hangthebankers.com/official-statement->

[by-the-government-of-ecuador-on-the-asylum-approval-for-julian-assange-translated/](http://www.hangthebankers.com/official-statement-by-the-government-of-ecuador-on-the-asylum-approval-for-julian-assange-translated/) , Last accessed on 6 April 2016

States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol Available online at: <http://www.unhcr.org/3b73b0d63.html>, Last accessed on 6 April 2016

The Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Report of the Special Rapporteur to the General Assembly on the Protection of Sources and Whistleblowers,' Available online at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ProtectionOfSources.aspx> Last accessed 6 April 2016.

Important reports

Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 8 September 2015, Available online at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361, Last accessed on 6 April 2016.