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ASYLUM AS A HUMAN RIGHT IN INTERNATIONAL LAW: THEORY AND PRACTICE IN PAKISTAN

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ABSTRACT

This article has two parts; first part discusses the asylum as a human right in international law, and second part discusses the law of asylum and procedure in Pakistan. Asylum has no universally accepted definition, but it has three major perspectives attributed to it in International Law. In this study, focus is on asylum as an individual human right. Although Pakistan lacks any specific legislation dealing with asylum system, the study examines and finds Foreigners Act 1946 and Cooperation Agreement 1993 concluded between Pakistan and UNHCR. It may be of a great help envisaging asylum regime in Pakistan. It also highlights how asylum seekers applications are dealt with under Mandate system by UNHCR.

INTRODUCTION

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The term asylum came from the Latin origin '*Asyilia*' which means inviolable place (Bukhari, 2018, p.11). It is also like Greek word '*Asylon*' which means freedom from seizure and detention (Boed, 1994). Asylum is defined in a dictionary as "asylum is the protection granted by a state to a foreign citizen against his own state" ("Asylum", n.d., a). Another definition of asylum is "a protection from extradition and arrest given by a state on its territory to political offenders and refugees" ("Asylum", n.d., b). By definition, it can be drawn that asylum has two major elements. One is the protection given by a state on its territory, second, this protection is granted to other than their own citizen. Concept of asylum is ancient, but till to date, there is no universal recognized definition of the term. The reason of the disagreement is that asylum may interfere with sovereignty of state in some instances. Therefore, states are reluctant in granting asylum due to self-interest of the state. Not only states vested interest are impinged, but also it may highly cost them in their foreign relations with other states. General accepted view of asylum is that it is a right of state, not of an individual; hence, this right cannot be claimed by the individual as a matter of right in international law. Besides, there are three faces of right of asylum in international law. First, the right of a state to grant asylum, this is the most common accepted concept of asylum, this right is based on the doctrine of territorial sovereignty (Stilz, 2019) of state. A sovereign state is independent in its decision, so a state got the right to grant asylum to any individual on its territory without any outside hindrance. Secondly, the right of an individual to seek asylum. This is the most criticized perspective of asylum as it only provides the individual to seek right but on the other hand, there is no entity whose duty is to provide that right. This sense of asylum states that an individual cannot be restrained from seeking an application to asylum from other states. This right is based on the principle that a state has no ownership on its nationals; resultantly, an individual may leave a country on his free will. Thirdly, the right of an individual to be granted asylum. This right is based on humanitarian grounds although states are not obliging it due to its non-binding nature. Asylum as a human right comes under this third face of right. This third face of right is also based on customary principle i.e., Principle of non-refoulement. This principle is also enshrined in article 33⁶ of the convention on the status of refugees 1951.

In context to asylum as human right, now, coming towards the Pakistani law and practice, neither Pakistan has any specific piece of legislation on asylum nor has it ratified the convention on the status of refugees 1951 or its 1967 protocol (United Nations High Commissioner for Refugees (UNHCR), April 2012). Interestingly, Pakistan is the third largest country in the world who granted asylum to the refugees ("World Must 'Step up', 2020). Pakistan hosted 4 million refugees ("Interpreting the Refugee Definition" 2020) on its soil albeit of the fact of its

⁶ "Prohibition of expulsion or return ("refoulement")

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

economic and strategic concerns. Pakistan is needed to ratify the convention as it has been already complying with the convention on the status of refugees.

Literature Review

This is a significant area of international law and human rights law, but no ample research has been made on considering the asylum as a human right. However, there are some books and research papers on the topic of asylum in international law.

1. S. Parkash Sinha authored a book titled "*Asylum as a Human Right. In: Asylum and International Law*" which was published in 1971. This book is the first comprehensive work on the right of asylum as it discusses the asylum as right. It states that asylum is a human right in pure sense, but world community has prioritized it as a state right. It is an excellent work in hand on my topic but, its different from my research piece as the researchers are envisioned to discuss the asylum right in three senses which are prevailing today (Sinha, 1971).

2. Roman Boed's published an article on the topic "*The state of the right of asylum in international law*" In 1994. This research is excellent in its spirit as it discussed the first-time asylum as right in three faces. But it lacks to configure the asylum as a right to be granted as a natural right. Moreover, this article lacking in discussing the prevailing situation of Pakistan's asylum law and practice (Boed, 1994).

Additionally, there are some other piece of papers wick are similar to the abovemention research articles, but still we have not found any particular research on asylum as a human right. Unfortunately, there are very few research on the asylum law and practice in Pakistan. Hence, the researchers decided to work on the research topic.

Objectives of the Study

The principal aims of the study were:

- a) To determine status of asylum as a human right in international law.
- b) To elaborate the law and procedure in Pakistan pertaining to asylum.

METHODS

The researchers opted the qualitative research methodology due to the very nature of research topic. Primary and secondary sources will be used to collect data. Under the doctrinal research method, Primary sources may include the international instruments, national laws, reports, and case laws. Secondary sources include books, scholarly research articles, newspapers, and credible

information. Since the methodology is not quantitative; therefore, conclusions may not be so accurate.

DISCUSSION

I. HISTORICAL DEVELOPMENT OF ASYLUM IN INTERNATIONAL LAW (BUKHARI, 2018)

Historically, asylum term was used as an '*inviolable place*' where another state is unable to exercise its jurisdiction. Evidently, history depicts it as a privilege of a jurisdictional state rather than a right. Therefore, there is strong tie between asylum and Jurisdiction. In ancient times, sanctuaries were offered by the holy places. '*Holy places*' due to its link with divinity were considered as inviolable. Thus, divinity was the actual cause of protection to the unfortunate people of the society (Sinha, 1971, p.5). It is found that asylum in Egyptian civilization in the temple of Amon and Osiris; it is considered a place of refuge for the slaves who flee from the cruel behavior of their lords. In Greek, there were a multiplicity of Gods and each city was protected by a particular God (Arora, 2013). There are some credible evidences that privilege of asylum was exercised by the Roman Empire. They opened a place in the temple for the victims and reluctant to send back them to the claimants due to humanity. Thus, the researchers can say that it was the first time, Roman Empire, who formally exercised this right as a privilege of state. Practically, Italy was the first city in which asylum was took place except for Greek colonies Magna and Garcia (Clough, ed., 1932). In 323 A.D., the great Constantine, authorization was given to the churches for granting asylum. This power of churches involved it in the matter of criminal jurisdiction, and it is often said that this was the actual cause by which Catholics got more and more power (Siska, 2004). In Islamic law, this term asylum is used as '*jawar*'. '*Pact of Medina*' (Ahmed, 2013) has many provisions as to jawar of Muslims into the Medina and '*Treaty of Hudebia*' (Smith, 2006, p.135) also had a term in the treaty that if a Muslim flees from the Medina to Makka, they will be protected by *Quresh*. In Arabian Peninsula, asylum is in existence from a long period of time, but it was formally inducted thereby Prophet Muhammad (PBUH), who started this doctrine after entering Mecca and proclaimed two places as a sanctuary. One is Mecca and seconds the home of *Abu Jahal*.

Treaty of Westphalia, (2020) is considered as the evolution of modern international law because territorial jurisdictions (Bassiouni, 2014) were demarcated in Europe by providing them sovereignty on their jurisdictions. After this treaty, the practice of asylum was limited in its exercise by the churches. Some of the limitations on the exercise of asylum were that places would not have the absolute immunity to all types of fugitives because states had to prosecute the fugitives and the existence of reciprocal duty of states to surrender the fugitives to other in certain cases (Mock, 2011).

In modern times, asylum, and refugee (Peers & Rogers, 2006) right is regarded as a realization of modern international law. Under the umbrella of United Nations (UNs) in the mid of 20th century, one can find many bilateral and multilateral agreements relating to international human rights law and international refugee law. This topical development is linked with the evolution of human rights, which took place after the Second World War (Siska, 2004).

I. RIGHT OF ASYLUM IN INTERNATIONAL LAW

Asylum as Right in international law is recognized in three senses.

- i. Asylum as a right of State
- ii. An Individual's right to seek Asylum
- iii. An Individual's right to be granted Asylum (Roman, 1994)

i. Asylum as a Right of State

Traditional view of asylum is that it is a right of a state and not of an individual. Meaning there by, only a state got the privilege to grant the right to an individual on its territory. No International or national forum can compel a state to grant asylum to an individual. This is based on the principle of territorial sovereignty of state. A state is independent in its territory and persons situated in it. This view is upheld by the International instruments ("Universal Declaration of Human Rights (UDHR)", 1948), and state practice also. This is the reason that states are reluctant in ratifying the convention on territorial asylum. If states ratify it, they will have to provide certain right to asylum seekers.

ii. Right to seek Asylum by Individuals

Asylum as a right to seek asylum is considered right in international law. This sense of asylum states that an individual cannot be restrained from seeking an application to asylum from other states. Article 14(1) of UDHR, 1948 is relevant in this regard as it provides an opportunity to individual for seeking the asylum from other states. The text of Article 14(1) is reproduced here for better understanding. "*Everyone has the right to seek and to enjoy in other countries asylum from persecution*". However, UDHR is a soft law in *stricto sensu* it is not binding on the states even after ratifying it. Furthermore, this right is based on the principle that a state has no ownership on its nationals. An individual may leave a country except in accordance with law, though, this right is considered as a right to seek asylum but in researcher's view, it is a right to leave a country. This view is also upheld in Article 13 of the UDHR. It states as "*Everyone has the right to leave any country, including his own, and to return to his country*". Perusal of the abovementioned article, it may be assumed that this right is about to leave a country without any hindrance of the resident state.

iii. Right of individual to be Granted Asylum

Grotius and Suarez considered asylum as a natural right (Roman, 1994). This school of International law states that Asylum is a right and there should be a reciprocal duty to grant it. Resultantly, they are of view that it is a right of an individual that if he seeks asylum in any state it must be granted by the state to whom application is made.

According to researchers' view, this face of right must be compared with the principle of non-refoulment. Principle of non-refoulment is customary and treaty right. It imposes a duty on a state not to return a refugee to a state where the life of refugee is threatened. By following this view, we can assume that a state is under an obligation to provide a temporary refuge to a refugee⁷. However, principle of non-refoulement bound the state only with obligation not to return a refugee to a state where his life is threatened but a state can return the refugee to other state where the life of refugee is not threatened. Hence, it can be said that there are no proper clauses in law which gives an individual to be granted asylum. Only principle of non-refoulement can be quote here which provides a person to take refuge in a state.

Asylum as a Human Right

As discussed earlier, there is only one school of thought that insists the world community to consider the asylum as a human right. Because it is granted on humanitarian grounds and is also considered as an act of humanity. Such an act of any state signifies to offer a human right to the vulnerable human beings. It is also said that, granting of asylum is not the establishing an independent right rather it is an act of enforcement of the already existing human right (Weis, 1954).

With the development of international human right law, asylum is considered as a human right for those individuals who are being persecuted or unfairly prosecuted. For that reason, an independent convention was adopted by the international community "Convention on the Status of Refugees" (UN General Assembly, 28 July 1951, p.137). The scope of it is also limited but it is a way forward in supplanting the human rights. First, granted to refugees, the ground for the asylum application is any persecution (Price, 2009) based on race, religion, creed, and political opinion. Secondly, it is granted to any politician who has well-founded fear of persecution by their rivals in their state of origin due to the vengeance of political reasons. Here one thing needs to be clear that there is a distinction between asylum seeker and refugee.

Asylum seeker is an individual who is seeking international protection in a state other than his/her origin. While refugee is an individual who has been fled from his/her state of origin due to persecution and got the status of refugee. Thus, it can be said that every refugee was -in first instance- an asylum seeker and later

⁷ A refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group.

become a refugee. But an asylum seeker whose claim of asylum is not accepted will not be called as refugee (“What’s the Difference between a Refugee and Asylum Seeker?”, 2017).

According to J. Stone (1946), asylum is a right of a state in a jurisprudential sense. It would be more appropriate to term it as a liberty of the state because the state is not bound to grant asylum. It has two features, ‘liberty’ with the viewpoint of state and ‘right’ with respect to an individual in international law. Only third perspective of asylum as discussed above can be referred here asylum as a human right.

The right of Asylum under International Instruments

In International law, there is still no specific convention on asylum but still it is considered as a right. This right is clearly accepted as right of a state and not of an individual. This is a discretionary right of a state and it should not be taken as unfriendly act of the granting state. (Bukhari, 2018, p.11)

Universal Declaration of Human Rights

UDHR developed the asylum right in a very logical manner as it is a right for those who are subject to persecution not for those who are being prosecuted for the non-political offenses. Article 14(1) states that everyone has the right to seek and to enjoy in other countries asylum from persecution. This article was first drafted (Roman, 1994, p.10) as *"Everyone has the right to seek and to be granted, in other countries, asylum from persecution"*. The first draft was objected by many states due to the word ‘granted’. States were reluctant to provide this right to an individual. Therefore, the former was adopted by the drafting committee. Present form of article provides an individual the right to seek asylum meaning thereby an individual cannot be restrained from seeking asylum in other states; however, other states do not have the corresponding duty under this declaration to grant asylum.

Convention on Territorial Asylum (CTA), 1954

This is a regional convention. Organization of American States brought this convention in 1954. Article 1 of the CTA, 1954 provides that, *"Every State has the right in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of this right, giving rise to a complaint by other State."* The first article of the convention is clearly showing that every state has the right to grant asylum and other states shall not make complaint to the other states for granting this right. However, this convention is not obliging the state to grant it.

Declaration on Territorial Asylum

A Declaration on Territorial Asylum was adopted by UNs General Assembly on 14 December 1967 which specifies some principles regarding territorial asylum. First, asylum granted by state must be respected by the other states and it must be taken as a humanitarian act and not be regarded as unfriendly act. Secondly, where a state feels burden due to grant of asylum then other states and UNs shall endeavour to mitigate the burden of that state (“Note on Asylum”, August, 24th of 1977). However, this is a declaration; hence, it is not a binding document.

III. LAW OF ASYLUM IN PAKISTAN

Presently, there is no special enactment on the asylum in Pakistan, but it does not mean that Pakistan is not providing asylum to the asylum seekers. The Foreigners Act 1946 can be referred to deal with the asylum in Pakistan, but it clearly states that Federal Government shall develop the policy and enact a law to deal with the alien and foreigners. That is not yet enacted. Foreigners Act is vague enough as it does not define the term ‘alien’. Between 1947 to 1993, the only law which deals with asylum application was Foreigners Act 1946, customary principles, and Islamic injunctions which were followed as source.

In 1993, the number of Afghan refugees hiked to 3 million persons, Government of Pakistan considered it seriously, and it tried to make a new requisite law. However, courtesy to then political instability, the policy to make law vanished. Hence, UNHCR—an agency which protects the refugees worldwide—brought an agreement with Government of Pakistan (GOP) to provide its services in Pakistan under its mandate system.⁸ It can be said here that Cooperation Agreement between Government of Pakistan, UNHCR, 1993 and Foreigners Act, 1946 are the relevant laws on asylum in Pakistan.

Procedure to Seek Asylum in Pakistan

After signing the cooperation agreement in 1993 there is a specific procedure. Currently, the process to seek asylum is delineated by the UNHCH under its mandate. Hence, it is the responsibility of UNHCR to deal with the asylum claims on the behest of GOP (“Asylum System in Pakistan”, n.d.). Asylum claims are determined by the UNHCR office under its mandate. The asylum granted by the UNHCR is called as ‘Mandate Refugees’(Maynard, 1982).

⁸“Persons who are recognised as refugees by UNHCR acting under the authority of its Statute and relevant UN General Assembly resolutions. Mandate status is especially significant in States that are not parties to the 1951 Convention or its 1967 Protocol.”

There are different stages to apply and to get asylum in Pakistan. Researchers would discuss the procedure step by step. A chart is also drawn for better understanding.

Application

To seek asylum, the seeker must come in person to the UNHCR or its partner office. Applicant must possess the certain document such as Identity card, passport, and other relevant documents. If the applicant has no documents, he can even apply by showing some evidence as to identity which could be treated as relevant for granting asylum ("Leaflet for Asylum Seekers in Pakistan", n.d.).

Protection needs Assessment Interview

The applications are scheduled for the protection need assessment interview to ascertain either protection is required, or application is fake. If application fulfils the criteria, it will be registered with UNHCR. If application is fake, then it will not be referred for registration with UNHCR ("Leaflet for Asylum Seekers in Pakistan", n.d., p.2).

First Instance Interview

After registration, an interview is taken of the admitted applicants. A day is intimated to the applicants for the interview. On the day of interview, the applicants must come with their complete family members, and they must also bring the document of registration with UNHCR along with all necessary documents which are under their possession. Documents are considered very supportive in the claim of asylum by UNHCR, so all necessary documents must be produced i.e., identity cards, school certificates, political party membership cards, birth certificates, and service cards etc. UNHCR knows asylum seekers may not be able to bring all the documents; thus, failing to produce the relevant documents will not become the cause of the rejection. It is recommended for the asylum seekers to produce the concrete evidence to get asylum in Pakistan. Interview may be taken more than one time ("Leaflet for Asylum Seekers in Pakistan", n.d.).

First Instance Decision

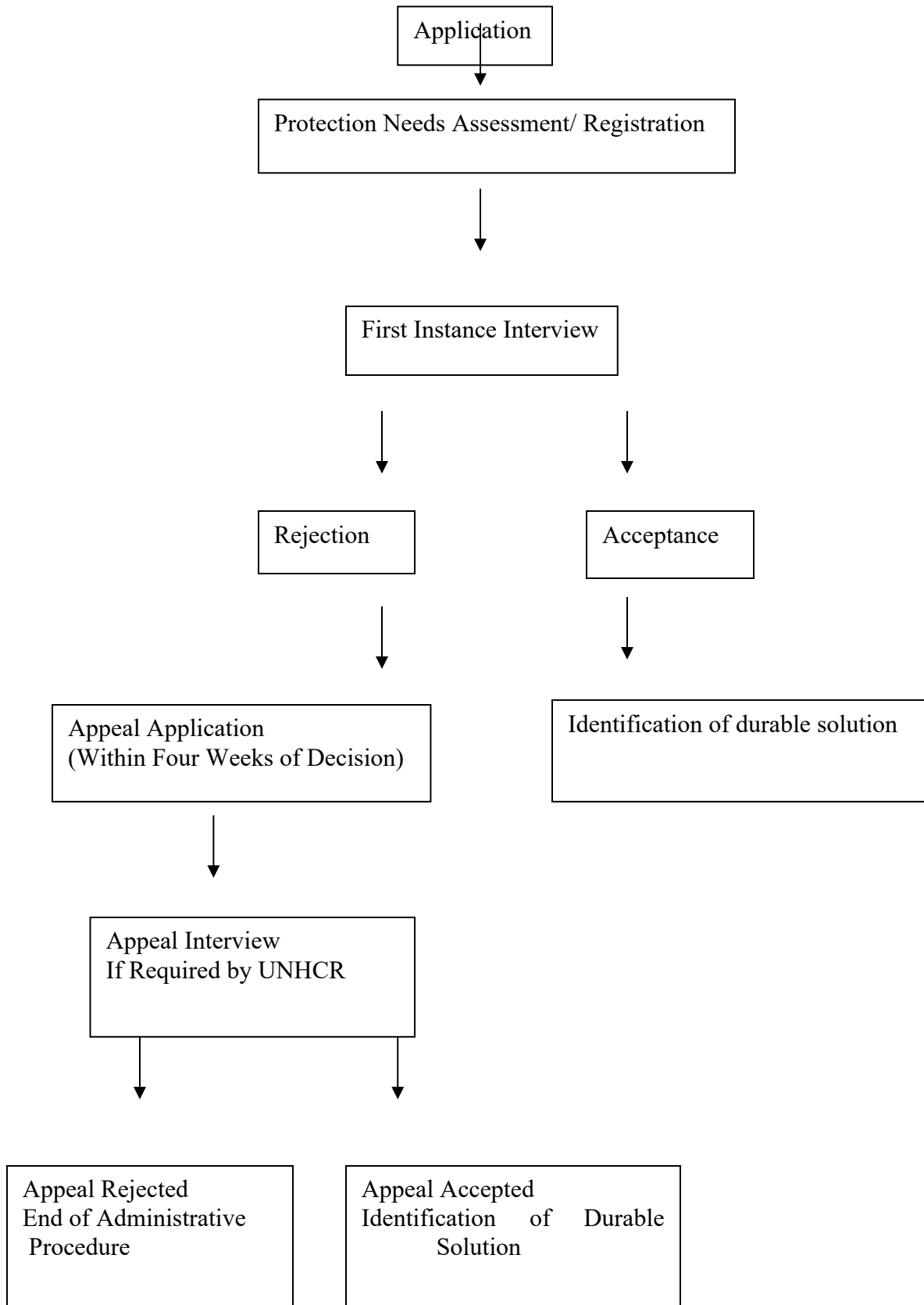
After interview, the applicants will be notified either they have been recognized as refugees or their claim has been rejected. The decision may take several months. If the application is accepted UNHCR will recognize the applicant and his family as refugees. UNHCR will issue a refugee card which will only be valid for 12 months ("Status Determination", 2017), but UNHCR will assist him for the perpetual solution for residence. Holding such card does not imply that are

refugee is the legal immigrant of Pakistan, but it will protect him from the arrest and detention (Bukhari, 2018).

Application Rejection and Appeal

In case the application is rejected at first instance interview, the applicant will be given written reasons for rejection. However, applicant will have the right for reconsidering the application by UNHCR. He must appeal against the decision within one month from the date of notification. He must also focus on the reasons of rejection of his application because he will have to satisfy the UNCHR officials that his application was rejected for wrong reasons. Thus, his appeal may be accepted, and he might be recognized as refugee. In appeal matters, the interview is not necessary as the decision is made based on applicant's appeal petition. However, interview may be conducted again in complicated cases (Bukhari, 2018).

CHART OF ASYLUM PROCEDURE IN PAKISTAN



CONCLUSION AND RECOMENDATIONS

Perusing the international conventions, asylum is not a right of an individual in international law. The traditional concept still prevails, but it has three different facets. Third aspect of asylum right gives a comparable shape with the asylum as a human right as it binds the state not to return. However, state is not bound to grant asylum under principle of non-refoulement as it can foreword him to other state. Today, asylum should be considered as a human right as the world is shifting to global village, and world community is talking about global citizenship. Thus, asylum must be taken as priority discussion, and it should be considered as a right of an individual.

Pakistan lacks proper legislation on asylum system despite it has been hosting huge amount of refugee, and it is regarded as the third largest country hosting Afghan refugees. Still, asylum in Pakistan is granted on humanitarian grounds by the UNHCR under its mandate system concluded in Cooperation Agreement between Government of Pakistan and UNHCR 1993.

Usually, it is the duty of the 'Home Department' of a state to deal with asylum applications because granting asylum is a sovereign act of the state; Pakistan has given this sovereign right to UNHCR due to lack of legislation and being non-party to the Refugee Convention 1951. Having responsibility of great amount of Afghan refugees, ratification of the Refugee Convention would be a hard nut to crack for Pakistan. However, asylum as a human right perspective, it may be recommended that Pakistan should ratify the Convention on the status of Refugees 1951, and it should also enact a specific legislation on the refugees and asylum to cater with the asylum applications.

Meanwhile, such ratification may have financial repercussion on Pakistan's already weak economy. Consequently, Pakistan would not be willing to opt such an option. However, such problem may be ended if UNs and international community provide requisite funding for the refugees. In such situation, it is highly recommended that Pakistan should ratify the Convention. It will also be helpful for the positive image of Pakistan at international level.

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